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

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.

1. Introduction

1.1. Scientific Contribution

This study makes the following contribution to the field of tax treaty interpretation:

1. It refutes the current orthodoxy that courts may rely on a single text for cases of routine interpretation, by showing that such approach necessarily produces cases of treaty misapplication in violation of the VCLT when the text relied on is not designated as prevailing. In addition, it refutes the commonly held view that courts may rely on the original text by virtue of it being the text of initial negotiation and drafting. Conversely, it shows that a valid combination of the VCLT principles obliges courts to compare all authentic language texts when none of them is designated as prevailing.

2. It shows that the VCLT permits courts to rely solely on a text designated as prevailing whether or not a divergence between the texts has been raised and established; all counterarguments brought forward by the critics of such approach are refuted, while any limitations to its applicability are outlined.

3. Based on all tax treaties concluded between 1960 and 2016 as recorded in the IBFD Tax Treaties Database, it provides an empirical survey of the global tax treaty network with respect to its lingual properties, together with an analysis concerning the interpretation and application of all types of final clause wordings employed.

4. Finally, it assumes the perspective of a technical strategy paper and, on the basis of all findings, issues policy recommendations on how to best eliminate residual interpretational complexity induced by plurilingual form, together with its economic cost.

In summary, the insights generated by this study may help to reduce misapplication of plurilingual tax treaties, by way of increased awareness about the pitfalls of the current orthodoxy and, in consequence, its abandonment. The alternative submitted (sole reliance on prevailing texts), if adopted, will reduce global resource costs of tax treaty interpretation and, at the same time, increase its overall consistency via elimination of unintended deviations caused by language idiosyncrasies. To support this goal, this study seeks to provide useful arguments and data to policy makers, treaty negotiators, judges, practitioners, and scholars.

1.2. Motivation

Although there is plenty of academic literature concerned with treaty interpretation, the volume of material concerned with the specific issues posed by plurilingual form is fairly manageable. As far as comprehensive studies exclusively focussed on the topic are concerned, only four come to mind with respect to the discourse on tax treaties, namely, the works of Arginelli, Maisto, Tabory, and Hilf.[1]

Arginelli's thesis is fairly recent, whereas the studies of Maisto, Tabory, and Hilf date back to 2005, 1980, and 1973, respectively. Only Arginelli and Maisto incorporate a special tax treaty perspective, whereas Tabory and Hilf are concerned with plurilingual treaties in general. In addition, Maisto's volume is divided in focus: it deals in part with European law and is not a systematic study but a collection of chapters by several authors on various issues and specific country perspectives, albeit methodically arranged.

Neither of the four contains a comprehensive empirical study investigating plurilingual form of tax treaties. Maisto's volume discusses a limited data set as part of the selective country chapters, but the sample only comprises 512 treaties from the treaty networks of a few OECD members ex-

[1] Paolo Arginelli, *The Interpretation of Multilingual Tax Treaties* (Leiden: Leiden University Press, 2013); Guglielmo Maisto, *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law* (Amsterdam: IBFD, 2005); Mala Tabory, *Multilingualism in International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980); Meinhard Hilf, *Die Auslegung mehrsprachiger Verträge: eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland.* (Berlin, New York: Springer-Verlag, 1973).

clusively from the EU/EFTA region. Therefore, it is not representative of the global tax treaty network and insufficient to draw unbiased conclusions from. Moreover, it provides no comprehensive information about the treaty final clause wordings concerning implementation of lingual form.

The number of articles devoted to the subject is again fairly manageable compared to the number of articles dealing with other topics of tax treaty interpretation. Of the prominent academics in international tax law, only Michael Lang has taken up the topic recently in two articles.[2] All in all, it seems as if the community of legal scholars engaged in the discourse on tax treaty interpretation considers plurilingual form a side issue not of central importance that may be ignored safely until it imposes itself.[3] This attitude has manifested itself as orthodoxy in doctrine.[4] In reality, however, plurilingual form is hardly a minor feature of tax treaties that would justify such disproportion in discussion: almost three-quarters of the well over 3,000 concluded tax treaties currently in force or yet to come into force are plurilingual.

Arginelli's recent thesis is of almost encyclopaedic breadth, making it a valuable resource; however, my reservations concerning his views are fundamental. They are based on the fact that he does not question established theories and therefore only helps to solidify a harmful practice, just because he does not want to argue against the mainstream:

> Against this background, drawing a normative legal theory of treaty interpretation affirming principles that conflicted with the generally accepted constructions of Articles 31–33 VCLT, or that lie to a significant extent outside the generally accepted borders of a perceived reasonable interpretation of such articles, would be equal to sustaining a legal theory of interpretation that, in the best case, could establish itself only in the very long run

[2] See Michael Lang, 'The Interpretation of Tax Treaties and Authentic Languages', in *Essays on Tax Treaties: A Tribute to David A. Ward*, ed. Guglielmo Maisto, Angelo Nikolakakis, and John M. Ulmer (Amsterdam: IBFD, 2013), 15–30; Michael Lang, 'Auslegung von Doppelbesteuerungsabkommen und authentische Vertragssprachen', *Internationales Steuerrecht* 20, no. 11 (2011): 403–10.

[3] The BEPS multilateral instrument, which has equally authoritative English and French texts, is currently reviving general sensitivity for the issue because it modifies a large number of treaties having texts in various languages. Since it was released only after conclusion of this study, it will be dealt with separately in the Annex.

[4] See Chapter 3, s. 3.3.2.

> and would cause a protracted period characterized by more legal uncertainty than in the current state of affairs and, in the worse case, would be generally regarded as utopian, since too detached from Articles 31–33 VCLT to be considered a reasonable interpretation thereof, thus lacking the legal status to be applied in practice as long as those articles remained in force. However, since the purpose of the present research is to suggest how the interpreter should *now* tackle and disentangle the most common types of issues emerging from the interpretation of multilingual tax treaties under public international law, the author is not willing to accept the above-described drawbacks of a normative legal theory infringing the generally accepted rules and principles of treaty interpretation derived from Articles 31–33 VCLT. In the author's intention, his normative legal theory should be shaped so as to fit within the generally accepted borders of a perceived reasonable interpretation of such articles; where the inferences drawn from the semantic analysis appeared to lie outside those outer borders, such inferences should be disregarded for the purpose of setting up the author's normative (semantics-based) theory of treaty interpretation. Hence, from a theoretical perspective, the author's normative legal theory of interpretation must be regarded as a non-ideal normative theory, as opposed to ideal normative theories.[5]

This seems tantamount to saying his entire research project is intended merely to confirm conventional wisdom, and whenever the results according to his adopted methodology contradict general opinion, they should be ignored. I do not share Arginelli's standpoint but rather agree with Popper that 'orthodoxy is the death of knowledge, since the growth of knowledge depends entirely upon disagreement.'[6] Moreover, Arginelli fails to provide a comprehensive empirical study of the global tax treaty network concerning plurilingual form but draws conclusions based on the Maisto sample,[7] which is problematic for said reasons.

Given all this, I submit my study in the good old tradition of academic dispute as a response to all scholars who have so far merely reproduced and bolstered the mainstream position I consider misguided; however, my aim is not just to refute a theory I regard erroneous and in support of a harmful practice that promotes divergence rather than uniformity of interpretation, but also to submit a sound approach in its place that is consistent with the

[5] Arginelli, *The Interpretation of Multilingual Tax Treaties*, 17–18.

[6] Karl R. Popper, *The Myth of the Framework: In Defence of Science and Rationality* (New York: Routledge, 1994), 34.

[7] See Arginelli, *The Interpretation of Multilingual Tax Treaties*, 131–34.

VCLT principles and can be implemented easily to resolve the problems caused by plurilingual form in practice.

With respect to the dangers of such approach pointed at by Arginelli, I do not share his concerns. To the extent my approach is adopted, the period of adoption would be characterised by more legal certainty than the current state of affairs, increasing in proportion with the rate of adoption. Given its feasibility, I do not consider it utopian. Certainly not to the extent it is readily available without requiring modification of operative provisions in actual treaties, which is the case for almost two-thirds of all plurilingual treaties in the global tax treaty network. Whether it will be adopted is another matter, of course. That is a question for policy makers, treaty negotiators, and judges. I have no influence on them, but that shall not prevent me from presenting my views. My hope is simply that my readers, whoever they may be, will find something of value for their own tasks in this book.

1.3. Research Question

The overarching research question of this study is whether courts are legally required to compare all authenticated language texts when interpreting a plurilingual tax treaty. The question is considered both in the context of all texts being equally authoritative and of one text being designated as prevailing. Over the course of the study, the issue is divided into five general questions, which are then subdivided by the individual chapters into several individual issues to develop my answer and extend the contribution of my study in terms of practical applicability and policy recommendations:[8] (1) Are judges legally obliged to compare all authentic language texts in the absence of a prevailing one? (2) If so, how is the comparison performed correctly? (3) To what extent can we eliminate the need for a comparison with the help of prevailing texts without risking treaty misapplication? (4) To what extent can we rely solely on prevailing texts in actual practice? (5) What can/should be done to further extend practical applicability of sole reliance on prevailing texts?

[8]Since chapters three and five present my fundamental answers to the overarching research question for treaties with and without prevailing text, they are formulated to proceed from hypotheses rather than questions.

1.4. Structure

Conceptually, this study is divided into several parts. The introductory part consists of chapters one and two, which introduce and scope the project, explain the meaning of key terminology, and outline the methodology applied.

The theoretical part is made up of chapters three to seven and subdivided into several subparts: chapters three and four deal with interpretation in case of all equally authoritative texts, whereas chapters five and six are concerned with the case of one text being designated as prevailing. Chapter seven is its own subpart, reversing the perspective from international to domestic law.

The empirical part consists of chapters eight and nine. They share a common methodological framework but have different functions: chapter eight is concerned with practical applicability of the theoretical approach developed to actual tax treaties, whereas chapter nine investigates implementation of English as *lingua franca* throughout the global tax treaty network.

The concluding part is made up of chapters ten and eleven: the first provides overall conclusions and policy recommendations while the latter deals exclusively with the BEPS multilateral instrument. The following list provides a more detailed overview:

- Chapter 2 outlines my methodology.
- Chapter 3 contains my argument refuting the currently prevailing view that judges may rely on a single text in isolation for cases of routine interpretation. In addition, it refutes the view that judges may rely on the original text by virtue of it being the text of initial negotiation and drafting.
- Chapter 4 deals with practical implementation and additional issues concerning tax treaties in particular, an in-depth consideration of which has been postponed by Chapter 3 for structural reasons in order to avoid detours from the main line of argument.
- Chapter 5 makes the case for sole reliance on prevailing texts. In addition, it sketches any limitations to this approach.

- Chapter 6 reviews and refutes all counterarguments submitted by the most adamant opponents to sole reliance on prevailing texts.
- Chapter 7 frames the issue from the viewpoint of domestic procedural law. This is necessary because tax proceedings are conducted under the jurisdiction of national courts. In consequence, domestic procedural law and legal culture influence results in practice and must be taken into account.
- Chapter 8 quantifies the extent to which sole reliance on actual prevailing texts may be applied in practice with respect to all treaties in the global tax treaty network. In addition to an empirical survey of treaty lingual properties, it examines policies of individual countries and certain groupings concerning implementation of prevailing texts. Moreover, it contains its own theoretical subpart concerning interpretation of all final clause wordings found in actual tax treaties.
- Chapter 9 investigates use of English as *lingua franca* for unilingual tax treaties and prevailing texts. Because such use enforces the approach proposed in the theoretical part and affects the decisions by countries concerning lingual form of their treaties, it is an essential factor to consider when formulating policy recommendations.
- Chapter 10 aggregates the conclusions of the individual chapters and discusses them from a macro perspective. In addition, it formulates policy recommendations on the basis of all findings.
- Chapter 11, the Annex, evaluates the policy implemented by the OECD BEPS multilateral instrument in terms of authentic languages, and sketches possible approaches to remedy its deficiencies.
- Finally, the appendices provide auxiliary information that may prove useful to the reader, as well as the sample data.

1.5. Terminology

This section explains the meaning of some key terms used by me in a technical sense.

1.5.1. Plurilingual versus Multilingual

Curiously, although the ILC Commentaries on the VCLT Draft Articles exclusively use 'plurilingual',[9] most academic literature on plurilingual treaties uses 'multilingual' instead.[10] The implied concepts prove difficult to distinguish,[11] and use of terminology remains diverse even among linguists, although 'multilingual' seems to have established itself as standard in English academic literature across disciplines.[12]

The Oxford Dictionary defines multilingual as 'In or using several languages' and plurilingual as 'Relating to, involving, or fluent in a number of languages; multilingual.' The Common European Framework of Reference for Languages (CEFR) draws a more pronounced distinction:

> Plurilingualism differs from multilingualism, which is the knowledge of a number of languages, or the co-existence of different languages in a given society. …Beyond this, the plurilingual approach emphasises the fact that …he or she does not keep these languages and cultures in strictly separated mental compartments, but rather builds up a communicative competence to

[9] ILC, *Draft Articles on the Law of Treaties with Commentaries 1966. Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly*, vol. II, Yearbook of the International Law Commission 1966, A/CN.4/SER. A/1966/Add.1 (United Nations, 1967), 219, para. 7; 224, paras. 1, 3; 225–226, paras. 6–9. Henceforth, the Commentaries on the Draft Articles will be referred to as VCLT Commentary.

[10] See, e.g., Tabory, *Multilingualism in International Law and Institutions*; Maisto, *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law*; Arginelli, *The Interpretation of Multilingual Tax Treaties.*

[11] See Daniel Coste, Danièle Moore, and Geneviève Zarate, 'Plurilingual and Pluricultural Competence: Studies Towards a Common European Framework of Reference for Language Learning and Teaching' (Strasbourg: Language Policy Division, Council of Europe, 2009), 10 et seq.

[12] See Charlotte Kemp, 'Defining Multilingualism', in *The Exploration of Multilingualism: Development of Research on L3, Multilingualism and Multiple Language Acquisition* (Amsterdam; Philadelphia: John Benjamins Publishing Co., 2009), passim.

> which all knowledge and experience of language contributes and in which languages interrelate and interact.[13]

The same distinction is made by the European Observatory for Plurilingualism in its charter, in which plurilingualism is defined as 'the use of several languages by the same individual' and distinguished from multilingualism as follows:

> This concept [plurilingualism] differs from that of multilingualism, which means the coexistence of several languages within a social group. A plurilingual society is composed mainly of individuals capable of expressing themselves at various levels of proficiency in several languages, . . .whereas a multilingual society may be predominantly made up of monolingual individuals ignoring the language of the other.[14]

In summary, plurilingual implies equal competence in several languages, whereas multilingual implies their coexistence.

Whatever terminology is chosen in the treaty context does not matter because the meaning is strictly defined: there is only one treaty made up of one set of terms, that is, only one text although available in several languages.[15] Notwithstanding, 'plurilingual' seems somewhat closer to the idea of one text in several languages, whereas 'multilingual' inspires an image of several coexistent language texts. For this reason – *nomen est omen* (the name is a sign), and in order to comply with the original terminology employed by the ILC, I shall use 'plurilingual'.

