Greetings from your IATJ.

We are in the final stages of completing all organizational aspects of the 10th Assembly to be held in Cambridge, England on September 13 and 14, 2019.

Attached is the program which is also on our website. Particulars of the registration for the 10th Assembly are on our website. I would encourage you to mark this date in your calendar and plan to attend as it is a special event for the IATJ because it is our 10th Anniversary of the founding of the IATJ.

Again, we welcome your participation and involvement. If you have any ideas or suggestions with respect to how to continue to develop the IATJ, please do not hesitate to contact me at your earliest convenience. Also, the IATJ is growing its membership and we encourage you to provide information to your colleagues with respect to the IATJ and its initiatives. This year besides the 10th Assembly, there will be a publication coming out with input from ten different jurisdictions relating to jurisprudence and interesting matters worldwide.

Attached for your interest is an article from a colleague from the UK which I am sure you will find of interest. If you have an opportunity to provide us with some interesting information from your jurisdiction or publications or papers you want to put in the Newsletter, please forward same to me at your earliest possible convenience.

Again, thank you for your continued support and cooperation.

Our best regards
E.P. Rossiter, President

IATJ 10th Assembly
September 13/14 September, 2019

Cambridge, United Kingdom

AGENDA

Thursday 12 September 2019
[Magdalene College]

12:00 p.m. to 14:00 p.m.	*Meeting of the Executive*
14:00 p.m. to 17:00 p.m.	*Meeting of the Board Directors*

Friday, 13 September 2019
[Magdalene College]

8:00 a.m. to 9:00 a.m.	**Registration**
9:00 a.m. to 9:05 a.m.	**Welcome by** Greg Sinfield (United Kingdom) President First-tier Tribunal
9:05 a.m. to 9:10 a.m.	**Welcome by** Eugene Rossiter (Canada) President IATJ
9:10 a.m. to 9:15 a.m.	**Presentation Agenda by** Wim Wijnen (Netherlands) Chairman PPC
9:15 a.m. to 10:30 a.m.	**Substantive Session on Penalties** **Chair:** Philippe Martin (France) **Panel:** Maarten Feteris (Netherlands) Maurice B. Foley (United States) Anthony Gafoor (Trinidad Tobago) Raphaël Gani (Switzerland) Anette Kugelmüller-Pugh (Germany) Luis Flavio Neto (Brazil) *Vineet Kothari (India) t.b.c.*
10:30 a.m. to 11:00 a.m.	Health Break– coffee/tea
11:00 a.m. to 12:00 p.m.	**Substantive Session on Penalties** Continued

12:00 p.m. to 14:00 p.m.	Lunch *[Magdalene College]*
14:00 p.m. to 15:30 p.m.	**Substantive Session on Legal Reasoning** **Chair:** Malcolm Gammie (United Kingdom) **Panel:** P.P. Bhatt (India) Emmanuelle Cortot-Boucher (France) Peter Darak (Hungary) EuiYoung Lee (Korea Rep.) Vesa-Pekka Nuotio (Finland)
15:30 p.m. to 15:45 p.m.	Health Break– coffee/tea
15:45 p.m. to 17:15 p.m.	**Substantive Session on Tax Procedures in the United Kingdom** **Chair:** Peter Wattel (Netherlands) **Panel:** First-tier Tribunal (United Kingdom) *t.b.c.* Upper-tier Tribunal (United Kingdom) *t.b.c.*
18:30 p.m.	**Cocktail Reception** *[Magdalene College]*

Saturday, 14 September 2019
[Magdalene College]

09:00 a.m. to 10:30 a.m.	**Substantive Session on Recent Case Law on Partnerships and Beneficial Ownership** **Chair:** Patrick Boyle (Canada) **Panel:** Jennifer Davies (Australia) Jong-Min KIM (Korea Rep.) Swami Raghavan (United Kingdom)
10:30 a.m. to 10:45 a.m.	Health Break– coffee/tea
10:45 a.m. to 12:00 a.m.	**Substantive Session on Recent Case Law on Banking and Financial Services in VAT/GST** **Chair:** Friederike Grube (Germany) **Panel:** Steven d'Arcy (Canada) Caroline Vanderkerken (Belgium)
12:00 p.m. to 14:00 p.m.	Lunch *[Magdalene College]*

14:00 p.m. to 15:25 p.m.	**Substantive Session on Soft Law** **Chair:** Bernard Peeters (Belgium) **Panel:** Pierre Collin (France) Eveline Faase (Netherlands) Robert Hogan (Canada) Paige Marvel (United States) Stephan Wilk (Germany)
15:25 p.m. to 15:40 p.m.	Health Break – coffee/tea
15:40 p.m. to 17:00 p.m.	**Substantive Session on Soft Law** Continued
17:00 p.m. to 17:15 p.m.	**Exotic topic:** ….(United Kingdom) *t.b.c.*
17:15 p.m. to 18:00 p.m.	**IATJ Business Meeting**
20:00……	**Closing Dinner** *[Magdalene College]* **Guest speaker**: ….(United Kingdom) *t.b.c.*
Conference Coordinator	Magdalene College

<u>Sunday, 15 September 2019</u>

Business:	
09:00-12:00:	Meeting of the Executive and Board Directors *[Magdalene College]*
Excursion:	
11:00-14:00:	Guided Tour

Permanent Program Committee
Malcolm Gammie (United Kingdom)
Friederike Grube (Germany)
Manuel Hallivis Pelayo (Mexico)
Philippe Martin (France)
Peter Panuthos (United States)
Wim Wijnen (Netherlands)

Interpreting Plurilingual Tax Treaties and the Trouble with Common Law

Dr. Richard Xenophon Resch

26th May 2019

The current orthodoxy maintains that courts are not required to compare all language texts of a plurilingual treaty. This view is fundamentally flawed, not in line with the VCLT, and the source of treaty misapplication. The following article refutes the current orthodoxy and shows that, in the majority of cases, sole reliance on prevailing texts is available as a pragmatic alternative that reduces global resource costs of tax treaty interpretation and increases its overall consistency by eliminating unintended deviations caused by language idiosyncrasies. In addition, it shows that the era of linguistic nationalism has been superseded by a new paradigm of English as lingua franca for tax treaties. Paradoxically, aside France, it is mainly the major English speaking countries that have resisted this trend, although they should be the first to embrace it. Concluding plurilingual treaties without English prevailing text is a political anachronism that should be overcome to cut its economic cost and increase global consistency of tax treaty application. The empirical part of this paper models the global tax treaty network based on a sample of 3,358 tax treaties currently concluded.

Contents

Introduction

The currently prevailing view is that courts are not legally required to compare all language texts[1] of a plurilingual treaty[2] but may rely on a single text unless an ambiguity arises or a divergence between the texts is raised. Conversely, it claims that when the texts diverge from each other, courts must first try to reconcile all texts by way of a comparative interpretation before they may rely exclusively on a text designated as prevailing in such case.

The problem with this view is twofold: On the one hand, it sanctions a practice of ignoring the other language texts until a divergence is raised, which may lead to treaty misapplication because textual divergences may be overlooked. On the other hand, when a divergence is raised, it requires an extensive effort of judges to engage in an interpretative comparison even though a prevailing text is available. The first clearly counteracts the intentions of the contracting states and violates Article 26, while the second seems to defy common sense.

In this paper, I shall argue to the contrary that, based on the principles enshrined in the VCLT, courts are legally required to compare all texts if none of the texts is designated as prevailing. Conversely, when one text is designated as prevailing, I shall argue that, as long as the prevailing text is clear,[3]

[1] The standard nomenclature employing the plural 'texts' to refer to multiple language versions of a treaty 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 Vienna Convention on the Law of Treaties (UN, Vienna Convention on the Law of Treaties, Series I–18232 (United Nations, 1969), henceforth referred to as VCLT), the International Law Commission (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 of 'texts' prevailed while 'version' and 'versions' were reserved for texts of non-authentic status, see F. 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: International Bureau of Fiscal Documentation, 2004), 351, 356, 358–359; R. K. Gardiner, Treaty Interpretation (Oxford: Oxford University Press, 2010), 356–358. This convention has been implemented in Article 33(2) and is adhered to here: throughout, 'text' refers to an authenticated language version of the text while 'texts' refers to more or all authenticated language versions. (Unless specified otherwise, all article references in this paper refer to articles of the VCLT). 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', see 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, A/CN.4/SER. A/1966/Add.1, Yearbook of the International Law Commission 1966, vol. ii (United Nations, 1967), 195, para. 1; 224, paras. 1, 3–4; 225, paras. 6–8; 272, para. 5; 273, para. 9 (the Draft Articles are henceforth referred to as VCLT Commentary). 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.

[2] The focus of this paper is on tax treaties; however, the arguments presented may in principle apply to all types of international treaties.

[3] 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, see J. Wouters and M. Vidal, *Non-Tax Treaties: Domestic Courts and Treaty Interpretation*, in G. Maisto (ed.), Courts and Tax Treaty Law (Amsterdam: IBFD, 2007), s. 1.3.2; L. Oppenheim, Oppenheim's International Law (9th ed., Harlow: Longman, 1992), at 1267; B. J. Arnold, *The Interpretation of Tax Treaties: Myth and Reality*, 64 Bulletin for International Taxation 1 (Amsterdam: International Bureau of Fiscal Documentation, January 2010), 2–15, at 3–4; Conseil d'État, *Société Schneider Electric* (June 2002), per M. Austry, *commissaire du*

courts may rely on it without comparing the others. Accordingly, when practice follows this view, treaty misapplication as a result of overlooking textual divergences is avoided, and judges may spare themselves a textual comparison in the face of divergences when a prevailing text is available.

In contrast to other scholars who have dealt with the topic of plurilingual treaty interpretation, and in particular Hardy,[4] whose treatment of the subject has substantially influenced the currently prevailing view, I employ axiomatic-deductive reasoning. The fundamental axiom on which I build my theory is the fundamental principle of unity of the treaty: 'in 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'.[5] In addition, I rely on the methodology of interpretation provided by the VCLT to help derive the premisses and deduct the conclusions put forward.[6] In the same vein, the arguments put forward by the most adamant supporters of the opposite view are evaluated in respect of their validity and soundness against the background of the VCLT principles. Finally, I conduct an empirical analysis of the global tax treaty network to quantify practical applicability of my theoretical findings. In summary, my quest is to derive conclusions of logic and good sense from the VCLT 'principles of logic and good sense',[7] and on their basis submit a pragmatic approach to solve the problem of additional interpretational complexity induced by plurilingual form.

The sample analysed consists of all tax treaties concluded between 1 January 1960 and 15 August 2016 insofar as they have been recorded in the tax treaties database of the International Bureau of Fiscal Documentation.[8] In total, the sample comprises 3,358 tax treaties in force or yet to come into force.[9] All types of tax treaties are included, that is, mainly income and capital and inheritance and gift tax treaties, whether separate or in combination, or only covering specific types of income. Not included are exchange of information treaties, transport agreements, social security treaties, economic relations treaties, FATCA agreements, friendship and fiscal co-operation agreements, friendship and commerce treaties, and mutual assistance agreements unless they are not stand-alone but coupled with a tax treaty in one single instrument.

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gouvernement: 'the text of an international treaty, even when clear, must always be interpreted taking into account its object', as translated by E. Bjorge, *'Contractual' and 'Statutory' Treaty Interpretation in Domestic Courts? Convergence Around the Vienna Rules*, in H. P. Aust and G. Nolte (eds.), The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence (Oxford; New York: Oxford University Press, 2016), 49–71, 57; E. Betti, Allgemeine Auslegungslehre als Methodik der Geisteswissenschaften (Mohr Siebeck, 1967), at 251, in terms of texts in general; cf. E. de Vattel, The Law of Nations (Indianapolis, IN: Liberty Fund, Inc., 1797), s. 263. This is the essence of the VCLT general rule aimed to arrive at a textual not literal meaning. In the VCLT context, the scope of clarity is defined by the wording of Article 32(a) and (b): a treaty may be regarded as clear only after an interpretation under the general rule of interpretation has been conducted that did not lead to an ambiguous, obscure, absurd, or unreasonable result, see Engelen, Interpretation of Tax Treaties Under International Law (2004), 390; R. X. Resch, The Interpretation of Plurilingual Tax Treaties: Theory, Practice, Policy (Hamburg: tredition, 2018), Chs. 3, 4, ss. 3.3.2, 4.4.2.

[4] J. Hardy, *The Interpretation of Plurilingual Treaties by International Courts and Tribunals*, 37 The British Year Book of International Law (Oxford: Oxford University Press, 1961), 73–155.

[5] ILC, VCLT Commentary (1967), at 225, para. 6. Henceforth referred to as principle of unity.

[6] UN, Vienna Convention on the Law of Treaties (1969), Articles 31–33.

[7] ILC, VCLT Commentary (1967), at 218–219, para. 4.

[8] IBFD, *Tax Treaties Database* (Amsterdam: online; IBFD, 2019), https://www.ibfd.org (last visited 15 August 2016).

[9] See Resch, The Interpretation of Plurilingual Tax Treaties (2018), Ch. 2, s. 2.2.3, and Appendix E.

Part I.
Theoretical Analysis

1. To Compare, or Not to Compare

Are courts legally required to compare all authenticated language texts when interpreting a plurilingual tax treaty?

1.1. The Current Orthodoxy

The fundamental proposition of the view currently prevailing in doctrine is that courts are not obliged to do so but, based on Article 33(3) stating that 'The terms of the treaty are presumed to have the same meaning in each authentic text', may rely on a single text for purposes of 'routine interpretation';[10] yet, this reliance should be exercised in good faith, that is, a single text may be relied on only until either an unclarity in the text relied on arises or a divergence between the texts is discovered.[11] Special Rapporteur 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 its basis.[12]

The proponents of the routine interpretation approach recognise the risk that, as a consequence of its application, textual divergences may be overlooked, which leads to misapplication of treaties. 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.[13] With respect to this, another crucial assumption is added by the proponents of the routine interpretation approach, namely, that each state applying the treaty 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.[14]

[10] It should be noted that 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, see UN, Vienna Convention on the Law of Treaties (1969), Article 31. In essence, the notion of 'routine interpretation' does not relate to any category of interpretation under international law but is a construct conjured up by scholars.

[11] See Engelen, Interpretation of Tax Treaties Under International Law (2004), at 388–390, 546. Henceforth, this view will be referred to as routine interpretation approach.

[12] See ILC, *Summary Records of the Eighteenth Session, 4 May – 19 July 1966*, A/CN.4/SER.A/1966, in Yearbook of the International Law Commission 1966, vols i, part ii (United Nations, 1967), at 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*, A/CN.4/SER. A/1966/Add.1, in Yearbook of the International Law Commission 1966, vol. ii (United Nations, 1967), at 100, para. 23. This 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 their underlying presupposition that the issue is essentially one of procedural law (see below).

[13] See Engelen, Interpretation of Tax Treaties Under International Law (2004), at 389–391.

[14] See M. Hilf, Die Auslegung mehrsprachiger Verträge: Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland (Berlin, New York: Springer-Verlag, 1973), at 76–83.

Hence, the issue is split in two by viewing it through the lens of state responsibility: the conduct of interpreting a single text in isolation and the conduct after the fact, once it has turned out that this has established a result in violation of the treaty for which the other party claims remedy. According to the proponents of the routine interpretation approach, the first would not incur any state responsibility as long as done *bona fide*, that is, it does not constitute a violation of any substantive treaty obligation under the condition that no unclarity or divergence has arisen and purposefully been ignored, whereas the latter incurs state responsibility in case of failure to successively remedy a treaty violation being a factual situation under objective criteria.[15] Crucial to this view is the assumption that the trust of each party in each single text correctly reflecting the full content of the treaty is justified as long as there is no unclarity and no divergence has arisen in 'whatever way', or else it would be justified to attribute the risk of treaty misapplication to the parties and hold them responsible if they stick to relying on a single text regardless.[16]

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; and
- c_2: there is no divergence between the texts (strong formulation) or no divergence between the texts 'has come to light' (soft formulation).[17]

1.2. Refutation of the Current Orthodoxy

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 unclarity, a divergence might not come to the attention of the interpreter without a comparison of texts.[18] In order for the argument of the routine interpretation approach to be valid, it must be the case that the presumption in Article 33(3) 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 the validity of the latter for tax treaties with the help of a simple thought experiment. The fundamental theorem looks as follows:

- p_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.
- p_2: Such cases exist or can be conceived for tax treaties.

[15] See *ibid.*, at 79, 82. This echoes Hardy's view that 'since the texts are presumed to agree, each party is justified in following its own version as long as the application of the treaty gives rise to no dispute between the parties', Hardy, *The Interpretation of Plurilingual Treaties by International Courts and Tribunals* (1961), 117.

[16] Hilf, Die Auslegung mehrsprachiger Verträge (1973), at 80; see also Engelen, Interpretation of Tax Treaties Under International Law (2004), at 390–91.

[17] Engelen, Interpretation of Tax Treaties Under International Law (2004), at 390.

[18] See M. Tabory, Multilingualism in International Law and Institutions (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), at 199; C. B. Kuner, *The Interpretation of Multilingual Treaties: Comparison of Texts Versus the Presumption of Similar Meaning*, 40 International & Comparative Law Quarterly 4 (Cambridge: Cambridge University Press, 1991), 953–964, at 958.

p_1+p_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.

If we accept p_1,[19] the argument hinges on p_2. On the basis of the *Natexis* case,[20] the thought experiment can be conducted to show that p_2 is fulfilled for tax treaties: Imagine a bilingual 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.

Although we may indeed argue that an ambiguity of a single text necessitates reference to the others,[21] we cannot make the *argumentum a contrario*. 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 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 light of the object and purpose.[22] 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.[23] 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 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.[24]

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, analog-

[19] It is assumed that the reader will agree with p_1, so that an extensive discussion of the principle of good faith and its application is unnecessary. Rejecting p_1 would result in a softening of the legal obligation to put the treaty into effect 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, see ILC, VCLT Commentary (1967), 225, para. 6.

[20] Conseil d'État, *Société Natexis Banques Populaires v France* (July 2006). The issue raised by the case, 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, see V. A. Ferreira and A. T. Marinho, *Tax Sparing and Matching Credit: From an Unclear Concept to an Uncertain Regime*, 67 Bulletin for International Taxation 8 (Amsterdam: International Bureau of Fiscal Documentation, August 2013), 397–413, 411, 92n.

[21] See Engelen, Interpretation of Tax Treaties Under International Law (2004), at 388–390; Gardiner, Treaty Interpretation (2010), at 360.

[22] 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 (May 1980), Reports of International Arbitral Awards, at 110, para. 40.

[23] See I. Sinclair, The Vienna Convention on the Law of Treaties (Manchester: Manchester University Press, 1984), at 150–151.

[24] See M. Lang, *Auslegung von Doppelbesteuerungsabkommen und authentische Vertragssprachen*, 20 Internationales Steuerrecht 11 (München: C.H. Beck, 2011), 403–410, at 405.

ous to Erwin Schrödinger's famous thought experiment colloquially known as 'Schrödinger's cat':[25] 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.[26]

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 softer 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 analytically from c_1 a priori, but whether c_2 is true is a matter independent from c_1 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 softer 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,[27] 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.[28] Therefore, an assumption for c_2 to be true without further investigation cannot be considered sound practice in view of Article 26.

The approach to distinguish between obligations of conduct and result, with only a failure of the latter counting as a violation in the absence of wilful neglect because of Article 33(3), is unfounded. Article 12 DARS states that 'There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character', and with reference to case law of the ICJ and the ECHR its Commentary makes clear that any distinctions between obligations of conduct and result are neither 'exclusive' nor 'determinative'.[29] Rather, parties may be considered to have accepted a multitude of obligations of conduct

[25] See E. Schrödinger, *Die gegenwärtige Situation in der Quantenmechanik*, 23 Die Naturwissenschaften 48 (Springer-Verlag, 1935), 807–812, at 807–12.

[26] See J. M. Mössner, *Die Auslegung mehrsprachiger Staatsverträge*, 15 Archiv des Völkerrechts 3 (Heidelberg: Mohr Siebeck Verlag, 1972), 273–302, at 301. In the words of Lord Wilberforce: '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*', *Fothergill v Monarch Airlines Ltd.*, [1981] AC 251, HL, 272 (emphasis added).

[27] 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* (May 1980), at 110, para. 40.

[28] This rejects the argument that states must be considered to conform to their international responsibilities in good faith unless they wilfully ignore divergences: when the existence of undetected divergences must be considered systemic, not consulting the other texts is as good as wilfully ignoring divergences.

