

# The Interpretation of Tax Treaties and Authentic Languages

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## Authentic Languages

Neither the OECD model convention<sup>1</sup> nor the UN model convention<sup>2</sup> contains a specific clause about authentic languages. Most countries, however, agree on one or more authentic languages when they negotiate and conclude a treaty under international public law. This policy decision is reflected in their tax treaties as well. Most tax treaties therefore have a specific provision on authentic languages.

There are several types of such clauses. Countries where the same language is spoken tend to agree on this language as the one and only authentic language for their bilateral tax treaty. Austria and Germany agreed on the following provision: “Done in duplicate in Berlin on 24 August 2000, both in the German language.”<sup>3</sup> If there is only one text in one language, it is often not necessary to include a clause in respect of the authentic language. In the UK-US treaty, which is, not surprisingly, drafted exclusively in English, it is obvious that English is the authentic language. The final provision of this treaty therefore reads merely as follows: “Done at London in duplicate, this 24th day of July, 2001.”<sup>4</sup>

Equality of states implies the right of each state to use the language of its choice in concluding treaties.<sup>5</sup> Thus, countries whose populations speak different languages

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- 1 Organisation for Economic Co-operation and Development, *Model Tax Convention on Income and on Capital: Condensed Version* (Paris: OECD, July 2010) (herein referred to as “the OECD model”).
- 2 United Nations Model Double Taxation Convention Between Developed and Developing Countries, UN publication no. ST/ESA/PAD/SER.E/21, 2001 (herein referred to as “the UN model”).
- 3 Austria-Germany (conclusion date: August 24, 2000; entry into force: August 18, 2002).
- 4 UK-US (conclusion date: July 24, 2001; entry into force: March 31, 2003).
- 5 Dinah Shelton, “Reconcilable Differences? The Interpretation of Multilingual Treaties” [1996-1997] no. 3 *Hastings International and Comparative Law Review* 611-38, at 613.

tend to have both languages as the authentic ones. Finland and France included the following final sentence in their treaty: “Done at Helsinki on the 11th day of September 1970, in two original copies in the French and Finnish languages, both texts being equally authentic.”<sup>6</sup>

Two countries with different languages sometimes declare a third language, in addition to the other two languages, to be authentic as well. The treaty between Denmark and Italy serves as an example: “Done in duplicate at Copenhagen this 5th day of May 1999, in the Danish, Italian and English languages, all texts being equally authentic.”<sup>7</sup>

According to some other treaties, the third language prevails in the case of a conflict; for example, Greece and Turkey agreed on the following provision: “Done in duplicate at Ankara this 3rd day of December 2003, in the Turkish, Hellenic and English languages, all three texts being equally authentic. In case of divergence between the texts, the English text shall be the operative one.”<sup>8</sup>

Some treaties stipulate that a third language prevails in the case of a conflict of interpretation. This third language, however, may be consulted only if the interpretation of the other treaty languages results in such a conflict. The following clause can be found in the treaty between the Netherlands and Japan: “Done at The Hague, on March 3, 1970 in six originals, two each in the Netherlands, Japanese and English languages. The Netherlands and Japanese texts are equally authentic and, in case there is any divergence of interpretation between the Japanese and Netherlands texts, the English text shall prevail.”<sup>9</sup>

Some treaties do not declare any of the languages that are spoken in the contracting states to be authentic and instead choose a third language. An example is the treaty concluded between Austria and Greece: “Done in duplicate in Athens on eighteenth July of 2007, in the English language.”<sup>10</sup>

The OECD model is not a treaty under international public law. The factual relevance of the OECD model is due to the fact that many countries—OECD members and to a certain extent non-members as well—use it as a starting point for their tax treaty negotiations. Every country is free to use this model. For OECD member countries, article 5(b) of the Convention on the Organisation for Economic Co-operation and Development<sup>11</sup> provides a legal framework for this approach. The convention on the OECD is itself a treaty under international public

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6 Finland-France (conclusion date: September 11, 1970; entry into force: March 1, 1971).

7 Denmark-Italy (conclusion date: May 5, 1999; entry into force: January 27, 2003).

8 Greece-Turkey (conclusion date: December 3, 2003; entry into force: March 5, 2004).

9 Japan-Netherlands (conclusion date: March 3, 1970; entry into force: October 23, 1970).

10 Austria-Greece (conclusion date: July 18, 2007; entry into force: April 1, 2009).

11 Convention on the Organisation for Economic Co-operation and Development, signed in Paris on December 14, 1960 (herein referred to as “the convention on the OECD”).

law. According to article 5(b), the OECD may “make recommendations to Members” in order to achieve its aims. The OECD model and its updates are passed as such “recommendations.” By taking the OECD model as a starting point for their tax treaty negotiations, OECD members comply with that recommendation.<sup>12</sup>

The convention on the OECD was signed in Paris on December 14, 1960 “in the English and the French languages, both texts being equally authentic.” Accordingly, the recommendation that refers to the OECD model was promulgated in these languages as well.<sup>13</sup> There are, however, translations available in other languages, but these translations, even if they have been prepared by governments, are not authentic OECD texts. Even if one attaches greater authority to translations made by a public institution than to completely unofficial texts,<sup>14</sup> they still do not have the same value as texts in their original languages.<sup>15</sup> The interpretation of the OECD model therefore has to be based on its English and French versions only.