1.5.2. Text(s)

The plural 'texts' is misleading in view of the treaty as one set of terms, because it may inspire the idea that there could be more than one text. During the drafting period of the VCLT the ILC discussed use of the plural extensively, and several voices argued in favour of 'versions' in order to refer to the different language versions of the one treaty text; however, use

[13] Language Policy Division, 'Common European Framework of Reference for Languages: Learning, Teaching, Assessment' (Strasbourg: Council of Europe), 4.

[14] Observatoire européen du plurilinguisme, 'Charte européenne du plurilinguisme', June 2015, *Préambule*.

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

of 'texts' prevailed while 'version' and 'versions' were reserved for texts of non-authentic status.[16]

This convention has been implemented in Article 33(2) and will be adhered to here: throughout, 'text' refers to an authenticated language version of the text while 'texts' refers to more or all authenticated language versions. Occasionally, however, the singular will refer to the treaty text in the abstract as one set of terms, not to any language text in particular and irrespective of the total number of language texts. Such double meaning is unavoidable because of the ILC terminology; I trust the intended meaning will be obvious from the context.

Despite its own convention, the ILC frequently adds the adjective 'authentic' in the VCLT Commentary.[17] Even the VCLT does so in paragraphs (3) and (4) of Article 33. Most academic literature on the subject adopts this terminology. Although this does not hurt, it is superfluous. Therefore, I do not follow the example but refrain from adding 'authentic' every single time. Occasional exceptions are made to benefit a sentence with precision or the reader with ease of understanding.

1.5.3. Clear

Most of the academic literature on the subject applies the adjective 'clear' to treaties and texts as a matter of course without explicit definition. This is problematic because it may ingrain a wrong understanding of clarity in a colloquial sense – the reader might read on without much contemplation. The Oxford Dictionary defines clear as 'Leaving no doubt; obvious or unambiguous.' A treaty text may indeed be clear in this sense, but only after interpretation, not before.[18] This is the essence of the VCLT general rule

[16] See Frank A. Engelen, *Interpretation of Tax Treaties under International Law: A Study of Articles 31, 32, and 33 of the Vienna Convention on the Law of Treaties and Their Application to Tax Treaties* (Amsterdam: IBFD, 2004), 351, 356, 358–59; Richard K. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2010), 356–58.

[17] See ILC, *Draft Articles on the Law of Treaties with Commentaries*, 195, para. 1; 224, paras. 1, 3–4; 225, paras. 6–8; 272, para. 5; 273, para. 9.

[18] See J. Wouters and M. Vidal, 'Non-Tax Treaties: Domestic Courts and Treaty Interpretation', in *Courts and Tax Treaty Law* (Amsterdam: IBFD, 2007), s. 1.3.2; L. Oppenheim, *Oppenheim's International Law*, ed. R. Jennings and A. Watts, 9th ed. (Harlow: Longman, 1992), 1267; Brian J. Arnold, 'The Interpretation of Tax Treaties: Myth and Reality', *Bul-*

aimed to arrive at a textual not literal meaning.

Furthermore, it is not necessary for a treaty to be unequivocal to be clear. As Larenz and Canaris observe, no legal text will be unequivocal unless 'drawn up exclusively in a symbolised sign language',[19] but it is the purpose of interpretation to establish the manifest meaning versus other interpretations that are less manifest.[20] To the extent it is possible to establish such manifest meaning, the text is clear. Otherwise, it remains ambiguous or obscure. All this will be argued in depth later on; for the moment it is sufficient to record that, throughout this study, 'clear' is used in a technical sense when referring to texts and treaties.

1.5.4. Analytic and A Priori

The terms 'analytic' and 'a priori' will be used occasionally because of their relevance with respect to the methods employed.[21] Analytic propositions are true a priori because of the meaning of the terms used and their relationship via the sentence structure, with a negation necessarily implying

letin for International Taxation, no. 1 (2010): 3–4; Conseil d'État, *Société Schneider Electric*, 2002, per M. Austry, *commissaire du gouvernement*: 'the text of an international treaty, even when clear, must always be interpreted taking into account its object', as translated by Eirik Bjorge, '"Contractual" And "Statutory" Treaty Interpretation in Domestic Courts? Convergence Around the Vienna Rules', in *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence*, ed. Helmut Philipp Aust and Georg Nolte (Oxford; New York: Oxford University Press, 2016), 49–71, 57; Emilio Betti, *Allgemeine Auslegungslehre als Methodik der Geisteswissenschaften* (Mohr Siebeck, 1967), 251, in terms of texts in general; cf. Emer de Vattel, *The Law of Nations* (Indianapolis, IN: Liberty Fund, Inc., 1797), s. 263.

[19] Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft*, 3rd ed. (Berlin: Springer-Verlag, 1995), 26.

[20] By manifest I mean the result of an interpretation under Article 31 that is not ambiguous, obscure, absurd, or unreasonable and, in view of the wording, context, and object and purpose, more reasonable than any other suggested meaning, i.e., one or more meanings can be discerned, and a decisive choice can be made on the basis of the means provided by Article 31 in case several interpretations are possible. Although, colloquially speaking, an absurd or unreasonable reading may be manifest in the sense of being unequivocal – the text really says so – such is factored out from the meaning of the term as used here unless the contrary is indicated explicitly.

[21] See Chapter 2, s. 2.2.1.

a contradiction in terms. Therefore, they are of special interest in logic as fundamental building blocks.

The classic sources with respect to their meaning are Leibniz and Kant. Leibniz distinguishes truths of reason from truths of experience, the former combining the ideas of analytic and a priori. He classifies truths of reason as necessarily true, their opposite being impossible, and truths of experience as contingently true, their opposite being possible. Necessary truths may be split via analysis into simpler ideas until one arrives at some primitive truth at their basis. At the end of this process remain only simple notions of which no further definition is possible, as well as first principles of which further proof is neither necessary nor feasible because they are essentially statements of identity, negations of which would entail explicit contradictions.[22]

In contrast to Leibniz, Kant distinguishes explicitly between the analytic and the a priori.[23] Accordingly, an analytic proposition is one in which the subject entails the predicate, and an analysis of the subject establishes that the predicate is included in it.[24] Kant uses the specific example of extended versus heavy bodies. The former constitutes an analytic proposition because all bodies are by definition extended in space, so the predicate 'extended' does not go beyond the boundaries of what is included in the subject 'body'. Conversely, the latter constitutes a synthetic proposition because

[22] See Gottfried Wilhelm Leibniz, *Monadologie*, trans. Robert Zimmermann (Wien: Braumüller und Seidel, 1847), ss. 33, 35.

[23] See Immanuel Kant, *Kritik der reinen Vernunft* (Köln: Anaconda, 2009), *Einleitung*.

[24] The German *Urteil* used by Kant is to be translated with 'judgement' rather than 'proposition'. I use the latter because 'judgement' may be misinterpreted to imply a mental process leading from the premisses to the conclusion, which is contrary to the conception of inference in modern logic, see Chapter 2, s. 2.2.1. Kant's terminology may indicate that he was influenced by Antoine Arnauld and Pierre Nicole, *Logic or the Art of Thinking*, trans. Jill Buroker (Cambridge: Cambridge University Press, 1996), published anonymously in 1662 as *La Logique ou l'art de penser* and commonly regarded as 'the most influential logic text from Aristotle to the end of the nineteenth century', see Jill Buroker, 'Port Royal Logic', in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Spring ed. (Stanford University, 2017). It founded the middle phase in the development of logic as a discipline (between classical Aristotelian and modern logic), which was characterised 'by a prevalence of epistemological and psychological issues', see Ernst Tugendhat and Ursula Wolf, *Logisch-semantische Propädeutik* (Stuttgart: Reclam, Philipp, jun. GmbH, Verlag, 1993), 7.

the predicate is not included in the subject by definition but constitutes an addition to it.

The notions of a priori and a posteriori are classified as epistemological concepts denoting ways of cognition via reason or experience.[25] All analytic propositions are necessary and as such a priori, that is, discoverable purely by reason, whereas all empirical, a posteriori propositions are synthetic. Kant draws these explicit distinctions because he wanted to introduce a third category of synthetic truths discoverable purely by reason, that is, while all empirical propositions are synthetic, not all synthetic propositions are, in his view, empirical.[26]

1.5.5. All Treaties and Global Tax Treaty Network

'All treaties' is used as a proxy for the entire sample defined in Chapter 2 and listed in Appendix E. 'Global tax treaty network' is used as a proxy for the entire sample without terminated treaties. Occasionally, 'all treaties' will be used colloquially to imply all treaties of a certain group or country, including or excluding terminated treaties; I trust the intended meaning will be obvious from the context. It has to be borne in mind that all generalising references imply the status quo at the cut-off date for the sample (15 August 2016).

1.5.6. Lingua Franca and (True) Diplomatic Language

I use the term *lingua franca* because it is commonly understood.[27] The Oxford Dictionary defines it as 'A language that is adopted as a common language between speakers whose native languages are different.' Here it is used in a slightly wider sense, not only to imply cases in which two countries adopted a third language for a prevailing text or unilingual treaty, but

[25] See Steup, Matthias, 'Epistemology', in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Fall ed. (Stanford University, 2016).

[26] Kant's argument in this respect is not relevant here, so I shall not elaborate it any further; the interested reader is referred to Anthony Quinton, 'The "A Priori" and the Analytic', *Proceedings of the Aristotelian Society* 64 (1963): 31–54.

[27] See John King Gamble and Charlotte Ku, 'Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice', *Indiana International and Comparative Law Review* 3 (1993): 236, 10n.

also to imply cases in which two countries concluded a treaty with a prevailing text in the official language of one of them, because some aggregated data comprises all three scenarios. 'Diplomatic language' will be used to denote only the latter, while 'true diplomatic language' will be used to refer to cases of two countries having concluded a unilingual treaty in a third language.

3. Routine Interpretation: A Refutation

3.1. Research Question

This chapter concerns itself with the question whether courts are legally required to compare all authenticated language texts when none of them is designated as prevailing.[1] In this context, it will also discuss the commonly held view that judges should give preference to the text of initial negotiation and drafting when they are faced with a divergence between the texts. The hypothesis put forward in this chapter may be split into the following four elements: (1) Articles 31–33 in combination with Articles 26–27 VCLT put courts under an obligation to compare all texts of a plurilingual tax treaty in the absence of a prevailing one; (2) this obligation is independent of domestic procedural law; (3) the currently prevailing view maintaining the opposite rests on an erroneous interpretation of Articles 31–33; and (4) Articles 31–33 do not sanction giving preference to the original text merely in virtue of it being the text of negotiation and drafting. Before we can discuss these propositions, it is necessary to clarify the meaning of the fundamental notions of treaty and text as well as their relationship.

3.2. Preliminary Considerations

3.2.1. The Treaty and Its Text

What constitutes the treaty? Must the treaty be considered an underlying agreement of concurring wills that exists independently from the text as legal instrument being merely the expression of such agreement, or does the text as legal instrument constitute the treaty as its formal embodiment?

[1] Parts of this chapter have been presented in embryonic form in the following peer reviewed publication: Richard Xenophon Resch, 'Not in Good Faith – A Critique of the Vienna Convention Rule of Interpretation Concerning Its Application to Plurilingual (Tax) Treaties', *British Tax Review*, no. 3 (2014): 307–28.

Or, is this a misleading dichotomy and a treaty is essentially and inseparably both, an agreement in the form of a written text? The consequences of an answer to this question are non-trivial. If we were to arrive at the conclusion that, in short, the text is the treaty, then any interpreter has only the text itself as a reference to establish its meaning, that is, the treaty's content. As a corollary, if there are more language texts, the meaning of each can be established only by reference to itself and/or the others, not by any reference to an agreement behind all texts that is not accessible except for what is expressed by them. Hence, we need to answer two questions: (1) What is the relationship between the treaty and its text? (2) In view of the answer to (1), does the and/or default to *and* or *or*?

What constitutes a treaty was discussed by the ILC over a period of sixteen years on the basis of the Brierly, Lauterpacht, Fitzmaurice, and Waldock reports.[2] One of the main sources used by Special Rapporteur Brierly for his initial report and draft was the Harvard Draft Convention, which had defined a treaty as 'a formal instrument of agreement'.[3] In contrast, the Draft Convention on the Law of Treaties presented by Brierly defined a treaty as 'an agreement recorded in writing'.[4] In Brierly's view, the written record did not require a particularly formal instrument,[5] such being no more than evidence for the existence of a treaty he considered to be an agreement existing before the act of its conclusion.[6] Therefore, his Commentary emphasised the underlying agreement as constituting the essence

[2]See Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden; Boston: Martinus Nijhoff Publishers, 2009), 75–76.

[3]ILC, *Documents of the Second Session Including the Report of the Commission to the General Assembly*, vol. II, Yearbook of the International Law Commission 1950, A/CN.4/SER.A/1950/Add.1 (United Nations, 1957), 243, Appendix A, Article 1(a). For a historical appraisal of the Harvard Draft Convention see Gardiner, *Treaty Interpretation*, 56–57.

[4]ILC, *Documents of the Second Session Including the Report of the Commission to the General Assembly*, II:226, Article 1(a). Brierly's intention was not to provide an independent definition of 'treaty', but only to define treaties for the limited scope of the draft convention, see ibid., 226, para. 14.

[5]See ibid., II:227, para. 23.

[6]See ILC, *Summary Records of the Second Session, 5 June – 29 July 1950*, vol. I, Yearbook of the International Law Commission 1950, A/CN.4/SER.A/1950 (United Nations, 1958), 82, paras. 88, 92.

of treaties, with the written record being merely a matter of practical necessity.[7]

Brierly's view was criticised by the majority of the ILC members, who preferred a definition of treaties that reverted to the wording of the Harvard draft.[8] In essence, the difficulty underlying the discussion consisted in the inseparability of both constituents.[9] In the words of Rapporteur Alfaro, 'The agreement could no more be separated from the instrument than the body from the soul. The soul of a treaty was the unanimity of intent. The body was the formal written instrument. The agreement without the instrument was nothing, and vice versa. …What constituted a treaty was an agreement converted into an instrument.'[10] In contrast to Brierly, the discussion in the meetings placed more importance on the formal instrument constituent, not considering any 'agreement recorded in writing' but only a 'formal instrument of agreement' to be a treaty.[11] In the end the ILC voted in favour of the Harvard Draft wording by six votes to four, with one abstention.[12]

When we fast-forward to the VCLT, we see that the wording of Article 2(1)(a), which defines treaties for purposes of the convention, appears closer to Brierly's conception:

> For the purposes of the present Convention: …'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

According to the VCLT Commentary, the scope of what constitutes a treaty is relatively broad, 'covering all forms of international agreements in writing concluded between States', subject to relatively low formal require-

[7] See ILC, *Documents of the Second Session Including the Report of the Commission to the General Assembly*, II:227, para. 19.

[8] See ILC, *Summary Records of the Second Session, 5 June – 29 July 1950*, 65, para. 73a; 68, paras. 8–8b; 69, para. 14; 71, paras. 33–34; 72, paras. 39a–c; 75, para. 14; 76, para. 26; 77, para. 33; 82, paras. 90–91, 94; 82–83, paras. 3–3a, 6, 7–7b; 84, para. 9.

