

# Canada / France / Poland / United Kingdom / OECD / International

## International Association of Tax Judges Webinar: Tax Courts and the Interpretation of Plurilingual Tax Treaties

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**This report summarizes the webinar held on 29 January 2021 by the judges of the International Association of Tax Judges on the topic of the use and interpretation of plurilingual tax treaties in tax courts.**

### 1. Introduction

Because of the COVID-19 pandemic, the International Association of Tax Judges (IATJ) suspended its annual assembly in 2020. Instead, the judges are holding a series of webinars. The second webinar on the topic of “The Use and Interpretation of Plurilingual Tax Treaties” took place on 21 January 2021.

Robert Hogan, Tax Court of Canada (TCC), served as the moderator of the webinar, which contained interventions by the following panellists: Dagmara Dominik-Ogińska, *Voivodeship Wojewódzki Sąd Administracyjny we Wrocławiu* (Regional Administrative Court in Wrocław, WSAwW), Poland; Emilie Bokdam-Tognetti, *Conseil d'Etat* (Supreme Administrative Court, CE), France; John Avery Jones (retired) Upper Tribunal (UT), United Kingdom; and Richard Resch (guest speaker), Germany.

The programme of the session was as follows. First, Resch presented his findings on the use of plurilingual tax treaties (“PT treaties”), which served as the topic of his dissertation research ( see section 2. ).<sup>[1]</sup> Next, these academic findings were confronted with the realities of life in the tax courts of the United Kingdom ( see section 3. ), France ( see section 4. ), Poland ( see section 5. ) and Canada ( see section 6. ). In the final part of the session ( see section 7. ), the panellists responded to some of the questions raised by the followers of the webinar.

### 2. The Interpretation of Plurilingual Tax Treaties

Richard Resch started by presenting the judges with the ultimate conclusion of his research, i.e. courts break international law if they do not compare all equally authoritative language texts of PT treaties in every case they hear. The reasoning behind this conclusion is that a failure to compare all of the texts necessarily results in treaty misapplication due to undetected divergences. Resch added that his research had revealed that current cases of misapplication due to language divergences were not a mere remote contingency but, rather, had the makings of a systemic problem.

The root of the problem is the fact that of all the bilateral tax treaties signed between 1960 and 2016, about 75% of tax treaties are drawn up in two or more languages. Of this body of “plurilingual” tax treaties, approximately 35% are drawn up in two languages. Sixty per cent are drawn up in three languages. Given that tax treaty disputes take place in a domestic sphere – namely between taxpayers and a single state with the courts of that same state deciding the matter – it is not very likely that language divergences in tax treaties will be raised before those courts. However, this situation does not affect the fact that these divergences exist. There is no comprehensive account of the damage caused by the misapplication of tax treaties in practice as a result of these divergences. Given the large numbers of global cases of treaty application and the high incidence of plurilingualism in tax treaties, the potential for misapplication, and resulting economic effect, is enormous.

Resch continued by observing that tax treaties, like all international agreements, are subject to the Vienna Convention on the Law of Treaties (1969) (the “Vienna Convention (1969)”).<sup>[2]</sup> Even if the Vienna Convention (1969) has not been signed, and ratified, by the entire community of states, there is widespread agreement that most of its provisions merely stipulate customary international law to which non-signatories should abide also. As a ground rule, the Vienna Convention (1969) provides that

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1. R.X. Resch, *The Interpretation of Plurilingual Tax Treaties: Theory, Practice, Policy* (Hamburg: Tredition, 2018). A freely accessible earlier version is available at <https://scholarlypublications.universiteitleiden.nl/handle/1887/66117> (accessed 15 Apr. 2021).

2. *UN Vienna Convention on the Law of Treaties* (23 May 1969) (the “Vienna Convention (1969)”), Treaties & Models IBFD.

treaties are binding and to be honoured in good faith.<sup>[3]</sup> Domestic law cannot justify failure to honour a treaty.<sup>[4]</sup> With regard to the interpretation of plurilingual treaties, the Vienna Convention (1969) provides that all of the authentic texts are equally authoritative, unless one prevails,<sup>[5]</sup> and that there is a presumption of equal meaning.<sup>[6]</sup> If a divergence cannot be resolved and no prevailing text exists, the object and purpose serve as the ultimate yardstick.<sup>[7]</sup>

Resch noted that these rules in the Vienna Convention (1969) have resulted in the common wisdom shared by many scholars, and possibly tax judges, that as long as there is no obvious problem with regard to the interpretation and application of a tax treaty, courts can rely in good faith on a single language version of the tax treaty. However, this position conflates two problems, namely: (i) that of ambiguity of meaning in a single language text; and (ii) that of a divergence between different language versions of the same text. In contrast to cases of ambiguity, the detection of a divergence necessarily requires the consultation of all language versions.

In practice, there are many factors depending on language that result in textual divergences. Resch argued that differences between different language texts of a treaty were the rule, rather than the exception. Accordingly, the question is at what point this general potential for divergences necessitates a default comparison of all of the versions to ensure that international obligations are satisfied. Resch argued that whenever the case arose that a single language text appeared to be completely clear and its meaning was plausible but still had the potential to be incorrect, it was necessary to consult other language versions. For instance, this is the situation if both seemingly correct and incorrect meanings in one language text are both acceptable in light of the object and purpose of the treaty. The object and purpose of a treaty are often drafted in broad terms.

Applying this view to bilateral tax treaties, it is clear that this problematic point is often reached. Resch listed a number of typical examples, including the case of the use of the terms “liable to tax” as opposed to “subject to tax” in relation to the relief for double taxation article.<sup>[8]</sup>

Resch reiterated his conclusion that courts had to compare the texts of all of the language versions of a treaty. By considering at a single text, judges may fail to appreciate the true object and purpose of a treaty and the context of the treaty terms. Moreover, given that other language texts of the same treaty are part of the context, these factors are not a supplementary means of interpretation. Reliance on a single language text may also result in a failure to spot the intended wording, which could be misrepresented in the language version under consideration. As such, it is not farfetched to conclude that reliance on a single language text is a practice that is at odd odds with the *pacta sunt servanda* principle enshrined in article 26 of the Vienna Convention (1969).