As we have seen above, bilateral tax treaties that are based on the OECD model do not necessarily declare French and English to be the only authentic languages. Sometimes one or more other languages are authenticated as well. Other treaties may, as we have also seen, even declare that neither English nor French is an authentic language and may choose different languages instead. We therefore want to examine what consequences these provisions on the authentic languages may have for bilateral tax treaties whose provisions are either completely or partly copied from the OECD model. If one were prevented from taking into account the English and the French version of the OECD model and were obliged to look at the text exclusively in one or more of the other language versions, which have been declared to be authentic by the bilateral treaty, one might be forced to interpret a provision of a bilateral treaty differently from the respective provision of the OECD model, although the provision is nothing less than a translation. It is widely known how difficult it is to express a legal concept in another language. Exact equivalents are not often found in different languages, and thus perfect translations can rarely be made.<sup>16</sup> Differences in meaning in different language versions of a text are not

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12 For the legal and practical relevance of OECD recommendations, see Hugh J. Ault, “Reflections on the Role of the OECD in Developing International Tax Norms” (2009) 34:3 *Brooklyn Journal of International Law* 757-81, at 767 et seq.

13 See Jacques Sasseville, “The OECD Model Convention and Commentaries,” in Guglielmo Maisto, ed., *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law*, EC and International Tax Law Series, vol. 1 (Amsterdam: IBFD, 2005), 129-34, at 130.

14 Lisbeth Stevens, “The Principle of Linguistic Equality in Judicial Proceedings and in the Interpretation of Plurilingual Legal Instruments: The Régime Linguistique in the Court of Justice of the European Communities” (1967) 62:5 *Northwestern University Law Review* 701-34, at 724.

15 See Shelton, supra note 5, at 634.

16 *Ibid.*, at 619.

only possible but inevitable.<sup>17</sup> No matter how carefully an international treaty is worded, discrepancies between the linguistic versions are bound to appear.<sup>18</sup>

## Interpretation of Tax Treaties According to Article 33 of the VCLT

The question of how treaties are to be interpreted if they are authenticated in two or more languages is dealt with in article 33 of the Vienna Convention on the Law of Treaties (VCLT).<sup>19</sup> The VCLT is itself a treaty under international public law, but its interpretation rules are considered to be part of customary international law and are therefore also relevant for countries which have not yet ratified the VCLT.<sup>20</sup> Article 33 of the VCLT has the following wording:

### Article 33

Interpretation of treaties authenticated in two or more languages

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.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

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.

Article 33(3) of the VCLT provides that the treaty terms are presumed to have the same meaning in each authentic text. The idea is that when we apply a multi-language treaty, there normally should be no need to scrutinize and compare all of the authenticated texts, considering all the time and effort inherent in such an examination. On the contrary, we should be able to select one of the texts—in

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17 Compare Christopher B. Kuner, “The Interpretation of Multilingual Treaties: Comparison of Texts Versus the Presumption of Similar Meaning” (1991) 40:4 *International and Comparative Law Quarterly* 953-64, at 956.

18 Stevens, *supra* note 14, at 715.

19 Vienna Convention on the Law of Treaties, signed at Vienna on May 23, 1969, UN doc. A/Conf. 39/27, fourth annex, UNTS 1155/331.

20 Richard Gardiner, “Treaty Interpretation in the English Courts Since *Fothergill v. Monarch Airlines* (1980)” (1995) 44:3 *International and Comparative Law Quarterly* 620-28, at 622.

principle, any of them—and rely upon it.<sup>21</sup> The obvious result seems to be that it is not necessary to compare language versions on a routine basis. For the interpretation of the treaty between Greece and Turkey, for example, this could mean that the Greek tax authorities may interpret the treaty exclusively in its Greek version. If the wording is completely clear and does not leave any room for doubt, there is no reason for the Greek official to consider the English or the Turkish version of the treaty as well. Likewise, Turkish tax officials interpreting the same treaty provision may limit themselves to examining the Turkish version of the provision. If the wording is clear, they will not be required to take the English or the Greek version into account.

Even if the wording of the provision both in Greek and in Turkish is completely clear, it is not at all guaranteed that the meaning of the texts in Greek and in Turkish is identical. We have already seen how easily discrepancies between the linguistic versions may occur:<sup>22</sup> many words are simply impossible to translate from one language to another without at least some change in meaning.<sup>23</sup> Legal draftsmen who wish to convey the meaning of a legal concept in another language are limited by the means available in the other language, by expressions in their own tongue which defy translation, by peculiar nuances of meaning, and, above all, by a terminology that varies not only between legal systems but also occasionally even between nations belonging to one legal family.<sup>24</sup> There is the almost insurmountable difficulty of giving linguistic expression to a concept which does not exist in the legal system under consideration.<sup>25</sup> The lack of precise linguistic equivalents and the differences in legal systems around the globe make it virtually certain that multiple language versions will include differences in terminology that lead to conflicting interpretations of the text.<sup>26</sup> If taxpayers, tax authorities, and courts were free to decide which of the authentic languages of a treaty they wanted to look at, different interpretations of the same treaty provision in both countries would occur rather frequently. No one could blame them for these results if focusing on either one of the authentic language versions, irrespective of which one, were equally correct legally.