[9] See ibid., I:82, para. 94.

[10] Ibid., I:83, para. 6.

[11] See ibid., I:84, para. 9.

[12] See ibid., I:84, para. 17.

ments regarding the respective instruments.[13] The wording 'concluded' seems to suggest stronger formal requirements than merely 'recorded in writing'; however, there is no fixed meaning of 'concluded' in international law, but the term simply implies a set of distinctive procedures that make a treaty binding.[14] As long as the objective intentions of the parties to create rights and obligations governed by international law are evident from the wording, the form is of secondary relevance.[15] Nevertheless, the scope of what constitutes a treaty under the VCLT is confined to agreements 'in written form', even if only for practical reasons and not to deny the legal force of oral agreements and the applicability of the same principles to them.[16] In summary, treaties are to some degree necessarily textual for purposes of the VCLT, with both constituents 'agreement' and 'instrument' being essential to constitute a treaty. This leaves the question of the exact

[13] See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:188, paras. 2–3; Engelen, *Interpretation of Tax Treaties under International Law*, 19–31.

[14] See Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 78–79.

[15] See Engelen, *Interpretation of Tax Treaties under International Law*, 21–24. The ICJ has made clear that all kinds of documents may constitute a treaty. Given clear language in the document at issue regarding obligations entered into, the court rejected otherwise declared intentions to the contrary as irrelevant: 'The 1990 Minutes refer to the consultations between the two Foreign Ministers of Bahrain and Qatar, in the presence of the Foreign Minister of Saudi Arabia, and state what had been "agreed" between the Parties. …Thus the 1990 Minutes include a reaffirmation of obligations previously entered into. …Accordingly, and contrary to the contentions of Bahrain, the Minutes are not a simple record of a meeting, …they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement. …The Court does not find it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of Qatar. The two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in a position subsequently to say that he intended to subscribe only to a "statement recording a political understanding", and not to an international agreement', *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain), Jurisdiction and Admissibility*, ICJ (Annual Reports of the International Court of Justice, 1994), 121–122, paras. 24–25, 27.

[16] See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:189, para. 7.

relationship between a treaty and its text open.[17]

An indirect answer may be obtained from examining the way how we are supposed to treat the text. Concerning this we know that we have to give priority to objective considerations based on the text:

> The article as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.[18]

Thus, when interpreting a treaty, we ought to follow a textual but not literal approach, based on the ordinary meaning, context, and object and purpose,[19] whereas teleological interpretations of the text in violation of its wording must not be given effect.[20] This intrinsic, text-based approach is not absolute but complemented by a limited extrinsic approach if the former

[17]Presumably, the purpose of the VCLT definition is to limit it to written treaties while recognising the existence of subsidiary agreements, instruments, and practice in Article 31, paras. 2a, 2b, 3a, and 3b, which need not (or, in the case of practice, will not) be in writing, leaving the force of oral agreements and the applicability of the VCLT principles to them unaffected, as is explicitly specified by Article 3(b) VCLT, see Jan Klabbers, *The Concept of Treaty in International Law* (The Hague: Kluwer Law International, 1996), 49–50.

[18]ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:220, para. 11, repeated in substance at 223, para. 18.

[19]UN, *Vienna Convention on the Law of Treaties*, Article 31(1); see *Temple of Preah Vihear (Cambodia v Thailand), Preliminary Objections*, ICJ (Annual Reports of the International Court of Justice, 1961), 32; *Anglo-Iranian Oil Co. (United Kingdom v Iran)*, ICJ (Annual Reports of the International Court of Justice, 1952), 104: 'But the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court.' For a comprehensive discussion of the textual approach prescribed by the VCLT, see Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), 114 et seq.; Engelen, *Interpretation of Tax Treaties under International Law*, Ch. 5. For a demarcation of the textual versus a literal approach in case law, refer to the summary elaborations of Mummery J. in *Inland Revenue Commissioners v Commerzbank*, [1990] STC 285, 297–298; *Fothergill v Monarch Airlines Ltd.*, 272, 279, 285, 290, 294; *Gladden v Her Majesty the Queen*, 519.

[20]See Engelen, *Interpretation of Tax Treaties under International Law*, 429.

leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable, in which case recourse may be had to supplementary means in order to determine the meaning;[21] apart from that, the latter may be used only to confirm but not contest a manifest meaning established under Article 31.[22] Consequently, the will of the parties manifested in the agreement and its expression in the text converge for purposes of interpreting and applying the treaty, because 'law cannot take into consideration anything that remains buried away in the minds of the parties. …[T]he expressed will is the only will upon which the parties have been able to reach an agreement.'[23] In summary, since it has only itself as a reference, the text must be treated *as if it were* the treaty – the main task of interpretation being 'to give effect to the *expressed* intention of the parties.'[24]

3.2.2. The Meaning of Text and Its Implications

What constitutes the text? The answer to this question is more straightforward: the text comprises all authenticated language versions of the text, and the procedures establishing authentic status are defined by Article 10 VCLT and its Commentary:

> Authentication is the process by which this definitive text is established, and it consists in some act or procedure which certifies the text as the correct and authentic text.[25]
>
> The text of a treaty is established as authentic and definitive: (a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or (b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.[26]

[21] The terminology of intrinsic versus extrinsic, which is appropriated for its suitability here and also by Sinclair, *The Vienna Convention on the Law of Treaties*, 118, was originally introduced by Charles de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (Paris: Pedone, 1963).

[22] UN, *Vienna Convention on the Law of Treaties*, Article 32(a) and (b).

[23] Paul Reuter, *Introduction to the Law of Treaties* (Kegan Paul Intl, 1995), 30, para. 65.

[24] Lord McNair, as quoted by John F. Avery Jones, ed., 'Interpretation of Tax Treaties', *Bulletin for International Taxation*, no. 2 (1986): 76.

[25] ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:195, para. 1.

[26] UN, *Vienna Convention on the Law of Treaties*, Article 10.

The immediate implication for the interpretation of treaties with their text in more than one language is that all language texts form part of the context definition under Article 31(2).[27] If we neglect the existence of Article 33 for the moment, this implies that all texts have to be considered authentic means of interpretation to which more relative weight must be attributed than to supplementary means.[28] Therefore, a legal obligation to compare all language texts as part of the context could be construed from Article 31 in the absence of Article 33.[29]

During the drafting period of the VCLT the Israeli government proposed that Article 31 should explicitly codify a comparison of all texts because the utility of such comparison extended beyond the decider function in case of textual differences.[30] This suggestion was not implemented in the VCLT, which raises the question how multiple language texts relate to each other for purposes of interpretation: Do all considered together constitute the text, or each considered by itself? Once more, the consequences of the answer are non-trivial: the former implies that considering one text in isolation can never make the treaty accessible in its entirety, whereas the latter implies that such is possible in principle.

To answer the question, a look under the hood of Article 33 is necessary. Its construction rests on two basic propositions. The first, henceforth denoted as *p*, is the fundamental principle of unity:

[27] See Engelen, *Interpretation of Tax Treaties under International Law*, 544.

[28] See ibid., 390.

[29] In addition to all texts forming part of the context, the requirement to interpret a treaty 'in light of its object and purpose' enshrined in Article 31(1) also implies a legal obligation to compare the texts if such must be presumed to be necessary to appreciate the full object and purpose, see Christopher B. Kuner, 'The Interpretation of Multilingual Treaties: Comparison of Texts Versus the Presumption of Similar Meaning', *International & Comparative Law Quarterly* 40, no. 4 (1991): 963, 73n, with reference to Hans van Loon, 'The Hague Conventions on Private International Law', in *Further Studies in International Law*, ed. Francis Geoffrey Jacobs and Shelley Roberts, vol. 7, United Kingdom Comparative Law Series (London: Sweet & Maxwell, 1987), 221, 238; Frederick A. Mann, 'Uniform Statutes in English Law', in *Further Studies in International Law* (Oxford: Clarendon Press, 1990), 284–85.

[30] See ILC, *Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly*, vol. II, Yearbook of the International Law Commission 1966, A/CN.4/SER. A/1966/Add.1 (United Nations, 1967), 92, 301, para. 16(h).

> [I]n law there is only one treaty – one set of terms accepted by the parties and one common intention with respect to those terms – even when two authentic texts appear to diverge.[31]

This principle is a presumption of law that cannot be rebutted.[32] It constitutes the fundamental axiom from which all further analysis must depart. In essence, it is a statement of numerical identity: A = A, A being the treaty.

As we have seen above, we ought to treat the text *as if it were* the treaty. Given that there may exist several language texts each of which has been established as definitive through the process of authentication, we can now better classify this *as if it were* relation between the treaty and its text, namely, as a relation of qualitative identity, because numerical identity is an analytic one-one relation a priori, whereas the relation between a treaty and the language of its text is potentially one-many.[33]

To say that a text is qualitatively identical to the treaty implies that both equally feature certain relevant properties as a result of which they may be qualified as the same. With respect to the treaty and its text, the relevant property for sameness consists in the text expressing the full content of the treaty, which must be presumed to be the case once a text in a particular language has been authenticated.[34]

---

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

[32] See Jörg Manfred Mössner, 'Die Auslegung mehrsprachiger Staatsverträge', *Archiv des Völkerrechts*, Bd. 15, no. 3. H. (1972): 282; Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer, 2007), 356.

[33] Aristotle is the first to elaborate on the difference between numerical and qualitative identity extensively, see Aristotle, *Topics* (The Internet Classics Archive, 350 B.C.), Book 1, Part 7; Aristotle, *Metaphysics*, Book IV, Part 4; Book V, Part 9. For refined considerations, see Gottfried Wilhelm Leibniz, *Metaphysische Abhandlung*, ed. Ulrich Johannes Schneider (Hamburg: Felix Meiner Verlag, 2002); Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (London: Kegan Paul, 1922); Gottlob Frege, 'Über Sinn und Bedeutung', *Zeitschrift für Philosophie und Philosophische Kritik*, 1892, 25–50; Saul A. Kripke, 'Identity and Necessity', in *Identity and Individuation*, ed. Milton K. Munitz, 1st ed. (New York: New York University Press, 1971); Saul A. Kripke, *Naming and Necessity* (Cambridge, Mass: Harvard University Press, 1980).

[34] The same applies to unilingual treaties: the *as if it were* relation between the treaty and its text in only one language is also one of qualitative not numerical identity. This is embodied by the VCLT allowing for the correction of errors under Articles 48(3) and

As a corollary, the variable *language* must be regarded as explicitly excluded by *p* from the sum of properties rendering the text qualitatively identical to the treaty, or else there could not be multiple language texts. On the basis of *p*, multiple language texts imply that language is irrelevant for the essential property of expressing the full content of the treaty: once authenticated, any language text must be presumed to express the full content of the treaty and therefore any other text until proven otherwise.[35]

In summary, there is only one treaty with one set of terms, the text represents the treaty, and each text constitutes the definitive text by way of authentication, wherefore all texts must be considered the same in their content even though the wordings in the different languages may differ. Hence, on the basis of *p*, the answer to the above question must by means of a logical tautology be that each text constitutes the text (that is, treaty).[36]

The second proposition on which the VCLT rules are based, henceforth denoted as *q*, is that discrepancies between the texts attributable to language are a material reality:

> Few plurilingual treaties containing more than one or two articles are without some discrepancy between the texts. The different genius of the languages, the absence of a complete *consensus ad idem*, or lack of sufficient time to co-ordinate the texts may result in minor or even major discrepancies in the meaning of the texts.[37]

This raises the question whether the point made is one of logical necessity or merely a fact of life. The former would mean that the practice of states to

79 VCLT. Such errors constitute defects of the text in its intended relation of qualitative identity with the treaty, and their correction does not imply a change or amendment of the agreement in substance (the corrected text applies *ab initio* under Article 79(4) VCLT) but merely a correction of the identified failure of the text to properly display the intended property of expressing the full content of the treaty, see ILC, *Draft Articles on the Law of Treaties with Commentaries*, 273, para. 6.

[35]Identity is a transitive relation: if A = B and B = C, then A = C, viz., if A = B and A = C, then B = C.

[36]In the technical sense of an analytical truth a priori but essentially redundant statement. To say that each of the authentic language texts is the text provides no new information; it states something true while saying nothing really meaningful (in the sense that we learn nothing new from that statement about the treaty), see Wittgenstein, *Tractatus Logico-Philosophicus*, passim, by analogy.

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

conclude treaties in plurilingual form is fundamentally flawed, whereas the latter implies that it is only corrupted by practical implementation. From the presumption that the genius of every language is different, discrepancies seem to follow as a logical necessity.[38] We may safely leave this discussion to the linguists because the corollary of *p*, that is, all texts are qualitatively identical, can only be reconciled with *q*, that is, most texts differ, if differences between the texts can be reconciled by way of interpretation. Otherwise *q* would amount to *not-p*, and *p* and *q* would contradict each other.

If *q* would indeed have to be considered true as a logical necessity, the exclusion of language as a material factor by *p*, that is, the practice of states to conclude treaties in plurilingual form, would have to be questioned as fundamentally flawed. Hence, the premiss of language being an immaterial factor implicit in *p* is challenged by *q* as unsound. In the face of *q*, it has to be reformulated into *language ought to be an immaterial factor*, because the principle of unity contained in *p* requires that there is only one treaty with one set of terms. Since *p* may not be immaterial by definition, *q* must be shown to be immaterial by way of interpretation, in the sense of *although the expression differs, the meaning is the same.*

In summary, we first of all ought to treat any text *as if it were* the treaty, because we have no separate underlying agreement at our disposal against which the text could be gauged other than the one expressed by the texts themselves. Secondly, based on the principle of unity, we ought to depart from the assumption that all texts must equal each other in meaning even if they differ from each other in expression. Crucially, however, both the content of each text and the sameness of all texts in this respect can be established only by way of interpretation in view of *q*. There is a fundamental tension between *p* and *q* that requires dissolution because *p* and *q* contradict each other if *q* holds true and the difference in expression cannot be shown to be immaterial in view of *p*, while *q* also implies that any text may single-handedly fail to convey the full content of the treaty (and the other

[38] According to Ajulo, 'linguists are unanimous in the view that no language can express fully any idea primarily conceived in another language', Sunday Babalola Ajulo, 'Myth and Reality of Law, Language and International Organization in Africa: The Case of African Economic Community', *Journal of African Law* 41, no. 1 (1997): 40.

texts) because of linguistic ambiguities or mistakes in the authentication process.