[29] 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

and result in order to achieve the objectives of a treaty.[30] Even when the obligation is identified as primarily one of result, the conduct cannot be separated from it as a basis for determining whether there is a breach of obligation.[31]

Thus, the question remains whether reliance on a single text in isolation may be considered in good faith because of Article 33(3), not whether state responsibility is invoked concerning the actual outcome in hindsight. The approach to confine the matter to the issue of invoked state responsibility must be rejected because the latter is only a secondary concern.[32] What matters is whether there is a breach of a primary obligation under the treaty, which depends entirely on the terms of the obligation itself.[33]

The VCLT Commentary makes clear that Article 33(3) is not intended as a waiver of the obligation to compare texts but to assure that the principle of unity is observed in all cases. It presumes the terms of a treaty to have the same meaning in all texts in order to stress that the interpreter is not justified 'in simply preferring one text to another' but required to undertake 'every reasonable effort' in order to ascertain the common intentions of the parties, that is, the one true meaning of the treaty, not of any single text.[34] The Commentary makes these observations mainly concerning cases of ambiguities, but they must be understood as generally applicable because of what is demanded by the principle of unity.

In the face of p_2, this implies that 'every reasonable effort' must be understood to exclude relying on a single text in isolation,[35] at least in the case of tax treaties. As is admitted by its proponents, the

A/56/10 – A/CN.4/SER.A/2001/Add.1, Yearbook of the International Law Commission 2001, vols ii, part 2 (United Nations, 2001), at 56–57, para. 11. The issue of state responsibility had been selected already as one of the subjects of the codification conference held in The Hague in 1930 under the auspices of the League of Nations, see H. Miller, *The Hague Codification Conference*, 24 The American Journal of International Law 4 (Cambridge: Cambridge University Press, 1930), 674–693, 675. After the second world war, the matter was picked up by the ILC in 1949 as one of their fourteen provisional topics selected for codification, see ILC, *Summary Records and Documents of the First Session Including the Report of the Commission to the General Assembly*, in Yearbook of the International Law Commission 1949 (United Nations, 1956), 281, para. 16. Since then the work of the ILC has lead to the DARS, which were noted, welcomed, and commended by the General Assembly to the attention of states in 2001, see UN, *Resolution Adopted by the General Assembly*, A/RES/56/83 (United Nations, 28 January 2002). The recommendation has been repeated, see UN, *Resolution Adopted by the General Assembly on 2 December 2004*, A/RES/59/35 (United Nations, December 2004), UN, *Resolution Adopted by the General Assembly on 6 December 2007*, A/RES/62/61 (United Nations, 8 December 2008), UN, *Resolution Adopted by the General Assembly on 6 December 2010*, A/RES/65/19 (United Nations, 10 January 2011); however, without resulting in a diplomatic convention and binding treaty to date. Therefore, customary international law applies; however, the DARS may be considered as crystallisation of the latter, as they heavily draw on case law of international courts and, despite their non-binding status *ad referendum*, are widely approved of and drawn on in turn, also by the ICJ, see J. Crawford, *Articles on Responsibility of States for Internationally Wrongful Acts*, United Nations Audiovisual Library of International Law (New York: United Nations, 2012), at 2, for example in ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (September 1997), Annual Reports of the International Court of Justice, 38–55, paras. 46, 50, 79, 83.

[30] *Ibid.*, at 77, para. 135.

[31] See ILC, DARS (2001), at 57, para. 11; ECHR, *Colozza v Italy* (February 1985), Application No. 9024/80, at 10, para. 28.

[32] See H. Pijl, *State Responsibility in Taxation Matters*, Bulletin for International Taxation 1 (Amsterdam: International Bureau of Fiscal Documentation, 2006), 38–51, at 39.

[33] See ILC, DARS (2001), at 55, para. 2.

[34] See ILC, VCLT Commentary (1967), at 225, paras. 6–8. The same follows directly from the wording of the general rule in Article 31. The interpreter has to interpret the treaty 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. It can hardly be claimed that he has done so if he arrives at a wrong result when relying on a single text, see Kuner, *The Interpretation of Multilingual Treaties* (1991), 963, 73n.

[35] In this respect, the WTO Appellate Body has stated the following: 'As we have observed previously, in accordance

routine interpretation approach sanctions a standard of tentative interpretation possibly in violation of treaty obligations and subject to retroactive correction,[36] whereas Articles 31–33 in combination with Article 26 requires the interpreter to give effect to the common intentions of the parties.

In other words: divergences do not 'arise' – they either exist or not. If they exist, they are either detected or not, and they can be detected only by comparing all texts. Treaties are to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[37] By looking only at one language text, the interpreter may fail on all three accounts: he may fail to appreciate the true object and purpose, he may fail to appreciate the full context, and he may fail to appreciate the intended wording, which may be misrepresented by the text looked at. In consequence, he may violate Article 26.

In its strong form, the currently prevailing view rests on circular reasoning: it proclaims that relying on a single text is sufficient as long as there is no divergence, whereas the establishment of a divergence requires a comparison of texts. Therefore, it is disproved by means of a *reductio ad absurdum*.[38] The softer form in essence suggests that divergences do not matter as long as they are not raised by anyone, that is, as long as they remain undetected. Such contention must be rejected in view of the VCLT principles: what matters is that the common intention of the contracting states as expressed by the treaty is observed, not whatever may be expressed by any single text considered in isolation, which may be at variance. Consequently, what matters is not that divergences remain undetected but that they are excluded, that is, that they are either ascertained not to exist or resolved by way of interpretation to arrive at the one true meaning of the treaty implementing the common intention of the contracting states. If this may be precluded by looking at one text alone as has been shown for tax treaties, interpretation in good faith requires consideration of all texts as long as they must be considered equally authoritative under Article 10 and the treaty final clause, and Article

with the customary rule of treaty interpretation reflected in Article 33(3) of the Vienna Convention, …the terms of a treaty authenticated in more than one language – like the WTO Agreement – are presumed to have the same meaning in each authentic text. It follows that the treaty interpreter should seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language. …We also note that, in discussing the draft article that was later adopted as Article 33(3) of the Vienna Convention, the International Law Commission observed that the "presumption [that the terms of a treaty are intended to have the same meaning in each authentic text] requires that every effort should be made to find a common meaning for the texts before preferring one to another"', WTO Appellate Body, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R (2004), Report of the WTO Appellate Body, at 22, para. 59, 50n, square brackets in the original. And: 'We agree, however, that the Panel's description of "price suppression" in paragraph 7.1277 of the Panel Report reflects the ordinary meaning of that term, particularly when read in conjunction with the French and Spanish versions of Article 6.3(c)1, as required by Article 33(3) of the Vienna Convention', WTO Appellate Body, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R (2005), Report of the WTO Appellate Body, 159, para. 424.

[36] See Hilf, Die Auslegung mehrsprachiger Verträge (1973), at 78; Engelen, Interpretation of Tax Treaties Under International Law (2004), at 391. As happened, e.g., in *Foster & Elam v Neilson*, 27 U.S. (2 Pet.) 253 (1829), in which the US Supreme Court had recourse only to the English text and later had to correct itself after a discrepancy with the Spanish text was raised, employing a rather symptomatic excuse: 'The Spanish part of the treaty was not then brought to our view, and we then supposed that there was no variance between them. We did not suppose that there was even a formal difference of expression in the same instrument, drawn up in the language of the other party', see Kuner, *The Interpretation of Multilingual Treaties* (1991), 958, with reference to H. P. de Vries, *Choice of Language*, 3 Virginia Journal of International Law (Chicago, Illinois: The Virginia Journal of International Law Association, 1963), 32–33, and *United States v Percheman*, 32 U.S. (7 Pet.) 51 (1833).

[37] UN, Vienna Convention on the Law of Treaties (1969), Article 31(1).

[38] Defined by the American Heritage Dictionary of the English Language as 'Disproof of a proposition by showing that it leads to absurd or untenable conclusions'. See also N. Rescher, *Reductio Ad Absurdum*, in J. Fieser and B. Dowden (eds.), The Internet Encyclopedia of Philosophy (online, 2018), https://www.iep.utm.edu (last visited 1 October 2018), s. 1.

33(3) may not be interpreted as a waiver of that obligation, because otherwise divergences may go unnoticed and the treaty may be misapplied in violation of Articles 31–33 and 26.

1.3. The Impact of Domestic Procedural Law

This risk for divergences to be overlooked is particularly high for tax treaties. In a normal state-state dispute about interpretation and application of an international treaty 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. As tax proceedings are taxpayer-state disputes under the jurisdiction of the national courts of one contracting state, 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). In consequence, it less likely that divergences are raised while it is not less likely that they exist.

With respect to this, the important 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 them. In light of the above, my answer has been in strongly in favour of the first for treaties without prevailing text. 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* subject to the principle of *iura novit curia*.[39]

The routine interpretation approach may be reformulated accordingly: Since the VCLT contains a presumption that 'The terms of the treaty …have the same meaning in each authentic text',[40] 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. 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.

In view of the VCLT rules, this proposition is unsound. 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,[41] not only the law as argued by the parties. Failure to correctly interpret the treaty will result in a breach of those obligations.[42] Hence, the primary concern for the court should

[39] 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 M. Derlén, Multilingual Interpretation of European Union Law (Kluwer Law International, 2009), at 315 et seq; L. Spagnolo, *Iura Novit Curia and the CISG: Resolution of the Faux Procedural Black Hole*, in L. Spagnolo and I. Schwenzer (eds.), Towards Uniformity: The 2nd Annual MAA Schlechtriem CISG Conference (The Hague: Eleven International Publishing, 2011), 181–221, at 183; M. Lang, *The Interpretation of Tax Treaties and Authentic Languages*, in G. Maisto, A. Nikolakakis, and J. M. Ulmer (eds.), Essays on Tax Treaties: A Tribute to David A. Ward (Amsterdam: IBFD, 2013), 15–30, at 20–21.

[40] UN, Vienna Convention on the Law of Treaties (1969), Article 33(3).

[41] *Ibid.*, Article 26.

[42] Concerning the 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,

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, 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.[43] As pointed out by Lord Scarman, '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'.[44]

In summary, the proposition 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 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.[45]

1.4. The Trouble with Common Law

Regardless of this conclusion, 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. Under domestic law, the role of courts and the implementation of *iura novit curia* differs between jurisdictions and, in particular, between civil and common law.[46] The role of the common law judge is that of an umpire: although he has the power to raise issues of law, it is for the parties to the dispute to do so, whereas the judge will usually restrict himself to the points submitted.[47] He 'is not treated as knowing the law', but 'It is a professional duty of representatives to produce relevant cases whether or not they are in favour of the party producing them'.[48] The focus is not on rights but on remedies.[49] This follows from the

the tax sparing credit is soaked up by the residence state in violation of the treaty.

[43] See, by analogy, Spagnolo, *Iura Novit Curia and the CISG* (2011), at 190–197.

[44] *Fothergill v Monarch Airlines Ltd.*, at 293.

[45] See ILC, VCLT Commentary (1967), at 225, para. 7. Article 2 DARS, which lists the elements of internationally wrongful acts, refers to the 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, DARS (2001), 36, para. 13.

[46] See F. A. Mann, *Fusion of the Legal Professions?*, 93 Law Quarterly Review (London: Sweet & Maxwell, 1977), 367 et seq., at 369; Derlén, Multilingual Interpretation of European Union Law (2009), at 315.

[47] See A. Giussani, *Some Comparative Notes on Tax Litigation*, in G. Maisto (ed.), Courts and Tax Treaty Law (Amsterdam: IBFD, 2007), at 1; J. F. Avery Jones, *Tax Treaties: The Perspective of Common Law Countries*, in G. Maisto (ed.), Courts and Tax Treaty Law (Amsterdam: IBFD, 2007), s. 3.1.1, s. 3.1.7; R. Fentiman, *Foreign Law in English Courts*, 108 Law Quarterly Review (London: Sweet & Maxwell, 1992), 142, at 144; R. Hausmann, *Pleading and Proof of Foreign Law: A Comparative Analysis*, in The European Legal Forum, vol. 1 (2008), 1–14, at 5–6; V. O'Connor, *Common Law and Civil Law Traditions: Practitioner's Guide* (International Network to Promote the Rule of Law, 2012), at 24.

[48] Avery Jones, *Tax Treaties* (2007), s. 3.1.7.

[49] See W. Tetley, *Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified)*, 4 Uniform Law Review 3 (Oxford: Oxford University Press, 1999), 591–618, at 618. Historically, English law proceeds from duties, from which rights based on obtainable remedies flow in turn, not the other way around, see P. S. Atiyah, Pragmatism and Theory in English Law (London: Stevens & Sons, 1987), 18 et seq.

historical role of the judge to decide the dispute at hand: whatever is not raised by the parties may not be considered under dispute and therefore needs no adjudication. This also affects the burden of proof, which is entirely on the parties; the court may not find the facts itself.[50]

In civil law systems, the judge occupies the central role in legal procedure: it is his duty to apply the law *ex officio*, that is, he does not rely on the submissions of the parties, but all issues of fact and law are his domain while parties do not have to call for any points of law at all.[51] The historical role of the judge is to apply the law as codified: contrary to his common law counterpart, he has to know the law and apply it to every situation brought before him. This again affects the burden of proof: in Germany, for example, it is for the court to inquire the facts; reporting obligations aside, issues of burden of proof for the taxpayer arise only when facts remain in doubt.[52]

This makes clear that, in practice, domestic procedural law plays a pivotal role in litigation involving tax treaties. In combination with the routine interpretation approach as orthodoxy, it curbs proper application of tax treaties by establishing specific procedural prerequisites for the consideration of all texts in form of a requirement for the parties to plead them. Furthermore, procedural law determines to what extent and by which means a judge will examine the content of foreign language texts. In order to evaluate the situation, we may distinguish between disputes in which either one or both parties have recourse to the other language text(s) and those in which neither party does. For purposes of the comparison, Germany and the UK are used as examples.

Concerning the first type of dispute, both common and civil law systems may be viewed as performing well albeit in different ways. In Germany, the court does not depend on the submissions of the parties. Theoretically, this could mean that the other language text gets ignored even if a party pleads it, but since the duty of the court is to apply the law *ex officio*, such is not conceivable in practice if the points raised are relevant. Although the court is not limited in terms of investigating all sources of evidence it sees fit, it may in practice rely on its own knowledge of the foreign language or the help of dictionaries.

In the UK, the meaning of foreign language texts seems to be treated as fact not law, somewhat analogous to foreign law.[53] Although there is no clear principle stated to this effect, it may be inferred from expert evidence concerning the meaning of the foreign language text being allowed, which would not be the case if it would be considered an issue of law.[54] Facts have to be proven to the judge by the parties pleading them,[55] for which the testimony of competent experts is required;

[50] In the UK, the burden of proof in tax cases is normally on the taxpayer because all relevant facts reside with him, see Avery Jones, *Tax Treaties* (2007), ss. 3.1.1, 3.1.4.

[51] See P. Martin, *Courts and Tax Treaties in Civil Law Countries*, in G. Maisto (ed.), Courts and Tax Treaty Law (Amsterdam: IBFD, 2007), s. 4.1.1; R. Mellinghoff, *The German Federal Fiscal Court: An Overview*, 70 Bulletin for International Taxation 1 – 2 (Amsterdam: International Bureau of Fiscal Documentation, December 2015), s. 3.4; Giussani, *Some Comparative Notes on Tax Litigation* (2007), at 1; O'Connor, *Common Law and Civil Law Traditions* (2012), at 18.

[52] See A. Rust, *Germany*, in G. Maisto (ed.), Courts and Tax Treaty Law (Amsterdam: IBFD, 2007), s. 11.1.2; Mellinghoff, *The German Federal Fiscal Court* (2015), s. 3.4.

[53] Concerning the treatment of foreign law, see Avery Jones, *Tax Treaties* (2007), s. 3.1.4; Hausmann, *Pleading and Proof of Foreign Law* (2008), at 2–3, in terms of the historical genesis: 'The fact doctrine is based on the old distinction between the courts of admiralty and the courts of common law. While the former had jurisdiction in matters with a foreign element, the latter decided on purely domestic issues. When the Common Law Courts extended their jurisdiction to matters with a foreign element in the 18th century they were bound to treat foreign law as fact because the only "law" they could apply was English common law', 10n.

[54] See *Fothergill v Monarch Airlines Ltd.*, at 274, 293, per Lords Wilberforce and Scarman. For an example, refer to *R (on the Application of) Federation of Tour Operators v HM Treasury*, [2007] EWHC 20622 (Admin), 52.

[55] In tax litigation the burden of proof is on the taxpayer, so in an appeal procedure it is for him to prove his case in

the other party is not obliged to bring by experts of their own, but will regularly do so if the issue is contested.[56] The judge will decide based on the evidence provided and will not consider any questions of fact or law not pleaded by the parties.[57]

The advantage of the latter approach is that because of having expert testimony, the quality of evidence provided should be high, that is, the system is well geared towards dealing with a problem of language appropriately once set in motion. On the other hand, if the meaning of the foreign language text would indeed be regarded strictly as a matter of fact, the role of the court as umpire operating under the assumption of ignorance prevents it from investigating any evidence not put forward.[58] Consequently, divergences between the texts will not be considered in the second kind of dispute when they have not been raised. For the UK and most other common law countries, this means that since in tax litigation the burden of proof is almost always on the taxpayer, failure of him or his advisers to appreciate the foreign language text and raise a divergence in his favour will lead to it not being considered by the court and the revenue winning the case on improper grounds.[59]

Not all is well in Germany either. In principle, the German system is better equipped for dealing with disputes of the second type, because the court applies the law *ex officio* subject to the principle *iura novit curia* and, therefore, may consider other language texts on its own initiative irrespective of any ambiguity in the German text.[60] Although there are several cases in which other language texts have been considered,[61] this is not true consistently for all case law on tax treaties. The reason for the omission, whether the other language texts are just ignored or have been consulted but found irrelevant and therefore not been further elaborated on, is difficult to judge and quantify. One imaginable reason could be the strong influence of doctrine in Germany.[62] With the routine interpretation approach in place as prevailing view, judges without foreign language proficiency could simply feel comfortable in discarding the necessity to look at the other texts until they are confronted with an ambiguity or divergence, whereas for judges having the respective language skills, checking the other language texts by default may be the natural course of action.

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fact and law; 'an assessment "stands good" unless displaced by evidence'. Avery Jones, *Tax Treaties* (2007), s. 3.1.4.

[56] See Hausmann, *Pleading and Proof of Foreign Law* (2008), at 13; T. C. Hartley, *Pleading and Proof of Foreign Law: The Major European Systems Compared*, 45 International and Comparative Law Quarterly (Cambridge: Cambridge University Press, 1996), 271, at 283–284.

[57] See Hausmann, *Pleading and Proof of Foreign Law* (2008), at 6, 13.

[58] See *ibid.*, at 13; Avery Jones, *Tax Treaties* (2007), s. 3.1.4.

[59] See Avery Jones, *Tax Treaties* (2007), s. 3.1.4. For Canada the practice may differ because of the constitutional equality of English and French, i.e., the court may compare the French text of the treaty on its own account, see, e.g., *Conrad M. Black v Her Majesty the Queen*, [2014] TCC 12, para. 25.

[60] See E. Reimer, *Germany: Interpretation of Tax Treaties*, 39 European Taxation 12 (Amsterdam: International Bureau of Fiscal Documentation, December 1999), 458–474, at 465; E. Reimer, *Tax Treaty Interpretation in Germany*, in M. Lang (ed.), Tax Treaty Interpretation (Wien: Linde Verlag Ges.m.b.H., 1998), 119–152, at 128.

[61] For example, BFH, I R 369/83 (3 February 1988), BStBl II 1988; FG Düsseldorf, VII 484/77 (17 January 1980), EFG 1980; BFH, I R 63/80 (21 August 1985), BStBl II 1986; FG Köln, 2 K 3928/09 (24 April 2012), EFG 1853; BFH, I R 48/12 (26 June 2013), BStBl II 2014.

[62] See Rust, *Germany* (2007), s. 11.1.1. In general, doctrine as developed by legal scholars plays an important role in civil law systems, because of the weight given to the logical and systematic structure of legislation. For every code there exist regularly updated commentaries by scholars that summarise doctrine and case law, and it is common for courts to cite the opinions of academics, see O'Connor, *Common Law and Civil Law Traditions* (2012), 14, 22. Historically, doctrine is inextricably interwoven with the formation of civil law and, although not a source of law, has retained its influence on the development of legal systems through its role in legal education and recourse by lawyers, judges, and legislators, see J. Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 The American Journal of Comparative Law 3 (Oxford: Oxford University Press, 1966), 419–435, 428; O'Connor, *Common Law and Civil Law Traditions* (2012), at 30–31.