Resch next addressed the elephant in the court room, which is the practicality of his suggested approach to treaty interpretation, or more precisely, the lack thereof. He conceded that an obligatory comparison of all of the language versions in all cases of tax treaty application appeared to be unreasonable in view of the scarcity of resources and countries and taxpayers being unequally equipped to conduct such an approach in practice.

The good news is that there is a cost-efficient way out of the dilemma, i.e. make tax treaties unilingual. However, due to constitutional law requirements, countries are often required to conclude an authentic text in their official language. Only in a limited number of bilateral relationships do the treaty states share a common official language. If unilingual tax treaties are a no-no, the second-best alternative would be the assigning of a “prevailing text”. Resch noted that, except for Canada, there appear to be no constitutional objections to having one authentic text prevail over the other, even if the prevailing text is not drafted in the official language of a particular country. The essence of a prevailing text is that its meaning prevails when the other texts differ.<sup>[9]</sup> If the authentic texts state the same, no additional comparison is necessary. If they state something different, the non-prevailing text ought to be ignored in favour of the prevailing one, unless, of course, the prevailing text is ambiguous. Resch concluded that the effort of comparing PT treaties could be avoided by relying on the prevailing text.<sup>[10]</sup>

To what extent is the solution of prevailing language texts used in treaty practice? Resch’s research demonstrated that, of the PT treaties, approximately two thirds have a prevailing text. Furthermore, the policy of concluding PT treaties without a prevailing text (“PLTwoPT treaties”) can be described as a policy of the past. Around the 1990s, at the time of the major expansion of the global treaty network, assigning a prevailing text became the prevailing policy. The fact that, of all PT treaties currently in force, one third do not have a prevailing text, is explained by the fact that many of those are “legacy” tax

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3. Id., at art. 26.

4. Id., at art. 27.

5. Id., at art. 33(1).

6. Id., at art. 33(3).

7. Id., at art. 33(4).

8. For a case illustrating this issue, see FR: CE, 26 July 2006, [Case No. 284930](#) (“*Natexis*”), Case Law IBFD.

9. See art. 33(1) *Vienna Convention* (1969).

10. This approach is in line with article 33(1) and 33(4) of the *Vienna Convention* (1969). Article 33(4) of the *Vienna Convention* (1969), which requires a comparison of text and object and purpose as the ultimate yardstick in case of differences of meaning across different authentic versions, only applies in case no prevailing text has been assigned.

treaties, signed between 1960 and 1989 without having been amended or repealed since. The incidence of PLTwoPT treaties is not evenly spread across countries. Nine countries, i.e. Canada, France, Germany, Ireland, Luxembourg, South Africa, Switzerland, the United Kingdom and the United States – account for around 65% of the total number of PLTwoPT treaties. If Australia, Belgium, Italy, Malta and Spain are added to this list, the percentage rises to almost 85%. The OECD member countries tend to be a signatory state to a significant higher percentage of PLTwoPT treaties than non-OECD countries. The incidence of PLTwoPT treaties between two non-OECD countries is about 20%. The incidence of PLTwoPT treaties between OECD member countries and non-OECD countries is approximately 38%. With a percentage of 56%, the highest rate of incidence of PLTwoPT treaties is to be found in tax treaties concluded between two OECD member countries.

Resch observed that the globally preferred solution, namely the signing of PT treaties with a prevailing text, is a market-based solution. In other words, this situation reflects the wisdom of the crowd. The OECD member countries stand out from the crowd in this regard as they lag behind. The fact that most international tax scholarship originates from the OECD member countries and the fact that scholars are naturally most aware of the situation in their own jurisdiction without necessarily having a clear overview picture of what is going on elsewhere, helps to explain, according to Resch, why this issue has been under the radar for so long. With regard to the specific nay-saying countries, Resch noted that, apart from France, it was mostly the major English-speaking countries that resisted the global push towards concluding PT treaties with prevailing text. India is a notable exception with only 10% of its tax treaties being PLTwoPT treaties. This finding is all the more striking, given that the English language is commonly accepted as the language of choice across countries for the adoption of unilingual treaties or prevailing texts of treaties. English is used in 65% of the combined total of unilingual and PT treaties as the prevailing text. English is also used as an authentic language in a large number of PLTwoPT treaties, ranging from 66% in the tax treaties between the OECD member countries, through 70% in the tax treaties between an OECD member country and a non-OECD country, to 80% in tax treaties between two non-OECD countries.

With regard to the default fallback to the prevailing text, Resch reiterated that, in practice, there may be a variety of reasons – procedural, habit, linguistic capabilities – why both the parties to a dispute and the court presiding over it first resort to the text in the official language of their domestic forum. However, Resch suggested that a feasible solution could be to interpret, in a first step, the text in the language that comes naturally, and, in a second step, verify the result with recourse to the prevailing text. Any further language texts could then be ignored safely in most cases.

Finally, Resch referred to the “Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting” (the “Multilateral Instrument” or MLI),<sup>[11]</sup> which is a bilingual tax treaty with authentic English and French texts but without a prevailing text.<sup>[12]</sup> At the time of writing this article, more than 95 countries had signed the MLI. Resch concluded that, by turning the MLI into a PLTwoPT treaty, the OECD had chosen the worst option available, as the complexity of the task for courts in interpreting a tax treaty is highest in respect of bilingual tax treaties without prevailing text. Even if there is no prevailing text, the complexity is reduced for tax treaties with more than two texts, as the additional context provided by additional texts may help to decide quickly cases of two authentic texts stating the perceived opposite of each other. Moreover, the OECD’s decision is out of touch with reality, given that it runs counter to the general trend across countries to conclude either unilingual tax treaties or tax treaties with a prevailing text. It neglects the global preference for English as the preferred language, and it forces stakeholders to consult equally authoritative texts in English and in French, even though French is not used by most countries as a treaty language. The MLI provides for the mutual agreement procedures (MAPs) to resolve interpretational issues, including language divergences. This situation is a case of turning back the clock, given what has been achieved in relation to resolving language divergences by resorting to unilateral and PT treaties with prevailing texts.