As a corollary, because *p* requires that 'every effort should be made to find a common meaning for the texts before preferring one to another',[39] *q* requires that all texts are considered together for purposes of interpreting the treaty, because to establish whether *p* holds true, that is, whether *q* amounts in fact to *not-q* after careful consideration, there is no exogenous variable against which the texts could be gauged, but the texts can only be gauged against each other and therefore have to be considered together in order for the interpreter to safely arrive at their common meaning constituting the true content of the treaty.[40]

Apart from the Israeli government cited above, this view was strongly endorsed by Rosenne, who argued for an explicit inclusion of a comparison of texts among the means of interpretation and concluded that the general rule of interpretation would be deficient without.[41] His proposal has not been implemented, and its underlying rationale is not supported by the majority of scholars to date. From the prominent academics in international tax law, only Klaus Vogel seemed to have adhered to it initially:

> With respect to **bilingual or multilingual** agreements, Art. 33 VCLT provides …that the original versions in **each language** are **equally binding**. …The domestic judge, therefore, when interpreting treaties cannot and may not limit

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

[40] See Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals', 126, 133–34, however, wrongly applied to cases in which a prevailing text exists, see Chapter 6, s. 6.2; Engelen, *Interpretation of Tax Treaties under International Law*, 545–46; Mössner, 'Die Auslegung mehrsprachiger Staatsverträge', 282; Kuner, 'The Interpretation of Multilingual Treaties', 961, with reference to M. Hudson, *International Legislation* (1971), vol. V, x; Michael Edwardes-Ker, *Tax Treaty Interpretation*, 1994, Ch. 20, 215, forcefully: 'Because Article 33 of the VCLT provides that each authenticated version of a plurilingual treaty is equally authoritative, all such versions should always be interpreted – because they all comprise one composite treaty.' This view has also been held by the Supreme Court of Kansas in *Johnson v Olson*, 92 Kan. 819 142 P. 256 (1914): 'The treaty must not only be construed as a whole, but where it is executed in two languages both are originals and must be construed together', as quoted by Kuner, 'The Interpretation of Multilingual Treaties', 955, 11n.

[41] ILC, *Summary Records of the Eighteenth Session, 4 May – 19 July 1966*, vol. I, Part II, Yearbook of the International Law Commission 1966, A/CN.4/SER.A/1966 (United Nations, 1967), 208–10, paras. 7–16.

> himself to the version of the treaty written in his mother tongue; he must always refer to the foreign version as well.[42]

But, with reference to Engelen's research and position, he qualified his view in the 5th edition of his Commentary by inserting 'as soon as doubts arise' between the 'must' and the 'always'.[43]

In the preliminary general part of his Commentary, Wassermeyer seems to take the position that always all language texts have to be considered as long as they are authenticated;[44] however, he qualifies his view by stating

[42]Klaus Vogel, *Klaus Vogel on Double Taxation Conventions: A Commentary to the OECD, UN and US Model Conventions for the Avoidance of Double Taxation of Income and Capital; with Particular Reference to German Treaty Practice*, 3rd ed. (London: Kluwer, 1997), 38, para. 72.

[43]Klaus Vogel and Moris Lehner, eds., *Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen: Kommentar auf der Grundlage der Musterabkommen*, 5th ed. (München: Beck, 2008), 141, para. 111, referring to Engelen, *Interpretation of Tax Treaties under International Law*, 384. This has been continued by the 6th German version, edited by Moris Lehner after Klaus Vogel's death, see Moris Lehner, ed., *Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen: Kommentar auf der Grundlage der Musterabkommen (begründet von Klaus Vogel)*, 6th ed. (München: Beck, 2015), 196, para. 111. In contrast, the new 4th English edition still implements the wording of the 3rd English edition quoted above, equivalent to the 4th German edition, see Ekkehart Reimer and Alexander Rust, eds., *Klaus Vogel on Double Taxation Conventions*, 4th ed. (The Netherlands: Wolters Kluwer Law & Business, 2015), 40, para. 87; Klaus Vogel and Moris Lehner, eds., *Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen: Kommentar auf der Grundlage der Musterabkommen*, 4th ed. (München: Beck, 2003), 151, para. 111. Whether this material difference of the new 4th English edition to the 5th and 6th German editions is intentional or merely the result of translating the respective paragraph in the introduction to the 4th German edition is not entirely obvious. In view of what the editors state in their preface, the latter seems more likely, however, not guaranteed: 'As from the 4th edition, the time for exact translations of the German book has elapsed, Klaus decided to separate the English from the German version and asked us to strive for a new Commentary – in the tradition of his previous English editions, but as an international endeavour with a higher degree of equidistance to national treaty practice and case law. . . .The result is an almost entirely new book. With the exception of Klaus's *Introduction*, which of course has gained the status of a classic and has undergone only careful but minor updating, we have started anew. All important developments since 1997 have been integrated.'

[44]See Franz Wassermeyer, ed., *Doppelbesteuerung: Kommentar zu allen deutschen Doppel-*

in his Commentary on Article 3 of the OECD Model that because of the general presumption of all texts being congruent, it is justified to rely only on the text in the official language of the state applying the treaty as long as there is no concrete evidence for a divergence.[45]

3.3. The VCLT Framework

3.3.1. The Content of Article 33

Article 33 comprises four paragraphs. Paragraphs (1) to (3) enshrine the principle of unity. Paragraph (1) stipulates equal authority of all authenticated texts unless parties agree otherwise, while paragraph (2) provides that non-authenticated versions have equal authority only if parties agree so. Paragraph (3) is a presumption that the terms of the treaty have the same meaning in each text. The presumption is not based on empirical evidence but on the principle of unity; however, in contrast to the underlying principle itself, the presumption is fully rebuttable in view of *q* and paragraph (4), in the sense that the presumption ceases to be effective when there is a divergence between the texts.[46] In light of *q* and paragraph (4), paragraph (3) must be read as stating that the terms of the treaty ought to be assumed to have the same meaning except when, as a matter of fact, they do not. In the latter case some further interpretative effort is necessary to reconcile the texts and establish a common meaning under paragraph (4), which provides that the meaning that best reconciles the texts with regard to the object and purpose shall be adopted when a divergence cannot be resolved under the general rule of interpretation.[47]

In terms of a comparison of texts, this essentially implements the position of Special Rapporteur Sir Humphrey Waldock. Based on both conceptual and practical considerations, he argued against an explicit inclusion of

besteuerungsabkommen, vol. I (München: Beck, 2016), MA, Vor Art. 1, 37, para. 47.

[45] See ibid., MA, Art. 3, 54–55, para. 83.

[46] See Kuner, 'The Interpretation of Multilingual Treaties', 955; Peter Germer, 'Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties', *Harvard International Law Journal* 11 (1970): 414; Mössner, 'Die Auslegung mehrsprachiger Staatsverträge', 300.

[47] Article 33(4) will be dealt with in detail in the next chapter.

such comparison among the principal means of interpretation. According to him, including it would be 'undermining the security of the individual texts' and for the most part only contribute to distort interpretation because of the inherent differences in languages. For this reason, each text should be interpreted in the context of its own language, and a comparative interpretation should be conducted only if in the course of such separate interpretation a problem in form of an ambiguity or divergence arises. In addition, he argued that the inclusion of a comparison would introduce additional practical difficulties and create an extra burden to the disadvantage of countries lacking the needed resources.[48]

Noteworthy, his conceptual argument emphasises *p* by pointing to the reality of *q*. It argues that in order to avoid two-way distortion of each text's meaning by idiosyncrasies of the other language transplanted out of context, it is essential to first interpret the texts separately according to their own idiomatic construction:

> It is one thing to admit interaction between two versions when each has been interpreted in accordance with its own genius and a divergence has appeared between them or an ambiguity in one of them. But it is another thing to attribute legal value to a comparison for the purpose of determining the ordinary meaning of the terms in the context of the treaty; for this may encourage attempts to transplant concepts of one language into the interpretation of a text in another language with a resultant distortion of the meaning.[49]

This does not reject the need for a comparative interpretation altogether, but only excludes it from the principal elements of interpretation and confines it to the point in time when interpretation of each text separately has been concluded and a problem between the outcomes remains. Thus, it is much more an argument concerning the mechanics of comparing texts than one against the necessity of such comparison in principle.

[48] See ILC, *Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly*, II:100, para. 23; ILC, *Summary Records of the Eighteenth Session, 4 May – 19 July 1966*, I, Part II:211, para. 35.

[49] ILC, *Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly*, II:100, para. 23.

3.3.2. The Prevailing View

Engelen has formulated the currently prevailing view in his seminal study on tax treaty interpretation.[50] Its fundamental proposition is that courts are not obliged to compare all texts but, based on Article 33(3), may rely on a single one for purposes of 'routine interpretation'.[51] Yet, this reliance should be exercised in good faith, that is, a single text may be relied on only until either an inclarity in the text used arises or a divergence between the texts is discovered.[52]

Engelen's own position seems to be more advanced. He recognises the risk that, as a consequence of the routine interpretation approach, textual divergences may be overlooked easily, which leads to misapplication of treaties. Therefore, contracting states may find themselves in the position of having violated their international obligations if it is established subsequently that the text relied on did not accurately reflect the treaty's meaning.[53]

Noteworthy, this risk is particularly high for tax treaties. In a normal state-state dispute under the jurisdiction of an international court each state will likely argue on the basis of the text in its own language, and the court will have to deal with the language issue automatically. A taxpayer-state dispute, however, arises within one state under the jurisdiction of that state's domestic courts. Hence, as a practical matter, if either party wants to gain support for its arguments from the other language text, it may have to bring it to the attention of the court. Engelen more or less ends with a warning in this respect and draws no further conclusions concerning the application of the VCLT rules to the interpretation of plurilingual tax treaties.

The question arises what exactly we are to understand by 'routine interpretation'. Neither the VCLT nor its Commentary distinguishes between different modes of interpretation according to which different principles would apply. There is only one combined 'General rule of interpretation' – the singular is declaratory in terms of substance.[54] In essence, the notion of 'routine interpretation' does not relate to any category of interpretation

[50]See Engelen, *Interpretation of Tax Treaties under International Law*, 384–88, 419, 546.
[51]Henceforth referred to as routine interpretation approach.
[52]See ibid., 388–90, 546.
[53]See ibid., 389–91.
[54]UN, *Vienna Convention on the Law of Treaties*, Article 31.

under international law but is a construct introduced by scholars.

Several authors echo the terminology explicitly,[55] whereas others merely paraphrase the theory behind it.[56] Waldock's argument in favour of relying on a single text until a 'difficulty arose' or, more precisely, until 'a divergence has appeared between them or an ambiguity in one of them' serves as the common point of departure.[57] Tabory refers to the 'absence of a specific problem' and provides a scheme of interpretative steps for which she distinguishes between a 'problem or lack of clarity' and a 'difference of meaning'.[58] Kuner points to the necessity of an 'allegation' to be made in terms of 'an ambiguity in one version or a difference among versions',[59] whereas Germer refers to an 'alleged divergence between the different authentic language versions of the treaty' only.[60] Gardiner contrasts scenarios 'where there is no reason to believe that there is any issue affected by the choice of language of the text which is being interpreted' to those when a 'difference or dispute over interpretation is presented to a court or tribunal', in which case a 'comparison of texts is likely to be essential.'[61] Hilf refers to 'inclarities' that appear and have to be resolved, or 'divergences' between the texts that appear in 'whatever way', have become 'visible', the party

[55] See Tabory, *Multilingualism in International Law and Institutions*, 198, 'routine understanding' at 196; Gardiner, *Treaty Interpretation*, 361; Kuner paraphrases the theory behind it, making use of the word 'routine', see Kuner, 'The Interpretation of Multilingual Treaties', 954; Arginelli summarises the arguments of a number of scholars quoting their terminology, see Arginelli, *The Interpretation of Multilingual Tax Treaties*, 248 et seq.

[56] See Hilf, *Die Auslegung mehrsprachiger Verträge*, 77; Germer, 'Interpretation of Plurilingual Treaties', 412.

[57] See ILC, *Summary Records of the Eighteenth Session, 4 May – 19 July 1966*, I, Part II:211, para. 35; ILC, *Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly*, II:100, para. 23. This immediately begs the question how a divergence – in contrast to an ambiguity – can 'arise' or 'appear' without it being raised by someone if only one text is looked at. The vague language and passive form often found with the proponents of the routine interpretation approach merely hides the underlying presupposition that the issue is essentially one of procedural law (discussed in depth below).

[58] Tabory, *Multilingualism in International Law and Institutions*, 196, 177.

[59] Kuner, 'The Interpretation of Multilingual Treaties', 954.

[60] See Germer, 'Interpretation of Plurilingual Treaties', 412.

[61] Gardiner, *Treaty Interpretation*, 360.

'stumbles on', or is 'confronted with'.[62] In his comprehensive treatment of the issue, he most thoroughly elaborates the crucial argument at the core of the routine interpretation approach, namely, that a state may be considered to have acted in line with its international obligations in good faith as long as it does not wilfully risk misapplication of the treaty by continuing to rely on a single text in the face of either inclarities or divergences.[63]

Drawing on Hilf, Engelen concludes that a single text can be relied on as long as its interpretation leads to a 'clear' and 'reasonable' result and no divergence 'has come to light', albeit under the risk that actual divergences between the texts may stay undetected, which bears the danger of treaty misapplication.[64] In this context, he implicitly connects the criterion of clarity to the wording of Article 32(a) and (b) for defining its scope and concludes that when the interpretation of a single text under the general rule of interpretation leads to an ambiguous, obscure, absurd, or unreasonable result, the interpreter first has to refer to the other text(s) before having recourse to supplementary means:

> In conclusion, it is submitted that, when the interpretation of any one authentic text in accordance with Article 31 VCLT leaves the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result, the Vienna Convention system of interpretation and, in particular, the principle of good faith requires the interpreter to first have recourse to the other authentic texts in order to determine the meaning before recourse is had for this purpose to the supplementary means of interpretation mentioned in Article 32 VCLT.[65]

In summary, the fundamental proposition of the routine interpretation approach is that any party to a treaty may in good faith rely on any single text in isolation as long as the following two conditions are fulfilled:

c_1: The text relied on is clear.
c_2: There is no divergence between the texts.

[62] Hilf, *Die Auslegung mehrsprachiger Verträge*, 72, 77, 80, 82.
[63] See ibid., 77–82, discussed in more detail in Chapter 7, s. 7.6, in the context of state responsibility.
[64] See Engelen, *Interpretation of Tax Treaties under International Law*, 390–91.
[65] Ibid., 390.

Regarding condition c_1, I agree with Engelen that clarity is to be defined in terms of an interpretation under Article 31 not leaving the meaning ambiguous or obscure or leading to a result that is manifestly absurd or unreasonable, that is, the scope of clarity is demarcated by Article 32(a) and (b), or else the attribution of different weights by the VCLT to the different means of interpretation would be upset. A wider colloquial definition of inclarity that would imply a treaty could be classified as unclear before all texts have been consulted to elucidate its meaning, and that recourse to supplementary means to determine the treaty meaning could in consequence be had before looking at the other texts, does not find representation in Articles 31–33.[66] All texts are per definition of context under Article 31(2) authentic means of interpretation, and supplementary means may be used to establish the treaty meaning only in case an interpretation considering all authentic means leaves the meaning ambiguous or obscure, or leads to an absurd or unreasonable result. Apart from that, supplementary means may be used only to confirm but not contest the meaning arrived at under Article 31.