How can the problems introduced by domestic procedural law be remedied? For civil law countries such as Germany, the problem may resolve automatically given the conditions – a change in the prevailing view abandoning the routine interpretation approach may be sufficient to bring about consistent practice because of the strong influence of doctrine; however, in the case of common law countries such as the UK, a change in doctrine will hardly bring about a change in practice, because the function of doctrine is different and its influence on practice marginal.[63] In consequence, action will be required. The intended result could be achieved by an extension of the professional duty of the representatives or the revenue to always compare the other texts and raise issues regardless of whether they are in favour of their own position.[64] This makes sense from the perspective of state responsibility because Article 4 DARS, which attributes the acts or omissions of organs of a state to that state according to the principle of its unity, conceives of such organs in the broadest possible sense, including federal as well as municipal tax authorities.[65]

2. In Search for a Practical Solution

The previous may have left the reader with unease. Sophocles comes to mind: 'Alas, how terrible is wisdom when it brings no profit to the man that's wise!'[66] If we subscribe to the arguments refuting the routine interpretation approach, we are at the same time presented with the real life practical challenges involved in a comparison of all texts.

2.1. The View from Outside the Ivory Tower

The situation may look particularly bleak for tax treaties because disputes about their application have to be decided by national courts of various levels that may not be sufficiently equipped to compare all texts.[67] Although the number of different language texts most commonly amounts

[63] In common law countries, case law as principal source of law creates precedents and has led to the principle of *stare decisis*: higher court decisions are binding for lower courts, which guards legal certainty through a uniform basis of case law rather than codification with a focus on comprehensiveness as well as logical and systematic structure, see Avery Jones, *Tax Treaties* (2007), ss. 3.1.1 and 3.1.7; D. A. Ward, *Use of Foreign Court Decisions in Interpreting Tax Treaties*, in G. Maisto (ed.), Courts and Tax Treaty Law (Amsterdam: IBFD, 2007), s. 7.3; O'Connor, *Common Law and Civil Law Traditions* (2012), at 14; Dainow, *The Civil Law and the Common Law* (1966), at 424–425; Tetley, *Mixed Jurisdictions* (1999), at 614. In consequence, scholarly commentators do not have the same role and importance in common law as they do in civil law. Rather than to theorise about legislation on the basis of general principles, the role of doctrine in common law is to track the evolution of law by way of compiling, classifying, and analysing case law, see O'Connor, *Common Law and Civil Law Traditions* (2012), 13–14; Dainow, *The Civil Law and the Common Law* (1966), at 428. Common law is genetically judge-made law by the royal judiciary, whereas the role of academic research and theory has been marginal traditionally, see R. C. van Caenegem, Judges, Legislators and Professors: Chapters in European Legal History (Cambridge: Cambridge University Press, 2008), 53; Atiyah, Pragmatism and Theory in English Law (1987), at 34 et seq., 131 et seq.

[64] In the UK, an extension of the professional duty could be achieved by the professional bodies or a practice direction by the judges, who could for example say that all language texts should be put before the judge. In Germany, the tax administration as first instance of appeal is already subject to the requirement to inquire all the facts irrespective of the submissions of the taxpayer, see Rust, *Germany* (2007), s. 11.1.1. A change in the prevailing view abandoning the routine interpretation approach should therefore bring about consideration of the other language text(s) already at the level of assessment. A sure way to implement this would be via a circular from the Federal Ministry of Finance.

[65] See ILC, DARS (2001), Article 4 and Commentary, 40–42, paras. 1–13.

[66] Teiresias in Sophocles, Antigone. Oedipus the King, Oedipus at Colonus (University of Chicago Press, 2013).

[67] See G. Gaja, *The Perspective of International Law*, in G. Maisto (ed.), Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law (Amsterdam: IBFD, 2005), 91–102, at 98.

only to two or three per treaty,[68] the problem increases with the expansion of a country's treaty network and the addition of languages. Whereas getting hold of the texts in the other languages may no longer pose much of a problem in today's world,[69] the expertise to illuminate their meaning may not be so readily available.[70]

Even if the judges interpreting the treaty are generally familiar with the other languages, it may be difficult for them to establish the exact meaning of any specific expression, in which case recourse to dictionaries, translators, and legal experts may become necessary.[71] Thus, Waldock's suggestion that from a pragmatic perspective an obligatory comparison of all texts seems unreasonable in view of the needed resources and countries being unequally equipped to follow such prescription in practice remains a fair point.[72] This leaves us with an obvious dilemma.

What if we just stick to the routine interpretation approach, tacitly accept its shortcomings, and hope for the best – no plaintiff, no judge? Even so the problem does not change in substance but only in degree: the issue remains how to deal with the practical problems associated with a comparison once ambiguities arise or divergences between the texts have been pointed out. Given the potential for divergences[73] together with the ever-increasing globalisation of commercial and investment activities[74] likely accompanied by respective international tax issues and growing taxpayer awareness out of self-interest, it is more than likely that the number of cases in which divergences will play a role and put judges in the predicament outlined above will grow in the future.[75] This sets us back to the practical problems involved in a comparison of texts whether or not we agree with the arguments presented beforehand or continue to adhere to the routine interpretation approach.

[68] See below.

[69] For a counterexample, see ICSID, *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim şirketi v Turkmenistan* (Washington, D.C.: July 2012), International Centre for Settlement of Investment Disputes, paras. 7.8–7.11.

[70] See P. Baker, *Recent Developments in the Interpretation and Application of Double Taxation Conventions*, Fiscalidade – Revista de Direito E Gestao Fiscal 4 (Coimbra: Almedina, 2000), 15–27, at 24.

[71] See, e.g., *Fothergill v Monarch Airlines Ltd.*, at 273–274, 286–287, 293–294, 300–301; *Buchanan (James) & Co. Ltd. v Babco Forwarding and Shipping (UK) Ltd.*, [1978] AC 141, HL, at 152–153; ICSID, *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim şirketi v Turkmenistan* (July 2012), paras. 1.38, 1.58, 1.60.

[72] See ILC, *Summary Records of the Eighteenth Session, 4 May – 19 July 1966* (1967), at 211, para. 35.

[73] Linguistic and juridical concordance between legal texts in different languages is hard to achieve in practice even in case of the most careful drafting, see S. Rosenne, *The Meaning of 'Authentic Text' in Modern Treaty Law*, in An International Law Miscellany (Leiden; Boston: Martinus Nijhoff Publishers, 1993), 397–429, at 416–423, concerning the efforts spent on UNCLOS III.

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

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

2.2. Reliance on the Original Text

When judges are faced with a divergence between the texts of a treaty and there is no prevailing text, the natural reflex may be to give preference to the one they can identify as the text of negotiation and drafting.[76] Scholars who have engaged in comparative studies of court decisions have identified such practice and provided comprehensive argument in its favour.[77]

This approach is not in line with the VCLT.[78] 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, 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.[79]

Nevertheless, reliance on the original text is supported by many scholars, even though it has been explicitly rejected by the drafters of the VCLT and 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 during the discussions at the ILC's 874th meeting.[80] Arginelli 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.[81] As most grave argument in support of his view, Arginelli postulates a deficiency of translation by definition citing Hardy and Rosenne,[82] according to whom there is 'all the difference in the world between a negotiated version and one produced mechanically by some translation service, however

[76] Henceforth referred to as the original text.

[77] See Hardy, *The Interpretation of Plurilingual Treaties by International Courts and Tribunals* (1961), at 105, 151–152. Similar suggestions are made by Sinclair, The Vienna Convention on the Law of Treaties (1984), 152; P. Arginelli, The Interpretation of Multilingual Tax Treaties (Leiden: Leiden University Press, 2013), at 231–232, 241; A. Aust, Modern Treaty Law and Practice (Cambridge; New York: Cambridge University Press, 2000), at 205–206; Lang, *The Interpretation of Tax Treaties and Authentic Languages* (2013), at 21–22; D. Shelton, *Reconcilable Differences? The Interpretation of Multilingual Treaties*, 20 Hastings International and Comparative Law Review (San Francisco: University of California, Hastings College of the Law, 1997), 611–638, at 637; J. Schuch and J.-P. V. West, *Authentic Languages and Official Translations of the Multilateral Instrument and Covered Tax Agreements*, in M. Lang (ed.), The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects (Wolters Kluwer Law & Business, 2018), 67–87, at 84.

[78] See ILC, VCLT Commentary (1967), at 226, para. 9; J. F. Avery Jones, *Treaty Interpretation*, in Global Tax Treaty Commenatries (Amsterdam: online; IBFD, 2018), s. 3.7.1.3; Gaja, *The Perspective of International Law* (2005), at 92.

[79] See K. 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), at 39, para. 72a; E. Reimer and A. Rust (eds.), Klaus Vogel on Double Taxation Conventions (4th ed., The Netherlands: Wolters Kluwer Law & Business, 2015), at 41, para. 88.

[80] See ILC, VCLT Commentary (1967), at 226. para. 9; ILC, *Summary Records of the Eighteenth Session, 4 May – 19 July 1966* (1967), at 208, 210–211, paras. 22, 33–34, 37.

[81] See Arginelli, The Interpretation of Multilingual Tax Treaties (2013), at 231–232.

[82] See *ibid.*, at 232.

competent'.[83] A similar view has been put forward by the joint dissenting opinion in the *Young Loan Arbitration*,[84] which has influenced many scholars such as Sinclair.[85]

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 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. As long as states officially designate translated texts as equally authentic, faulty translation can only be an issue of errors and unwittingly introduced differences that are identified on a case by case basis 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.

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.[86] There is nothing 'normal' or 'natural' about the original text to be preferred, but such contention is merely speculative and without legal basis. If an implicit pre-eminence of the original text were to be naturally assumed, such should have been codified in the VCLT. What all the authors in support of granting decisive weight to the original text are basically saying is that the VCLT principles should be largely ignored because everybody simply *knows* the text initially drawn up provides the proper meaning. They do not interpret the VCLT rules but revise them. The ethically charged language of their suggestions like 'unfair', 'natural', or 'normal' shows the difficulty to base their view on the VCLT principles other than through a loose reference to the principle of good faith.

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

[83] Rosenne, *The Meaning of 'Authentic Text' in Modern Treaty Law* (1993), at 450.

[84] 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* (May 1980), at 140, paras. 40–41.

[85] See Sinclair, The Vienna Convention on the Law of Treaties (1984), at 152. A similar position is taken by Lang, *The Interpretation of Tax Treaties and Authentic Languages* (2013), 23–24; Mössner, *Die Auslegung mehrsprachiger Staatsverträge* (1972), at 290; Shelton, *Reconcilable Differences? The Interpretation of Multilingual Treaties* (1997), at 637; Schuch and West, *Authentic Languages and Official Translations of the Multilateral Instrument and Covered Tax Agreements* (2018), at 84–85.

[86] 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 prevail must be rejected, see ILC, *Summary Records of the Eighteenth Session, 4 May – 19 July 1966* (1967), at 210–211, para. 33; Gardiner, Treaty Interpretation (2010), at 366–369.

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 the quoted academics in respect of the interpretative value of the original text boil down to an implicit *petitio principii* that runs counter to Articles 31–33. 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.[87]

2.3. Reliance on the Prevailing Text

What if the treaty designates one text as prevailing in case of a divergence between the texts? The view currently prevailing in doctrine concerning prevailing texts rules out sole reliance on them, but such is permitted only as a limited solution when reconciliation of the texts under a comparative interpretation has proven impossible.[88]

At the core of this restrictive approach lies a particular interpretation of the term 'divergence', which limits it to cases of material differences in meaning, that is, differences not reconcilable by a comparison of all texts under Articles 31 and 32.[89] According to this view, a divergence warranting recourse to the prevailing text under Article 33 is given only when a difference in meaning between the texts persists after the application of Articles 31 and 32 to all texts, otherwise the prevailing text cannot be taken to prevail. In consequence, decisive recourse to the prevailing text requires the interpreter to conduct a reconciliatory comparative interpretation first in order to establish whether the condition of a divergence is fulfilled and the meaning of the prevailing text may be applied as prevailing.

In summary, the proponents of the restrictive approach read Article 33(4) as making a distinction merely between two situations: cases where differences in meaning either can or cannot be reconciled by a comparison of texts under application of Articles 31 and 32. The suggested approach then is as follows: When a divergence has arisen, disregard any prevailing text status and conduct a reconciliatory comparison of all texts.[90] In the course of this, establish whether the divergence is only *prima facie* or material. If the latter is the case, adopt 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty'.[91] Alternatively, adopt the meaning of

[87] 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, see ICJ, *LaGrand (Germany v United States of America)* (June 2001), Annual Reports of the International Court of Justice, paras. 100–102; Gaja, *The Perspective of International Law* (2005), at 97.

[88] This restrictive approach concerning recourse to the prevailing text is most comprehensively argued by Arginelli, see Arginelli, The Interpretation of Multilingual Tax Treaties (2013), at 333 et seq.

[89] See, e.g., *ibid.*, at 333–338; Engelen, Interpretation of Tax Treaties Under International Law (2004), at 394. Article 33(1) and (4) reads '1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail. ...4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.'

[90] Some authors seem to imply that it is sufficient to compare only the divergent texts in the official languages of the contracting states. This view will be discussed in more detail below.

[91] UN, Vienna Convention on the Law of Treaties (1969), Article 33(4).

an existing prevailing text.

This view rests on Hardy's supposition that the interpretation most compatible with all texts is not necessarily the one suggested by the prevailing text in isolation.[92] Based on the assumption that all texts were always intended to mean the same, the existence of a divergence warranting decisive recourse to the prevailing text is practically ruled out,[93] and Arginelli goes as far as to advocate reconciliatory comparative interpretation to the point that it ought to be conducted instead of decisive recourse to the prevailing text even if reconciliation is possible only with the help of supplementary means or by granting decisive weight to the text of initial negotiation and drafting, because such renders recourse to the prevailing text 'superfluous'.[94]

Contrary to the prevailing restrictive view, the essence of the permissive approach advocated here is to conceive of the prevailing text as a tool to reduce complexity of plurilingual treaty interpretation into a situation of quasi-unilinguality, based on the submission that the VCLT framework of interpretation allows for sole reliance on the prevailing text,[95] which has been practised also by international courts in several cases.[96] At the same time, it does not rule out reconciliatory comparative interpretation of all texts as an alternative as long as the result converges to the meaning of the prevailing text. Reconciliatory comparative interpretation of all texts may still become necessary under certain circumstances, for example, when an interpretation of the prevailing text under Article 31 leaves its meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.[97]

The permissive approach is based on what may be called the *logical argument*.[98] Its core is that

[92] See Hardy, *The Interpretation of Plurilingual Treaties by International Courts and Tribunals* (1961), at 126, 133–34.

[93] See Engelen, Interpretation of Tax Treaties Under International Law (2004), at 394; Arginelli, The Interpretation of Multilingual Tax Treaties (2013), at 103, 232, 333–338, 241.

[94] Arginelli, The Interpretation of Multilingual Tax Treaties (2013), at 333.

[95] See Resch, The Interpretation of Plurilingual Tax Treaties (2018), Ch. 5. The solution of sole reliance on existing prevailing texts is discussed and submitted here on a theoretical basis for academic purposes. It may be resorted to in practice; however, given the reality that it is for a variety of reasons customary for courts to rely on their own language text (at least initially), such suggestion may be dismissed by the practitioner as an academic ivory tower proposal. Hence, the following modified approach is suggested in practice: instead of direct recourse to the prevailing text, the text in the own language is relied on together with recourse to the prevailing text to gauge the result. The other language text(s) may then be ignored – at least most of the times. Given that countries tend to choose a language for the prevailing text they have a high level of familiarity with (and for which Model Conventions coupled with Commentaries exist that, depending on the circumstances, may be drawn on for purposes of interpretation), together with a largely uniform choice of prevailing language over the entire global tax treaty network reducing the amount of third party resources needed, such approach seems practicable, neither overburdening states nor taxpayers. Indeed, this may come close to what is practice already, at least by some courts. In I R 48/12, para. 13, the German Federal Fiscal Court (*Bundesfinanzhof* – BFH) employed this approach in a decision concerning the status of S-Corporations under the Germany-US (1989) tax treaty in order to establish the exact point in time when the 2006 protocol would start to take effect. Although the treaty does not feature a prevailing text – this being an example of the court merely consulting the other text – the approach suggested here would be analogous concerning method and in the case of a prevailing text all the more warranted. The court interpreted the German text and then confirmed its interpretation by reference to the English text. Although the formulation of the English text happened to be more precise concerning the specific point in time supporting the conclusion of the court, there was no suggestion that the German text had been ambiguous.

[96] See, e.g., PCIJ, *Treaty of Neuilly (Bulgaria v Greece)* (September 1924), Publications of the Permanent Court of International Justice 1922–1946, at 3–10, as referenced by ILC, VCLT Commentary (1967), 224, para. 4; *Aron Kahane Successeur v Francesco Parisi and the Austrian State*, Romanian-Austrian Mixed Arbitral Tribunal (March 1929), Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix, as discussed by Arginelli, The Interpretation of Multilingual Tax Treaties (2013), 327–328.

[97] The interpretation of Article 33 on which the permissive approach is based is outlined in more detail below.

[98] Implying that, logically, both methods (interpretation of the prevailing text and reconciliatory comparative interpret-

it does not matter whether there is a divergence, because the prevailing text can be relied on in any case; the other texts must be interpreted always to have the same meaning as the prevailing text, which makes recourse to them unnecessary if the meaning of the prevailing text is manifest.[99] Either the prevailing text has the same meaning as the other texts, in which case it may be relied on same as the others, or it has a different meaning, in which case it must be relied on while the other texts must be interpreted to concord to its meaning.[100]

As outlined, the restrictive approach predominantly advocated in doctrine rests on the idea that 'the interpretation most compatible with all texts is not necessarily the one suggested by the authentic text viewed separately'.[101] The first is the outcome of a selective comparison during which the interpretations of all texts are 'hedged' against each other and errors are corrected by cross-examination, whereas the latter is a one-dimensional exercise by the judge without such corrective 'hedge'.[102] This argument implies the presumption that as long as there is a common meaning to all texts, no divergence can be said to exist, in which case any meaning of the prevailing text not in congruence with the common meaning does not prevail.

The suggestion that it would be necessary for the interpretation of the prevailing text to be hedged within the limits of the others is in friction with the property of it prevailing, which rather suggests the opposite, namely, that the interpretations of the other texts are to be hedged within the limits of the prevailing one. In order to make sense of Hardy's argument, we must examine its theoretical foundations. In essence, it rests on the following two premisses: (1) The notion of divergence is subjective, that is, the existence of a divergence, which is the precondition for the prevalence of the prevailing text, can be established only after a close objective examination. (2) Texts lend themselves to several interpretations, and they may be so 'obscure or vague' that they lend themselves 'either to no constructions or a virtually unlimited number'.[103]

Consequently, if the prevailing text is equivocal, any particular interpretation chosen by the judge may be in conflict with an interpretation arrived at by a concordant interpretation of all texts after a comparison. Given this, no interpretation of the prevailing text may be chosen as the prevailing one without establishment of a divergence, because it may not prevail over any other interpretation that happens to be in concordance with the other texts, in which case no real divergence can be said to exist. Therefore, the interpreter must always engage in reconciliatory comparative interpretation and can rely on the prevailing text only when such turns out fruitless, that is, only when no single common meaning can be established. Accordingly, the prevailing text is a device of last resort, to

ation of all texts) should lead to the same result.

[99] 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.

[100] See Engelen, Interpretation of Tax Treaties Under International Law (2004), at 380; Hardy, *The Interpretation of Plurilingual Treaties by International Courts and Tribunals* (1961), at 126, with reference to *Foreign Relations of the United States* (1923), vol. 2, 1166, 1171. In the words of Lord Roskill: 'I think, like my noble and learned friends, that those writings point strongly to the conclusion which all your Lordships have reached, that "avarie" in this context includes "partial loss". Either therefore "damage" in the English text must be construed so as to include "partial loss", or there is an inconsistency and the French text as I would interpret it in the light of those writings must prevail. *I do not think it matters by which route that conclusion is reached*', *Fothergill v Monarch Airlines Ltd*, 301 (emphasis added).

[101] Hardy, *The Interpretation of Plurilingual Treaties by International Courts and Tribunals* (1961), at 133–134. By 'authentic text' he means the prevailing text.

[102] See *ibid.*, at 126.

[103] *Ibid.*, at 82.

be applied only as a prevailing alternative to the *modus operandi* provided by Article 33(4) for cases in which no text is designated as prevailing.