### 3. Plurilingual Tax Treaties in the United Kingdom

John Avery Jones started his presentation with three preliminary remarks. First, he agreed with Richard Resch’s conclusion that it is necessary to read other language texts in all cases. Avery Jones cited the International Law Commission’s preparatory work on the Vienna Convention (1969), in respect of which it is stated that: “... in law there is only one treaty... Plurilingual in expression, the treaty remains a single treaty with a single set of terms...”<sup>[13]</sup> Considering matters in this light, there can be no argument that one should read only half the text when interpreting a treaty.

Second, Avery Jones believed there was no problem in doing this. He noted that, in the United Kingdom, there is no objection to having expert evidence of the other language. Although as a dualist country, in the United Kingdom legal effect is given only to the English text, and that text includes the statement that the other language text is equally authoritative. With regard to the question of why UK courts generally fail to look at other language texts, Avery Jones believed that it boiled down to ignorance.

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11. OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (7 June 2017), Treaties & Models IBFD (the “*Multilateral Instrument*” or MLI).

12. Id., at art. 39.

13. A. Watts et al., *The International Law Commission 1949-1999, vol. 2: The Treaties – Part 2*, p. 695 (Oxford U. Press 1999).

Avery Jones observed that the number of treaty cases in the United Kingdom is rather low in general, and that most of the cases that do occur relate to the three United Kingdom-United States Income Tax Treaties,<sup>[14]</sup> which (were and) is drafted in English only. In some of the rare cases involving a PT treaty, like *Sun Life of Canada* (1986)<sup>[15]</sup> or *Memec* (1998),<sup>[16]</sup> the issue has not been raised. Outside the field of tax treaties, there is more relevant material, with one of the leading cases on the subject being *Fothergill v. Monarch Airlines* (1980).<sup>[17]</sup> This case concerned the interpretation of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (1929) (the “Convention”). The Convention stipulated that the French was the only authentic text and, given that the relevant terms in the English text were ambiguous, the English text was to be ignored. Another relevant case is *Federation of Tour Operators v. HM Treasury* (2007).<sup>[18]</sup>

Avery Jones directed the audience to the recent treaty case of *Royal Bank of Canada (RBC)* (2019), which was decided by the First-Tier Tribunal (Tax Chamber) (FTT) on 23 June 2019.<sup>[19]</sup> RBC had advanced loans to a Canadian company to fund the company's exploitation of rights to drill for oil on the UK continental shelf. These rights were subsequently sold to another oil company, and the consideration included entitlement to royalty payments based on the oil production and linked to the excess market price of oil. Next, the Canadian company went into receivership, and the bank was assigned the rights to all future payments in consideration of the sale of the oil rights. Subsequently, the holder of the oil rights sold the rights to a UK company. One of the issues before the FTT was the qualification for the purpose of the Canada-United Kingdom Income Tax Treaty (1978)<sup>[20]</sup> of the continued payments by the UK company to RBC. Specifically, the issue was whether “rights to variable or fixed payments as consideration for the working of, or the right to work... natural resources” in article 6 (Income from immovable property) of the Canada-United Kingdom Income Tax Treaty (1978) covered an outright disposal of an asset, i.e. the oil rights, for periodic payments. The French text was consulted. In the French text “or right to work” was phrased as “*ou la concession de l'exploitation*”. Accordingly, the French text was believed to clarify the English text, as the French word “*concession*” does not cover an outright disposal of an asset. Rather, the term only covers a licence. However, the FTT judge concluded – mistakenly, according to Avery Jones – that the French text was of no help in resolving the issue and ignored it. Strangely enough, the UK tax authorities, Her Majesty's Revenue & Customs (HMRC), raised the argument that, in any event, the English and French text of the Canada-United Kingdom Income Tax Treaty (1978) were equally authoritative, and that there was no basis for inferring a narrower meaning of the English wording by reference to a supposedly correct, i.e. narrower, translation of the French wording. Avery Jones believed this argument to be wrong, or it must have been wrongly recorded in the decision, given that it boils down to claiming that both texts are equal, but that some are more equal than others. This could not be accepted.

With regard to the question of whether it was for the parties to raise treaty language issues before the court, Avery Jones observed that this was not much of an issue in the United Kingdom. In the United Kingdom, judges are regarded as umpires. As in a cricket game, the umpire sits back and leaves it to the parties to argue whatever they want to argue. The problem is that if a language issue arises at the hearing, it might be too late to obtain expert evidence. With regard to the duties of the judges, Avery Jones observed that, as the United Kingdom had ratified the Vienna Convention (1969), the state was under the duty to comply with it as a matter of international law. It is the judge, who in the last resort on behalf of the state, interprets treaties. Consequently, the judge has the duty to comply with the Vienna Convention (1969) and its rules on interpretation. The United Kingdom has not thought it necessary to give effect to the Vienna Convention (1969) in domestic law, even though it is a dualist country. Avery Jones believed this to be irrelevant, given that what is at stake is the duty of the judge in international law. With regard to the argument that this might be difficult to achieve in practice, Avery Jones believed this issue to be another breach of international law, i.e. it is not possible to rely on domestic law as an excuse for not complying with international law.<sup>[21]</sup> He added that the tax authorities are also part of the state. As such, they also have a duty to assist the judge in complying with his duty in interpreting the treaty. Avery Jones added that, based on the argument raised by the tax authorities in *RBC* regarding the coexistence of two authentic language versions of a tax treaty, it is doubtful that the UK tax authorities are taking this duty very seriously at the moment.