Under article 33(4) of the VCLT, however, it is presumed that the terms of the treaty have the same meaning in each authentic text. This presumption can be

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21 Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht, the Netherlands: Springer, 2007), at 356.

22 Stevens, *supra* note 14, at 715.

23 Meinhard Hilf, *Die Auslegung mehrsprachiger Verträge* (Berlin: Springer-Verlag, 1973), at 20 et seq.; and Linderfalk, *supra* note 21, at 356.

24 Stevens, *supra* note 14, at 716.

25 *Ibid.*

26 Shelton, *supra* note 5, at 612.

rebutted. Thus, if in a dispute between two subjects of international law, one of the parties presents the argument that the meaning of a term in one of the authentic languages differs from the meaning the other party has determined when it examined the text in the other authentic language, both language versions have to be compared and then attempted to be reconciled according to the rules laid down in article 33 of the VCLT. In the case of a treaty in which the provisions are directly relevant only for the two parties and therefore can become an issue only between these two countries, it makes sense to require the other party to rebut the presumption. For example, if the interpretation of a provision of a nuclear test-ban treaty is a matter of controversy between the parties and if one authentic version of the treaty indicates that a conference of all the signatory states must be held three years after the date of the *anniversary* of its opening for signature, and according to another equally authentic version of the treaty in another language, this conference is envisaged three years after the opening, one might expect that in such a dispute the parties would quickly rebut the presumption that the meaning found in one of the authentic texts is identical to the meaning found in the other versions.<sup>27</sup> As soon as the presumption is rebutted, the mechanism described in article 33(4) of the VCLT will come into play. This presumption seems workable in such a situation.

In case the meaning of a *tax treaty* provision becomes controversial, the situation is completely different. Such a dispute does not usually start between the two contracting states but rather between one state's tax authority and the taxpayer. Unless a mutual agreement procedure is initiated, the other party to the treaty may never get involved in the dispute or may not even become aware of it. If the local tax authority of first instance applies the treaty and tries to find the right interpretation, one cannot expect each taxpayer to know whether the meaning of a provision in one of the other authentic languages differs from the clear meaning of the term in the language version of the treaty which is exclusively looked at by the tax authority.<sup>28</sup> Such a requirement would shift the burden of proof regarding the law to the taxpayer.<sup>29</sup> At least in countries where, according to the country's domestic law, tax authorities and domestic courts themselves are obliged to find out what the law is, both in cases of domestic tax provisions and tax treaty provisions, it is hard to imagine that tax authorities might act equally correctly and lawfully. They cannot be blamed if they apply a tax treaty provision either in its meaning A, which is exclusively derived from the clear wording in one authentic

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27 For a slightly changed example, see Anthony Aust, *Modern Treaty Law and Practice*, 2d ed. (Cambridge, UK: Cambridge University Press, 2007), at 184 et seq.

28 For a discussion of similar problems, see Mala Tabory, *Multilingualism in International Law and Institutions* (Alphen aan den Rijn, the Netherlands: Sijthoff and Noordhoff, 1980), at 199.

29 However, see Richard Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), at 360 et seq.

language, or in its meaning B if the taxpayer rebuts the presumption by providing evidence that the other language version of the text leads to a different result, thus requiring the two language versions to be reconciled.<sup>30</sup> In countries where tax authorities or at least courts have to take the maxim *iura novit curia* (the court knows the law) into consideration, such an approach would not be acceptable. It is therefore inevitable—at least as far as the interpretation of treaties that impose rights and obligations not only on contracting parties but on individuals as well (as is the case in tax treaty law) is concerned—to analyze all authentic language versions and, if it turns out to be necessary due to different meanings in the various language versions, to attempt to reconcile the different meanings. According to some scholars, the comparison of the treaty versions in the different languages is required in any case, and thus is not limited to treaties which impose rights and obligations on individuals: a treaty is a single agreement, composed of a single set of provisions, even if the treaty happens to be expressed in several languages.<sup>31</sup> It is the meaning of the treaty, and not the meaning of the texts of the treaty, that should be established by interpretation.

The fact that countries are often driven by political reasons when they agree on the authenticated languages in a treaty, and that this question is also and sometimes mainly a question of symbolic relevance, has to be taken into account when interpreting and applying article 33 of the VCLT. All texts in the different language versions are not always equally considered during the drafting of the treaty. The International Law Commission (ILC) even “examined whether it should be specified that there is a legal presumption in favour of . . . the language version in which the treaty was drafted.”<sup>32</sup> The ILC only refrained from doing so because “[i]t felt . . . that this might be going too far, since much might depend on the circumstances of each case and the evidence of the intention of the parties.”<sup>33</sup> The fact that the ILC did not codify this principle does not mean that it rejected the principle as such. In international treaty practice, cases are known where a text designated as authentic was not even in existence when the treaty itself was adopted.<sup>34</sup> Similarly, the Protocol of Signature and the Statute of the Permanent Court of International Justice were originally authenticated in two languages, English and French. At the

30 See also Frank Engelen, *Interpretation of Tax Treaties Under International Law* (Amsterdam: IBFD, 2004), at 387 et seq.