Hardy's argument relies on contrasting the interpretation suggested by the prevailing text to an interpretation compatible with all texts, and it implies the notion that all texts considered together constitute the treaty versus each text representing it. As outlined above, this suggestion is correct for plurilingual treaties without prevailing text because of the otherwise residual indeterminacy of the treaty meaning; however, here we are considering the case of a quasi-unilingual treaty because one text is designated as prevailing. When there is a clear meaning of the prevailing text, the principle of unity in combination with Article 31 demands that this meaning is the undivided meaning of the treaty. For cases without prevailing text, Hardy's argument applies because of the failure of clarity of a single text as a criterion to resolve the inherent indeterminacy. When there is a prevailing text with a clear meaning, however, there is no longer any indeterminacy; clarity of the prevailing text becomes sufficient as a criterion, or else we cannot make sense of the notion of it to prevail. In summary, Hardy's argument is valid only for cases in which no prevailing text exists or cases in which its meaning remains unclear.

It is not necessary for the prevailing text to have only a single meaning to be clear. When one of its possible meanings is manifest under Article 31, it constitutes the treaty meaning – much alike the case of a unilingual treaty, in which it is precisely the task of interpretation to establish the one true meaning out of all possible ones. If text X means A and text Y (prevailing) can be read to mean either A or B, B prevails as meaning of the treaty if such conclusion is manifest according to an interpretation of Y under Article 31 (optionally confirmed under Article 32). To suggest otherwise, that in this case there would be no divergence and A, common to both texts, needs to be regarded as the meaning of the treaty, runs counter to the VCLT principles: if a consideration of the ordinary wording of the text in good faith in light of the context and object and purpose establishes a meaning, such meaning should be regarded as the meaning of the treaty (bearing in mind that such meaning of the prevailing text is of decisive authority in case the interpretations of the other texts depart from it).[104]

In summary, a common interpretation unequal to the manifest meaning of the prevailing text constitutes a case of divergence, and the manifest meaning of the prevailing text prevails. To suggest that such would not constitute a case of divergence and *any* common meaning of all texts supersedes a different meaning of the prevailing one even though the latter has been established as manifest under Article 31 runs counter to the intention of the contracting parties declaring one text as prevailing and contradicts the interpretative principles enshrined in the VCLT general rule of interpretation. Thus, Hardy's counterargument is only partially valid for cases in which the prevailing text has no clear meaning, that is, when text X means A while text Y (prevailing) may mean either A or B and neither can be established as manifest under application of Article 31 (optionally confirmed under Article 32).

[104]It is easy to see how a suggestion to the contrary would go wrong when applied to our example based on the *Natexis* case. Suppose that the text saying liable to tax would have been declared as prevailing, and an interpretation of it under the VCLT general rule would establish that the effective payment of a tax would not be necessary for granting a tax sparing credit. Since liable to tax means both subject to tax and liable but not subject to tax, following Hardy's argument would mean that the meaning of the text saying subject to tax as the common meaning would have to be given preference every time instead of the different manifest meaning of the prevailing text.

2.4. The Permissive Approach under Article 33

In order to answer the question whether the suggested permissive approach to prevailing texts is covered by the principles enshrined in the VCLT, we have to interpret Article 33. The Oxford Dictionary defines to prevail as to 'Prove more powerful or superior', stemming from the Latin *praevalere* (to have greater power). Hence, the meaning of the prevailing text must be considered more authoritative than the meaning of any other text or all others combined, otherwise we cannot make sense of the notion of it to prevail. According to the wording of Article 33(1), the prevailing text does not prevail by default but only conditional upon the existence of a divergence. From this situation originates the problem of 'when to apply the prevailing text'.[105] As has been convincingly established by Engelen,[106] however, this limitation may be the result of 'infelicitous drafting' not intended to create a peremptory norm, but the intention of the contracting parties expressed in the wording of the actual treaty final clause remains decisive while Article 33(1) is intended only as a general reservation of such clauses.[107]

In essence, the prevailing text may be considered super-authoritative as a kind of *primus inter pares* even under the VCLT wording: as authentic text it is at minimum equally authoritative but of higher authority when circumstances are such that it ought to be regarded as prevailing. Hence, the existence of a prevailing text may be viewed as creating a new category of interpretative means in form of the non-prevailing texts, because the notion of one text to prevail in case of divergence is just another way of saying that the other texts can only confirm but not contest a clear meaning of the prevailing one. In relation to the prevailing text, the others may be viewed akin to supplementary means: recourse to them is permissible but not mandatory unless an interpretation of the prevailing text leaves its meaning unclear, in which case recourse to the other texts becomes mandatory again to determine the meaning of the treaty.[108]

In summary, when the prevailing text has a clear meaning, that meaning qualifies as the definitive treaty meaning. Either the other texts say exactly the same, or there is a divergence and their meanings must be reinterpreted to concur to the meaning of the prevailing text, which constitutes the one true meaning of the treaty: once it is established that the prevailing text has a clear meaning, Article 33(3) precisely demands that the other texts must be interpreted to concord to it. Hence, the prevalence of the prevailing text may be regarded as not conditional but quasi-absolute, that is, not really dependent on the de facto existence of any divergence.

This is congruent with the particular object and purpose of Article 33 to establish a relationship of comparative authority between the authentic texts: looking into the genesis of Article 33, we find that Special Rapporteur Waldock explicitly stated in the ILC's 770th meeting that 'article 74 dealt with the texts or versions which could be consulted for the purposes of interpretation, whereas article 75 was concerned with the comparative authority of texts'.[109] The VCLT Commentary speaks

[105] ILC, VCLT Commentary (1967), at 224, para. 4; see Hardy, *The Interpretation of Plurilingual Treaties by International Courts and Tribunals* (1961), at 123 et seq.; Arginelli, The Interpretation of Multilingual Tax Treaties (2013), at 325 et seq.

[106] See Engelen, Interpretation of Tax Treaties Under International Law (2004), at 376–379.

[107] See ILC, VCLT Commentary (1967), at 224, para. 4.

[108] See ILC, *Documents of the Sixteenth Session Including the Report of the Commission to the General Assembly*, A/CN.4/SER.A/1964/Add.1, in Yearbook of the International Law Commission 1964, vol. ii (United Nations, 1965), at 65, para. 10. Versus supplementary means, however, they retain their status as authentic means and the corresponding higher weight, constituting 'text' and therefore 'context' under Article 31(2).

[109] ILC, *Summary Records of the Sixteenth Session, 11 May – 24 July 1964*, A/CN.4/SER.A/1964, in Yearbook of the International Law Commission 1964, vol. i (United Nations, 1965), at 319, para. 60. Articles 74 and 75 were

in this respect of the 'master text',[110] which paraphrases this property of supremacy.

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

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

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

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

The VCLT Commentary confirms this interpretation by explicitly stating that 'a plurilingual treaty may provide that in the event of *divergence between the texts* a specified text is to prevail'.[111] The wording of the French Commentary is equivalent and reads '*Deuxièmement, un traité plurilingue peut disposer qu'en cas de divergence entre les textes, un texte déterminé l'emportera.*'[112]

Article 33(4) may be consulted to deliberate this interpretation because of its direct reference and

combined later into one article, which in its final version was included as Article 33 in the VCLT.

[110] ILC, VCLT Commentary (1967), at 224, para. 4.

[111] *Ibid.*, at 224, para. 3 (emphasis added).

[112] ILC, Projet d'Articles sur le droit des traites et commentaires 1966: Texte adopté par la Commission à sa dix-huitième session, en 1966, et soumis à l'Assemblée générale dans le cadre de son rapport sur les travaux de ladite session, Annuaire de La Commission Du Droit International 1966, vol. ii (United Nations, 1967), at 244, para. 3.

systematic connection to Article 33(1).[113] It does not explicitly echo the term 'divergence' but implicitly distinguishes between three different situations that refer to cases of divergence via the wording of 'difference in meaning' in combination with the existence or non-existence of a prevailing text, linking it to Article 33(1): First, a prevailing text exists, in which case we are referred back to Article 33(1). Second, no prevailing text exists and there are differences in meaning that can be reconciled by a comparative application of Articles 31 and 32_1[114] to all texts, in which case the problem has been solved already. And third, no prevailing text exists and there are differences in meaning that cannot be reconciled by a comparative application of Articles 31 and 32_1 to all texts, for which a further *modus operandi* is needed and provided by Article 33(4) itself.

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

Such understanding is not impaired by the fact that Article 33(4) explicitly only references 'a difference of meaning which the application of articles 31 and 32 does not remove', as this must be interpreted in the context of the provision merely providing a specific instruction for a particular case. By explicitly mentioning only the particular case of an irreconcilable difference in meaning, the general case of reconcilable differences in meaning is presupposed. Since all reconcilable differences have been reconciled along the way by an application of Article 33(1) in combination with Articles 31 and 32_1 before the specific instruction contained in Article 33(4) comes into play, there is no need to explicitly repeat any instructions applying to them. Both reconcilable differences as well as their reconciliation are implied to have been the case and taken place already. Therefore, the concept of material difference in meaning explicitly described by Article 33(4) entails both: itself as operand of the second part of the entire operation (the specific *modus operandi* contained in paragraph (4) of Article 33), and the concept of merely *prima facie* difference in meaning as operand of the initial part of the operation (reconciliatory comparative interpretation under Articles 31 and 32_1). The entire operation consists in the two *modi operandi* reconciliatory comparative interpretation under Articles 31 and 32_1 and application of the interpretative rule contained in Article 33(4), whereas the operand itself (the divergence) retains its identity and only changes its character over the course of the entire operation from merely apparent into material.[115]

The wording 'when' of Article 33(4) instead of 'if' or 'in case' is indicative in this respect: it does not talk about an imaginable scenario of the interpreter encountering a divergence, but about the definite case that he has encountered one. As soon as the normal way to handle it (reconciliatory

[113] See Mössner, *Die Auslegung mehrsprachiger Staatsverträge* (1972), at 300.

[114] Article 32 distinguishes between two different uses, thereby delimiting the overall use of supplementary means. Its particular drafting separates the two different uses not via self-contained paragraphs but merely via two parts of the same sentence. Henceforth, when only the first part excluding letters a) and b) is implied, it will be cited as Article 32_1 for purposes of disambiguation. For a detailed analysis of the relationship between Articles 32 and 33 see Resch, The Interpretation of Plurilingual Tax Treaties (2018), Ch. 4, s. 4.4.

[115] The distinction between *prima facie* and material divergences made by the proponents of the restrictive approach is artificial: obviously, any divergence is at first merely *prima facie* before a full interpretative comparison has been conducted, apart from the most obvious cases of outright contradictions. To distinguish between *prima facie* and material divergences before such comparison and suggest a different treatment based on such distinction concerning whether a comparison is to be conducted is based on circular reasoning and therefore nonsensical.

comparative interpretation under Articles 31 and 32_1) has failed, he needs to implement the particular operation prescribed by Article 33(4). Implementing that special operation presupposes that, beforehand, reconciliatory comparative interpretation under Articles 31 and 32_1 has failed and, in consequence, that a divergence, necessitating such reconciliatory comparative interpretation under Articles 31 and 32_1, has been present.

In summary, the systematic composition of Article 33 suggests that paragraph (4) employs the disjunctive standard form of definitions regarding the concept of divergence introduced in paragraph (1).[116] That is to say, it combines all conditions that are by themselves each sufficient but not necessary to establish a case of divergence. Thus, a divergence is either a material difference (not reconcilable by the comparative application of Articles 31 and 32_1) or a merely apparent one (reconcilable by the comparative application of Articles 31 and 32_1), that is, not a difference in meaning but a mere difference in expression. Both are covered by the combined wordings of Article 33(1) and (4).[117] From this follows also that the term divergence cannot be restricted to either 'difference of expression' or 'difference of meaning', as the expression could be equivalent but the meaning different and vice-versa. This may explain why 'divergence' is used in Article 33(1) and neither 'difference of meaning' nor 'difference of expression': both types of differences needed to be addressed in a way that even cases of equivalent terms having different connotations in their respective languages would be covered.

For Article 33(4) to distinguish between three different situations is only logical. When no prevailing text exists, Article 33(1) only tells us that all texts are equally authoritative. Hence, we need further guidance for all situations when (i) any kind of difference appears and (ii) the difference persists, that is, when Articles 31 and 32_1 fail to produce a clear meaning common to all texts in the face of (i). Article 33(4) presumes a comparison of all texts has been undertaken in order to resolve any problems between them and only provides an additional instruction what to do in case such has failed. For cases that fall under (i) but not (ii) no additional instruction is needed; Articles 31 and 32_1 apply (and resolve the case) in line with the dictum that the fundamental principles of interpretation are not to be different for plurilingual treaties than they are for unilingual ones.[118]

Article 33(1) in combination with Articles 31 and 32_1 is sufficient also when a prevailing text exists: for a quasi-unilingual situation no further interpretative instruction on top of the general rule is needed because the VCLT assumes that a contextual interpretation of a single text in the light of its object and purpose can always be found unless the text remains ambiguous or obscure or the result of its interpretation is absurd or unreasonable.[119] Concerning this, the only difference between a unilingual treaty and a plurilingual one with prevailing text is that in the latter case the other texts are available as additional context to help resolve any residual problems of the prevailing one and

[116] X is F if X is G *or* X is H, see J. Pfister, Werkzeuge des Philosophierens (Stuttgart: Reclam, Philipp, jun. GmbH, Verlag, 2013), 68. This may escape the eye because paragraph (4) does not explicitly echo the term 'divergence' but only relates to it via its systematic connection to paragraph (1); however, this only conforms to the requirement of *terminus definitus non debet ingredi definitionem* (a term may not be defined through itself) for any proper definition, with the violation of this requirement also known as fallacy *idem per idem* (explaining the same through the same).

[117] The terms used by the texts could also be equivalent in the different languages (for example, 'control' in English and *contrôle* in French) but with their meaning being different, as in the case brought forward by Mr Bartos in the ILC's 770th meeting, see ILC, *Summary Records of the Sixteenth Session, 11 May – 24 July 1964* (1965), at 319, para. 65. For some more examples, see C. Sacchetto, *The Italian Experience*, in G. Maisto (ed.), Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law (Amsterdam: IBFD, 2005), 63–78, 70–73; Shelton, *Reconcilable Differences? The Interpretation of Multilingual Treaties* (1997), at 4–5. For a comprehensive discussion of this issue, see D. Cao, Translating Law (Channel View Publications Ltd., 2007), 54–60.

[118] See ILC, VCLT Commentary (1967), at 225, para. 7.

[119] See J. F. Avery Jones, *Treaty Interpretation*, in Global Tax Treaty Commentaries (online; IBFD, 2018), s. 5.1.2.2.6.

recourse to them takes precedence over recourse to supplementary means in their active role.[120]

This understanding is consistent with the wording of Article 33(4) starting out with the condition that 'Except where a particular text prevails in accordance with paragraph 1', which implies that what follows is relevant only in such case. Thus, Article 33(4) merely completes Article 31 for plurilingual treaties without prevailing text in order to avoid a gap in the general rule of interpretation identified by the ILC during the drafting period of the VCLT.[121] It is an extension to adapt the general rule to plurilingual scenarios, not a distinct rule in its own right, which is implicit in the dictum that, fundamentally, the same principles apply whether the treaty is unilingual or plurilingual.[122]

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

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

The VCLT Commentary employs varied terminology to discuss a continuum of situations from mere differences in expression to material differences in meaning, contemplated in various contexts from equal authority to cases with prevailing text. Nowhere does it contain any explicit or implicit suggestion that the notion of divergence should be restricted to mean only material differences in meaning and courts should rely on the prevailing text only after having engaged in a reconciliatory comparison without success. At best, the VCLT Commentary remains indecisive about the matter: it issues no recommendation but leaves it up to the contracting parties,[123] that is, neither reconciliatory comparative interpretation of all texts nor sole reliance on the prevailing one are ruled out in principle. This confirms the interpretation submitted here.

It seems rather obvious that the intention behind a prevailing text must be to avoid having to grind through a comparative interpretation of all texts, and not to use it only once that grind proves unfruitful. One must not forget in this context that the 'different genius of languages'[124] will require

[120] This is discussed extensively in Resch, The Interpretation of Plurilingual Tax Treaties (2018), Ch. 4, s. 4.4.

[121] See UN, *United Nations Conference on the Law of Treaties: First Session Vienna, 26 March – 24 May 1968, Official Records, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, A/CONF.39/11 (United Nations, 1969), at 188–189, paras. 39–43.

[122] See ILC, VCLT Commentary (1967), at 225, para. 7. The singular employed by the title of Article 31 is indicative: it makes clear that there is only one combined general rule of interpretation. Article 33(4) merely adapts the rule to multiple texts. As a corollary, the meaning of 'object and purpose' in Articles 31 and 33(4) is the same. The latter only provides for a different application as sole decider, not a teleological expansion, see Avery Jones, *Treaty Interpretation* (2018), s. 3.7.1.7.

[123] See ILC, VCLT Commentary (1967), at 224, para. 4.

[124] *Ibid.*, at 225, para. 6.

more than literal word-for-word translations of expressions. A proper translation must accurately reflect the complete sense of the translated, which may demand an extensive linguistic effort.[125] For this reason, different language versions of a text will often differ in phrasing and expression precisely out of the need to convey the same meaning, that is, *prima facie* differences between texts will be common, which has been recognised by the drafters of the VCLT.[126]

Hence, even if one would not subscribe to the argument that a comparison of all texts is obligatory for any serious effort to interpret a treaty in good faith in the absence of a prevailing text, it is clear that the potential need for such comparison may be rather large in practice. What would be the purpose then of having a prevailing text if not to assist the judge in his difficult task and relieve him as much as possible from the burden of a reconciliatory comparative interpretation? It seems an odd suggestion in the presence of a prevailing text that the judge should still be required to first compare all texts in order to find out whether he ought to rely on the prevailing one, because that would be tantamount to saying the judge must conduct a reconciliatory comparative interpretation in order to establish whether such was necessary in the first place. To borrow Bertrand Russell's words, the restrictive approach 'is one of those views which are so absurd that only very learned men could possibly adopt them'.[127]

2.5. Limitations to the Permissive Approach

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

Concerning the latter, the limitation to the applicability of the permissive approach is not strictly demarcated. If to be considered customary international law, Article 33 should be regarded as applicable without restriction.[128] Depending on the relationship of international and national constitutional law, however, domestic legal systematics may interfere, demanding implementation of the VCLT, as for example in the case of Germany, which signed the VCLT on 30 April 1970 and ratified it on 21 July 1987.[129]

[125] See Cao, Translating Law (2007), Chs. 2, 4 and 7.

[126] See ILC, VCLT Commentary (1967), at 225, para. 6.

[127] B. Russell, My Philosophical Development (1st ed., New York: Simon; Schuster, 1959), at 148.

[128] See K. Vogel and R. Prokisch, *Interpretation of Double Taxation Conventions*, CDFI LXXVIII a (Rotterdam: online; International Fiscal Association, 1993), 55–85, https://www.ifa.nl/cahiers (last visited 1 October 2018), at 66–67; K. Vogel, *Double Tax Treaties and Their Interpretation*, 4 International Tax & Business Lawyer 1 (Berkeley, California: University of California, Berkeley, 1986), 4–85, at 15; Engelen, Interpretation of Tax Treaties Under International Law (2004), at 48–57; T. Bender and F. Engelen, *The Final Clause of the 1987 Netherlands Model Tax Convention and the Interpretation of Plurilingual Treaties*, in F. A. E. H. P. A. M. van Arendonk and S. Jansen (eds.), Essays in Honour of Maarten J. Ellis (Amsterdam: IBFD, 2005), at 3; Sinclair in J. F. Avery Jones et al., *Interpretation of Tax Treaties*, Bulletin for International Taxation 2 (Amsterdam: International Bureau of Fiscal Documentation, February 1986), 75–86, at 75–76.

[129] In some of its decisions, the BFH entertains a strict view concerning the non-retroactivity of the VCLT, see BFH, I R

Most states and their courts subscribe to the view that the VCLT rules of interpretation stipulate what is valid customary international law,[130] for example, Australia and the UK.[131] To a certain extent, this view is shared by states not being signatories, for example, France and India.[132] The situation in the US seems to be ambivalent, caught up in a historical struggle between internationalist and nationalist paradigms.[133] Many lower federal and state courts regularly appeal to the VCLT rules of interpretation as binding rules of customary international law,[134] but the US Supreme Court hardly ever refers to them.[135] Several of its decisions stretch the VCLT textual approach in favour of making liberal use of extraneous materials,[136] its decision in *O'Connor* is based on unilateral material not part of the official *travaux préparatoires*,[137] and in *Alvarez-Machain* it arguably decided the case in violation of Article 31(3)c.[138]

The ICJ has repeatedly recognised 'The existence of identical rules in international treaty law and customary law'.[139] It is settled case law to apply the VCLT to cases in which one or even both parties

74/86 (1 February 1989), BStBl II 1990; BFH, I R 20/87 (14 March 1989), BStBl II 1989; BFH, I R 111/08 (2 September 2009), BStBl II 2010; see also Rust, *Germany* (2007), s. 11.2.1.2. In others, an explicit reference to the VCLT seems to indicate that the BFH takes the view the VCLT rules of interpretation merely stipulate what is valid customary international law, see BFH, I R 40/97 (16 December 1998), BStBl II 1999, on the 1971 tax treaty with Switzerland; see also *ibid.*, s. 11.2.1. In the same vein, although the VCLT is not explicitly referenced in some decisions on treaties concluded before signing and ratifying the VCLT, one can still recognise the court considering the ordinary wording, context, and object and purpose in its interpretation as if it were applying Article 31, see BFH, I R 274/82 (23 October 1985), BStBl II 1986, on the 1966 tax treaty with Spain.