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14. Most recently, [Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains](#) (24 July 2001) (as amended through 2002), Treaties & Models IBFD.
  15. See the decision of the Court of Appeal of England and Wales (CAEW) (Civil Division) in UK: CAEW, 12 June 1986, [Sun Life Assurance Co. of Canada v. Pearson, Inspector of Taxes](#), Case Law IBFD.
  16. UK: CAEW, 9 June 1998, [Memec plc v. Commissioners of Inland Revenue](#), Case Law IBFD.
  17. See the decision of the House of Lords (HL) in UK: HL, 10 July 1980, [Fothergill v. Monarch Airlines Ltd](#), [1981] AC 251.
  18. See the decision of the High Court (HC), Queen's Bench Division (Administrative Court) in UK: HC, 4 Sept. 2007, Case No. CO/1505/2007, [R \(Federation of Tour Operators and Others\) v. HM Treasury and Others](#), [2007] UKHRR 1210.
  19. UK: FTT, 23 June 2019, [Royal Bank of Canada v. Revenue and Customs Commissioners](#).
  20. [Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains](#) (8 Sept. 1978) (as amended through 2014), Treaties & Models IBFD.
  21. Art. 27 Vienna Convention (1969).

Next, Avery Jones returned to Resch's finding that 65% of tax treaties are drafted in English only or have an English prevailing language version, and 85% of all treaties have an English text. Yet at the same time, there were English speaking countries, like the United Kingdom, that were resisting the trend of signing PT treaties with an English prevailing text.<sup>[22]</sup> In light of this, Avery Jones wondered why the United Kingdom was not more forthcoming in asking its treaty partners for an English prevailing language version. Maybe the United Kingdom was simply being too nice to ask for it. Supposing the United Kingdom was negotiating a tax treaty with Germany, Avery Jones would understand the United Kingdom's reticence towards requesting the English version to be the prevailing version. But, on the other hand, if Germany were to be negotiating a tax treaty with Spain, both states would find it no less than evident to have an English version as the prevailing text. The preference of having English as the prevailing text is even expressly included in the German Model Tax Convention.<sup>[23]</sup> As a result, the United Kingdom and other English-speaking countries were strongly advised to join the rest of the world and to conclude tax treaties with an English prevailing text. Such a stance would avoid many of the problems raised in this section. Most countries would be perfectly able to manage an English prevailing text. This position would allow English truly to become the language of international tax.

With regard to the MLI, John Avery Jones agreed with Resch that the introduction of provisions in equally authoritative English and French into a tax treaty with other equally authoritative languages, or worse with an English prevailing version, is a move in the wrong direction.<sup>[24]</sup> Avery Jones believed the only way out of the mess is to make a new tax treaty incorporating the MLI provisions in English or with an English prevailing text.

## 4. Plurilingual Tax Treaties in France

Emilie Bokdam-Tognetti started by highlighting that plurilingualism is completely foreign to French legal tradition and internal legislation. Article 2 of the French Constitution provides that the language of the French Republic is French. This provision was introduced only in 1992 with the purpose of protecting French against the influence of English in the context of the adoption of the [EU Treaty](#) of Maastricht. Under article 2 of the Constitution, the French *Conseil constitutionnel* (Constitutional Court, CC) has held that the use of French is mandatory on all public law entities, for private entities providing public services and on the law subjects dealing with the administrative authorities. Historically, the use of French has been regarded as a means of national-building and as a matter of national sovereignty. This perception continues today and is manifested, for example, in the fact that France continues to defend the use of French in international organizations. France will not easily accept signing a treaty that does not have an authentic and authoritative version in French. However, the domestic predominance of French in the judicial courts of France – in which all proceedings and evidence have to be in French – does not prevent a French judge from considering other language texts of treaties.

With regard to the interpretation of tax treaties by the French administrative courts, Bokdam-Tognetti observed that the procedures at these courts are inquisitorial and in written form. A distinction is made between the scope of the law and the conditions of the law. The scope of the law includes the categories of persons, entities or things to which the law applies and the geographical scope. A court, by its own motion, must raise breaches of the scope of the law, even if the parties do not invoke these. The application of a bilateral tax treaty is considered to be a matter of the scope of the law, such treaties allocate the competence to levy tax and have the power to restrict the application of domestic tax law. Accordingly, in applying a domestic tax law provision, the court must by its own motion ascertain whether a tax treaty provision is not preventing the application of the domestic provision, even if this element was not raised by the parties. As such, the application of a treaty can be raised for the first time on appeal or in cassation.

Bokdam-Tognetti observed that, until 1990, the French CE considered that an administrative judge was not competent to interpret the terms of a tax treaty in cases where these were not clear, and had to seek and follow the interpretation of the terms provided by the French *Ministère de l'Europe et des Affaires étrangères* (Ministry of Foreign Affairs). Fortunately, the administrative courts operate in an age of reason, and, currently, treaty interpretational issues are not dealt with differently from the interpretation of domestic tax law. As treaty interpretation is considered to be a question of law, it is for the judge alone to provide, without the latter being bound by interpretation given by the Ministry of Foreign Affairs or the parties. The parties can refer to other language texts of a treaty in making their case. However, given that treaty interpretation is considered to be a question of law, it is impossible for the court to order expert evidence on the interpretation issue. This outcome was found