31 Linderfalk, supra note 21, at 356; see also Jörg Manfred Mössner, “Die Auslegung mehrsprachiger Staatsverträge” (1971/72) 15 *Archiv des Völkerrechts* 273-302, at 282.

32 United Nations, *Yearbook of the International Law Commission 1966*, vol. II (New York: United Nations, 1967), at 226.

33 Ibid.

34 Shabtai Rosenne, “The Meaning of ‘Authentic Text’ in Modern Treaty Law,” in R. Bernhardt, eds., *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* (Berlin: Springer-Verlag, 1983), 759-84, at 781.

San Francisco Conference (the United Nations Conference on International Organization, April 25–June 26, 1945), it was decided that the statute would become an integral part of the Charter of the United Nations and that both instruments were to be adopted in five languages—Chinese, English, French, Russian, and Spanish—each equally authentic. However, this did not prevent courts from putting all or at least more emphasis on the English and French versions when interpreting these rules, since English and French were also the working languages in San Francisco.<sup>35</sup> One should therefore refrain from drawing radical conclusions from article 33 of the VCLT: comparing the different language versions of a treaty is no more than the “mechanical aspect of multilingual interpretation,”<sup>36</sup> while putting heavy emphasis on the object and purpose of the treaty and taking into consideration many other aspects is not at all excluded. If a “text is equally authoritative in each language,” one is not obliged to put equal emphasis on all language versions if the history of the treaty indicates that not all language versions had been considered equally carefully during drafting. McNair points out that “tribunals dealing with a treaty written in two or more languages of equal authority will sometimes seek to ascertain the ‘basic language,’ that is, the working language in which the treaty was negotiated and drafted and regard that as more important.”<sup>37</sup> Rosenne summarized this convincingly: “The fact that a text is designated ‘authentic’ implies no more than that it *may*—perhaps even should—be *one* of the elements mobilized in the interpretative process. But neither the word ‘authentic’ nor article 33 of the VCLT takes us very far in answering the question of *how* it should be used.”<sup>38</sup> It is only normal that preference should be given to the original version, the basis on which the negotiators in fact first reached agreement.<sup>39</sup> Aust reminds us that not “each language text will carry the same weight. If the treaty was negotiated and drafted in only one of the authentic languages, it is natural to place more reliance on that text.”<sup>40</sup> If English and French, or at least one of these languages, are among the authentic languages of a bilateral treaty, and if it is evident that a certain treaty provision is a mere translation of a provision of the OECD model, it is therefore

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35 See in detail, *ibid.*, at 763.

36 *Ibid.*, at 771.

37 Arnold Duncan McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), at 434.

38 Rosenne, *supra* note 34, at 784.

39 Shelton, *supra* note 5, at 637; for an early view, see Alfred Rest, “Interpretation von Rechtsbegriffen in internationalen Verträgen” (dissertation, University of Cologne, 1971), at 116 et seq.

40 Aust, *supra* note 27, at 205; see also A.N. Makarov, “Zur Auslegung mehrsprachiger Staatsverträge,” in *Faculté de droit de l’université de Genève*, ed., *Recueil d’études de droit international en Hommage à Paul Guggenheim* (Geneva: Institut universitaire de hautes études internationales 1968), 403–25, at 417; furthermore, for an early view, see H. Dölle, “Zur Problematik mehrsprachiger Gesetzes- und Vertragstexte” (1961) 26 *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 4–39, at 22 and 37 et seq.

well justified to focus more on the English or French version of the OECD model that was copied and to put less emphasis on other language versions, even if they are authentic as well.

McNair mentions an example which shows that putting more weight on a specific language version fits well with international treaty practice.<sup>41</sup> In the *Standard Oil Company's Tankers* case in 1926,<sup>42</sup> an arbitration tribunal had to examine the expressions “legal or equitable interests” in the English text and “tous droits et intérêts légitimes” in the French version of the Treaty of Versailles of 1919, article 440 of which provided that the French and English texts are both authentic. The tribunal remarked,

[T]here is notable discrepancy in these texts, for while the English stipulates that due regard shall be had to any “legal or equitable interests”, which corresponds to very clear and well-known conceptions of English and American law, of which equity is a form, the French employs the infinitely vaguer phrase of “droits et intérêts légitimes” which corresponds to no definite legal idea; [and] therefore everything points to the conclusion that the French phrase is merely the translation of the English, in which alone the expression employed has legal sense, and which makes clear the general tenor of the articles.<sup>43</sup>

In the context of the OECD model, one might therefore even go one step further and ask whether it is appropriate to put more emphasis on either the English or the French version, depending on its relevance in the drafting process. In the light of the arguments just raised, such an approach would be consistent. The materials from the early 1950s, when most of the drafting work for the first version of the OECD model was done, illustrate that for some working parties the working language was French and for some it was English. The language used by the working party could be a relevant factor in deciding on which language version more emphasis should be put when interpreting a specific treaty provision. Since this might differ from working group to working group, the answer might depend on the provision of the OECD model. Due to the predominance of the English language in recent years, one might conclude that the English text could prevail over the French text if more recently developed provisions of the OECD model are the object of the interpretation. However, more weight could only be put to a specific language version if there is a clear indication that this language was the predominant working language during drafting.<sup>44</sup> If other versions were carefully drawn by the

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41 McNair, *supra* note 37, at 414.