[130] See Vogel and Prokisch, *Interpretation of Double Taxation Conventions* (1993), at 66–67; R. C. Pugh, O. Schachter and H. Smit, International Law: Cases and Materials (3rd ed., St. Paul, Minn: West Group, 1993), at 416; Avery Jones, *Treaty Interpretation* (2018), s. 3.1.

[131] See Bjorge, *'Contractual' and 'Statutory' Treaty Interpretation in Domestic Courts?* (2016), at 64; *Thiel v Federal Commissioner of Taxation*, [1990] 171 CLR 338, at 356; *Czech Republic v European Media Ventures SA*, [2007] EWHC 2851 (Comm), at 15.

[132] See Martin, *Courts and Tax Treaties in Civil Law Countries* (2007), s. 4.3.2.2; V. Kanwar, *Treaty Interpretation in Indian Courts: Adherence, Coherence, and Convergence*, in H. P. Aust and G. Nolte (eds.), The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence (Oxford; New York: Oxford University Press, 2016), 239–264, passim; *Ram Jethmalani v Union of India*, Supreme Court of India (July 2011), para. 60, states that 'While India is not a party to the Vienna Convention, it contains many principles of customary international law, and the principle of interpretation, of Article 31 of the Vienna Convention, provides a broad guideline as to what could be an appropriate manner of interpreting a treaty in the Indian context also.'

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

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

[135] See Criddle, *The Vienna Convention on the Law of Treaties in U.s Treaty Interpretation* (2004), at 433–434.

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

[137] See *O'Connor v United States*, 479 U.S. 27 (1986), at 31; Criddle, *The Vienna Convention on the Law of Treaties in U.s Treaty Interpretation* (2004), at 453.

[138] See *United States v Alvarez-Machain*, 504 U.S. 655 (1992), at 668–669, para. 15; Criddle, *The Vienna Convention on the Law of Treaties in U.s Treaty Interpretation* (2004), at 433; M. Waibel, *Principles of Treaty Interpretation: Developed for and Applied by National Courts?*, in H. P. Aust and G. Nolte (eds.), The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence (Oxford; New York: Oxford University Press, 2016), 9–33, at 21.

[139] ICJ, *Nicaragua v United States of America – Military and Paramilitary Activities in and Against Nicaragua* (June 1986),

have not implemented it, on grounds that the VCLT articles reflect customary international law.[140] The same rationale has been applied, for example, by the High Court of Australia concerning the tax treaty between Australia and Switzerland:

> Those rules [of interpretation recognised by international lawyers] have now been codified by the Vienna Convention on the Law of Treaties to which Australia, but not Switzerland, is a party. Nevertheless, because the interpretation provisions of the Vienna Convention reflect the customary rules for the interpretation of treaties, it is proper to have regard to the terms of the Convention in interpreting the Agreement, even though Switzerland is not a party to that Convention.[141]

With extensive reference to case law of the ICJ, the ITLOS, the WTO Appellate Body, the ECHR, the Inter-American Court of Human Rights, the ECJ, and the ICSID, the ILC has confirmed that Articles 31–32 'apply as customary international law'.[142] Although it found 'significant indications in the case law that article 33, in its entirety, indeed reflects customary international law', the ILC did not pass a final verdict but left the issue open to be addressed in the future because some courts to date have dealt only with parts of Article 33 in terms of reflecting customary international law, whereas others have explicitly stated that it reflects customary international law as a whole.[143] For example, despite the stipulated non-retroactivity, the ECHR has applied the VCLT principles of interpretation even before the convention's entry into force, based on the recognition that 'its Articles 31 to 33 enunciate in essence generally accepted principles of international law, to which the Court has already referred on occasion.'[144]

Part II. Empirical Analysis

3. Applicability to Tax Treaties

As George Bernard Dantzig writes, 'The final test of a theory is its capacity to solve the problems which originated it'.[145] Now that we have a clear view to what extent sole reliance on prevailing texts is available in principle, we need to establish to what extent it may be applied to actual tax treaties, that is, to what extent formulations of treaty final clauses in the global tax treaty network

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Annual Reports of the International Court of Justice, at 95, para. 177; see also ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (1969), Annual Reports of the International Court of Justice, at 38–39, para. 63; ICJ, *Avena and Other Mexican Nationals (Mexico v USA)* (2004), Annual Reports of the International Court of Justice, at 48, para. 83.

[140] See ICJ, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (1994), Annual Reports of the International Court of Justice, at 19–22, para. 41; ICJ, *Arbitral Award of 31 July 1989 (Guinea Bissau v Senegal)* (1991), Annual Reports of the International Court of Justice, at 69–70, para. 48; ICJ, *LaGrand (Germany v United States of America)* (June 2001), at 501–502, paras. 99, 101; ICJ, *Kasikili/Sedudu Island (Botswana/Namibia)* (December 1999), Annual Reports of the International Court of Justice, at 1059, para. 18, 1075, para. 48; ICJ, *Sovereignty over Pulau Litigan and Pulau Sipidan (Indonesia v Malaysia)* (December 2002), Annual Reports of the International Court of Justice, at 645, para. 37.

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

[142] ILC, *Report of the International Law Commission on the Sixty-Fifth Session, 6 May – 7 June and 8 July – 9 August 2013*, in Doc. A/68/10 (United Nations, 2013), at 13, Conclusion 1(5), and 14–15, para. 4.

[143] See *ibid.*, at 15–16, paras. 5–6.

[144] ECHR, *Golder v United Kingdom* (1975), Application No. 4451/70, at 10, para. 29.

[145] G. Dantzig, Linear Programming and Extensions (Princeton University Press, 1998), vii.

permit sole reliance on existing prevailing texts. As Article 33(1) does not constitute a peremptory norm in this regard,[146] such investigation into the intentions of the contracting states as expressed in their treaties is necessary.

3.1. Final Clause Types of Wording

The final clauses used in the global tax treaty network can be classified into nine different types of wording: TOW1 represents the case of plurilingual treaties without prevailing text. TOW2 designates one text as prevailing. Its most basic form lists the number of copies and authentic languages, and mimics the wording of Article 33(1) concerning its condition to designate one text as prevailing.[147] TOW3 differs from TOW2 only with respect to its explicit reference to interpretation. The most basic form lists again the number of copies and authentic texts, designating one as prevailing in case of divergence of (or in) interpretation.[148] TOW4 is a variation of both TOW2 and TOW3 in the sense that all texts are declared as equally authentic while in case of divergence (of interpretation) between the first two (or three) texts the third (or forth) shall prevail.[149] TOW5 represents the case of unilingual treaties. TOW6 differs from TOW2, TOW3, and TOW4 in the sense that it does not refer to cases of divergence but to cases of doubt.[150] TOW7 is a special case of plurilingual treaties not designating one text as prevailing but instead prescribing application of the treaty MAP as an alternative solution to cases of divergence. TOW8 is another special case of treaties designating one text as prevailing, with the defining criterion being a dispute in the interpretation and/or application of the treaty.[151] Finally, TOW9 is a substantive variation of TOW4 in which only the texts in the official languages of the contracting states are declared authentic, whereas the text designated as prevailing in case of divergence is not.[152]

Since TOW1 represents plurilingual treaties without prevailing text and TOW5 represents unilin-

[146] See ILC, VCLT Commentary (1967), at 224, para. 4; Engelen, Interpretation of Tax Treaties Under International Law (2004), at 376–379.

[147] See, e.g., Armenia-United Arab Emirates (2002): 'Done in Abu Dhabi on April 20, 2002, in two originals, in the Armenian, Arabic and English languages, all texts being equally authentic. In case of divergence the English text shall prevail'. Almost all treaties with TOW2 final clauses add 'any' or 'between texts' or both to the wording. These wordings explicitly heal the slight imprecision in the formulation of Article 33 (with exception of the Russian text) on which TOW2 is based and which induces the proponents of the restrictive approach to mistakenly equate 'divergence' with the more narrow concept of material divergence. The first makes clear that *any* divergence is sufficient to trigger the condition, including mere differences in expression. The latter two explicitly add the subject 'texts' of the predicate 'divergence'. This makes clear that 'divergence' means divergence between texts, which can be any kind of divergence, that is, a difference in expression as well as a difference in meaning.

[148] See, e.g., Finland-Switzerland (1991): 'Done in duplicate at Helsinki this 16th day of December 1991, in the Finnish, German and English languages, all three texts being equally authentic. In the case of divergence of interpretation the English text shall prevail'. The majority again adds 'any' or 'between texts' to the wording to read 'In case of any divergence of interpretation' or 'In case of divergence in interpretation between texts'.

[149] See, e.g., Estonia-Germany (1996): 'Done at Tallinn this 29th day of November 1996 in two originals, each in the Estonian, German and English languages, all three texts being authentic. In the case of divergent interpretation of the Estonian and the German texts the English text shall prevail'.

[150] See, e.g., Thailand-Vietnam (1992): 'Done in duplicate at Hanoi on this 23rd day of December, one thousand nine hundred and ninety-two Year of the Christian Era, each in the Thai, Vietnamese and English languages, all texts being equally authoritative, except in the case of doubt when the English text shall prevail'.

[151] See, e.g., Iran-Malaysia (1992): 'Done in duplicate at Tehran this 11th day of November 1992, each in Bahasa Malaysia, Persian and the English languages, the three texts being equally authentic. In the event of there being a dispute in the interpretation and the application of this Agreement, the English text shall prevail'.

[152] There exists a significant variation specifying that an existing third English text 'shall be taken into consideration as a reference', see Hungary-Uruguay (1988) and Poland-Uruguay (1991).

gual treaties, they are not relevant here. TOW2 does not need to be discussed in detail because it corresponds to the wording of Article 33(1), that is, the previous discussion applies. In short, the conclusion is that the permissive approach is applicable and we may resort to sole reliance on the prevailing text for all treaties featuring a TOW2 final clause, subject to the outlined limitations. TOW7 is a special case: instead of implementing a prevailing text, the contracting states agree to use the treaty MAP in cases of divergence. In summary, the types of wording to be considered are TOW3, TOW4, TOW6, TOW8, and TOW9.

Equal authenticity of all texts implies that the judge may choose any of them as initial reference, including the one designated as prevailing. Hence, concerning sole reliance on the prevailing text, the crucial two questions to ask are not whether the judge is allowed to automatically go to the prevailing text and rely on it exclusively, but whether the wording of the particular treaty final clause contains anything that prevents him from taking the prevailing text as initial reference and, if not, whether the meaning he arrives at by interpreting the prevailing text alone is such that he can spare himself from comparing it to the others.

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

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

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

TOW4 is the most equivocal and difficult to interpret of the nine types. Using the final clause in the treaty Netherlands-Russia (1996) as example, Bender and Engelen provide a comprehensive discussion of TOW4.[153] In essence, their conclusion boils down to TOW4 implementing the restrictive approach. Since the final clause in question states that the English text only prevails in case the Netherlands and Russian texts diverge, they argue that the logical argument does not apply, as a result of which the English text may only be resorted to as decisive after it has been established that the other two diverge from each other. Sanghavi arrives at the same conclusion in his discussion of the *New Skies* case.[154] Bender and Engelen's argument reads as follows:

[153] Bender and Engelen, *The Final Clause of the 1987 Netherlands Model Tax Convention and the Interpretation of Plurilingual Treaties* (2005), at 13 et seq.

[154] See D. Sanghavi, *Found in Translation: The Correct Interpretation of 'Secret Formula or Process' in India's Tax Treaties*, British Tax Review 4 (London: Sweet & Maxwell, November 2016), 411–415, at 414; *Director of Income Tax v New Skies Satellite BV*, ITA 473/2012 (February 2016).

> However, this reasoning [the logical argument] cannot be applied here without hesitation, since the final clause of the Netherlands-Russian tax treaty does not invest the English text with a decisive authority in each and every case of divergence between the texts, but only in case there is a divergence of interpretation between the Netherlands and Russian texts. In other words, there is no legal presumption in favour of the English text in case there is a divergence of interpretation between this text on the one hand, and the Netherlands and Russian texts on the other. Therefore, it would not be correct to presume that the English text is decisive from the very outset. Disregarding the Netherlands and Russian texts in this way would clearly not be in accordance with the intention of the parties in designating the all [*sic*] three texts as equally authentic, and thus authoritative for purposes of interpretation. In fact, the presumption that each text has the same meaning implies that the burden of proof lies on the party invoking the rule that the English text prevails. In other words, in the absence of any evidence to the contrary, the Netherlands, Russian and English texts are presumed to concord; therefore, in order to activate the supremacy of the English text, it must first be shown that the Netherlands and Russian texts are divergent.[155]

This reasoning is not compelling in terms of the clause analysed, that is, TOW4.[156] Being part of the treaty, the final clause must be interpreted in accordance with its ordinary wording, context, and object and purpose,[157] and the context consists first and foremost in the entire text.[158] Therefore, the second sentence of the final clause designating the English text as prevailing in case the Netherlands and Russian texts diverge must be interpreted in the context of its first sentence declaring all three as equally authentic. As Bender and Engelen themselves stress, this implies that all three texts are first and foremost equally authoritative and usable for purposes of interpretation without restriction.[159]

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

The English text is clearly identified as always prevailing in terms of a divergence between the others, that is, the English text must be presumed to better represent the parties' intentions than the other two. If we assume that the general intention of the final clause is to ease interpretation rather than to complicate it, while it cannot be its intention to ever confer lesser weight on the English text than the others because of its first sentence, it seems not sensible to suggest that the English text prevails in some cases but is subordinated in others, that is, that the outcome of any comparative interpretation under Articles 31 or 33(4) could ever turn out to establish anything else than what the English text says.

Looked at from the other way around, there is nothing in TOW4 that prevents the court from initially looking at the English text, since it is declared as equally authentic. It seems not sensible to suggest that the contracting parties, whose common intention must be assumed to be making inter-

[155] Bender and Engelen, *The Final Clause of the 1987 Netherlands Model Tax Convention and the Interpretation of Plurilingual Treaties* (2005), at 15.

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

[157] UN, Vienna Convention on the Law of Treaties (1969), Article 31(1).

[158] *Ibid.*, Article 31(2).

[159] See Bender and Engelen, *The Final Clause of the 1987 Netherlands Model Tax Convention and the Interpretation of Plurilingual Treaties* (2005), at 14.

pretation easier not more complicated, would agree that the English text prevails for all scenarios except for one, which would make it impossible for any court to rely on the prevailing text without first excluding that said scenario in every case to be decided.

From a purely practical perspective, it does not seem to be in line with the object and purpose of designating a third text in a well-known third language as prevailing if that text cannot be relied on before the text in the unfamiliar language of the other country is consulted.[160] Coined to our example of Netherlands-Russia (1996), such would imply that the judge on either side would be obliged to compare either the Dutch or Russian text to the one in his own language before being able to rely on the English text; however, it must be assumed that the idea behind introducing a prevailing third text in English in the first place has been to avoid having to deal with the (from each other's perspective) arcane language of the treaty partner in all day to day applications of the treaty.

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

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

The same conclusion applies to TOW8. Once a case has reached court, it is fairly safe to assume that there is a dispute about the interpretation and application of the treaty.[161] Again, however, this is irrelevant. There is nothing in TOW8 preventing the court from directly referring to the prevailing text, and all interpretations of the other texts must converge to its meaning. Therefore, also all treaties with TOW8 final clauses lend themselves to sole reliance on the prevailing text.

Finally, TOW9 is a peculiar scenario in that only the texts in the official languages of the treaty partners are declared authentic, whereas the text prevailing in case of them diverging from each other is not. In consequence, the court may not go to the prevailing text from the outset, since it is not equally authentic and therefore of lesser authority than the others. Only once the other texts are found to diverge may the prevailing text be invoked.[162]

[160] See Arginelli, The Interpretation of Multilingual Tax Treaties (2013), at 132–133, 386n, albeit wrongly applied to an example of TOW9.

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

[162] The way this can be done differs for the two variations of TOW9. The original wording is equivalent to TOW4, however, without the prevailing text being declared as equally authentic. To this wording the whole argumentation of Bender and Engelen concerning TOW4 quoted above applies. For the variation of TOW9 implemented in Hungary-Uruguay (1988) and Poland-Uruguay (1991), the process of interpretation is different conceptually. In the original variation the prevailing text 'prevails' over the others once they are found to diverge. Consequently, the

This line of reasoning depends on whether the prevailing text has been subject to signature, ratification, or any authentication procedure stipulated by the treaty same as the other texts at the time of conclusion, because authentic status is bestowed on any text by the conditions specified in Article 10 VCLT. As interpreted, TOW9 suggests that the prevailing text is not an authenticated text but merely an official version prepared at the time of conclusion of the treaty, or the negotiated and initially drafted version kept as a reference without being authenticated. Otherwise, failure of TOW9 to explicitly label the prevailing text as authentic may be considered a drafting error, that is, TOW9 is merely a wrongly formulated TOW4 and the interpretation submitted above in respect of TOW4 applies. That there is only one treaty in force with this wording of TOW9[163] and only two others with a variation of it[164] suggests the latter. Whatever is the case is not investigated here, but TOW9 is simply upheld as a genuine wording and available policy choice for countries, while the factual conditions necessary for it are assumed as given. In summary, courts may not resort to sole reliance on the prevailing text for treaties with a TOW9 final clause, subject to the condition that TOW9 is not a drafting error.

3.2. The Linguistic Anatomy of the Global Tax Treaty Network

When we look at the entire sample of 3,358 tax treaties in force or yet to come into force, we find that roughly one-quarter is unilingual while three-quarters are plurilingual. Almost 65% of the plurilingual ones have a prevailing text. Hence, only roughly 26% of all treaties are plurilingual without prevailing text, while almost 74% are either unilingual or have a prevailing text.[165] In total, almost three-quarters of all treaties in force or yet to come into force are either unilingual or have a prevailing text,[166] that is, the problem of additional interpretational complexity attributable to plurilingual form is confined to roughly one-quarter of today's global tax treaty network.

Regarding the number of authentic languages employed by the 2,511 plurilingual treaties, we find the following: roughly 36% have two texts, about 18% of which designate one as prevailing; roughly 60% have three texts, about 90% of which designate one as prevailing; only about 4% have four texts, about 95% of which designate one as a prevailing; and less than 1% have five texts, all of which designate one as prevailing. Thus, the standard scenario for plurilingual tax treaties is either two or three texts. Instances with more than three texts are few, and no tax treaty has more than five

other texts would have to be reinterpreted to converge to the meaning of the one declared as prevailing, that is, the exercise is very much one of interpreting the prevailing text and then attributing the outcome to the others. In the latter variation, however, the third text 'shall be taken into consideration as a reference'. Consequently, the third text has more or less only the status of an additional text, not that of one truly prevailing, that is, the exercise is one of augmenting the context used to interpret the other texts in light of the meaning of the third.

[163] Germany-Japan (1966). Japan-Netherlands (1970) also employed a TOW9 final clause of the original variation but has been terminated and replaced by Japan-Netherlands (2010), which is unilingual in English. This may be an indication that in this case, the previous TOW9 was meant to be TOW4.

[164] Hungary-Uruguay (1988) and Poland-Uruguay (1991).

[165] Three Tunisian treaties in force provide for two (English and French) prevailing texts instead of one: Pakistan (1996), Malta (2000), and Iran (2001). The first two have three authentic texts (English, French, Arabic) while the latter has four (English, French, Arabic, Persian). These treaties will be commented on in more detail below; for the purpose of the figures presented in this section they are not separately accounted for but lumped together with treaties featuring one prevailing text. Seven treaties provide for a MAP in case of divergence; they are not accounted for as either with or without prevailing text but will be dealt with separately later.

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

texts.

Whereas the vast majority of bilingual treaties has no prevailing text, the relation is almost exactly reverse for trilingual treaties, most of which feature a prevailing text. Moreover, almost all treaties with more than three texts feature a prevailing text. From this we may conclude that the main function of additional language texts is to provide for a prevailing text and the problem of additional interpretational complexity is mostly confined to bilingual treaties.