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22. This issue has been the topic of a previous article by J.F. Avery Jones in the *Bulletin for International Taxation*. See J.F. Avery Jones, [Why Can't the English ...?](#), 73 Bull. Intl. Taxn. 6/7 (2019), Journal Articles & Opinion Pieces IBFD. For a reply on this article from a German perspective, see M. Wichmann, [Comment from a German \(Language\) Perspective](#), 73 Bull. Intl. Taxn. 6/7 (2019), Journal Articles & Opinion Pieces IBFD. For a reply on the German reply, see: R. Resch, [Why Can't the Germans ...? English as Lingua Franca for Tax Treaties](#), 47 Intertax 11, pp. 910-922 (2019).
23. See the final clause in Article 32, *in fine*, of the [German Income and Capital Tax Treaty Model](#) (22 Apr. 2013), Treaties & Models IBFD. The final clause reads as follows: "Done at [place] on [date], in duplicate, in the German, [foreign language] and [English] languages, each text being authentic. In case of divergent interpretations of the German and [foreign language] texts, the English text shall prevail."
24. This problem had been foreseen in advance by J.F. Avery Jones and his co-authors in an article commenting on an early draft of the MLI. See S. Austray et al., [The Proposed OECD Multilateral Instrument Amending Tax Treaties](#), 70 Bull. Intl. Taxn. 12 (2016), Journal Articles & Opinion Pieces IBFD.

to be unsatisfactory and, in 2010, the administrative procedural rules were changed to permit the administrative courts to invite an “*amicus curiae*” (“friend of the court”) to provide opinions, also on questions of law. However, the use of an *amicus curiae* remains rare.

Bokdam-Tognetti reminded the audience that France has not signed the Vienna Convention (1969). However, French courts do apply the customary principles of international law that have been codified in the Vienna Convention (1969). With regard to treaty interpretation, priority is given to literal interpretation. If ambiguities remain, additional and subsidiary methods of interpretation are used, such as reliance on the object and aim of the treaty provision, the shared intention of the signatories and the preliminary works of the signatory states. If these methods of interpretation do not shed sufficient light on the true meaning of the treaty terms, subsidiary methods can be relied on, such as the wording of the treaty in other languages.

Bokdam-Tognetti observed that there were only few examples of French treaty case law in which reliance had been placed on the meaning of treaty terms in other treaty languages. In *Regazzacci* (2012),<sup>[25]</sup> the CE had to interpret the terms “*assujetti à l’impôt*” used both in article 3 (Residence) and article 9 (Dividends) of the France-United Kingdom Income Tax Treaty (1968).<sup>[26]</sup> In the English version, the terms “liable to tax” and “subject to tax” were used respectively. Even though the decision of the CE was based on an interpretation said to be derived from the object and purpose of the terms, the court did reference the learnings derived from consulting the English text. In *Masterfoods* (2019),<sup>[27]</sup> the CE had to decide whether the income derived by a French limited partner from his participation in a German limited partnership company organized in the form of a “*Kommanditgesellschaft*” (KG) was subject to tax in France under the France-Germany Income and Capital Tax Treaty (1959).<sup>[28]</sup> The CE held that it was not and relied, inter alia, based on the German version of the France-Germany Income and Capital Tax Treaty (1959),<sup>[29]</sup> and on the fact that, by signing a tax bilingual tax treaty, France had agreed not to apply to a French partner of a German KG the rules that it would normally apply to the general partner of a French “*société en commandite simple*” (SCS) to which a KG was normally assimilated. In *Chemkostav* (2019),<sup>[30]</sup> the reporting judge referred to the Czech version of the Czech Republic-France Income and Capital Tax Treaty (2003)<sup>[31]</sup> to determine whether the terms “a permanent establishment also encompasses... a building site” (“*un chantier de construction*” in French) mean that it covers one single construction site or a construction site in general terms. Both meanings can be read into the term “*un chantier de construction*”.

With regard to the question why the other authentic language version of a tax treaty was consulted in so few French treaty cases, Bokdam-Tognetti believed that there were both theoretical reasons and practical reasons. From a theoretical perspective, there simply is no obligation, at least not in French domestic law to consider systematically the other version. The practical reasons are not very honourable. Bokdam-Tognetti believed judges often lack the required linguistic skills and, most of all, the time and the means in which to consult other language versions. And even if the courts would fully master the foreign language, it is simply not feasible to expect courts to consult the foreign language version if the language of the French version is, or rather: seems to be, clear, and the parties do not bring up the issue of language. Here, it should be noted that, before the French courts, the parties almost never refer to the other language version in a treaty argument.

Bokdam-Tognetti believed there was no reason to dramatize this state of affairs, and that matters had to be put into perspective. Blatant contradictions between two linguistic versions should be rare. Furthermore, authentic linguistic versions of a tax treaty are supposed to mean exactly the same thing. The intention of the drafters of the tax treaty is revealed through clear provisions. If the French version of a tax treaty is clear and has an unambiguous meaning, there are no grounds for further use of other means of interpretation. And if there is ambiguity, there are various other tools and methods of interpretation, in addition to consulting the other language version that could aid in clarifying the meaning of a term.

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25. FR: CE, 27 July 2012, (“*Regazzacci*”).

26. *Convention between the United Kingdom of Great Britain and Northern Ireland and France for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (22 May 1968) (as amended through 1987), Treaties & Models IBFD.

27. FR: CE, 8 Nov. 2019, Case No. 430543 (“*Masterfoods*”), Case Law IBFD.

28. *Convention between the Federal Republic of Germany and the French Republic for the Avoidance of Double Taxation and the Establishment of Rules for Reciprocal Administrative and Legal Assistance with Respect to Taxes on Income and on Capital, Business Tax and Land Tax* (unofficial translation) (21 July 1959), (as amended through 1989), Treaties & Models IBFD.

29. See *Abkommen zwischen der Bundesrepublik Deutschland und der Französischen Republik zur Vermeidung der Doppelbesteuerungen und Über Gegenseitige Amts- und Rechtshilfe auf dem Gebiete der Steuern vom Einkommen und vom Vermögen sowie der Gewerbesteuern und der Grundsteuern* (21 July 1959), (as amended through 1989), Treaties & Models IBFD.

30. FR: CE, 9 May 2019, Case No. 422046 (“*Chemkostav*”), Case Law IBFD.

31. See *Convention between the Government of the Czech Republic and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (unofficial translation) (28 Apr. 2003), Treaties & Models IBFD [ *Czech Rep.-Fr. Income and Capital Tax Treaty* (2003)] for an unofficial English translation of the *Czech Rep.-Fr. Income and Capital Tax Treaty* (2003).