42 *The Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers* (1926), Reports of International Arbitral Awards 775 (Arbitral Tribunal Instituted by the Repatriation Commission and the Government of the United States) ([http://untreaty.un.org/cod/riaa/cases/vol\\_II/777-795.pdf](http://untreaty.un.org/cod/riaa/cases/vol_II/777-795.pdf)).

43 *Ibid.*, at 792.

44 Mössner, *supra* note 31, at 290.

negotiators having reference to all the texts, they were not mere translations.<sup>45</sup> For the provisions of the OECD model which were drafted in the 1950s, it is often not clear whether it is justifiable to put more emphasis on a specific language version. Almost all minutes and preliminary reports were available in both languages. Thus, there is no clear indication that the discussions focused only on one specific language version of the draft. The discussions within Working Party 4, which was responsible for drafting the non-discrimination clause, may serve as an example that both languages were taken into account.<sup>46</sup> Although the working language of Working Party 4 seems to have been French (since the original versions of the documents produced by this working party were produced in that language), at some point the delegates changed the term “operator” to “entrepreneur” in the English draft text of the future article 24 of the OECD model, whereas the French term “*entrepreneur*” remained unchanged.<sup>47</sup> This demonstrates that some emphasis was put on the English version as well.

However, the observations made and the conclusions drawn above justify a uniform interpretation of a treaty provision only by reconciling the different *authentic* language versions. If languages other than English and French are authentic, the obvious danger is that the meanings of tax treaty provisions drift apart and that identical provisions of the OECD model are understood differently in each bilateral treaty. If, according to the treaty between Finland and France, for example, the Finnish and the French versions are authentic, whereas the German one is authentic according to the Austria-Germany treaty, the interpretation derived from the attempt to reconcile the French and the Finnish versions of a certain provision may differ from the meaning derived from the German version, even if both provisions were copied and merely translated in these languages. The meaning which may be derived from this provision under the French and English versions of the OECD model may be different from both other meanings. Countries that copy provisions of the OECD model in their bilateral tax treaties to make their meaning concurrent with the model treaty provisions would not be able to achieve this goal. The different meanings would be inevitable, unless the English and French languages exclusively are declared to be equally authoritative for the treaty interpretation.<sup>48</sup> The choice of authentic languages is often a matter of psychological

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45 Shelton, *supra* note 5, at 637.

46 M. Lang, “Der Begriff ‘Unternehmen’ und Art. 24 OECD Musterabkommen” (2011) 21:1 *Steuer und Wirtschaft International* 9-20, at 10 et seq.

47 Later in the drafting process, both the English and the French terms were changed into “enterprise” and “entreprise,” respectively. See *ibid.*, at 12.

48 See Augusto Fantozzi, “Conclusions,” in *Multilingual Texts*, *supra* note 13, 335-42, at 342, who discusses whether tax treaties should be concluded in English only. See also Jean Pierre Le Gall, “Comments,” *ibid.*, 327-32, at 329 et seq.

and political importance, closely related to nationalism and fears of cultural hegemony.<sup>49</sup> Equality of states implies the right of each state to use the language of its choice in concluding treaties.<sup>50</sup> A self-limitation of the contracting states to the selection of English and French as the only authentic languages, which would require them to refrain from declaring their own languages to be authentic, has never been realistic. It is unlikely in tax treaty law—as in other areas of international public law—that in the future, states will authenticate treaties exclusively in one or more *lingua francas*.<sup>51</sup>

In case neither English nor French is the authenticated language of a treaty, does article 33 of the VCLT really prevent taking these two original language versions of the OECD model into account? This seems to be the case. In the ILC, after drafts for the VCLT had been prepared, it was discussed whether in certain circumstances recourse could be made to non-authoritative texts to show the intentions of the parties.<sup>52</sup> If this had been permitted, the English or the French version of the OECD model could at least be taken into account for the interpretation of provisions of bilateral tax treaties which are copied from the OECD model and translated into and authenticated in other languages. One must not ignore the fact that it was a deliberate decision of the ILC not to include such an explicit rule in the VCLT; the ILC did not think “it would be appropriate to formulate any general rule regarding recourse to non-authentic versions, though these are sometimes referred to for such light as they may throw on the matter.”<sup>53</sup> It is worth mentioning again that the ILC did not reject the possibility of taking into consideration non-authentic versions. The ILC merely did not consider it “appropriate to codify” such a principle as part of the “general rules for the interpretation of plurilingual treaties” and thus refrained from formulating such a rule. This does not mean that article 33 of the VCLT would exclude the use of such versions.<sup>54</sup>

It is therefore not surprising that authors have emphasized that non-authentic versions of a treaty might be taken into account for the interpretation of its provisions. Thus, such versions are not completely irrelevant. In this context, most authors have referred to article 32 of the VCLT, a rule which is part of the general rules of interpretation as well.<sup>55</sup> Article 33(4) does not exclude recourse to the

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49 Rosenne, *supra* note 34, at 782.