Regarding condition c_2, some authors stress the importance of a divergence being alleged by a party to the dispute. Engelen refers to the ICJ decision on the territorial dispute between Libyan Arab Jamahiriya and Chad, which seems to follow this rationale:

> The Treaty was concluded in French and Arabic, both texts being authentic; the Parties have not suggested that there is any divergence between the French and Arabic texts. …The Court will base its interpretation of the Treaty on the authoritative French text.[67]

For additional support he quotes the American Law Institute, according to which courts 'may consider any convenient text unless an argument is addressed to some other text'.[68] This line of argument will be subject to in-

[66] This will be discussed in detail in the next chapter, s. 4.4.2.

[67] *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ (Annual Reports of the International Court of Justice, 1994), 6; Engelen, *Interpretation of Tax Treaties under International Law*, 388–89.

[68] The American Law Institute, *Restatement of the Law Third: The Foreign Relations Law of the United States*, vol. 1, 1987, 199, para. 2; see Engelen, *Interpretation of Tax Treaties under International Law*, 384–85. Noteworthy, this stance marks a departure by the American Law Institute and US Secretary of State from their previously held views, see

depth considerations below; however, we may record already that the suggestion does not necessarily correspond to the wordings of Article 33(1) and (4), which only refer to cases of divergence in general and differences in meaning disclosed by a comparison of the texts, that is, to instances when some kind of divergence exists, without delimiting the ways this has been established or specifying who has instigated a comparison.

3.3.3. Critique of the Prevailing View

In the opinion of the proponents of the routine interpretation approach, Article 33 as a whole contains no obligation to conduct a comparison when the text interpreted is clear, but the interpreter may rely in such case on the presumption in Article 33(3) as long as no divergence rebuts it. The argument rests on the absence of any divergence but remains silent as to how that condition has been established. Unlike an inclarity, however, a divergence might not come to the attention of the interpreter without a comparison of texts.[69] In order for the argument of the routine interpretation approach to be valid, it must be the case that the presumption actually gets rebutted whenever a divergence rebutting it exits, or else reliance on the presumption does not work as presupposed by the routine interpretation approach. Hence, we may test its validity for the case of tax treaties with the help of a simple thought experiment. The fundamental theorem looks as follows:

> **Proposition r_1:** Based on the presumption in Article 33(3), states may in good faith rely on any single text in isolation if no cases exist or can be conceived in which a divergence necessarily stays undisclosed while interpretation of the text chosen leads to a clear result.
>
> **Proposition r_2:** Such cases exist or can be conceived for tax treaties.
>
> **Conclusion r_1+r_2:** States cannot in good faith rely on any single text in isolation; for tax treaties the presumption in Article 33(3) is rebutted by default, and courts are obliged to compare all texts under Article 31(1) and (2), as they are part of the context.

Kuner, 'The Interpretation of Multilingual Treaties', 955, with reference to *Restatement (Second) of Foreign Relations Law of the United States*, §147(1)(i), 1965, and G. Hackworth, *Digest of International Law* (1927), vol. V, 265.

[69] See Tabory, *Multilingualism in International Law and Institutions*, 199; Kuner, 'The Interpretation of Multilingual Treaties', 958.

If we accept r_1, the argument hinges on r_2. For purposes of the following discussion, it is assumed that the reader will agree with r_1, so that an extensive discussion of the principle of good faith and its application, which lies beyond the scope of this study, is unnecessary.[70] It is difficult to delineate the scope of good faith in its application as a legal principle, because it rests on the broader and less tangible moral concepts of honesty, fairness, and reasonableness.[71] Hence, there may be room to contest r_1. Notwithstanding, interpretation in good faith is an essential element of the *pacta sunt servanda* rule if that rule 'is to have any real meaning'[72] – all rights and obligations under the treaty must, in their spirit as well as according to their letter, be put into effect by the parties to the best of their abilities.[73]

Rejecting r_1 would result in a softening of this legal obligation if we must concede that correct interpretation is a matter of chance. As acknowledged by the drafters of the VCLT themselves, divergences between texts of plurilingual treaties are not a remote contingency but a considerable empirical reality, if not even to be assumed a necessary result of the 'different genius of the languages' a priori.[74] This implicitly rejects Hilf's and Engelen's argument that states must be considered to conform to their international responsibilities in good faith unless they wilfully ignore divergences, in the sense that they might have a point if undetected divergences were a remote contingency, but not when the existence of undetected divergences must be considered systemic, in which case not consulting the other texts is as good as wilfully ignoring divergences.

On the basis of the *Natexis* case discussed by Arruda Ferreira and Trindade Marinho,[75] the thought experiment conceived above can be conducted to show that r_2 is fulfilled for tax treaties. Imagine a bilingual

[70] For in-depth considerations, see Engelen, *Interpretation of Tax Treaties under International Law*, 33–34, 124 et seq.; Arginelli, *The Interpretation of Multilingual Tax Treaties*, 154–58; Joseph F O'Connor, *Good Faith in International Trade* (Aldershot: Dartmouth Publishing Co. Ltd., 1991), Ch. 8.

[71] See Engelen, *Interpretation of Tax Treaties under International Law*, 123.

[72] ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:219, para. 5.

[73] See Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 363–68.

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

[75] Conseil d'État, *Société Natexis Banques Populaires v France*; Arruda Ferreira and Trindade Marinho, 'Tax Sparing and Matching Credit'.

treaty the two texts of which are based on the OECD Model, but one says 'subject to tax' where the other says 'liable to tax', all other things being equal. Both wordings are sufficiently unambiguous but mean different things, namely, a tax is effectively paid versus a tax may potentially be paid. This divergence between the texts will not disclose itself by looking at one text in isolation, because the avoidance of double taxation as object and purpose is not unequivocal in this respect: both subject and liable to tax avoid double taxation. Therefore, interpretation of each text in isolation under Article 31 may lead to two conflicting meanings, each of which may be regarded as manifest and applicable by the judge if considered only by itself.

Natexis may be considered a case exemplifying this. The issue raised by it, that is, the difference in meaning between the Portuguese *incidido* and the French *supporté*, is akin to the issue of difference in meaning between liable and subject to tax in the OECD Model.[76] Arguably, what happened in *Natexis* is that the divergence resulted in the French text failing to convey the full scope of the treaty's object and purpose. Alternatively, the conclusion may be that the Conseil d'État simply made a mistake by missing the true point of the object and purpose when interpreting the tax sparing clause,[77] provided that one agrees with the contention of the present author and the authors Arruda Ferreira and Trindade Marinho that the court interpreted the treaty wrongly.[78] In any case, it is safe to assume that there

[76] See Arruda Ferreira and Trindade Marinho, 'Tax Sparing and Matching Credit', 411, 92n.

[77] See ibid., 413.

[78] *Natexis* is not a case for which the position of the court could be defended by the reasoning that if one of two texts has a wider meaning, the court should adopt the narrower one that harmonises with both texts and is doubtless in accordance with the common intention, as applied by the PCIJ in *The Mavrommatis Palestine Concessions*, PCIJ (Publications of the Permanent Court of International Justice 1922–1946, 1924). First, in *Mavrommatis* the court did not intend to lay down a general rule, but the restrictive interpretation applied was considered appropriate only for that particular case, see ILC, *Draft Articles on the Law of Treaties with Commentaries*, 225, para. 8. Second, the reasoning per se is hardly appropriate in a case of subject versus liable to tax. The more restrictive subject to tax does not necessarily harmonise the intentions of the parties: although it is included in the wider liable to tax, it sometimes means the opposite. This will be discussed in more detail in the next chapter, s. 4.3.2. In respect of Conseil d'État, *Ministre du Budget c Ragazzacci*, 2012, which may serve as a counterexample to *Natexis*,

would have been a bigger chance for a different interpretation of the treaty if the court had looked into the Portuguese text. In the same vein, it is safe to assume that a Brazilian court interpreting the treaty would have reached a different conclusion from the Conseil d'État merely by departing from the Portuguese text. Such outcome is not in line with the objective of common interpretation,[79] which is inherent in the principle of unity.[80] Since the Portuguese text was not considered in *Natexis*,[81] the question arises as to what might happen if another French taxpayer claims the tax sparing credit in a French court, now based on the divergence disclosed by the authors Ar-

---

the object and purpose may be considered to have satisfactorily solved the issue of liable versus subject to tax. With reference to the object and purpose being the avoidance of double taxation, the Counsel d'Etat applied the English text and denied a refund of the *avoir fiscal*, a granting of which would have led to double non-taxation because the taxpayer would not have been subject to any tax in the UK on non-remitted dividends. This differs from the *Natexis* scenario because there is still a difference between unintended double non-taxation and intended double exemption, which is particularly important in the context of *Natexis* and the respective tax sparing clause, the meaning of which does not necessarily disclose itself if only the text saying 'subject to tax' is considered, because the object and purpose of a treaty is primarily to be obtained from the text of the treaty, consistent with the textual approach to interpretation prescribed by the VCLT, see Sinclair, *The Vienna Convention on the Law of Treaties*, 118. Even if the treaty also states avoidance of abuse to be its goal, not all cases of double non-taxation must necessarily be considered avoidance cases, see Ingo Jankowiak, *Doppelte Nichtbesteuerung im internationalen Steuerrecht* (Baden-Baden: Nomos, 2009), passim.

[79] See OECD, *Model Tax Convention*, 2017, 'Introduction', para. 5; Vogel and Lehner, *Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen: Kommentar auf der Grundlage der Musterabkommen*, 142–45, paras. 113–120; Philip Baker, *Double Taxation Conventions: A Manual on the OECD Model Tax Convention on Income and on Capital* (Sweet & Maxwell, Limited, 2001), pt. E. 26.

[80] See Vogel, *Klaus Vogel on Double Taxation Conventions*, 41, para. 75a; Reimer and Rust, *Klaus Vogel on Double Taxation Conventions*, 43, para. 93.

[81] It should be mentioned that France is not a signatory to the VCLT. Notwithstanding, the principles of treaty interpretation enshrined in the VCLT may be considered part of the corpus of customary international law. Consequently, they may be considered applicable also to countries that are not a party to the VCLT, see Philippe Martin, 'Courts and Tax Treaties in Civil Law Countries', in *Courts and Tax Treaty Law* (Amsterdam: IBFD, 2007), 4; Avery Jones, 'Interpretation of Tax Treaties', 75; *Fothergill v Monarch Airlines Ltd.*, 282; *Thiel v Federal Commissioner of Taxation*, [1990] 171 CLR 338, 356. This will be discussed in more detail in Chapter 5, s. 5.5.

ruda Ferreira and Trindade Marinho. If this taxpayer – unlike *Société Natexis Banques Populaires* – would receive the credit with reference to the Portuguese text, the result would be two differing court decisions and two different tax treatments for taxpayers in the same situation on exactly the same issue, that is, there would be a fragmentation of jurisprudence and, likely, a breach of domestic principles of equality.

Now, although we may indeed argue that an ambiguity of a single text necessitates reference to the others (as is acknowledged by the proponents of the routine interpretation approach),[82] we cannot make the *argumentum a contrario* (argument from the contrary). It does not necessarily follow from the mere fact of the text used being clear that we may regard its meaning as the applicable one, because that mere fact alone tells us nothing about the other texts and their meaning. The Young Loan Arbitration tribunal has established in this regard that we may not rely on the clearer text automatically because the meaning of the clearer text may not be the correct one in the light of the object and purpose.[83] Hence, without investigation whether it portrays the correct meaning, giving primacy to one text from the outset on grounds of it being more clear violates the principle of unity.[84]

It also violates the principle of effectiveness enshrined in the maxim *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be made void), which has a double implication: teleological interpretations rendering the text ineffective must be ruled out; however, because the treaty must be understood to be intended to achieve some purpose, any interpretation failing to achieve that purpose is equally incorrect.[85] Thus, if there are divergences between the texts of a treaty, we may not automatically assume that the clearer one more accurately reflects the intended meaning.

[82]See Engelen, *Interpretation of Tax Treaties under International Law*, 388–90; Gardiner, *Treaty Interpretation*, 360.

[83]See *The Kingdom of Belgium, the French Republic, the Swiss Confederation, the United Kingdom and the United States of America v The Federal Republic of Germany*, Arbitral Tribunal for the Agreement on German External Debts (Reports of International Arbitral Awards, 1980), 110, para. 40.

[84]See Sinclair, *The Vienna Convention on the Law of Treaties*, 150–51.

[85]See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:219, para. 6; Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties', in *International Law*, ed. Malcolm D. Evans (Oxford; New York: Oxford University Press, 2003), 202.

The clearer meaning may be more unequivocal with respect to static semantics, that is, it may be well-formed regarding syntax and have *a* clear meaning; however, that meaning may not necessarily be the true semantic meaning because there is a difference between meaning and reference: the meaning of a term is not necessarily congruent with its referent.[86]

Article 16 of the OECD Model may serve as an example: texts based on the English version of the Model will use the term 'board of directors', whereas texts based on the French version will read *counsel d'administration ou de surveillance* instead. Similarly, texts based on the German translation will read *Verwaltungs– und Aufsichtsrat*. The French and German terminology corresponds to the respective French and German two-tier board systems of corporate organisation, whereas the English wording corresponds to Anglo-Saxon style one-tier board systems. Hence, if each text is considered only by itself without a comparative perspective, they may be understood to refer to two distinct realities. If we assume treaties with English and French or English and German texts with precisely these properties and underlying one-tier and two-tier board systems, each seems to have a clear meaning in terms of static semantics when considered only by itself, because the terms 'board of directors', *counsel d'administration ou de surveillance*, and *Verwaltungs- und Aufsichtsrat* refer to clearly defined sets of persons under domestic law;[87] however, they do not necessarily refer to the same set, and their referents may not correspond to the meaning to be established by reconciling the meaning of the texts under Article 33(4).[88]

Now, if we may not assume that the clearer text more accurately reflects the meaning when divergences between the texts have arisen, we may also not assume that the text we are looking at conveys the one true meaning of

[86] See Frege, 'Über Sinn und Bedeutung', 25–50; Hilary Putnam, 'Meaning and Reference', *The Journal of Philosophy* 70, no. 19 (August 1973): 699–711. Reference merely consists in 'a relation that obtains between certain sorts of representational tokens (e.g. names, mental states, pictures) and objects', Marga Reimer and Eliot Michaelson, 'Reference', in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Summer ed. (Stanford University, 2016), before Introduction.

[87] The term 'member of the board of directors' is not defined in the OECD Model; therefore, it has to be interpreted according to domestic law 'unless the context otherwise requires', OECD, *Model Tax Convention*, 2017, Article 3(2).