A time-series analysis is required to evaluate the global development.[167] From the 1960s throughout the 1990s, the number of tax treaties has more than doubled per decade. The absolute number of treaties concluded per decade remained high in the 2000s, but the high growth rates of the previous decades slowed down: the number of treaties per decade no longer doubled but only equalled the number of the 1990s.

As revealed by the data, the major expansion of the global tax treaty network has been taking off as late as the 1990s: roughly 80% of all tax treaties in force today have been concluded since 1990. The 1970s and especially 1980s may be viewed as a first wave of expansion in which most of the initial 20% of today's global tax treaty network has been concluded; therefore, almost all treaties concluded by OECD members, amounting to roughly two-thirds of the entire global tax treaty network, are within the ambit of some version of the OECD Model.[168]

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

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

Not every treaty is of equal importance. In order to arrive at a balanced view, we have to examine the policy of individual countries, regions, and political groupings. Treaties without prevailing

[167] Decades have been chosen as suitable time interval.

[168] In total 590 treaties between OECD members and 1,689 treaties between OECD members and non-members, amounting to 17.57% and 50.30% of the global tax treaty network, respectively.

text are not evenly spread out, but roughly two-thirds (581) of them are concentrated in the treaty networks of nine countries: France, Canada, the UK, Luxembourg, Germany, the US, Switzerland, Ireland, and South Africa. Almost 85% (748) of them are concentrated in the treaty networks of fourteen countries, that is, the previous nine plus Spain, Italy, Malta, Belgium, and Australia.

Not all of these countries have the same policy. Canada, France, the US, Australia, the UK, Luxembourg, South Africa, and Ireland all seem to have a dominant policy of not concluding treaties with prevailing text irrespective of their treaty partner.[169] The motivations behind the numbers may still differ for each country. At the same time, the overall outcome comprised of bilateral relationships will be influenced by the policies of their respective treaty partners. The assumed preference of the listed countries not to conclude treaties with prevailing text may be only one side of the coin: their treaty partners may share the sentiment or want to avoid granting linguistic advantages.

For countries like Canada and Luxembourg, on the other hand, the availability of multiple official legal languages domestically may strongly influence their policies concerning treaties. This is particularly obvious in the case of Canada, which completely rejects the option of concluding unilingual treaties even when sharing an official language with the treaty partner, whereas Luxembourg has concluded a proportion of 20%. Canada's policy is attributable to domestic law: its constitution provides that English and French have equal status; all federal laws must be adopted in both languages, and each language version is to be equally authoritative, while its Official Languages Act stipulates that all international treaties should be authenticated in both official languages.[170]

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

Although each features a sizeable absolute number of treaties without prevailing text, Germany, Belgium, Spain, Switzerland, and Italy seem not to have a predominant policy either way but to conclude treaties with or without prevailing text on a roughly equal basis depending on the treaty partner. Germany appears to be tilted in disfavour of prevailing texts; however, it recently published its own Model Convention with a final clause providing for one,[171] that is, Germany's own policy is shifting in favour of prevailing texts if it ever was different to begin with.

For the other four, the numbers are reverse. Italy is most clearly in favour of implementing prevail-

[169] Given that the native tongues of most countries in this list are either English or French, the political potential for agreeing on prevailing texts may exhaust itself to some extent in the conclusion of unilingual treaties. France, the US, the UK, and Australia all have sizeable proportions of unilingual treaties: the UK and US of roughly 30%, France of roughly 25%, and Australia of well over 40%. Noteworthy, the UK has eight fairly recent treaties with English prevailing text, i.e., Uzbekistan (1993), India (1993), Latvia (1996), Malaysia (1996), Taiwan (2002), Bahrain (2010), Tajikistan (2014), and the United Arab Emirates (2016). Not all of them are with countries having English as official language, and three of them are fairly recent. The prevailing texts may be attributable to policies of the respective treaty partners or indicate a recent policy change on the side of the UK to implement English prevailing texts when politically feasible. Whether the latter proves to be true remains to be seen.

[170] Constitution Act, 1982, 16 and 18(1), Official Languages Act, 1985, 10(1); see J. Sasseville, *The Canadian Experience*, in G. Maisto (ed.), Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law (Amsterdam: IBFD, 2005), 35–62, at 36.

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

ing texts. Like Germany, it has a relatively low propensity of about 5–6% to conclude unilingual treaties. Switzerland has with almost 12% the highest propensity among the three, which may be attributable to the availability of several domestic official languages: twelve of Switzerland's fourteen unilingual treaties are with German, French, or Italian speaking countries in German, French, or Italian, while only two are in English with Norway (1987) and Taiwan (2007). With over 16%, Spain has a higher propensity to conclude unilingual treaties as a consequence of the shared native tongue with all of Latin America except Brazil: fourteen of the sixteen unilingual treaties in its tax treaty network are unilingual in Spanish with Latin American countries; the remaining two are with Morocco (1978) and Tunisia (1982) in French.

The high proportion of almost 40% unilingual treaties in Belgium's tax treaty network is not attributable to its ability to draw on several domestic official languages, as thirty-seven of its thirty-eight unilingual treaties are in English with countries not sharing a common language, while only the treaty with France (1964) is in French. Together with the lower proportion of treaties without prevailing text versus those with, this indicates that Belgium has a preference against plurilingual treaties without prevailing text. It issued its own Model Convention in 2007, which features a final clause codifying a unilingual treaty.[172] This shows that Belgium itself favours unilingual form; prevailing texts appear to be its second choice when feasible, while it accommodates the policies of its treaty partners not to implement one.

Almost all of these fourteen countries are big players in the global economy and international tax system: their treaties cover large cross-border flows of capital, goods, and services, and their policies reverberate throughout the global tax treaty network. When we look at all treaties concluded between OECD members, we see that the ratio of unilingual to plurilingual ones roughly conforms to the global average, whereas the ratio of treaties with prevailing text to those without is roughly 44:56. For treaties between members and non-members, this ratio is more than reversed to roughly 62:38 in favour of prevailing texts. Treaties between non-members show a ratio of roughly 80:20 in favour of prevailing texts.

As regards the tax treaty network of the CW,[173] the proportion of unilingual treaties is with over 60% between members high in comparison, while the ratio of treaties with prevailing text versus those without is 50:50. This means that the problem of plurilingual form does not arise much within the CW because of the potential for unilingual treaties (most countries in the CW are either native English-speaking or have English as official language), while half of the plurilingual ones provide for a prevailing text. For treaties between CW and third countries, the proportion of treaties without prevailing text rises to almost 60%, while the proportion of unilingual treaties decreases to less than a quarter. This points again to a strong policy preference of the leading CW countries against prevailing texts, in addition to a possible reluctance of states to grant linguistic advantages.[174]

As regards all treaties between countries of the European Union including EFTA members but excluding France, Ireland, Malta, and the UK,[175] the proportions of unilingual and plurilingual treat-

[172] T. K. of Belgium, Belgian Draft Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital (2007), henceforth referred to as Belgian Model.

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

[174] India, an important player in the global economy and international tax system, has a diametrically opposed policy to the other CW countries: out of its one hundred tax treaties, only four are unilingual and 93% of the plurilingual ones feature a prevailing text.

[175] Henceforth abbreviated as EU.

ies roughly correspond to the global averages. For treaties between members and non-members, the propensity to conclude unilingual treaties is below the global average, whereas the propensity to conclude plurilingual ones is above. The proportions of treaties without prevailing text versus those with are close to the global averages for both groups, however, the preference for the latter is stronger between EU countries. Thus, in contrast to the excluded ones, the overall policy for the rest of the EU countries is clearly in favour of prevailing texts.

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

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

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

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

The remaining Asian countries that were neither considered as part of CW, CIS, EU, AF, or AW (AS)[176] display an overwhelming policy preference for treaties with prevailing text. Between AS countries almost 30% of all treaties are unilingual and 90% of all plurilingual ones feature a prevailing text. For treaties with third countries, these percentages drop to roughly 20% and 80%, respectively.

Concerning the nine different final clause types of wording, an examination of the entire sample shows that there are three main wordings in use: TOW5, TOW1, and TOW3. The first two are each implemented by roughly a quarter of the global tax treaty network while the third is implemented by almost 29%. The remaining 20% are unevenly distributed between the six other types of wording. TOW2 and TOW4 cover a seizable number of treaties each, so they are relevant from a practical perspective. TOW2 is the more important, implemented in about 10% of all treaties while TOW4 is implemented only by roughly 6%.[177] TOW6 and TOW8, which cover seventy-five and twenty-

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

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

nine treaties, respectively, still have some practical relevance,[178] while TOW7 (seven treaties[179]) and TOW9 (three treaties) together are implemented only by less than half a percent of the global tax treaty network.

For the first five types of wording, the development over time from the 1960s to the 2000s shows that TOW1 and TOW5 have steadily increased in absolute terms until the end of the 1990s; however, whereas TOW5 treaties continued to increase per decade throughout the 2000s (albeit with a slowed down growth rate), TOW1 treaties peaked in the 1990s and declined in the 2000s. TOW3 had outgrown all other types of wording by the end of the 1980s and surged in popularity by the 1990s, steeply outgrowing all others. The growth rate has decreased over the 2000s but remains steeper than for all other types of wording. TOW2 shows steady growth as well but lags behind TOW3 in popularity. It made a major leap in the 1990s along the general wave of expansion of the global tax treaty network, but its growth rate has not been as steep as that for TOW3 and decreased over the 2000s. TOW4 has made a small jump in the 1990s but started to stagnate in terms of treaties per decade throughout the 2000s.

The percentage numbers of all treaties per decade show the steady proportional decline of TOW1 and TOW5 since the 1970s. Whereas TOW5 has flattened out at a percentage share of roughly 20% during the 2000s, TOW1 has continued its decline. TOW2 and especially TOW3 have increased largely in percentage share of treaties per decade from the 1980s onward (TOW3 to a roughly 35% share and TOW2 to a roughly 13% share), together accounting for almost half of all treaties concluded in the 2000s. TOW4 peaked in the 1990s and has decreased since.

3.3. English as Lingua Franca of Tax Treaties

When we look at the language distribution for all unilingual treaties, which make up roughly one quarter of the global tax treaty network, we see that slightly more than three-quarters of them are in English. Other languages most used for unilingual treaties are Arabic and French, with respective shares of 8.97% and 7.56%. After Spanish with 3.90% and German with 1.42%, the total share of the remaining seven languages used for unilingual treaties combined is 1.53%.[180]

An investigation into all unilingual treaties for each individual language reveals that, apart from the English ones, they simply more or less exhaust the potential of treaties between countries sharing their native tongue or an official language, that is, none of them is used as a true diplomatic language. The seventy-three Arabic treaties are all between members of the Arab World, the twenty-nine Spanish treaties are all between Spanish-speaking Latin American countries plus Spain, and the twelve German treaties are all between Germany, Austria, Switzerland, Liechtenstein, and Luxembourg.

As for the sixty-four French treaties, the situation is slightly more differentiated but more or less leads to the same conclusion. Roughly two-thirds of them are between countries where French is either the native or a official language, used as a lingua franca (most of them being member states of

Model Conventions, see D. R. van het Koninkrijk der Nederlanden, Nederlands Standaardverdrag (1987); BMF, German Model (2013).

[178] TOW8 is used mostly by Malaysia, which is the only country with a significant number of treaties with TOW8 final clauses, amounting to 35.38% of all its treaties with prevailing text. The only other country having more than one treaty featuring a TOW8 final clause is Myanmar.

[179] France-United Arab Emirates (1989), Spain-Albania (2010), Spain-Cyprus (2013), Spain-Germany (2011), Spain-Oman (2014), Spain-Pakistan (2010), Spain-Qatar (2015).

[180] Chinese, Dutch, Greek, Italian, Korean, Portuguese, Romanian.

the *Organisation internationale de la Francophonie*).[181] The remaining treaties are all between such countries and third countries, with the only exception of Greece-Italy (1964),[182] that is, only in the case of one treaty is French used as true diplomatic language.

For unilingual treaties in English, the situation differs. Matching them to the countries having English as official language shows that English unilingual treaties between them make up only one quarter of all English unilingual treaties, while almost 40% are between countries having English as official language and countries that do not, and still almost 35% are between countries not having English as official language. This means there is a significant number of countries not having English as official language that use English as true diplomatic language between themselves, as well as a number of such countries accepting it as diplomatic language with English speaking treaty partners, that is, when conceding a hypothetical linguistic advantage.

The vast majority (83.92%) of treaties in the global tax treaty network have English as language of at least one of their texts, whereas French plays only a marginal role with 7.68%. Also the proportion of treaties with neither English nor French as authentic language is with 8.40% relatively small.

When we look at all plurilingual treaties without prevailing text, which again make up roughly a quarter of the global tax treaty network, we see that over 70% of them have English as authentic language, about 16% have French as authentic language, and about 12% have neither. This is due to the fact that a relatively high proportion of English speaking countries have a policy of not implementing an English prevailing text when concluding plurilingual treaties, while some other countries may be averse to grant perceived linguistic advantages by doing so.[183] In addition, it hints at English receiving a boost when prevailing texts are implemented.

The numbers for plurilingual treaties with prevailing text, which make up roughly half of the global tax treaty network, reveal that the overwhelming majority (almost 95%) of them use English as language for the prevailing text. The remaining percentage points are mostly distributed between forty-seven treaties with a French prevailing text and thirty-six treaties with a Russian prevailing text. Three Tunisian treaties constitute a special case of two prevailing texts (in English and French)

[181] I conveniently use the term 'lingua franca' because it is commonly understood, see J. K. Gamble and C. Ku, *Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice*, 3 Indiana International and Comparative Law Review 2 (Indianapolis, Indiana: Indiana University Robert H. McKinney School of Law, January 1993), 233–264, at 236, 10n. While the Oxford Dictionary defines it as 'A language that is adopted as a common language between speakers whose native languages are different', I shall use it in a slightly wider sense, not only for cases in which two countries adopted a third language for a unilingual treaty or prevailing text, but encompassing also cases in which two countries concluded treaties with a prevailing text in the official language of one of them. 'Diplomatic language' will be used to refer only to the latter scenario while 'true diplomatic language' is reserved for cases of two countries having concluded a unilingual treaty in a third language.

[182] It may be worth mentioning in this context that Greece joined the *Organisation internationale de la Francophonie* in 2004, while Italy seems to have retained a policy of using French as diplomatic language to a certain degree (see below).

[183] See Resch, The Interpretation of Plurilingual Tax Treaties (2018), Chs. 8–9, ss. 8.2.3–8.2.4, 9.4–9.5; Arginelli, The Interpretation of Multilingual Tax Treaties (2013), at 133; Gaja, *The Perspective of International Law* (2005), at 92. There are documented cases of this sentiment in practice: when acceding to the Treaty of Rome, Denmark would only concede to restricting the number of languages to English and French if in turn the English-speaking members would exclusively use French and vice-versa, see L. Oakes, *Multilingualism in Europe: An Effective French Identity Strategy?*, 23 Journal of Multilingual and Multicultural Development 5 (London: Routledge, 2002), 371–187, 375. The numbers concerning English as official language confirm a certain potential for this problem to show resilience, as roughly 87% of all bilingual treaties without prevailing text having English as authentic language are between a country having English as official language and one that does not (the rest is largely attributable to Canada not implementing prevailing texts even if English is available as shared native tongue).

each.[184] The residual two treaties are one treaty with a Croatian prevailing text and one with a Portuguese prevailing text.[185] The thirty-six treaties with a Russian prevailing text are all treaties between CIS[186] members or between CIS members and Germany or Poland. As far as the forty-seven treaties with a French prevailing text are concerned, ten are between countries in which French is either the native or official language or used as lingua franca, while twenty-six are between such countries and third countries. The remaining eleven are all between third countries using French as lingua franca.[187]

In summary, almost two-thirds of all treaties in the global tax treaty network are either unilingual in English or have an English prevailing text and final clause allowing for sole reliance on it. The equivalent share of French in second place is already very low (roughly 3%),[188] and its use as (true) diplomatic language is even more marginal. All other languages are used as unilingual treaty or prevailing text language only to a very limited extent (combined roughly 5% of the global tax treaty network), confined to certain linguistic, geographical, or political regions, merely exhausting the potential for unilingual treaties attributable to a shared native or official language.[189] All in all, the era of 'linguistic nationalism', which had emerged after the second world war and in which it had become custom to conclude international instruments in the languages of the contracting states instead of universally accepted languages such as Latin and French for the preceding eras,[190] has been largely transcended and given way to a new paradigm of English as lingua franca for tax treaties. Particularly since the 1990s, concluding tax treaties without an English prevailing text has become a political anachronism from a global perspective.

Conclusions

Despite its rather obvious flaws, the routine interpretation approach has found widespread acceptance. One is reminded of Schopenhauer: 'There is no opinion, however absurd, which men will not readily embrace as soon as they can be brought to the conviction that it is generally adopted'.[191] It has been suggested that the routine interpretation approach ultimately derives from considerations of practical convenience and political expediency.[192] Indeed, it takes little imagination to see why

[184] Pakistan (1996) and Malta (2000) with three authentic languages each (English, French, Arabic), and Iran (2001) with four authentic languages (English, French, Arabic, Persian).

[185] Bosnia and Herzegovina-Croatia (2004) and Portugal-Timor Leste (2011). Notably, the Portugal-Timor Leste treaty has both an English and a Portuguese text but declares the Portuguese text as prevailing, while the Bosnia and Herzegovina-Croatia treaty has no English text but three texts in Serbian, Bosnian, and Croatian.

[186] Commonwealth of Independent States plus former members and associate states.

[187] Germany-Iran (1968), Hungary-Italy (1977), Italy-Spain (1977), Argentina-Italy (1979), Italy-Portugal (1980), Italy-Sweden (1980), Italy-Slovak Republic (1981), Czech Republic-Italy (1981), Bulgaria-Italy (1988), Italy-Netherlands (1990), Italy-Venezuela (1990). Notably, ten of them are Italian treaties, and they all have been concluded prior the beginning of the major expansion of the global tax treaty network in the 1990s. Thus, it seems that, at least to a certain degree, Italy has retained a policy of using French as lingua franca up to the 1990s.

[188] In respect of unilingual treaties, French is merely in third place behind Arabic (see above).

[189] See Resch, The Interpretation of Plurilingual Tax Treaties (2018), Ch. 9, s. 9.2.

[190] See Hardy, *The Interpretation of Plurilingual Treaties by International Courts and Tribunals* (1961), at 72; de Vries, *Choice of Language* (1963), at 26.

[191] A. Schopenhauer, The Art of Controversy (FV éditions, 2014), XXX.

[192] See Kuner, *The Interpretation of Multilingual Treaties* (1991), at 962; Hilf, Die Auslegung mehrsprachiger Verträge (1973), at 75; Tabory, Multilingualism in International Law and Institutions (1980), at 199; P. Germer, *Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties*, 11 Harvard International Law Journal (Cambridge, Massachusetts: Harvard Law School, 1970), 400, at 413.

the suggestion for it to suffice to rely only on one's own language text is attractive. Of course, applying tax treaties is a real world problem, and practicality matters; however, let alone that it is not the primary task of jurisprudence to accommodate political expediency, the routine interpretation approach fares poorly in respect of constituting a truly pragmatic solution: the problem of additional interpretational complexity introduced by plurilingual form is not resolved by it because, by its own standard, a single text may be relied on only until problems in form of an ambiguity or divergence arise. Consequently, even if it were correct, it would provide no solution in principle but only to a limited extent because divergences are bound to be a significant material reality, attributable to the 'different genius of the languages'.[193]

Now, if scientific considerations of a problem lead to impractical conclusions, the solution cannot be to bend reason just to arrive at a theory that allows for whatever is considered politically expedient, but the aim must be to develop a pragmatic alternative that is scientifically sound. In fact, as regards tax treaties, the routine interpretation approach is not a scientific theory at all, but a 'reflexive' one,[194] essentially working like a self-fulfilling prophecy. Conducting all tests that might refute a theory is an essential element of any scientific approach.[195] The routine interpretation approach suggests that a comparison of texts must be conducted only in case a divergence arises, which does however not happen automatically with tax treaties because their object and purpose allows for conflicting interpretations on the basis of each single text considered in isolation to be equally plausible.[196] In consequence, the problems defined by the routine interpretation approach as conditions legitimately limiting its application, if present, are partly ignored as a consequence of its application. Thus, its claim to validity is a result of it being applied and not of all the conditions granting legitimacy to its application being fulfilled.