50 Shelton, *supra* note 5, at 613.

51 *Ibid.*, at 623.

52 Peter Germer, “Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties” (1970) 11:2 *Harvard International Law Journal* 400-27, at 405.

53 *Supra* note 32, at 226.

54 See Mössner, *supra* note 31, at 302, who points out that article 33 of the VCLT only has limited relevance: The provision neither helps nor does any harm.

55 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden, the Netherlands: Martinus Nijhoff, 2009), at 458.

history of the negotiations as a supplementary means of interpretation.<sup>56</sup> Hence, the relevance of a non-authentic version does not have to derive directly from article 33. It may also be a result of the application of the general rules of interpretation. Article 33(4) of the VCLT emphasizes the overriding importance of the object and purpose of the treaty provisions.<sup>57</sup> One must therefore take a closer look at articles 31 and 32 in order to find out whether they provide a legal basis for taking the English and French versions of the OECD model into account when interpreting bilateral tax treaty provisions copied and translated from the model, either in addition to the language versions which have been formally authenticated or instead of them.

### **Interpretation of Tax Treaties According to Articles 31 and 32 of the VCLT**

The last observation above makes it clear that article 33 of the VCLT must not be understood in isolation. Article 33 is one of the three articles of the VCLT dealing with interpretation. Articles 31 to 33 are contained in section III of the VCLT, and they bear the joint heading “Interpretation of Treaties.” Article 33 itself refers to article 31 and deals exclusively with the text of a treaty, whereas articles 31 and 32 of the VCLT emphasize the different aspects of the interpretation process, including the text of the provision, its context, its object and purpose, and its history. By interpretation, the meaning of the law, not the meaning of the text, is to be determined. The text is only the expression of the agreement the contracting parties have achieved. Article 33 of the VCLT is a specific rule which focuses on one element of the interpretation process—namely, the text of the provision—and provides guidance on how to deal with the text in the specific situation when it is available in two or more language versions. Thus, it is clear that although the interpretation cannot be based exclusively on the English and French texts of the OECD model, this does not mean that these language versions of the model must be totally ignored.

The English and the French versions of the OECD model could qualify as “supplementary means of interpretation” under article 32 of the VCLT.<sup>58</sup> The preparatory work of the treaty and the circumstances of its conclusion are referred to in article 32 as examples of such materials. The use of supplementary means of interpretation is not limited to material expressly mentioned in article 32. Recourse may be had to any evidence establishing the common intention of the parties.<sup>59</sup> If tax treaty

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56 Shelton, *supra* note 5, at 636.

57 Villiger, *supra* note 55, at 460; see also Hilf, *supra* note 23, at 101 et seq.

58 See Michael Lang and Florian Brugger, “The Role of the OECD Commentary in Tax Treaty Interpretation: (2008) 23:2 *Australian Tax Forum* 95-108, at 98.

59 See Engelen, *supra* note 30, at 336-38.

negotiations are based on the OECD model, the model may provide guidance in establishing the meaning of treaty provisions. Consequently, the OECD model qualifies as a supplementary means of interpretation under article 32 of the VCLT, provided that the treaty provision in question is based on the OECD model.<sup>60</sup>

Material falling under article 32 of the VCLT is accorded only a secondary role in the interpretation of treaties.<sup>61</sup> The use of such material is limited to confirming the meaning that results from the application of article 31 of the VCLT, or to determining the meaning of terms when the interpretation according to article 31 leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable. Therefore, on the basis of article 32 of the VCLT, recourse to the English and French language version of the OECD model is limited. However, article 31 may attach more weight to the OECD model in the interpretation process. In any case, the supplementary means do not stand alone and at the very least must be applied in conjunction with the general rule in article 31.<sup>62</sup>

According to article 31(1) of the 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.” Article 31(1) is based on a “textual” approach to treaty interpretation. The text of the treaty is presumed to be the authentic expression of the intentions of the parties and serves as a starting point in the interpretation process.<sup>63</sup> The reference to the “ordinary meaning” to be given to the terms of the treaty does not, however, entail a purely literal interpretation. On the contrary, the ordinary meaning is to be derived from the context in which a treaty provision occurs and in the light of the object and purpose of

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60 See Klaus Vogel, “The Influence of the OECD Commentaries on Treaty Interpretation” (2000) 54:12 *Bulletin for International Fiscal Documentation* 612-16, at 614; Peter J. Wattel and Otto Marres, “The Legal Status of the OECD Commentary and Static or Ambulatory Interpretation of Tax Treaties” (2003) 43:7-8 *European Taxation* 222-35, at 228; Engelen, *supra* note 30, at 460; and M. Waters, “The Relevance of the OECD Commentaries in the Interpretation of Tax Treaties,” in Michael Lang and Heinz Jirousek, eds., *Praxis des internationalen Steuerrechts: Festschrift für Helmut Loukota zum 65. Geburtstag* (Vienna: Linde Verlag Wein, 2005), 671-89, at 679.