[88] See Vogel, *Klaus Vogel on Double Taxation Conventions*, 956–57.

the treaty merely because it is clear, even if no divergence has been raised. Therefore, all texts must be compared to ensure that they provide the same meaning even though each of them may convey *a* clear meaning when considered only by itself.[89] With its interpretation of the presumption in Article 33(3), the routine interpretation approach creates a kind of interpreter's paradox concerning the interpretation of plurilingual treaties, analogous to Erwin Schrödinger's famous thought experiment colloquially known as 'Schrödinger's cat':[90] without a comparison, the interpreter cannot know whether a divergence exists and, consequently, cannot know whether he is required to conduct a comparison because the presumption in Article 33(3) must be considered rebutted. This fundamental indeterminacy of the treaty meaning resolves only when the interpreter makes the comparison and discovers the meaning of all texts, that is, the interpreter's action determines the outcome. Therefore, the meaning of a single text interpreted in isolation may not be considered clear in the sense of conveying the one true meaning of the treaty. It may appear clear, but it remains indeterminate as long as all texts have not been compared.[91] In the words of Lord Wilberforce (by analogy but nevertheless pertinent):

> There it is not only permissible to look at a foreign language text, but obligatory. What is made part of English law is the text set out 'in the First Schedule', i.e. in both Part I and Part II, so both English and French texts must be looked at. *Furthermore, it cannot be judged whether there is an inconsistency between two texts unless one looks at both.*[92]

In summary, the fundamental proposition of the routine interpretation approach may be considered valid and sound only when c_1 and c_2 are both true. As formulated by its proponents, its stronger form presupposes that 'if c_1, then c_2', while its weaker form considers it sufficient for the fundamental proposition to be valid when c_1 is true as long as nobody contests c_2. Both forms suffer from failure to acknowledge that c_2 does not follow

[89] See Lang, 'Auslegung von Doppelbesteuerungsabkommen und authentische Vertragssprachen', 405.

[90] See Erwin Schrödinger, 'Die gegenwärtige Situation in der Quantenmechanik', *Die Naturwissenschaften* 23, no. 48 (1935): 807–12.

[91] See Mössner, 'Die Auslegung mehrsprachiger Staatsverträge', 301.

[92] *Fothergill v Monarch Airlines Ltd.*, 272 (emphasis added).

analytically from c_1 a priori, but whether c_2 is true is a matter independent from c_1 and subject to empirical evidence. Therefore, the implicit presumption of the routine interpretation approach in terms of the stronger form is invalid as long as c_2 is not established empirically by a comparison of all texts. As regards the weaker form, such would treat the proposition 'if c_1, then c_2' as a natural assumption subject only to a contingency of c_2 to be false, justifying not to look into the matter of whether c_2 is true as long as nobody contests it. But, as is also established case law,[93] c_1 is not sufficient to justify the fundamental proposition of the routine interpretation approach by itself, because clarity of a single text considered in isolation is not a sufficient criterion under the VCLT framework of interpretation. In addition, the thought experiment conducted has shown that, at least for tax treaties, failure of c_2 to be true cannot be considered a mere contingency to be safely neglected in good faith until proven otherwise, but must be considered a systemic problem. Therefore, an assumption for c_2 to be true without further investigation cannot be considered sound practice in view of Article 26 VCLT.

3.4. The Impact of Domestic Procedural Law

The question arises whether procedural law has any bearing on the matter, that is, whether the argument brought forward may depend to some extent on the legal system from which one is departing.[94] In a state-state dispute under the jurisdiction of an international court, both parties are prone to argue on the basis of their own language text. Tax proceedings, however, are taxpayer-state disputes under the jurisdiction of the national courts of one contracting state. Therefore, both parties have an incentive to argue on the basis of the text in that state's official language and, if the routine interpretation approach is accepted, are less prone to look at the other text(s).

[93] See *Young Loan Arbitration*, 110, para. 40.

[94] In this section, the issue is discussed from the perspective of international law. Regardless of the conclusions, the anatomy of the current international tax system with national courts presiding over disputes that include international aspects remains to have an important impact on the application of tax treaties in practice. Therefore, Chapter 7 will return to the matter from the domestic law perspective.

In consequence, it less likely that divergences are raised while it is not less likely that they exist.

Given this, the issue in question is whether the presiding court is under an obligation to compare all texts, under no obligation but free to do so or not, or prevented from comparing all texts. Based on all the aforesaid, my conclusion has been strongly in support of the first. The view traditionally advanced by scholars (which underlies the routine interpretation approach) is that the answer depends on domestic procedural law and, in particular, on whether and to what extent the court has to apply the law *ex officio* (by right of office) subject to the principle of *iura novit curia* (the court knows the law).[95]

The role of courts and the implementation of *iura novit curia* differs between jurisdictions and, in particular, between civil and common law.[96] In common law countries, the job of courts seems to be to decide disputes on the basis of the arguments put before them. Although courts are not precluded from raising arguments about something that the parties have not pleaded and will do so concerning matters of public interest,[97] it seems

[95]Parties do not need to plead the law, but it is the duty of the court to apply the appropriate legal rules to the dispute brought before it, irrespective of what is pleaded by the parties, see Mattias Derlén, *Multilingual Interpretation of European Union Law* (Kluwer Law International, 2009), 315 et seq; Lisa Spagnolo, 'Iura Novit Curia and the CISG: Resolution of the Faux Procedural Black Hole', in *Towards Uniformity: The 2nd Annual MAA Schlechtriem CISG Conference*, ed. Lisa Spagnolo and Ingeborg Schwenzer (The Hague: Eleven International Publishing, 2011), 183; Lang, 'The Interpretation of Tax Treaties and Authentic Languages', 20–21.

[96]See Frederick A. Mann, 'Fusion of the Legal Professions?', *Law Quarterly Review* 93 (1977): 369; Derlén, *Multilingual Interpretation of European Union Law*, 315. According to Jacobs, however, a stark contrast between civil and common law in this respect is misplaced, but the issue is rather one of degree between different jurisdictions, both civil and common law, see *Van Schijndel and van Veen v SPF, Opinion of Advocate General Jacobs*, Joined Cases C–430/93 and C–431/93 (ECR I–4705, 1995), paras. 33–35, 41. Spagnolo suggests that 'some version of *iura novit curia* exists in all jurisdictions. Judges are presumed to know and empowered to apply the law, or at least the domestic law. A "strict" approach to *iura novit curia* obliges the court to *ex officio* identify and apply the substantive law it considers applicable to the case. A "soft" approach to *iura novit curia* authorizes this, but does not demand it', Spagnolo, 'Iura Novit Curia and the CISG', 185–186.

[97]For example, courts will refuse to enforce illegal contracts, see *Bank of India v Trans*

not to be meaningful to suggest that they are legally obliged in this respect.

We may reformulate the routine interpretation approach accordingly: Since the VCLT contains a presumption that 'The terms of the treaty …have the same meaning in each authentic text',[98] but no explicit instruction for the judge to establish the truth of that presumption – only directions what to do once the presumption has been rebutted, the duty to rebut the presumption is not covered by the VCLT but an issue to be determined under domestic procedural law.[99] Consequently, as long as domestic procedural law attributes a passive role to the court presiding, failure of the parties to the dispute to claim not-c_2 is as good as c_2 being true, and the judge may in good faith rely on c_1 alone to justify application of the routine interpretation approach, that is, Article 33(3) may be understood to sanction treaty interpretation on the basis of a single text in isolation as long as that text is clear and nobody comes along to displace the presumption.

Formulated like this, the proposition appears valid, however, disturbing on several accounts. As has been acknowledged by the drafters of the VCLT, divergences must be expected to constitute the rule not the exception.[100] Therefore, such reliance on the presumption contained in Article 33(3) downplays q and the need to defuse it via interpretation, basing itself on the exception rather than the rule, which per se does not inspire confidence in the interpretation effort. As we have seen, clarity of a single text by itself is not a sufficient criterion to rely on for purposes of interpretation

Continental Commodity Merchants Ltd. & J. N. Patel, [1982] 1 Lloyd's Rep. 427, 429, per Bingham J.; *Singh Butra v Ebrahim*, [1982] 2 Lloyd's Rep. 11, C.A., 13, per Lord Denning; *United City Merchants v Royal Bank of Canada*, [1983] AC 168, HL, 189, per Lord Diplock; *Van Schijndel and van Veen v SPF, Opinion of Advocate General Jacobs*, para. 35; Trevor C. Hartley, 'Pleading and Proof of Foreign Law: The Major European Systems Compared', *International and Comparative Law Quarterly* 45 (1996): 288; Rainer Hausmann, 'Pleading and Proof of Foreign Law – a Comparative Analysis', *The European Legal Forum*, Section I, no. 1 (2008): 6. Hence, according to Spagnolo, it may be more correct to characterise this not as absence but a soft implementation of *iura novit curia*, see Spagnolo, 'Iura Novit Curia and the CISG', 186.

[98] UN, *Vienna Convention on the Law of Treaties*, Article 33(3).

[99] See, by analogy, Spagnolo, 'Iura Novit Curia and the CISG', 184.

[100] See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:225, para. 6; Hilf, *Die Auslegung mehrsprachiger Verträge*, 24; Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals', 82.

under the VCLT framework. The outcome may be that 'the tribunal may find itself interpreting a text on the faulty assumption that it reflects the meaning of the treaty as a whole, when in fact it contradicts the intended meaning.'[101] Consequently, such approach weakens *p* and fails to consistently serve the *pacta sunt servanda* rule in practice.

In addition, since national procedural rules vary, so will outcomes. Depending on whether and to what extent the principle *iura novit curia* is implemented in domestic procedural law, the presiding court may consider itself to be obliged, free, or prohibited to refer to the other texts.[102] Against this state of affairs speaks that if tax treaties must be presumed to be 'intended to reconcile national fiscal legislations and to avoid the simultaneous taxation in both countries',[103] which necessitates some degree of common interpretation,[104] the realisation of such goal cannot be partly imposed on the taxpayer (who is not even party to the treaty) but should be the full responsibility of the courts of the contracting states because it must be considered the duty of the court presiding to prove beyond reasonable doubt that its authoritative interpretation is the correct one.[105] As Kuner observes, 'if states are to see any value in concluding treaties, then the primary goal of interpretation must be to reach a correct evaluation of their intent as

[101] Tabory, *Multilingualism in International Law and Institutions*, 199.

[102] See, by analogy, Spagnolo, 'Iura Novit Curia and the CISG', 183–84.

[103] Raoul Lenz, 'Report on the Interpretation of Double Taxation Conventions' (International Fiscal Association, 1960), 294.

[104] See Vogel and Lehner, *Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen: Kommentar auf der Grundlage der Musterabkommen*, 142–45, paras. 113–120; Klaus Vogel and Rainer Prokisch, 'Interpretation of Double Taxation Conventions', General Report (Rotterdam: International Fiscal Association, 1993), 62–63; Ekkehart Reimer, 'Seminar F: Die sog. Entscheidungsharmonie als Maßstab für die Auslegung von Doppelbesteuerungsabkommen', *Internationales Steuerrecht*, no. 15 (2008): 554, s. 4.3; Klaus Vogel, 'Über Entscheidungsharmonie', in *Unternehmen Steuern: Festschrift für Hans Flick zum 70. Geburtstag*, ed. Franz Klein et al. (Köln: Dr. Otto Schmidt Verlag KG, 1997), 1055–6; Hans Flick, 'Zur Auslegung von Normen des Internationalen Steuerrechts', in *Von der Auslegung und Anwendung der Steuergesetze*, ed. Günther Felix, Festschrift für Armin Spitaler (Stuttgart: C.E. Poeschel, 1958), 158.

[105] This certainly applies in countries where the court is supposed to apply the law *ex officio* subject to the principle *iura novit curia*, see Lang, 'Auslegung von Doppelbesteuerungsabkommen und authentische Vertragssprachen', 405–6.

expressed in the treaty.'[106]

Not only outcomes will differ but, depending on their domestic procedural law, the burden of interpretation is divided unevenly between countries. Those that do not (or only softly) implement *iura novit curia* are sanctioned to favour the text in their own official language and disregard the others, which in substance violates the equal authenticity of all texts declared by the treaty. If this leads to a situation that each treaty partner applies only its own text and a divergence between the texts is not detected simultaneously by both treaty partners, the treaty will be split into two sets of terms in violation of the principle of unity.

Results will vary not only between the contracting states but also within jurisdictions. Two decisions of the same court on equivalent facts fulfilled by two different taxpayers may differ if the taxpayer in the later procedure raises the issue of a relevant divergence, whereas the taxpayer in the earlier one had failed to do so. Such fragmentation of jurisprudence may be questionable in view of applicable domestic law principles of equality and legal certainty in the context of a general mission of courts to ensure consistency in the application of law, as for example is the case for the Dutch Hoge Raad, the German BFH, the French Conseil d'Etat, the Belgian Cour de Cassation/Hof van Cassatie, and the US Tax Court.[107]

In view of all this, the question arises whether the fundamental proposition of the routine interpretation approach as reformulated above is sound. When deciding the dispute as brought before it by the parties, the court has to ensure that the international obligations covered by the treaty are observed,[108] not only the law as argued by the parties. Failure to correctly

[106] Kuner, 'The Interpretation of Multilingual Treaties', 962.

[107] See Peter J. Wattel, 'Tax Litigation in Last Instance in the Netherlands: The Tax Chamber of the Supreme Court', *Bulletin for International Taxation* 70, nos. 1 – 2 (December 2015), s. 2.1; Rudolf Mellinghoff, 'The German Federal Fiscal Court: An Overview', *Bulletin for International Taxation* 70, no. 1/2 (December 2015), ss. 2.2–2.3, 3.2, 3.4, 4.5; Philippe Martin, 'The French Supreme Administrative Tax Court', *Bulletin for International Taxation* 70, no. 1 (2016), s. 3; Martin, 'Courts and Tax Treaties in Civil Law Countries', 7–9; Myriam Ghyselen and Bernard Peeters, 'The Court of Cassation as the Supreme Body of the Judiciary in Belgium', *Bulletin for International Taxation* 70, nos. 1 – 2 (December 2015), s. 1.2; Keith Fogg, 'The United States Tax Court – A Court for All Parties', *Bulletin for International Taxation* 70, no. 1/2 (December 2015), s. 2.

[108] UN, *Vienna Convention on the Law of Treaties*, Article 26.

interpret the treaty will result in a breach of those obligations.[109] Hence, the primary concern for the court should be to apply the correct principles of interpretation. National procedural rules should be evaluated in respect of their compatibility with those principles. If the conclusion is in the negative, they must be discarded under Article 27 VCLT, which prohibits any party to 'invoke the provisions of its internal law as justification for its failure to perform a treaty.'

In other words, national procedural law may not limit the application of the VCLT principles of interpretation, but those principles take precedence. The extent to which domestic procedural rules may be applied legitimately is confined to the extent they do not impair the obligation of the contracting state to perform its duties under the treaty.[110] As pointed out by Lord Scarman (by analogy but nevertheless pertinent), 'We may not take refuge in our adversarial process, paying regard only to the English text, unless and until one or other of the parties leads evidence to establish an inconsistency with the French.'[111]

In summary, the applicable principles of interpretation are provided by the VCLT. If those principles require a comparison of all texts in order for them to be applied correctly, such is the duty of the court presiding over the dispute; absence of argument by the parties to the dispute invoking the other text(s) cannot affect such obligation.[112]

---

[109] Concerning our example based on the *Natexis* case, the real issue at stake is not that as a result of neglecting the other text the taxpayer is unduly taxed, but that the balance of taxing rights agreed on by the treaty partners and implemented via reciprocal restrictions of their sovereign taxing rights under the treaty is upset. In consequence, the tax sparing credit is soaked up by the residence state in violation of the treaty.

[110] See, by analogy, Spagnolo, 'Iura Novit Curia and the CISG', 190–97.