## 5. Plurilingual Tax Treaties in Poland

Dagmara Dominik-Ogińska started by proving some background information regarding the Polish judiciary. Poland is a civil law country. Administrative judges cannot appoint experts to give evidence on treaty text in foreign languages. The parties may submit arguments based on other language texts, but they rarely do so. The Polish courts cannot rely on an *amicus curiae*. The official language is Polish, and most judges simply do not know any other languages. Most relevant documents regarding treaty interpretation, i.e. the documentation relating to the treaty negotiations, models and commentary, international doctrine, etc., are in English or French. In conclusion, Dominik-Ogińska believed that it was very difficult and impossible in practice for Polish judges to compare other language versions of Polish tax treaties with the Polish versions.

Nevertheless, there are examples of decisions in which the courts have dealt with PT treaties. For instance, in a case decided in 2012, the Polish *Naczelny Sąd Administracyjny* (Supreme Administrative Court, NSA) had to consider whether interest paid by a Polish company to a related company in Sweden under a cash-pooling arrangement was subject to withholding tax in Poland.<sup>[32]</sup> Under Polish domestic law, a withholding tax of 20% is applied on such interest. Article 11(1) of the Polish version of the Poland-Sweden Income Tax Treaty (2004)<sup>[33]</sup> provided that merely that interest “may be taxed only” in the residence state. The Polish version provided that the interest “shall be taxable only” in the residence state if paid “to the person who is entitled”. The English version of the Poland-Sweden Income Tax Treaty (2004)<sup>[34]</sup> stated that the interest “shall be taxable only” in the residence state if “beneficially owned by a resident”. Article 30 provided that the tax treaty had been signed in duplicate in the Polish, Swedish and English languages, and that, in case of divergence of interpretation, the English tax should prevail. However, the taxpayer argued that the Polish version should be decisive, as there was no reference to a beneficial ownership requirement in the Polish version.

Dominik-Ogińska believed it was rather surprising that the NSA did find a divergence between the Polish and the Swedish<sup>[35]</sup> versions of the Poland-Sweden Income Tax Treaty (2004), and held that the English version had to prevail in line with the tax treaty’s final clause. The NSA referred to article 33 of the Vienna Convention (1969), and added that the tax authorities and the courts may not ignore a specific norm contained in the provisions of a specific tax treaty regarding the resolution of divergences by means of reliance on a text that is designated as prevailing. The NSA, therefore, held that the Polish version of the tax treaty had to be understood as incorporating the beneficial ownership requirement. The NSA subsequently decided in favour of the tax authorities, and held that the taxpayer was not entitled to the benefit of article 11 of the Poland-Sweden Income Tax Treaty (2004), given that the cash pooling administrator in Sweden was not the beneficial owner of the interest.

The decision has been heavily criticized in the Polish tax doctrine. A first point of criticism was that the NSA had failed to note that the final clause of the Poland-Sweden Income Tax Treaty (2004) provides that the English text prevails “in case of any divergence of interpretation”. Article 33 of the Vienna Convention (1969) refers to a prevailing text “in case of divergence”. Dominik-Ogińska believed that a divergence and a divergence of interpretation were not synonyms. The latter does not cover any divergence, as it only deals with divergences of interpretation. However, the NSA did not elucidate why it had equated the two concepts.

The second point of criticism was that the NSA did not pay attention to the fact that the Poland-Sweden Income Tax Treaty (2004) had been drawn up in three authentic language texts, and that, under the rule of equivalence of texts, the Vienna Convention (1969) generally equates the force of all authentic versions. Furthermore, it was argued that reference to the prevailing text in English should only be made in exceptional cases and not in the case of a divergence but only in the case of a divergence of interpretation.

Dominik-Ogińska observed that the crux of the issue was to determine whether there was a divergence of interpretation. She believed it was clear that the Polish version of article 11(1) of the Poland-Sweden Income Tax Treaty (2004) did not include part of the provision – the beneficial ownership requirement – that was included in the Swedish, and the English, versions. The Polish government appeared to share this view, given that, in 2017, it had issued a rectification the Polish version of the Poland-Sweden Income Tax Treaty (2004). The issuing of a unilateral correction by a treaty partner raises a whole new set of questions, especially regarding the legality of the rectification. Dominik-Ogińska noted that rectification was based on the Polish *ustawy z dnia 14 kwietnia 2000 umowach międzynarodowych* (Act of 14 April 2000 on International Agreements,

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32. PL: NSA, 2 Feb. 2012, Case No. II FSK 1399/10.

33. *Konwencja między Rządem Rzeczypospolitej Polskiej a Rządem Królestwa Szwecji w Sprawie Unikania Podwójnego Opodatkowania i Zapobiegania Uchyleniu się od Opodatkowania w Zakresie Podatków od Dochodu* (19 Nov. 2004), Treaties & Models IBFD.

34. *Convention between the Government of the Republic of Poland and the Government of the Kingdom of Sweden for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (19 Nov. 2004), Treaties & Models IBFD.

35. *Avtal Mellankonungariket Sveriges Regering och Republiken Polens Regering för Undvikande av Dubbelbeskattning och Förhindrande av Skatteflykt Beträffande Skatter på Inkomst* (19 Nov. 2004), Treaties & Models IBFD.

AIA),<sup>[36]</sup> which did provide for the possibility to correct errors in international agreements in certain circumstances. Article 18B of the AIA provides that a number of specified errors can be corrected. These errors are as follows: (i) errors in an international agreement consisting in inconsistencies between the language versions in which the agreement was drawn up; (ii) errors in the translation of an international agreement into Polish consisting in inconsistencies in the translation with the international agreement in the foreign language in which the agreement was drawn up; and (iii) errors in a government declaration regarding an international agreement. In the Polish government's rectification of the Poland-Sweden Income Tax Treaty (2004), it is not indicated what type of error the rectification is correcting. If it is an error of the first type, this situation would mean that the error was equivalent to a divergence of interpretation for the purpose of article 30. If it is not one of the three types of errors listed in the AIA, the Polish government should have agreed with the Swedish government to amend the Poland-Sweden Income Tax Treaty (2004), instead of attempting to correct the mistake unilaterally.