The routine interpretation approach has frequently claimed heritage of Special Rapporteur Waldock's arguments. It is true that Waldock may be interpreted to have argued its case; however, he may be understood also to have been primarily concerned with how a comparison is to be conducted, that is, the point in time *when* to best compare the texts, and not with denying the need for a comparison altogether. If he were to be understood otherwise, his overall position would have to be considered inconsistent. As pointed out by him in the ILC's 874th meeting, the defects of the initially drafted text may be the source of the problem rather than the solution, so any notion that the initially drafted text should necessarily prevail must be rejected.[197] This contradicts interpretation of his conceptual argument against adding a comparison among the principal means of interpretation along the lines of the routine interpretation approach, which presupposes an ultimate security of the individual texts when interpreted in isolation. Here Waldock concedes that the contrary is true: there is no ultimate security based on any individual text if the result is not confirmed by

[193] ILC, VCLT Commentary (1967), at 225, para. 6.

[194] See G. Soros, The Alchemy of Finance: Reading the Mind of the Market (Hoboken, New Jersey: John Wiley & Sons, Inc., 1987), at 27–45, by analogy.

[195] See K. R. Popper, The Logic of Scientific Discovery (Routledge, 2002), passim.

[196] See above and Resch, The Interpretation of Plurilingual Tax Treaties (2018), Ch. 3, s. 3.3.3. Tax treaties may not be special in this regard, but the conclusion may be reformulated as a general principle: *If the object and purpose of a treaty covers conflicting interpretations, then clarity of a single text considered in isolation does not satisfy the VCLT principles of interpretation and the set of cases to which the routine interpretation approach may be applied in good faith is an empty set.* The thought experiment on which the proof of this point is essentially based has been conducted only in the context of tax treaties in line with the scope of this paper. Therefore, this conclusion must be restricted to tax treaties as a matter of scientific rigour. To the extent no similar thought experiments are conducted or actual cases are observed for other types of treaties to test its applicability, the principle remains a hypothesis in their context.

[197] See ILC, *Summary Records of the Eighteenth Session, 4 May – 19 July 1966* (1967), at 210–211, para. 33.

the others, even when the text considered is the original one. Hence, his argument against a comparison in order not to undermine the 'security of the individual texts' by transplanting 'concepts of one language into the interpretation of a text in another language'[198] may be understood only as implying a provisional procedural measure intended to safeguard interpretation of each text according to its own idiomatic construction, while the outcomes remain subject to verification under a consecutive comparison, or else he would have to be considered to contradict himself.

As construed by the proponents of the routine interpretation approach, his argument would not be very convincing in the first place, because he fails to provide sufficient reason why comparing terms during the process of interpretation should result in distortion rather than clarification. Such contention is merely speculative, while the opposite appears much more plausible. In view of the need to preserve the unity of the treaty, the purposive constructions of the texts ought to be reconciled regardless of their individual idiomatic constructions unless such proves impossible, in which case the treaty must be considered defective.[199] This is the essence of Article 33(1), (3), and (4), and Waldock provides no good reason why in order to achieve this goal a comparison of terms should prove more harmful than helpful.[200] Certainly, his contention as understood by the proponents of the routine interpretation approach would not find support among the prominent hermeneutic theorists of all eras, some of whom forcefully rejected analogous ideas explicitly.[201]

When not understood in the sense of excluding a comparison altogether, the idea to first contemplate every text on its own merit in order to avoid additional confusion may to some extent be sensible because the judge cannot consider everything all at once but has to work his way forward through the materials. Because of the remaining indeterminacy of a single text interpreted in isolation, the question is then not whether but at what point in time to conduct a comparison. The VCLT is tacit as to this point in terms of explicit imperative language. According to Waldock as understood here, the interpreter should first appreciate each text separately and then venture to interpret them in light of each other. The approach to adopt may be summarised as per Lord Wilberforce:

> So, in the present case the process of interpretation seems to involve (1) interpretation of the English text, according to the principles on which international conventions are to be interpreted, (2) interpretation of the French text according to the same principles but with additional linguistic problems, (3) comparison of these meanings. Moreover, if the process of interpretation leaves the matter in doubt, the question may have to be faced whether *travaux preparatoires* may be looked at in order to resolve the difficulty.[202]

Unfortunately, the misguided practice of having recourse only to the text in the official language of the country under whose jurisdiction the dispute is decided has established itself as widespread custom, sanctioned by the currently prevailing view in doctrine that is reinforced by idiosyncrasies of domestic procedural law, especially in common law countries. In consequence, textual divergences are overlooked in practice, which leads to misapplication of treaties. Hence, taxpayers are ill-advised to pay attention only to the text in their own language.[203]

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[198] 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* (1967), at 100, para. 23.

[199] See Resch, The Interpretation of Plurilingual Tax Treaties (2018), Ch. 4, s. 4.3.

[200] See Kuner, *The Interpretation of Multilingual Treaties* (1991), at 958.

[201] See Resch, The Interpretation of Plurilingual Tax Treaties (2018), Ch. 3, s. 3.5.

[202] *Fothergill v Monarch Airlines Ltd.*, at 272.

[203] With respect to tax treaties, the routine interpretation approach may result in treaty misapplication in a variety of ways, not only in terms of liable versus subject to tax, but also for all issues of personal and material scope that may affect the reciprocal sharing of taxing rights between the contracting states in ways not intended but undetected because the court fails to look into the other text(s) and realise the false meaning projected by the seemingly clear text looked at, mistakenly taking clarity of one text for clarity of the treaty meaning.

Although it is a particular anatomic feature of the institutional architecture of international tax law that national courts preside over the application of tax treaties, those courts have to apply international law as if they were a proxy for an international court, that is, to the extent the issues at stake are governed by international law, the guiding line for the presiding judges has to be a consideration of the correct principles of interpretation to be applied by an international tax court, assuming such existed.[204] *Fothergill* states in this respect per Lord Diplock:

> By ratifying that convention, Her Majesty's government has undertaken an international obligation on behalf of the United Kingdom to interpret future treaties in this manner and, since under our constitution the function of interpreting the written law is an exercise of judicial power and rests with the courts of justice, that obligation assumed by the United Kingdom falls to be performed by those courts.[205]

The common law judge may be trying to come to the same answer as an international court, but if in doing so he obstinately adheres to the domestic litigation traditions in terms of relying on one text alone when the parties do not raise a divergence, he will not be able to come to that answer and, in consequence, violate Articles 26 and 27. Domestic procedural rules do not have to be abandoned, but they have to be transcended to ensure proper observance of obligations under international law, because with respect to tax treaties it is not the law as argued by the parties to the dispute that is at stake, but the terms of the deal struck between the contracting states.[206] In practice, such may

[204] See, by analogy, *Penhallow et al. v Doane's Administrators*, 3 U.S. 54 (1795), Dallas's Reports, 36: 'A prize court is, in effect, a court of all the nations of the world, because all persons in every part of the world are concluded by its sentences, in cases clearly coming within its jurisdiction' (a prize court is a 'municipal (national) court in which the legality of captures of goods and vessels at sea and related questions are determined', *Prize Court*, in Encyclopædia Britannica (Chicago: online; Encyclopædia Britannica Inc., 2018), https://www.britannica.com (last visited 1 October 2018); see also M. O. Hudson, The Permanent Court of International Justice 1920–1942 (New York: The Macmillan Company, 1943), 71–79); *Rose v Himeley*, 8 U.S. 241 (1808), 277, concerning the 'principle that the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all'; *TWA v Franklin Mint Corp.*, 466 U.S. 243 (1984), 262–263, Justice Stevens (dissenting): 'The great object of an international agreement is to define the common ground between sovereign nations. Given the gulfs of language, culture, and values that separate nations, it is essential in international agreements for the parties to make explicit their common ground on the most rudimentary of matters. The frame of reference in interpreting treaties is naturally international, and not domestic. Accordingly, the language of the law of nations is always to be consulted in the interpretation of treaties. …Constructions of treaties yielding parochial variations in their implementation are anathema to the *raison d'etre* of treaties, and hence to the rules of construction applicable to them'; *Buchanan (James) & Co. Ltd. v Babco Forwarding and Shipping (UK) Ltd*, 152, per Lord Wilberforce, concerning interpretation of a treaty 'unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation'; *Memec Plc v Inland Revenue Comissioners*, 1349, per Robert Walker J., in terms of treaties to be construed in an 'international, not exclusively English' way; *R v Secretary for the Home Department, Ex Parte Adan*, [2001] AC 477, 515–517, per Lord Steyn: 'In principle therefore there can only be one true interpretation of a treaty. …In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.'

[205] *Fothergill v Monarch Airlines Ltd.*, at 283. As Waibel notes, although the VCLT is not incorporated into UK domestic law, 'there is widespread agreement about the customary character of the VCLT interpretative principles' and English courts 'refer to the VCLT with some regularity, and when they do so seem to apply the VCLT as international law', Waibel, *Principles of Treaty Interpretation* (2016), 20–21.

[206] Noteworthy, the principle of *iura novit curia* has been recognised and applied by international courts such as the PCIJ, the ICJ, the Inter-American Court of Human Rights, the ECHR, and the WTO adjudicating bodies, see M. Oesch, Standards of Review in WTO Dispute Resolution (Oxford; New York: Oxford University Press, 2003), at 50 et seq.; F. Ortino, The WTO Dispute Settlement System, 1995–2003 (The Hague: Kluwer Law International, 2004), at 167 et seq.; J. M. Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights (Cambridge; New York: Cambridge University Press, 2003), at 154 et seq.; ICJ, *Nicaragua v United States of America – Military and Paramilitary Activities in and Against Nicaragua* (June 1986), at 14 and 29; ICJ, *Fisheries Jurisdiction (United Kingdom v Iceland)* (1974), Annual Reports of the International Court of Justice, at 9, para. 17; *Hilaire, Constantine and Benjamin et al. v Trinidad and Tobago*, Inter-American Court of Human Rights (June 2002),

be achieved in common law countries only via an extension of the duties of parties to put all texts before the judge.

Abandoning the routine interpretation approach escalates the practical problems and resource demands implied by a comparison of texts. The natural reflex of the judge may be to look to the original text, that is, the text of initial negotiation and drafting. Without explicit support by the treaty, however, such preference is in violation of Article 10 establishing authenticity of texts, Article 33, and the treaty final clause declaring all texts as equally authoritative. The fact that treaties are concluded with multiple language texts declared as authentic implies the common intention of the parties not to consider the text in the language of negotiation and drafting of higher relevance for interpretative purposes, regardless of what the process of authentication in detail entails.

In order to overcome the problem of additional interpretational complexity induced by plurilingual form, contracting parties may explicitly confer special authority to one text for purposes of interpretation by designating it as prevailing. Thereby, the practical and resource problems implied by comparing texts can be reduced because the VCLT framework of interpretation allows for sole reliance on the prevailing text as long as its interpretation under Article 31 establishes a clear meaning.[207] If such clear meaning cannot be established, recourse must first be had to the other texts to clarify the meaning of the treaty via a comparative application of Article 31 to all texts. Alternatively, the interpreter may engage in a reconciliatory comparison of all texts from the start; however, such may turn out to be a moot exercise in view of the prevailing text having a clear meaning under Article 31. Hence, from a pragmatic point of view, it is always preferable to begin with the prevailing text and only resort to the others when the prevailing text does not provide a clear meaning.

The view that sole reliance on the prevailing text is permitted only once a comparison of texts in the face of an apparent divergence fails to reconcile their meaning, submitted by the advocates of the restrictive approach, is not in line with the VCLT principles. Contrary to their view, a divergence as referred to by Article 33 can be any divergence, that is, a mere difference in expression as well as differences in meaning that can or cannot be reconciled by a comparison of the texts under Article 31 and, optionally, Article 32 in its passive confirmatory role. This notion fits with the fundamental axiom of the unity of the treaty in the sense that any problem of difference between texts, even if only a different choice of words or equivalent words with different connotations, must be addressed by interpretative means to ensure equivalence in meaning.

As a corollary, Article 33 allows for sole reliance to the prevailing text but does not prescribe it. In principle, recourse to the prevailing text becomes mandatory only in case the interpreter would otherwise depart from its meaning. This implies, however, that the prevailing text must be checked always and can never be left out of the equation. Because the meaning of the prevailing text prevails in all cases the other texts diverge from it, the one true meaning of the treaty defaults to its meaning in any case, that is, the existence of a prevailing text creates a situation of quasi-unilinguality.

This conclusion should hardly come as a surprise, since the VCLT Commentary is relatively explicit in implying it in paragraph 4 on page 224, in which the drafters of the VCLT express their indecisiveness with respect to prescribing a definite rule when the interpreter has to resort to the prevailing

para. 107. Thus, it may be regarded as a principle to be applied in proceedings concerned with issues of international law.

[207] Optionally, such may be confirmed but not contested by supplementary means, see UN, Vienna Convention on the Law of Treaties (1969), Article 32.

text, apart from prohibiting cases of departure from its meaning.[208] Therefore, the wording supplied by the VCLT, if not expressly delimited by the contracting parties in their actual treaties, must be considered flexible enough to allow for sole reliance on the prevailing text as a tool to decrease the complexity of interpreting plurilingual treaties, because either there is a divergence prescribing reliance on it, or there is no divergence, allowing reliance on it. At the same time, the VCLT wording does not compel sole reliance on the prevailing text, but the court may compare all texts instead as long as it does not depart from the meaning of the prevailing text.

Regarding the applicability of the permissive approach to plurilingual tax treaties with prevailing text in practice, an analysis of the global tax treaty network establishes the following: With respect to one-quarter (25.22%), there is no problem of plurilingual interpretation because of unilingual form. Almost two-thirds (64.60%) of the remaining three-quarters feature a prevailing text, amounting to almost half (48.30%) of the global tax treaty network. Apart from a small handful of exceptions, the wordings of all actual tax treaty final clauses implementing a prevailing text allow for sole reliance on it. Sole reliance on prevailing texts is unavailable for roughly one-third (35.13%) of all plurilingual tax treaties not providing for one, amounting to roughly one-quarter (26.27%) of the global tax treaty network. In addition, it remains unavailable for a small handful of treaties that feature final clauses not allowing for automatic recourse to the prevailing text without a divergence being established first.

English dominates as widely accepted lingua franca for tax treaties: About three-quarters (76.62%) of all unilingual treaties as well as the overwhelming majority (94.57%) of all prevailing texts are in English. In total, almost two-thirds (65.01%) of the global tax treaty network use English as language for unilingual treaties and prevailing texts, whereas for French that share is confined to 3.31%. English is used in numerous cases as (true) diplomatic language for unilingual treaties by countries that do not have English as official language. In contrast, French is confined to a marginal role with only 7.56% of all unilingual treaties and 2.90% of all prevailing texts. Apart from a few exceptions, French is hardly used as (true) diplomatic language. English permeates the global tax treaty network as authentic language up to 83.92%, whereas French remains marginal with only a 7.68% share. An equally marginal 8.40% of all tax treaties use neither English nor French as authentic language.

The use of either English unilingual treaties or English prevailing texts is the preferred policy of the vast majority of countries to the effect of covering roughly two-thirds of all tax treaties. More than three-quarters of all unilingual treaties and almost 95% of all prevailing texts are in English, but there still remains a gap of roughly 14% that mixed bilingual treaties (between countries that have English as official language and countries that do not) lag behind in using English as diplomatic language compared to the non-English speaking world.

This gap is attributable to the policy choices of a few native English-speaking countries that do

[208] It follows that in posing the question as it has been posed traditionally – that is, whether one has to automatically apply the prevailing text or conduct a comparison to establish the existence of a divergence first – the bulk of academic commentators is barking up the wrong tree: one *has to* either way only if the treaty itself lays down a definite rule in this respect, otherwise one simply has the option. This stance of the ILC implies their conviction that both approaches must lead to a correct interpretation of the treaty, i.e., that the existence of an actual divergence is not a necessary precondition for reliance on the prevailing text, or else a definite rule of interpretation would have been called for. Thus, the ILC implicitly submits to the logical argument and rejects Hardy's reasoning against it, which coincides with Engelen's conclusion that Article 33(1) is not intended as a peremptory norm, and the requirement of a divergence to exist the outcome of 'infelicitous drafting', see Engelen, Interpretation of Tax Treaties Under International Law (2004), at 376–379. Hence, the proper question to be asked is under which conditions the judge has to compare the other texts when there is a prevailing one at his disposal.

not exhaust the potential, whereas the rest of the world largely accepts and uses English as lingua franca in form of English prevailing texts.[209] Several countries (such as the Nordic ones) have even gone a step further by using English as true diplomatic language for unilingual treaties. This almost schizophrenic seeming result is all the more striking because the same English-speaking countries must be considered the biggest losers of this situation in terms of resource efficiency. With recourse to an English prevailing text being unavailable, they will have to compare texts in (from their perspective) arcane languages, whereas their treaty partners will only need to compare the other text in English, used by them already as lingua franca in most other treaty relationships.

What might be the reasons for the paradoxic persistence of this gap? One argument traditionally put forward is that countries may be reluctant to concede linguistic advantages.[210] There are documented cases of this sentiment in practice: when acceding to the Treaty of Rome, Denmark would concede to restricting the number of languages to English and French only if in turn the English-speaking members would exclusively use French and vice-versa.[211] The numbers concerning English as official language confirm a certain potential for this problem to show resilience, as roughly 87% of all bilingual treaties without prevailing text having English as one authentic language are between a country having English as official language and one that does not (the rest is largely attributable to Canada not implementing prevailing texts even if English is available as shared native tongue).

Moreover, the major English-speaking countries themselves may have little incentive to change. With the routine interpretation approach in place as dominant doctrine, they are not necessarily the biggest losers as diagnosed by me but may be regarded as the biggest beneficiaries because they can tacitly favour their own language text in bilingual situations, and when more languages are involved, the English text will almost without exception have prevailing status. As Lord Diplock has put it, 'Machiavellism is not extinct at international conferences.'[212] On the other hand, it is only understandable if they simply want to avoid accusations of imperialism. Tax treaties are ultimately based on economic reciprocity and thus subject to sensitive trade-offs between individual and mutual benefits. It might not exactly be opportune to suggest one's own language as prevailing in such bargaining situation even though it may be the obvious choice for various good reasons – a double bind.[213]

Finally, domestic constitutional law may interfere with the policy to designate one text as prevailing, as in the case of Canada. As for France being the only major country outside the English-speaking world that has resisted the global trend, the reasons may be rooted in history with French having once played a dominant role as lingua franca and even true diplomatic language for a prolonged period, as well as national political doctrine.[214]

[209] France and Canada are the only countries with major treaty networks that have not concluded a single treaty unilingual in English or with an English prevailing text. Apart from them, the total number of all treaties of countries to which the same applies accounts for less than 3% of the global tax treaty network. Moreover, they are distributed over countries with only one or two treaties in total plus a few French-speaking countries with small treaty networks.

[210] See Arginelli, The Interpretation of Multilingual Tax Treaties (2013), at 133; Gaja, *The Perspective of International Law* (2005), at 92.

[211] See Oakes, *Multilingualism in Europe* (2002), at 375.

[212] *Fothergill v Monarch Airlines Ltd.*, at 283.

[213] Defined by the Oxford Dictionary as 'A situation in which a person is confronted with two irreconcilable demands or a choice between two undesirable courses of action.'

[214] See H. Uterwedde, *Frankreich – Grundlagen der Grandeur*, in J. Braml, S. Mair, and E. Sandschneider (eds.), Außenpolitik in der Wirtschafts– und Finanzkrise (Walter de Gruyter, 2012); G. Haensch, *Frankreich: Politik, Gesellschaft, Wirtschaft*, in J. Braml, S. Mair, and E. Sandschneider (eds.), Aussenpolitik in der Wirtschafts– und

How can these issues be addressed? From a purely theoretical perspective, the 'linguistic advantage' argument makes little sense. According to the principle of unity there is only one treaty with one set of terms, irrespective of the language in which they are expressed. Hence, it remains elusive what the conjured up linguistic advantage or disadvantage should exactly consist in. Reserving a kind of linguistic sovereignty in the sense of reserving the right to arrive at different results depending on one's own language text goes against the very idea of the unity of the treaty and must be discarded as a motivation not in good faith to begin with.