[111] *Fothergill v Monarch Airlines Ltd.*, 293 (emphasis added).

[112] Nollkaemper provides a good summery account of the argument concerning the obligation of national courts to apply the VCLT rules of interpretation: 'A first ground which can provide a justification for the application of international rules of interpretation in domestic courts is that such application may be an intrinsic part of the performance of international obligations. This obligation to perform a treaty in good faith is then extended to the principles of interpretation of treaties. There are two variations of this argument. A strong version would say that there is a freestanding obligation to apply international principles of interpretation (the *pacta sunt servanda* principle would then apply to the Vienna Convention …itself) and that this obligation would rest on

Hence, we are back at the question of whether the interpretative framework of the VCLT requires a comparison of all texts in order to ensure the intended result, which has been answered in the affirmative for tax treaties. The VCLT does not explicitly state this requirement, but it follows from a valid combination of the supplied principles. All texts have to be compared to establish the one true meaning of the treaty because of the otherwise inherent indeterminacy attributable to an object and purpose that is not unequivocal in its application, wherefore clarity of any single text considered in isolation is not sufficient to ensure that the meaning so established effects what the parties to the treaty intended.

The fundamental proposition of the routine interpretation approach as reformulated, that the obligation to compare all texts is an entirely exogenous variable to be established under domestic procedural law because the VCLT is tacit in terms of explicit imperative language concerning such obligation, must be rejected as unsound in view of the dictum that every reasonable effort must be made to find a common meaning of all texts and no single text must be preferred over the others until such effort is fully exhausted.[113]

---

national courts. Article 26 of the VCLT stipulates that "every treaty in force" has to be performed in good faith – apparently not excluding the VCLT itself. Though the VCLT is not expressly drafted in terms of "obligations", it would seem that the entire rationale of the treaty is that states are not at liberty to apply or refrain from applying the provisions of the treaty. In that sense, the principles of interpretation, as a matter of obligation, have to be applied by states. …A weaker version of this argument is that while states …may not be obliged to give effect to principles of interpretation as a freestanding obligation, such principles inform the meaning and application of the primary norms. Application of such principles may then not be obligatory as such, but may be required to the extent that this would be necessary to ensure the effective application of the international norm subject to interpretation. A failure to give effect to an international obligation with the meaning and content it has at the international level may constitute a wrongful act, for giving effect to an international norm that is devoid of its international normative context may well be giving effect to a different norm', André Nollkaemper, 'Grounds for the Application of International Rules of Interpretation in National Courts', in *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence*, ed. Helmut Philipp Aust and Georg Nolte (Oxford; New York: Oxford University Press, 2016), 37–38. The issue of state responsibility will be discussed in detail in Chapter 7, s. 7.6.

[113]See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:225, para. 7. Article 2 DARS, which lists the elements of internationally wrongful acts, refers to the

3.5. A Refutation Based on General Hermeneutics

Above I have refuted the routine interpretation approach in respect of the specific principles codified in the VCLT. In this section I shall add a refutation based on general hermeneutics and the fundamental intention of the VCLT to establish the textual meaning of a treaty:[114]

breach of an obligation not a rule in letter (b). Its Commentary clarifies that 'What matters for these purposes is not simply the existence of a rule but its application in the specific case. …The term "obligation" is commonly used in international judicial decisions and practice and in the literature to cover all the possibilities', ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries; Report of the Commission to the General Assembly on the Work of Its Fifty-Third Session, Document A/56/10*, vol. II, Part 2, Yearbook of the International Law Commission 2001, A/CN.4/SER.A/2001/Add.1 (United Nations, 2001), 36, para. 13.

[114] Although concerned with a particular type of texts that, to some extent, have their own logic, Articles 31–33 are not drafted as detailed technical instructions fundamentally different from normal techniques of interpretation, but as general 'principles of logic and good sense', which are merely supplemented by specific conventions regarding canonical means, see ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:218–26. This raises the question whether and to what extent treaty hermeneutics may 'claim any independent systematic significance' from general hermeneutics, or whether the former must be regarded merely 'as a special application of' the latter, see Hans-Georg Gadamer, *Truth and Method*, trans. Joel Weinsheimer and Donald G. Marshall, 2nd ed. (London; New York: Continuum, 2004), 321, by analogy. Treaty hermeneutics displays some particular contours in this regard; however, the particularities that may be identified to distinguish interpretation of treaties from that of texts in general resemble accentuations rather than clear demarcations completely separating treaty from general hermeneutics. As pointed out by Arnold, 'The basic interpretive approach set out in Art. 31(1) should not strike anyone as novel. …The same three major elements – the ordinary meaning of words (text), context, and purpose – form the foundation for the interpretation of language generally. Tax legislation and tax treaties are no different in this regard', Arnold, 'The Interpretation of Tax Treaties', 5. Therefore, a broader perspective may be instructive: the thought and methodologies generated by general hermeneutics may prove useful in the context of contemplating treaty interpretation, and a historical perspective concerning the development of hermeneutics as a discipline may enable us to better classify scholarly theories and reject overcome ideas. This is particularly so because the VCLT rules provide only a general framework; their application in detail is left to the interpreter, who is still required to apply a solid hermeneutic approach in general, see ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:218, para. 4.

> '[T]he ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose.'[115]

Accordingly, the meanings of terms in a treaty are not to be confused with their literal meaning but must be considered in their contextual relation to other terms in the text and the purposive structure of both the provisions they are part of and connected with, as well as the treaty as a whole.[116]

In its particular relation to treaty interpretation, this implements the idea of the hermeneutic circle, which has been introduced by Friedrich Schleiermacher in a series of lectures in the beginning of the 19th century.[117]

---

[115] ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:221, para. 12.

[116] See *Temple of Preah Vihear (Cambodia v Thailand), Preliminary Objections*, 32: 'the Court considers that it must interpret Thailand's 1950 Declaration …as a whole and in the light of its known purpose, …words are to be interpreted according to their natural and ordinary meaning in the context in which they occur'; *Anglo-Iranian Oil Co. (United Kingdom v Iran)*, 104; *Inland Revenue Commissioners v Commerzbank*, 297–298, per Mummery J; *Memec Plc v Inland Revenue Comissioners*, [1998] STC 754, 766g; *Fothergill v Monarch Airlines Ltd*, 272, 279, 285, 290, 294, per Lords Wilberforce, Diplock, Fraser and Scarman; *Sportsman v IRC*, [1998] STC (SCD) 289, 293: 'There is no such thing as an abstract ordinary meaning of a phrase divorced from the place which that phrase occupies in the text to be interpreted'; Sinclair, *The Vienna Convention on the Law of Treaties*, 121; Avery Jones, 'Treaty Interpretation', s. 3.4.4. Regarding legal hermeneutics, this may be traced back to Roman law: *'Incivile est nisi tota lege perspecta una aliqua particula eius proposita iudicare vel respondere'* (it is unlawful to pass judgement or expert opinion according to any provision of a law without considering the whole law), see Okko Behrends et al., *Corpus Iuris Civilis II: Digesten 1-10*, 1st ed. (Heidelberg: C.F. Müller, 1995), 114. Concerning language in general, see Gottlob Frege, *Die Grundlagen der Arithmetik: eine logisch mathematische Untersuchung über den Begriff der Zahl* (Breslau: Verlag von Wilhelm Koebner, 1884), s. 62: 'Only in the context of a sentence do words have any meaning', translation by John Wallace, 'Only in the Context of a Sentence Do Words Have Any Meaning', *Midwest Studies in Philosophy* 2, no. 1 (1977): 144–46, 144; Wittgenstein, *Tractatus Logico-Philosophicus*, s. 3.3: 'Only the proposition has sense; only in the context of a proposition has a name meaning.'

[117] Friedrich D. E. Schleiermacher, *Hermeneutik und Kritik: mit besonderer Beziehung auf das Neue Testament* (Berlin: G. Reimer, 1838), 36–37, 39. Mantzavinos provides an English translation of one of Schleiermacher's formulations: 'that the same way that the whole is, of course, understood in reference to the individual, so too, the individual can only be understood in reference to the whole', C. Mantzavinos, 'Hermeneutics', in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Fall ed. (Stanford University, 2016), s. 2. This is not intended to submit logically circular reasoning – the circle is but a

Schleiermacher's deliberations have been pivotal for the development of hermeneutics as a discipline: they mark the historical point at which the division into subject specific theoretical constructions is overcome and a general theory of hermeneutics as a fundamental discipline is developed.[118]

---

metaphor. In Schleiermacher's view, interpretation is a holistic task: all linguistic, psychological, and historical elements have to be considered together in light of each other. Single text passages can be understood only in the context of the text to which they belong, which in turn can be understood only in its overall context. The interpreter cannot consider everything all at once but has to begin somewhere, expand his focus, and work his way towards full comprehension. From reading single text passages he may develop a provisional understanding of them and, in their comparative consideration, the text as whole, which he may then refine by considerations of the psychological and historical context. The result may be reapplied to the individual passages to refine their interpretation, which in turn leads to an improved overall understanding, and so forth. Interpretation is thus a process of approximation that oscillates between contemplation of the parts and the whole in light of each other and gradually increases understanding along a spiral of interactive refinement – hence the image of a circle: 'Such holism introduces a pervasive circularity into interpretation, for, ultimately, interpreting these broader items in its turn depends on interpreting such pieces of text. Schleiermacher does not see this circle as vicious, however. Why not? His solution is not that all of these tasks should be accomplished simultaneously – for that would far exceed human capacities. Rather, it essentially lies in the (very plausible) thought that understanding is not an all-or-nothing matter but instead something that comes in *degrees*, so that it is possible to make progress toward full understanding in a piecemeal way', Michael Forster, 'Friedrich Daniel Ernst Schleiermacher', in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Fall ed. (Stanford University, 2017), s. 4. The VCLT conception is very similar: treaty interpretation is to be regarded a holistic 'single combined operation' – all means are to be thrown into the 'crucible' and weighed by the interpreter in light of each other, see ILC, *Draft Articles on the Law of Treaties with Commentaries*, 219–220, para. 8. Of course, the court has to start somewhere. Typically, it begins with a consideration of the words, which are then analysed in an 'interactive process' in light of the other means, see ILC, 'Report of the International Law Commission on the Sixty-fifth Session, 6 May – 7 June and 8 July – 9 August 2013', Doc. A/68/10 (United Nations, December 2013), Ch. 4, 18, para. 14.

[118] Although important efforts to establish a *hermeneutica generalis* may be traced back several centuries before him to Dannhauer and others, Schleiermacher's work may be seen as the culmination of this process, see Böhl, Meinrad, Wolfgang Reinhard and Peter Walter, *Hermeneutik: die Geschichte der abendländischen Textauslegung von der Antike bis zur Gegenwart* (Böhlau Verlag Wien, 2013), passim; Joisten, Karen, *Philosophische Hermeneutik* (Berlin: Akademie Verlag GmbH, 2009), 17–18, 82, 96–97; Mantzavinos, 'Hermeneutics', Introduction.

Schleiermacher distinguishes between a lax and a rigorous approach to interpretation. The lax approach departs from the idea that understanding happens automatically; its goal is merely the avoidance of misunderstanding. Conversely, the rigorous approach departs from the idea that misunderstanding happens automatically, whereas understanding must be actively pursued.[119] In consequence, the lax approach is content with an exegesis of single text passages that appear obscure and therefore remains an agglomeration of unconnected sporadic observations,[120] whereas the rigorous approach investigates texts in a systematic manner from the start, considering the meanings of all terms in their entire context.

Schleiermacher concludes that the lax approach does not qualify as a scientific method, but methodical interpretation must begin from the moment a reader wants to understand the content of a text, not only once he encounters passages that make him lose confidence about the level of his understanding, because when understanding blurs concerning specific passages, it is a sign that efforts to understand have been neglected beforehand in a more fundamental way. The ultimate goal of interpretation is to understand a text first as good as and finally better than its author.[121]

---

[119] Schleiermacher, *Hermeneutik und Kritik*, 29 et seq.

[120] An example of such approach in the legal context would be Vattel's view: 'The first general maxim of interpretation is, that *It is not allowable to interpret what has no need of interpretation.* When a deed is worded in clear and precise terms, – when its meaning is evident, and leads to no absurd conclusion, – there can be no reason for refusing to admit the meaning which such deed naturally presents. …Since the sole object of the lawful interpretation of a deed ought to be the discovery of the thoughts of the author or authors of that deed, – *whenever we meet with any obscurity in it, we are to consider what probably were the ideas of those who drew up the deed, and to interpret it accordingly.* This is the general rule for all interpretations. It particularly serves to ascertain the meaning of particular expressions whose signification is not sufficiently determinate', de Vattel, *The Law of Nations*, ss. 263, 270. It is obvious how such would fail in the context of plurilingual treaties when interpreting a single text in isolation, mistaking its interpretation for the meaning of the treaty. As established above, clarity of a single text in isolation is no definitive criterion for the meaning of a plurilingual treaty in the absence of a prevailing text, see also *Young Loan Arbitration*, 110, para. 40.

[121] See Schleiermacher, *Hermeneutik und Kritik*, 32. According to Schleiermacher, every text is conceived and must be understood from a double perspective, namely, the totality of language and the totality of the author's thought process. From this he deduces two fundamental hermeneutic methods he labels 'grammatical' and 'psychological'. The

This conception resonates with the VCLT general rule of interpretation. The stipulation that the meaning of the treaty is not the literal but the ordinary meaning arrived at under an interpretation of its terms in good faith in their context and in the light of their object and purpose paraphrases Schleiermacher's rigorous approach to interpretation. Larenz and Canaris submit a similar conception concerning legal texts in general when they conclude that

> It would be a misconception to assume that legal texts would require interpretation only where they appear to be particularly 'dark', 'unclear', or 'contradictory'. Rather, *all* legal texts are, as a cardinal rule, both capable of being interpreted and in need of interpretation. Their need for interpretation is not a 'shortage' that could be remedied by efforts to draft an as precise as possible final version, but will remain for as long as not all legislation, court rulings, and even contracts will be drawn up exclusively in a symbolised sign language.[122]

Also Schleiermacher's formulated goal of understanding the text first as good as and finally better than its author resonates. Treaties are drafted in general terms to be applied to a wide variety of scenarios, which are not all imagined by the drafters in detail. When applying the treaty to the facts of a particular case, the judge first has to understand the intentions of the contracting states as expressed in the treaty text(s) as good as the contracting states themselves and finally better in the sense that he has to judge how these intentions should apply to particular circumstances the

---

first concerns understanding of an expression in relation to the language it is part of, while the second understands any utterance as part of a speakers life process. The grammatical method then attempts to understand a text on the basis of the total use of language by a given lingual community, employing linguistic and literary knowledge, while the psychological method attempts to duplicate the thought process of the author from a historical perspective, employing knowledge of the author's entire work as well as the work of his contemporaries in order to comprehend the entire background of the author's thinking. Both are equally important in understanding a text and, therefore, have to be employed on an equal footing in the interpretative process, as a result of which understanding a text better than its author becomes possible from a historical vantage point.