As to her own opinion on the case in question and the use of plurilingual texts in general, Dominik-Ogińska believed it might be beneficial to rely more on the general rules of interpretation in articles 31 to 33 of the Vienna Convention (1969) as a whole, instead of focusing on a single method of interpretation. In the case in question, the problem arose by relying solely on the literal wording of the treaty clauses. However, if greater deference had been given to the presumption that texts are equivalent and the fact that treaties have to be interpreted in good faith, the Polish version of article 11(1) of the Poland-Sweden Income Tax Treaty (2004) might be read as also including the beneficial ownership requirement. Similarly, if more deference had been given to the context of the terms – the context which is partly formed by article 11 in the OECD Model<sup>[37]</sup> to which Poland did not object or issue reservations – a similar result might be achieved. Dominik-Ogińska believed that, in any case, the NSA should make greater efforts in properly motivating and justifying its application of international law. The judgments of the NSA have a significant educational value for the lower courts. Without access to proper elucidation on how to apply international law, lower courts tend to revert to the principles of domestic law, being the law with which they are most familiar.

## 6. Plurilingual Tax Treaties in Canada

Robert Hogan started by emphasizing that Canada is in an unusual position amongst the OECD member countries, as it has two official languages – French and English. The two languages enjoy equal protection under the Canadian constitution. Subsection 18(1) of the Canadian Charter of Rights and Freedoms provides that all Canadian federal laws are drafted in French and English, with both texts being authentic and authoritative. This implies that a judge – who is deemed to know the law – is required to determine on his own whether there is a divergence. If a judge does not do so, his decision will most likely be overturned on appeal, particularly if the interpretation of a term is at issue in the case. The meaning of a term in Canadian domestic law must be decided with regard to both language versions of the law. Hogan noted that the rules of interpretation laid down by the Supreme Court of Canada (SCC) on this matter are the exact same rules as those described in section 1. for the application in an international setting.

With regard to the signing of PT treaties with a prevailing text, Hogan noted that the Canadian Constitution requires that all statutes are adopted in both languages. Given that treaties are ratified as laws, i.e. enabling legislation is enacted that adopts the treaty as domestic law, they must be adopted in both French and English. This implies, first, that Canadian treaties are generally bilingual, and, second, it also explains why Canada will not sign a treaty with a prevailing text. If a prevailing text clause were to be adopted, this clause would likely be inoperative, as the clause would be considered *ultra vires* with regard to the constitution, which requires laws to be authenticated in both languages. Even in the remote case where a treaty were to be negotiated with a treaty partner, for example, only in English, the treaty would have to be enacted by Parliament both in French and in English.

Next, Hogan gave an overview of the Canadian rules on the interpretation of bi- and multilingual tax treaties. First of all, Canadian courts must, when engaged in statutory interpretation, take into account the fact that the two versions of a Canadian tax treaty – in English and in French – are equally authoritative. Under the principles of statutory interpretation, differences between the English and the French versions of the terms used in a tax treaty must be reconciled by finding the meaning common to both, unless the context requires otherwise. As Canadian courts are rather comfortable with plurilingual considerations when engaged in statutory interpretation, they would be open to considering the meaning of an undefined term in the language of their treaty partner. This is particularly true if a term used in a treaty is not defined in French and English in Canada's Income Tax Act.<sup>[38]</sup>

Hogan noted that, in practice, judges of the TCC can assume there is no divergence between language texts, but their judgment can be overturned on appeal if they assume so. The three-step method for interpretation in case of discordant

36. PL: *ustawy z dnia 14 kwietnia 2000 r. o umowach międzynarodowych* (Act of 14 April 2000 on International Agreements, AIA), Official Gazette, No. 39, Item 443.

37. Most recently, *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), Treaties & Models IBFD.

38. CA: Income Tax Act (ITA).



bilingual statutes is set out by the SCC in *Daoust* (2004).<sup>[39]</sup> This three-step method can be summarized as follows: (i) is there discordance between the two versions of the text; (ii) what is the common meaning between the texts, consistent with Parliament's intent; and (iii) is the interpretation consistent with other principles of interpretation in the given circumstance? Hogan noted that the basic rule was to determine a common meaning. This step could not be skipped, as it was required under the law. But the finding of a common meaning was not a prerequisite. The meaning could also be determined by using the other principles of interpretation.

Hogan believed the principles set out by the SCC were exactly the same as the rules of interpretation to be applied in an international law context. He believed that the Canadian approach to tax treaty interpretation based on these principles is consistent with the requirements of article 3(2) of the OECD Model and the interpretation rules in the Vienna Convention (1969). It is also consistent with the SCC's decision in *Crown Forest* (1995).<sup>[40]</sup> This landmark case was one of the first Canadian cases on treaty interpretation. In particular, the SCC held that:

In interpreting a treaty, the paramount goal is to find the meaning of the words in question. This process involves looking to the language used and the intentions of the parties.<sup>[41]</sup>

Effectively, there is only one tax treaty, and, if required, a liberal interpretation must be applied to come to an understanding what the signatory states intended.