61 See also Lang and Brugger, *supra* note 58, at 98 et seq.; see, however, Heribert Franz Köck, *Vertragsinterpretation und Vertragsrechtskonvention* (Berlin: Duncker und Humblot, 1976), at 95; and Stephen M. Schwebel, “May Preparatory Work Be Used To Correct Rather than Confirm the ‘Clear’ Meaning of a Treaty Provision?” in Jerzy Makarczyk, ed., *Theory of International Law at the Threshold of the 21st Century: Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996) 542-47, at 546 et seq.

62 Gardiner, *supra* note 20, at 623.

63 See Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2d ed. (Manchester: Manchester University Press, 1984), at 115; and W. Hummer, “‘Ordinary’ Versus ‘Special’ Meaning: Comparison of the Approach of the Vienna Convention on the Law of Treaties and the Yale-school Findings” (1975) 26 *Österreichische Zeitschrift für Öffentliches Recht* 87-163, at 97.

the provision and the treaty as a whole.<sup>64</sup> The ordinary meaning to be given to a term may well be a technical meaning.<sup>65</sup> Article 31(4) of the VCLT provides that “a special meaning shall be given to a term if it is established that the parties so intended.”<sup>66</sup> The “special meaning” is not “any meaning other than the ordinary meaning to be given to a term in the application of Article 31(1) VCLT”<sup>67</sup> but an “unusual” meaning, distinct from its colloquial meaning, to be applied for treaty purposes.<sup>68</sup> As pointed out during the drafting process by a number of ILC members, “the technical or special use of the term is normally clear from the context and the ‘technical’ or ‘special’ meaning becomes, as it were, the ‘ordinary’ meaning in that particular context.”<sup>69</sup>

If it can be established by reference to the text of the treaty that a double taxation convention is, in principle, based on the OECD model, an interpretation in good faith requires that the original language versions of the model be consulted in the interpretation process. The principle of good faith “requires that one party should be able to place confidence in the words of the other, as a reasonable man might be taken to have understood them in the circumstances.”<sup>70</sup> If the contracting states merely translated the wording of the OECD model in drafting a certain provision, it is only reasonable to assume that they intended such a provision to have the meaning it has as expressed in the English and French versions of the OECD model. The general rule of interpretation in article 31(1) of the VCLT thus establishes

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64 See R. Prokisch, “Fragen der Auslegung von Doppelbesteuerungsabkommen” [1994] no. 2 *Steuer und Wirtschaft International* 52-59; Engelen, supra note 30, at 145-47; and Christian Gloria, “Die Doppelbesteuerungsabkommen der Bundesrepublik Deutschland und die Bedeutung der Lex-Fori-Klausel für ihre Auslegung” (1986) 32:12 *Recht der Internationalen Wirtschaft* 970-78, at 970.

65 See Lang and Brugger, supra note 58, at 99.

66 See Hugh J. Ault, “The Role of the OECD Commentaries in the Interpretation of Tax Treaties” [1994] no. 4 *Intertax* 144-48, at 146, who regards article 31(4) of the VCLT as a “bridge” between articles 31 and 32 of the VCLT.

67 Engelen, supra note 30, at 149; see also Sinclair, supra note 63, at 126; and David A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (Kingston, ON and Amsterdam: International Fiscal Association [Canadian branch] and IBFD Publications BV, 2005), at 18-19.

68 See Hummer, supra note 63, at 110-12; Klaus Vogel et al., *Klaus Vogel on Double Taxation Conventions: A Commentary to the OECD-, UN- and US Model Conventions for the Avoidance of Double Taxation on Income and Capital with Particular Reference to German Treaty Practice*, 3d ed. (London: Kluwer Law International, 1997), Introduction MN 70; Gloria, supra note 64, at 974; and Prokisch, *ibid.*, at 58-59.

69 Hummer, supra note 63, at 109.

70 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons, 1953), at 107, cited in Engelen, supra note 30, at 134.

the relevance of the original language versions of the OECD model in the interpretation process.