[122]Larenz and Canaris, *Methodenlehre der Rechtswissenschaft*, 26, with reference to Hart's 'open texture' argument, see Hart, *The Concept of Law*, 123.

contracting parties did not foresee.[123]

In contrast, the currently prevailing view concerning plurilingual treaty interpretation, that it is save to ignore the other language texts as long as no problem in form of an ambiguity or divergence arises, appears like a formulation of the lax approach. Certainly, any comparable suggestion would not be accepted as a sound method of interpretation in the discourse on general hermeneutics since Schleiermacher.[124]

3.6. Reliance on the Original Text

When judges are faced with a divergence between the texts of a treaty, the natural reflex may be to give preference to the one they can identify as the text of negotiation and drafting.[125] Scholars who have engaged in comparative studies of court decisions have identified such practice and provided comprehensive argument in its favour. Hardy leads the way: based on imperative reasoning, he concludes that in the case of incompatible texts there must be an obvious drafting error. Such would not justify declaring the treaty as defective, but only the text with the error. It would then be normal

[123]See Gadamer, *Truth and Method*, 324: 'The judge who adapts the transmitted law to the needs of the present is undoubtedly seeking to perform a practical task, but his interpretation of the law is by no means merely for that reason an arbitrary revision. Here again, to understand and to interpret means to discover and recognize a valid meaning. The judge seeks to be in accord with the "legal idea" in mediating it with the present.'

[124]In respect of its theoretical conception, the routine interpretation approach may be placed historically within the corpus of hermeneutic approaches that had focussed predominantly on the interpretation of single dark passages, before the holistic turn effected by Schleiermacher, see Böhl, Meinrad, Wolfgang Reinhard and Peter Walter, *Hermeneutik*, passim; Joisten, Karen, *Philosophische Hermeneutik*, passim. Even so it seems unlikely that its reasoning (by analogy) would have been accepted by the prominent hermeneutic theorists preceding Schleiermacher. For example, Saint Augustine, who according to Heidegger provided 'the first "hermeneutics" in grand style', Heidegger, *Ontology – The Hermeneutics of Facticity*, 9, forcefully rejected interpretation of a single translation in isolation as an unsound method and source of errors, see Saint Augustine, *On Christian Doctrine: A Select Library of the Nicene and Post-Nicene Fathers of the Christian Church*, ed. Philip Schaff, vol. 2 (Buffalo: The Christian Literature Company, 1887), Book II, Ch. 11–12, paras. 16–18.

[125]Henceforth referred to as the original text.

in such case to rely on the meaning of the original text because of it most closely implementing the agreement of the contracting parties; however, this would depend on the circumstances of the treaty's conclusion, that is, if (and to what extent) the negotiators were directly involved in the drafting of the other texts, or whether those happened to be mere translations by translators.[126]

Although supported by many scholars, this approach is not in line with the VCLT.[127] Before discussing this in detail, it is important to note that Hardy's pre–VCLT reasoning does not convince based on its own construction. His conclusion contradicts his own premiss that the point of agreement on the common intention is the time of the treaty's conclusion.[128] If at that time the treaty does not confer any superiority to the original text, granting it decisive power over the others violates that clear common intention. As Hardy himself admits, the two principles of the superiority of the original text and the equivalence of texts are mutually exclusive by definition.[129]

His supporting arguments of clear drafting errors and translation shortcomings also fail to convince. Such would have been identified and, if at all possible, corrected by applying the means provided by Articles 31–33 before concluding that the meanings of the texts are incompatible. Once we

[126]See Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals', 105, 151–52. Similar suggestions are made by Sinclair, *The Vienna Convention on the Law of Treaties*, 152; Arginelli, *The Interpretation of Multilingual Tax Treaties*, 231–32, 241; Anthony Aust, *Modern Treaty Law and Practice* (Cambridge; New York: Cambridge University Press, 2000), 205–6; Lang, 'The Interpretation of Tax Treaties and Authentic Languages', 21–22; Dinah Shelton, 'Reconcilable Differences? The Interpretation of Multilingual Treaties', *Hastings International and Comparative Law Review* 20 (1997): 637; Josef Schuch and Jean-Philippe Van West, 'Authentic Languages and Official Translations of the Multilateral Instrument and Covered Tax Agreements', in *The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects*, ed. Lang, Michael et. al. (Wolters Kluwer Law & Business, 2018), 84.

[127]See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:226, para. 9; Avery Jones, 'Treaty Interpretation', s. 3.7.1.3; Giorgio Gaja, 'The Perspective of International Law', in *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2005), 92.

[128]See Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals', 104.

[129]See ibid., 106.

arrive at the conclusion that the texts are incompatible after exhaustion of all interpretative means provided by the VCLT, the suggestion that there is a clear drafting error or translation mistake is unhelpful because a criterion on the basis of which the defective text could be identified without doubt is lacking, especially in the case of only two texts contradicting each other without a third or more texts as additional context.

The argument that a choice must be made in all cases between texts with incompatible wordings is invalid when the texts are equivalent concerning the provision granting equal authority to all texts. Any other provision the wording of which turns out contradictory between the texts cannot render the provision granting equal authority to all texts defective, but must be considered defective itself in view of such provision, that is, the provision granting equal authority to all texts cannot at the same time be the reason for and the object of the deficiency of other provisions. The conclusion cannot be that because another provision is defective in view of the provision granting equal authority to all texts, the equal authority of all texts must be modified. Rather, if no obvious error is identified in one text under the application of Articles 31–33 and healed by interpretative means or via agreement of the contracting states under Articles 48 and 79 VCLT, the conclusion must be that the contradictory provision itself is defective and the parties either failed to agree on the matter of the provision or failed to properly express their agreement.[130]

Nevertheless, Arginelli picks up Hardy's reasoning and goes as far as to proclaim that because of it being the text in the language of negotiation and drafting, it would be 'illogical, unreasonable and unfair' not to give the original text special relevance, wherefore it should be treated as a 'proxy for the *travaux préparatoires*' to reconcile apparent differences in meaning.[131]

[130] See Vogel, *Klaus Vogel on Double Taxation Conventions*, 39, para. 72a. The 6th German edition erroneously abandons this view still held by the 4th and 5th German editions (Lehner, *Doppelbesteuerungsabkommen der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen: Kommentar auf der Grundlage der Musterabkommen (begründet von Klaus Vogel)*, 197, para. 112a), see next chapter, 30n. In contrast, the new 4th English edition upholds Vogel's earlier view (Reimer and Rust, *Klaus Vogel on Double Taxation Conventions*, 41, para. 88). Whether this is intentional or the result of translating the 4th German edition is not entirely obvious, see above, 43n.

[131] See Arginelli, *The Interpretation of Multilingual Tax Treaties*, 231–32.

In order to argue his suggestion, he conducts a survey of the arguments of other scholars in support of this view, the *travaux préparatoires* of the VCLT, and case law.[132]

He acknowledges that during the discussions at the ILC's 874th meeting the proposal of Mr Verdross to include an explicit provision giving preference to the original text in case reconciliation of texts proved impossible did not gather support.[133] Yet, he contends that the idea of a treaty being negotiated and drafted in a certain language conferring special weight to the text in that language was generally recognised by the ILC, from which he concludes that such a fact should be taken into account to the effect that the intentions of parties 'should be derived *primarily* from the drafted texts and the supplementary means of interpretation'.[134] As most grave argument in support of his view he postulates a deficiency of translation by definition citing Hardy and Rosenne,[135] according to whom there is 'all the difference in the world between a negotiated version and one produced mechanically by some translation service, however competent'.[136] A similar view has been put forward by the joint dissenting opinion in the *Young Loan Arbitration*,[137] which has influenced many scholars such as Sinclair.[138]

The argument deserves some consideration. Advocates of this view seem to equate the proposition 'X is a translation of Y' with the proposition 'X fails to properly portray the meaning of Y in an equivalent manner'. But unless one is convinced that there is no such thing as a proper translation guaranteeing equivalence in meaning, the latter does not necessarily follow

[132]See ibid., 231–40.

[133]See ILC, *Summary Records of the Eighteenth Session, 4 May – 19 July 1966*, 208, para. 5; 210, para. 22; 210–211, paras. 33–34, 37.

[134]Arginelli, *The Interpretation of Multilingual Tax Treaties*, 232–36 (emphasis added).

[135]See ibid., 232.

[136]Shabtai Rosenne, 'The Meaning of "Authentic Text" in Modern Treaty Law', in *An International Law Miscellany* (Leiden; Boston: Martinus Nijhoff Publishers, 1993), 450.

[137]See *Young Loan Arbitration*, 140, paras. 40–41.

[138]See Sinclair, *The Vienna Convention on the Law of Treaties*, 152. A similar position is taken by Lang, 'The Interpretation of Tax Treaties and Authentic Languages', 23–24; Mössner, 'Die Auslegung mehrsprachiger Staatsverträge', 290; Shelton, 'Reconcilable Differences? The Interpretation of Multilingual Treaties', 637; Schuch and West, 'Authentic Languages and Official Translations of the Multilateral Instrument and Covered Tax Agreements', 84–85.

from the former, that is, the latter does not qualify as an analytic proposition a priori. Of course, translation is a process that may result in errors; however, their existence may only be established in the light of empirical evidence on grounds of the criteria laid down in the VCLT, that is, a yardstick to identify and measure the error is necessary. The view that there is no such thing as a proper translation is not compatible with the accepted international practice of states to conclude treaties with equally authoritative texts in different languages, the principle of unity, and the presumption of equal meaning in Article 33(3). If one would subscribe to it, one would in consequence be compelled to change the common practice concerning the conclusion of treaty instruments as well as the underlying principles themselves. Thus, any argument conferring general superiority to the original text implicitly based on the supposition that translation into another language cannot create a text of equivalent meaning must be rejected – at least in view of the status quo.[139]

In summary, there is no principle implemented in the VCLT rules that the original text should be given more weight over the others, and the VCLT Commentary explicitly denies such suggestion.[140] As pointed out by Special Rapporteur Sir Humphrey Waldock in the ILC's 874th meeting, the defects of the initially drafted text may be the source of the problem rather than the solution; hence, any notion that the initially drafted text should necessarily

[139]For linguists this may of course be a topic of debate, see, e.g., Sergio Bolaños Cuéllar, 'Equivalence Revisited: A Key Concept in Modern Translation Theory', *Forma y Función*, no. 15 (August 2010): 60–88, and Anthony Pym, 'On History in Formal Conceptualizations of Translation', *Across Languages and Cultures* 8, no. 2 (January 2007): 153–66; however, such discussion lies outside the scope of the subject matter at hand. As long as states officially designate translated texts as equally authentic, faulty translation can only be an issue of errors and unwittingly introduced differences on a case by case basis that are identified via the interpretative means provided by the VCLT, and any supposition that translations are by definition inferior must be refused. The mere fact that a text is a translation tells us nothing about whether it correctly conveys the meaning of the treaty or its relative value versus the other texts in this respect, but its value for interpretative purposes is determined by its status as authentic text alone.

[140]See ILC, *Draft Articles on the Law of Treaties with Commentaries*, II:226. para. 9; ILC, *Summary Records of the Eighteenth Session, 4 May – 19 July 1966*, I, Part II:210–11, paras. 22, 33–34.

prevail must be rejected.[141] Like any other text, the original text may have more or less weight depending on further evidence that shows there was an obvious translation problem and the faulty translation does not suit the object and purpose of the treaty; however, what is decisive in such case is that there is indeed an identified particular translation error not in line with the intentions of the contracting parties, not that the text happens to be a translation.

The views of Hardy, Arginelli, and others in respect of the interpretative value of the original text boil down to an implicit *petitio principii* (begging the question) that runs counter to Articles 31–33. They do not interpret but revise them. That courts in practice resort to the original text does not establish its decisive weight as a matter of principle. Such recourse may be justified in any particular case as outcome of an interpretation under Articles 31–33, but not merely because of it being the initially negotiated and drafted text while the others are translations. For example, in the often quoted *LaGrand* case the court observed in the proceedings that the French text, the meaning of which it confirmed as applicable over that of the English text invoked by the US, was the original one; however, it based its decision on Article 33(4) and a corresponding analysis of the object and purpose, which established the prevalence of the meaning as suggested by the French text, not on the mere fact that the French text happened to be the original one.[142]

In his conclusion, Arginelli rephrases his views. The imperative vocabulary used in his analysis is replaced by subjunctive form:

> However, the preceding positive analysis shows that the drafted text (i.e. the text that has been discussed upon during the negotiations and eventually drafted as result thereof) *may sometimes* be given more weight than the other texts for the purpose of construing the treaty, since there is a *reasonable presumption* that it *may* reflect more accurately the common intention of the parties, in particular where the treaty negotiators were not involved in the subsequent drafting and examination of the other authentic texts.[143]

[141] See ILC, *Summary Records of the Eighteenth Session, 4 May – 19 July 1966*, I, Part II:210–11, para. 33; Gardiner, *Treaty Interpretation*, 366–69.

[142] See *LaGrand (Germany v United States of America)*, ICJ (Annual Reports of the International Court of Justice, 2001), paras. 100–102; Gaja, 'The Perspective of International Law', 97.

[143] Arginelli, *The Interpretation of Multilingual Tax Treaties*, 241 (emphasis added).

In substance, this echoes again the considerations of Hardy, Rosenne, and the joint dissenting opinion in the *Young Loan Arbitration* with respect to the need of taking the individual facts and circumstances of how the authenticity of the texts was established into account; however, the subjunctive form concedes that the value of the original text is an exogenous variable that must be evaluated case by case based on an extrinsic yardstick, and a definite statement in its favour based on existing legal principles is not possible. The conjured up 'reasonable presumption' cannot be a surrogate for a mere ethical judgement but must be filled with considerations based on the principles enshrined in the VCLT, according to which alone the relevance of the original text must be evaluated. The mere consideration that a particular text has been the text of negotiation and drafting is not part of these principles and may therefore not be subsumed under the surrogate 'reasonable presumption'.

On a final note, ascribing special relevance to the original text is in friction also with the routine interpretation approach supported by many of the quoted scholars at the same time. If such special relevance would be conceded, the routine interpretation approach could be applied only asymmetrically with respect to ones own language, namely, by the country the official language of which happens to be the language of the original text, whereas the other country would always be urged to ultimately rely on the, from its perspective, 'other' text. Thus, the combination of both views is fundamentally incompatible with international law in the sense of implicitly allowing one country to prefer its own language while the other is either limited in its choice or at minimum always has to consult the decisive original text as well. This not only violates the equal authenticity of texts, that is, the principle of effectiveness in view of a final clause declaring such equal authenticity, but also the fundamental principle of the sovereign equality of states.[144]

[144]UN, *Charter of the United Nations* (United Nations, 1945), Article 2(1). A thorough discussion of the principle lies outside the scope of this study. The interested reader is referred to Ulrich K. Preuß, 'Equality of States – Its Meaning in a Constitutionalized Global Order', *Chicago Journal of International Law* 9, no. 1 (2008): 17–49; Hans Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization', *The Yale Law Journal* 53, no. 2 (1944): 207–20; Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (The Lawbook Exchange, Ltd., 1950), 50 et seq.