Hogan referred to *Prévost Car* (2009), in which the Federal Court of Appeal (FCA)<sup>[42]</sup> upheld the decision by the TCC. On 22 April 2008, Justice Rip of the TCC<sup>[43]</sup> held that the Canadian tax authorities were wrong to decide that Prévost Holding in the Netherlands was not the beneficial owner of dividends received from Prévost Car in Canada. In order to come to this conclusion, Justice Rip took into account the common law meaning of the terms "beneficial owner" in the Canada-Netherlands Income Tax Treaty (1986),<sup>[44]</sup> but did not apply it, given that the tax treaty meaning of "beneficial owner"/" *bénéficiaire effectif*" is somewhat different than the common law concept. The tax authorities argued that the term required looking more at the substance of the arrangement. Given that, in the case at hand, there was an agreement of the shareholders to pay a large part of the dividends received by Prévost Holding in the Netherlands to its own shareholders in Sweden, it was these shareholders who were the effective beneficiaries. Justice Rip also considered expert evidence on Dutch law, which revealed that the shareholder agreement was not binding on the directors of Prévost Holding in the Netherlands. He did not look at the economic substance, given that Canada is a jurisdiction that upholds the principle of form over economic substance. If the directors had lost the power to pay the dividends, then the Dutch entity would be a conduit and not be the beneficial owner of the dividends. Hogan summarized that the decision was based on the meaning of the terms in the three languages of the Canada-Netherlands Income Tax Treaty (1986), Justice Rip concluded that the English term "beneficial ownership" was more in line with the common law meaning commonly associated with the terms in English.

In Hogan's own experience at the TCC, the treaty cases he has had before his bench tend to involve large pecuniary interests. Accordingly, the parties tend to call on expert evidence on language issues. If not, it is the judge who is obliged to look at least at both the English and the French version of the tax treaty in question. By application of the rules in the Vienna Convention (1969) and as Canada does not agree on a prevailing text, judges also have to consider the other language versions of the text, if any. Expert evidence on the French and English versions is not permissible in court, given that the judge is expected to know the law. As such, at the TCC, cases with a lurking language issue tend to be assigned to bilingual judges. With regard to a third language, the judge will usually raise the issue with the parties and ask whether to submit expert evidence on the meaning of the relevant terms in the third language of the treaty. If parties refuse, the judge is free to name an *amicus curiae* to do so.

Finally, Hogan observed that, since *Crown Forest* (1995), it is clear that, also in Canada, it is necessary to consider the OECD Model and the Commentaries on the OECD Model<sup>[45]</sup> as a source of interpretation where relevant. However, the OECD Model and the OECD Commentaries are drafted in multiple language versions. Hogan believed a similar issue as with PT treaties arises here, given that it is not possible to assume merely that the OECD Commentaries are identical in each language version. The same is true for the MLI, which is drafted in English and in French. This suits Canada and its judges very well, given that it is in line with Canada's constitutional requirements. It does mean that, in addition to the MLI itself, judges must also consider both the English and the French version of the MLI's Explanatory Statement<sup>[46]</sup> when applying MLI provisions to tax treaties.

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39. CA: SCC, 12 Feb. 2004, *R. v. Daoust*, 2004 SCC 6 (CanLII), [2004], 1 S.C.R. 217.

40. CA: SCC, 22 June 1995, *Crown Forest Industries Ltd. v. Her Majesty the Queen*, 23940, Case Law IBFD.

41. *Id.*, at p. 5393.

42. CA: FCA, 26 Feb. 2009, *Prévost Car Inc. v. Her Majesty the Queen*, A-252-08, Case Law IBFD.

43. CA: TCC, 22 Apr. 2008, *Prévost Car Inc. v. Her Majesty the Queen*, 2004-2006(IT)G and 2004-4226(IT)G, Case Law IBFD.

44. *Convention between the Kingdom of the Netherlands and Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (27 May 1986) (as amended through 1997), Treaties & Models IBFD.

45. Most recently, *OECD Model Tax Convention on Income and on Capital: Commentaries* (21 Nov. 2017), Treaties & Models IBFD.

46. OECD, *Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (7 June 2017), Treaties & Models IBFD (the "Explanatory Statement").

## 7. Final Remarks

In the final question and answer part of the webinar, the panellists responded to some questions from the audience. On the question of whether treaty negotiators - who cannot but be aware of the inherent risks of plurilingualism in tax treaties – are willing to live with a certain plurilingual uncertainty merely for the purpose of furthering their own state's interpretation of a particular tax treaty provision, Richard Resch responded that plurilingualism in tax treaties was a historical fact. The intention to preserve linguistic sovereignty may exist, or has existed, as a motivation, but this is a very short-sighted strategy. The treaty is one in law, irrespective of the language. A country cannot reserve a particular interpretation that is different from the agreed interpretation of the term by its treaty partner state without acting in bad faith. Resch did believe treaty negotiators unwittingly act as guardians of their national linguistic sovereignty simply because they have been educated in their domestic legal system and tend to use domestic law language to draw up the treaty. Given that the meaning of terms in domestic law does not always fully coincide with the meaning of the same terms used in an international forum, treaty negotiators should not overuse domestic terminology in treaties. An example of such a term is “habitual abode”, used in the tie-breaker provision of article 4(2) of the OECD Model and many tax treaties. Given its purpose to break a tie, the term needs to have a common meaning in both treaty states. In the German language, the term used for “habitual abode” is “*gewöhnlicher Aufenthalt*”. The term is also used in both German and Austrian domestic tax law, but, in both jurisdictions, the term has a different meaning. If an Austrian judge sees the term in a tax treaty and applies the domestic law meaning, he might come to a different decision than his German peer who does the same.

With regard to the question of why two civil law countries would complicate treaty interpretation by assigning English as the prevailing (third) language text, given that English does not necessarily have the right vocabulary to frame civil law concepts, John Avery Jones believed the facts demonstrate that many civil law countries do use English as a prevailing text. Avery Jones believed that these countries are perhaps able to read the English through civil law eyes, so they do not see this problem. Resch added that to resolve language issues in tax treaties, the selection of English is irrelevant. What matters most is the assigning of a prevailing text, regardless of the language of this text. English merely happens to be the de facto language of choice in the overwhelming majority of cases.

The session was closed by Chief Justice Eugene Rossiter of the TCC and President of IATJ.