Any argument in favour of texts in equally authentic languages without English prevailing text in order to facilitate interpretation and application of tax treaties by taxpayers, national authorities, and courts, 'who might not be familiar with other languages, not even French or English, but are generally very familiar with the technical language of domestic tax law',[215] is equally unconvincing. Tax treaties are necessarily formulated in terms of general abstractions connecting the tax systems of two countries.[216] Considerations of domestic law technical language are an important component in their interpretation under provisions modelled on Article 3(2) of the OECD Model;[217] however, interpretation primarily according to domestic law technical language is not the guiding principle.[218]

Moreover, English is without doubt the language of global trade and business, permeating also all other social dimensions such as diplomacy and science as global lingua franca.[219] As *The Economist* has pointed out already at the beginning of this century:

> It [English] is everywhere. Some 380 million people speak it as their first language and perhaps two-thirds as many again as their second. A billion are learning it, about a third of the world's population are in some sense exposed to it and by 2050, it is predicted, half the world will be more or less proficient in it. It is the language of globalization – of international business, politics and diplomacy.[220]

For taxpayers who need to evoke the protection of tax treaties for their cross-border transactions, it is more than likely that they already conduct their cross-border business in English or have no problem in doing so. If they should really lack the proficiency, their legal advisers, who should be accustomed to dealing with tax treaties and clients with cross-border activities, will not. On the other hand, taxpayers should obviously welcome the extra legal certainty that comes with a prevailing text, especially since otherwise they, too, need to compare texts in all other languages for their purposes.

As far as authorities and courts are concerned, the numbers in terms of treaties concluded unilingual

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Finanzkrise (Walter de Gruyter, 2012).

[215] Arginelli, The Interpretation of Multilingual Tax Treaties (2013), at 134.

[216] See Gaja, *The Perspective of International Law* (2005), at 99–100; W. Wijnen, *Some Thoughts on Convergence and Tax Treaty Interpretation*, 67 Bulletin for International Taxation 11 (Amsterdam: International Bureau of Fiscal Documentation, 2013), 575–579, at 575.

[217] OECD, Model Tax Convention on Income and on Capital (Paris: OECD Publishing, 2017).

[218] Neither do treaty terms identical to domestic law terminology imply they should be interpreted according to domestic law, nor treaty terms different from domestic law terminology that they should not be interpreted according to it, see F. Wassermeyer (ed.), Doppelbesteuerung: Kommentar zu allen deutschen Doppelbesteuerungsabkommen, vol. I (München: loose-leaf; C.H. Beck, 2016), MA, Art. 4, 55–56, para. 74; Avery Jones, *Treaty Interpretation* (2018), s. 4.3.2.1; Resch, The Interpretation of Plurilingual Tax Treaties (2018), Ch. 4, s. 4.5.

[219] See, e.g., D. Crystal, English as a Global Language (2nd ed., Cambridge; New York: Cambridge University Press, 2012); A. Johnson, *The Rise of English: The Language of Globalization in China and the European Union*, 22 Macalester International (Berkeley, California: Berkeley Electronic Press, 2009), 131–168; T. Neeley, *Global Business Speaks English*, 90 Harvard Buisness Review 5 (Brighton, Massachusetts: Harvard Business Publishing, May 2012).

[220] *A World Empire by Other Means: The Triumph of English*, The Economist (London: The Economist Newspaper Limited, 20 December 2001).

in English or with English prevailing text show that general English proficiency of a country has little effect, which implies that the required English proficiency of the human resources involved in the negotiation, interpretation, and application of treaties must be assumed as a given. It is not necessarily the countries with generally lower English proficiency that show a low tendency to conclude treaties with English prevailing texts, but the native English-speaking countries plus France and Luxembourg and a few others with a generally high level of English proficiency.[221] The policy against prevailing texts in English seems even less reasonable in the context of where it is most widespread, namely, the OECD and EU, where English is the de facto working language on a multilateral level.[222]

In essence, aside a self-defeating policy not to provide for a prevailing text, the arguments in favour of plurilingual form without prevailing text seem to boil down to nothing more than a costly concession to national sentiment.[223] In the absence of an artificial universal language like Esperanto, which despite some support by the UN never gained critical mass,[224] English prevailing texts in addition to texts in the official languages of the contracting states are the next best thing to balance these sentiments with political and economic interests, because of the de facto global reach of English.[225] All national sentiment aside,[226] the gap of plurilingual treaties without English prevailing text constitutes a costly impediment to economic activities in a global economy the de facto operating language of which is English, and an anachronism in times of 'harmonization' being identified as a policy goal on many levels.[227]

In view of all this, it is submitted that the policy to conclude plurilingual treaties without prevailing

[221] See the EF English Proficiency Index, https://www.ef.de/epi [Accessed 27 April 2019].

[222] According to Sasseville, 'The practical reality is that, nowadays, the OECD work on tax treaties is primarily carried on in English and the French version is usually a translation', J. Sasseville, *The OECD Model Convention and Commentaries*, in G. Maisto (ed.), Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law (Amsterdam: IBFD, 2005), 129–134, at 130; according to Dor, 'Ninety nine per cent of European institutions cite English as their working language', D. Dor, *From Englishization to Imposed Multilingualism: Globalization, the Internet, and the Political Economy of the Linguistic Code*, 16 Public Culture 1 (Durham, North Carolina: Duke University Press, 2004), 97–118, at 103.

[223] Costly not only in terms of the resource costs involved but also because of the inherent indeterminacy of tax treaties as a result of which reliance on a single text may lead to treaty misapplication bilaterally and fragmented jurisprudence domestically.

[224] See J. K. Gamble, L. Kolb and C. Graml, *Choice of Official Text in Multilateral Treaties: The Interplay of Law, Politics, Language, Pragmatism and (Multi)-Nationalism*, 12 Santa Clara Journal of International Law 2 (Santa Clara, California: Santa Clara University School of Law, May 2014), 29–55, at 31–32.

[225] This is not to say that English is necessarily also the most suitable language given its intrinsic properties. Especially in the past there has been much argument in favour of French because of certain of its characteristics, see *ibid.* 36 et seq. Although this may be a valid discussion from a linguistic point of view, such is moot for purposes of this study in view of the realities.

[226] This is not intended to denounce national sentiment per se, and especially not as love for and devotion to one's own native tongue. The present author is far from free of it, loving his native tongue German for its capability to organically create and relate concepts; however, tax treaties are not works of philosophy, poetry, or literature, essential for defining cultural identity, but international legal tools to facilitate cross-border trade, business, and investment. Hence it seems sensible to give the devil his due, at least from a purely pragmatic perspective. There are of course drawbacks of such choice in general to moan about, see M. Mizumura, The Fall of Language in the Age of English (New York: Columbia University Press, 2015), passim; however, the question remains whether tax treaties are really the proper area to make a stand.

[227] Although the gap of easily available potential not exhausted only amounts to 14%, it represents a much larger share of global economic activity with respect to flows of capital, goods, and services. This is obvious from the countries involved and the sizes of their economies. As this study is not focussed on economics, I refrain from matching the data in order to put an exact number to this assertion. For purposes of the discussion at hand, it is sufficient to appreciate the economic weight of the issue in principle.

text should be reconsidered and abandoned to close the residual gap. One may point particularly to the Asian (but also CIS, AW, and LA) countries as setting a good example in this respect. Their economic success over the past decades may be attributable to a multitude of different factors, however, considering the observed data, pragmatism certainly appears to be one of them.

Of course, it would be naive to think national sentiment would simply wane when confronted with its dead-weight loss. In bilateral scenarios all sorts of additional historical and political factors may weigh in, so success may vary. In order to take the sting out of the issue, the topic should be discussed at the multilateral level. The best forum to achieve real progress in this respect would be the OECD, as most of the countries clinging to the policy choice of plurilingual treaties without prevailing text are OECD members, while they are at the same time engaged there in a project to achieve conformity of interpretation via the OECD Model and Commentary, carried on primarily in English.

In summary, since the 1990s, prevailing texts have emerged as predominant global standard, while almost all final clause wordings implementing a prevailing text allow for sole reliance on it. Today, additional interpretational complexity induced by plurilingual form is confined to merely one-quarter of all tax treaties in force. Three-quarters of today's global tax treaty network do not pose a problem because of unilingual form or existing prevailing texts in combination with final clauses allowing for sole reliance on them. In addition, the paradigm of linguistic nationalism has been largely transcended and replaced by a new paradigm of English as predominant lingua franca for tax treaties: two-thirds of today's global tax treaty network are made up of treaties unilingual in English or with an English prevailing text. Paradoxically, aside France, mainly the major English-speaking countries have resisted this trend. Concluding plurilingual treaties without English prevailing text is a political anachronism that should be overcome to cut its economic cost and increase consistency of treaty interpretation. The politics involved may require a multilateral approach to close the residual gap of remaining plurilingual tax treaties without prevailing text. Therefore, coordination at the multilateral level may be necessary to eliminate remaining additional interpretational complexity induced by plurilingual form, together with its associated economic cost.[228]

[228] Specific policy recommendations for both the bilateral and multilateral level are provided in Resch, The Interpretation of Plurilingual Tax Treaties (2018), Chs. 10 and 11.

Executive Summary

Plurilingual Tax Treaties: Problem and Solution

Dr. Richard Xenophon Resch

1 The Problem: Undetected Divergences

[1] To rely only on the treaty text in the official language of the contracting state under the jurisdiction of which the dispute is being decided is insufficient to satisfy the obligation to apply the interpretative principles enshrined in the Vienna Convention on the Law of Treaties (VCLT):[1] Under Article 26 VCLT, 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith', and under Article 31 VCLT, 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. By looking only at one language text, the judge may fail on all three accounts: he may fail to appreciate the true object and purpose, he may fail to appreciate the full context, and he may fail to appreciate the intended wording, which may be misrepresented by the text looked at. In consequence, he may violate Article 26.

[2] The current orthodoxy, that it is sufficient to rely only on one language text in cases of 'routine interpretation', that is, as long as no problem in form of an ambiguity or divergence 'arises',[2] rests on circular reasoning and is therefore disproved by means of a *reductio ad absurdum*: it proclaims that relying on a single text is sufficient as long as there is no divergence, whereas the establishment of a divergence requires a comparison of texts.[3]

[3] In the opinion of the proponents of the routine interpretation approach, Article 33 VCLT 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) VCLT that 'The terms of the treaty are presumed to have the same meaning in each authentic text' 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. In order for the argument to be valid, it must be the case that the presumption in Article 33(3) VCLT 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. This is not the case for tax treaties because their object and purpose covers conflicting interpretations, as a result of which each single text considered in isolation may appear perfectly clear and plausible while it violates the common intentions of the contracting states.

[4] **Example**: One text says 'liable to tax' while the other says 'subject 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

[1] UN, Vienna Convention on the Law of Treaties, Series I–18232 (United Nations, 1969), Article 26, 31–33. The scenario implied is a plurilingual treaty without prevailing text, i.e., there exist several authentic (equally authoritative) language versions of the treaty text without one being designated as prevailing in case of divergence.

[2] See F. 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: International Bureau of Fiscal Documentation, 2004), at 388–390, 546. Henceforth, this view will be referred to as routine interpretation approach.

[3] Unlike an ambiguity, a divergence might not come to the attention of the interpreter without a comparison of texts, see M. Tabory, Multilingualism in International Law and Institutions (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), at 199; C. B. Kuner, *The Interpretation of Multilingual Treaties: Comparison of Texts Versus the Presumption of Similar Meaning*, 40 International & Comparative Law Quarterly 4 (Cambridge: Cambridge University Press, 1991), 953–964, at 958.

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 VCLT may lead to two conflicting meanings, each of which may be regarded as manifest and applicable by the judge if considered only by itself.[4]

[5] **Conclusion**: The fundamental proposition of the routine interpretation approach 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,[5] and 'every reasonable effort' must be understood to exclude relying on a single text in isolation.[6] As is admitted by its proponents, the routine interpretation approach sanctions a standard of tentative interpretation possibly in violation of treaty obligations and subject to retroactive correction,[7] whereas Articles 31–33 in combination with Article 26 requires the judge to give effect to the common intentions of the contracting states, and Article 33(3) VCLT may not be interpreted as a waiver of that obligation.

2 Practical Relevance: High

[6] The risk for divergences to be overlooked is particularly high for tax treaties. In a normal state-state dispute about interpretation and application of an international treaty 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. As tax proceedings are taxpayer-state disputes under the jurisdiction of the national courts of one contracting state, 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). In consequence, it less likely that divergences are raised while it is not less likely that they exist.

[7] As acknowledged by the drafters of the VCLT,[8] divergences between texts of plurilingual treaties are not a remote contingency but a considerable empirical reality. Consequently, even if one would not subscribe to the argument that a comparison of all texts is obligatory for any serious effort to interpret a treaty in good faith in the absence of a prevailing text, it is clear that the potential need for such comparison may be rather large in practice. Hence, even if it were correct, the routine interpretation approach fares poorly in respect of constituting a truly pragmatic solution: the problem of additional interpretational complexity introduced by plurilingual form is not resolved by it because, by its own standard, a single text may be relied

[4] Conseil d'État, *Société Natexis Banques Populaires v France* (July 2006) may be a real life example of this. The difference in meaning between the Portuguese *incidido* and the French *supporté* is akin to the difference between liable and subject to tax in the OECD Model. As a result of relying only on the French text, the Conseil d'État decided based on the meaning of *supporté*. Consequently, the tax sparing credit was soaked up by France as the residence state, arguably in violation of the treaty.

[5] See 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, A/CN.4/SER. A/1966/Add.1, Yearbook of the International Law Commission 1966, vol. II (United Nations, 1967), at 225, para. 7. Henceforth, the Draft Articles with Commentaries are referred to as 'VCLT Commentary'.

[6] See WTO Appellate Body, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R (2004), Report of the WTO Appellate Body, at 22, para. 59, 50n; WTO Appellate Body, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R (2005), Report of the WTO Appellate Body, at 159, para. 424.

[7] See M. Hilf, Die Auslegung mehrsprachiger Verträge: Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland (Berlin, New York: Springer-Verlag, 1973), at 78; Engelen, Interpretation of Tax Treaties Under International Law (2004), at 391. As happened, e.g., in *Foster & Elam v Neilson*, 27 U.S. (2 Pet.) 253 (1829), in which the US Supreme Court had recourse only to the English text and later had to correct itself after a discrepancy with the Spanish text was raised, employing a rather symptomatic excuse: 'The Spanish part of the treaty was not then brought to our view, and we then supposed that there was no variance between them. We did not suppose that there was even a formal difference of expression in the same instrument, drawn up in the language of the other party', see Kuner, *The Interpretation of Multilingual Treaties* (1991), 958, with reference to H. P. de Vries, *Choice of Language*, 3 Virginia Journal of International Law (Chicago, Illinois: The Virginia Journal of International Law Association, 1963), 32–33, and *United States v Percheman*, 32 U.S. (7 Pet.) 51 (1833).

[8] See ILC, VCLT Commentary (1967), at 225, para. 6.

on only until problems in form of an ambiguity or divergence arise. Therefore, even if it were correct, it would provide no solution in principle but only to a limited extent. Given the potential for divergences together with the ever-increasing globalisation of commercial and investment activities likely accompanied by respective international tax issues and growing taxpayer awareness out of self-interest, it is more than likely that the number of cases in which divergences will play a role will grow in the future.

[8] For tax treaties, application of the routine interpretation approach may cause treaty misapplication attributable to undetected divergences in a wide variety of ways, not only in terms of liable versus subject to tax, but also for all issues of personal and material scope that may affect the reciprocal sharing of taxing rights between the contracting states in ways not intended but undetected because the court fails to look into the other text(s) and realise the false meaning projected by the seemingly clear text looked at, mistakenly taking clarity of one text for clarity of the treaty meaning.

[9] It is common for tax treaties to deliberately or incidentally use domestic law terminology in the respective language texts. Such may happen because domestic law technical terms may be simply what OECD Model terms literally translate to in the languages of the treaty partners, treaty negotiators discuss treaty provisions using their domestic law technical language with the laws of their countries in mind, or the treaty is intended to apply asymmetrically concerning the point in question with reference to the domestic law of the applying state under a clause modelled on Article 3(2) of the OECD Model. If only the text in the own language is consulted, the seemingly obvious reference to domestic law may trick the judge into overlooking the term in question to constitute first and foremost a general abstraction that *may* default to its domestic law meaning if so intended, which can however be determined only when analysed against the background of both contexts implied by Articles 3(2) OECD-MC and 31(2) VCLT including the other language texts as 'text', or else mismatches in qualification may result that lead to double taxation or double non-taxation unintended by the treaty.[9]

[10] **Problem**: Abandoning the routine interpretation approach escalates the practical problems and resource demands implied by a comparison of texts. The suggestion that from a pragmatic perspective an obligatory comparison of all texts seems unreasonable in view of the needed resources and countries being unequally equipped to follow such prescription in practice remains a fair point. This leaves us with an obvious practical dilemma.

3 Practical Solution: Reliance on Prevailing Texts

[11] If the treaty designates one text as prevailing, the VCLT principles allow the judge to rely on the prevailing text by default without establishing the existence of a divergence first.[10] It does not matter whether there is a divergence, because the prevailing text can be relied on in any case; the other texts must be interpreted always to have the same meaning as the prevailing text, which makes recourse to them unnecessary if the meaning of the prevailing text is clear. Once it is established that the prevailing text has a clear meaning, Article 33(3) VCLT precisely demands that the other texts must be interpreted to concord to it.

[12] If a clear meaning of the prevailing text cannot be established, recourse must first be had to the other

[9] See G. Gaja, *The Perspective of International Law*, in G. Maisto (ed.), Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law (Amsterdam: IBFD, 2005), 91–102, Appendix, Intervention by Prof. Maarten Ellis.

[10] Sole reliance on prevailing texts is submitted here on a theoretical basis for purposes of discussion. It may be resorted to in practice; however, given the reality that it is for a variety of reasons customary for courts to rely on their own language text (at least initially), such suggestion may be dismissed by the practitioner as unrealistic. Hence, the following modified approach is suggested in practice: instead of direct recourse to the prevailing text, the text in the own language is relied on together with recourse to the prevailing text to gauge the result. Given that countries tend to choose a language for the prevailing text they have a high level of familiarity with (and for which Model Conventions coupled with Commentaries exist that, depending on the circumstances, may be drawn on for purposes of interpretation), together with a largely uniform choice of prevailing language over the entire global tax treaty network reducing the amount of third party resources needed, such approach seems practicable, neither overburdening courts nor taxpayers. The other language text(s) may then be (mostly) disregarded.

texts to clarify the meaning of the treaty via a comparative application of Article 31 to all texts. If that remains unsuccessful, then Article 33(4) VCLT must be applied, that is, the object and purpose criterion should be invoked as sole decider. If all these efforts based on authentic means remain unfruitful to establish the unequivocal treaty meaning, the judge may have recourse to supplementary means to determine it under Article 32(a) or (b) VCLT.

[13] Alternatively, the interpreter may engage in a reconciliatory comparison of all texts from the start; however, such may turn out to be a moot exercise in view of the prevailing text having a clear meaning under Article 31. Hence, from a pragmatic point of view, it is always preferable to begin with the prevailing text and only resort to the others when it does not provide a clear meaning.

[14] **Applicability in practice**: An analysis of the global tax treaty network[11] establishes that

1. With respect to one-quarter, there is no problem of plurilingual interpretation because of unilingual form.
2. Almost two-thirds of the remaining three-quarters feature a prevailing text, amounting to almost half of the global tax treaty network.
3. Apart from a small handful of exceptions, the wordings of all actual tax treaty final clauses implementing a prevailing text allow for sole reliance on it.
4. Sole reliance on prevailing texts is unavailable for roughly one-third of all plurilingual tax treaties not providing for one, amounting to roughly one-quarter of today's global tax treaty network.
5. English dominates as widely accepted lingua franca for tax treaties: About three-quarters of all unilingual treaties as well as the overwhelming majority (95%) of all prevailing texts are in English. In total, almost two-thirds (65%) of the global tax treaty network use English as language for unilingual treaties and prevailing texts.
6. Noteworthy, plurilingual treaties without prevailing texts are not evenly spread out over the global tax treaty network but concentrated in the treaty networks of a handful of countries. Paradoxically, aside France, it is mostly the major English-speaking countries that have resisted the global trend, although they should be the first to embrace it.

In summary, for almost three-quarters of today's global tax treaty network the problem of additional interpretational complexity induced by plurilingual form is significantly reduced by being either unilingual or providing for a prevailing text in English in combination with a final clause allowing for sole reliance on it. Hence, a truly pragmatic approach in line with the VCLT is widely available and just needs to be embraced. If adopted, it 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. The current orthodoxy, however, necessarily produces cases of treaty misapplication in violation of the VCLT when the text relied on is not designated as prevailing. Therefore, it should be abandoned.

[11] The term 'global tax treaty network' is used here as a proxy for a sample of all tax treaties in force or yet to come into force that have been concluded between 1 January 1960 and 15 August 2016 insofar as they have been recorded in IBFD, *Tax Treaties Database* (Amsterdam: online; IBFD, 2019), https://www.ibfd.org (last visited 15 August 2016). In total, the sample comprises 3,358 treaties, see R. X. Resch, The Interpretation of Plurilingual Tax Treaties: Theory, Practice, Policy (Hamburg: tredition, 2018), Ch. 2, s. 2.2.3, and Appendix E.