It occasionally may be doubtful whether the contracting states merely translated the English and French versions of the OECD model into their languages. If a certain provision has been omitted or if a provision which does not exist in the OECD model has been added, it is obvious that the contracting states deviated from the English and French versions of the model and thus from its content as well. In such a situation, no recourse to the English or French version of the model can be made. The interpretation question is more difficult to answer if the meaning of the translated text comes close to the meaning one derives from the English and the French versions of the OECD model. As already mentioned, many words are simply impossible to translate from one language to another without at least some change in meaning.<sup>71</sup> In such a case, recourse must be had to other means of interpretation in order to find out whether the wording of the treaty should only reflect the corresponding provision of the OECD model. If one of the contracting states uses a model treaty for its treaty negotiations in its own language and there is evidence that the provision at stake from this model does not deviate from the corresponding provision of the OECD model, it could become relevant whether this provision has also become part of the bilateral treaty.<sup>72</sup> For OECD member countries, article 5(b) of the convention on the OECD might come into play here.<sup>73</sup> In the case of doubt and in the absence of other indications to the contrary, it may be assumed that OECD member countries wanted to comply with the OECD recommendation and thus intended only to translate the OECD model into other languages. However, if they have made a reservation to a certain provision of the model, this might indicate the contrary.<sup>74</sup>

More difficulties could arise if certain treaty provisions, or the treaty as a whole, are taken from the UN model. In such a case, similar deliberations have to be made as in the context of the OECD model. However, the interpretation of provisions taken from the UN model could require examining even more language

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71 Hilf, *supra* note 23, at 20 et seq.; and Linderfalk, *supra* note 21, at 356.

72 See also Mössner, *supra* note 31, at 280.

73 In respect of the legal relevance of article 5(b) of the convention on the OECD, see also K. Vogel, "Abkommensvergleich als Methode bei der Auslegung von Doppelbesteuerungsabkommen," in Rudolf Curtius-Hartung, Ursula Niemann, and Gerd Rose, eds., *Steuerberater-Jahrbuch 1983/84* (Köln: O. Schmidt, 1984), 374-91, at 378; and Frank Engelen, "How 'Acquiescence' and 'Estoppel' Can Operate to the Effect that the States Parties to a Tax Treaty Are Legally Bound To Interpret the Treaty in Accordance with the Commentaries of the OECD Model Tax Convention," in Sjoerd Douma and Frank Engelen, eds., *The Legal Status of the OECD Commentaries* (Amsterdam: IBFD, 2008), 51-72, at 59 et seq.

74 For the relevance of reservations in the interpretation process, see Lang and Brugger, *supra* note 58, at 101.

versions.<sup>75</sup> Additional difficulties might be due to the fact that the UN model is to a large extent based on the OECD model. If a bilateral treaty primarily follows the UN model and the corresponding provision of that model has itself been copied from the OECD model, more attention will be paid to the English and French versions of the OECD model. The situation is comparable to the interpretation of a treaty that was drafted in certain languages, with additional languages being authenticated over time. It is obvious that more emphasis should be placed on the languages that were the working languages when that provision of the treaty was drafted. If this was done in the OECD context, those working languages were English and French.

The interpretation rule of article 3(2) of the OECD model does not alter this result.<sup>76</sup> Although this provision is *lex specialis* to the interpretation rules of the VCLT, it does not completely change the concept enshrined in the VCLT for tax treaty provisions.<sup>77</sup> In my view, article 3(2) only emphasizes that the interpretation process should focus on the context of the treaty and that only in exceptional cases is reference to domestic law permitted. Thus, article 3(2) of the OECD model does nothing other than confirm the interpretation rules of the VCLT.<sup>78</sup> Even if one puts more emphasis on domestic concepts in the context of article 3(2) of the OECD model than I do, no one can ignore that this rule leaves room to take into account the context of the entire treaty. Whenever this is required, all the observations made above are valid.

## Conclusions

The OECD model has to be taken into account for the interpretation of those bilateral tax treaty provisions which have merely been translated from the model

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75 The UN model convention is published by the Committee of Experts on International Cooperation in Tax Matters, which has been established by the Economic and Social Council (ECOSOC), in all six official languages of the United Nations (Arabic, Chinese, English, French, Russian, and Spanish). English is also the committee's working language, from which the translations into the other official languages are made, and is therefore particularly important. However, the UN model and its updates are generally recognized only by the ECOSOC and are not subject to resolutions. Thus, they are considered to be purely advisory documents from a group of experts.

76 See, however, Shelton, *supra* note 5, at 624, referring to article 3(2) of the Switzerland-UK tax treaty.

77 See also Monika Kunesch, "Interpretation Problems Concerning the Multilingualism of Tax Treaties Under Special Consideration of Directors' Fees," in Michael Schilcher and Patrick Weninger, eds., *Fundamental Issues and Practical Problems in Tax Treaty Interpretation* (Vienna: Linde Wein, 2008), 287-305, at 293.

78 Michael Lang, "Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen (Art. 3 Abs. 2 OECD Musterabkommen)," in Gabriele Burmester and Dieter Endres, eds., *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis—Festschrift für Helmut Debatin* (Munich: Beck, 1997), 283-304, at 303 et seq.

and nothing indicates that the content was to be changed. It does not make any difference whether both English and French are authentic or whether only one of the two languages or neither is authentic in a bilateral tax treaty. Neither does it matter whether other languages (or how many of them) are authentic. Special emphasis has to be given to the text of the OECD model in its original English and French versions. The text in other authentic languages is merely of secondary relevance. If nothing indicates that the content of a bilateral treaty provision should deviate from its corresponding OECD model provision, then in practice the real starting point for the interpretation should be its English and French versions, irrespective of whether these languages are authentic or not. The text available in languages other than French and English should be relevant only to the extent that that text, in combination with the context, object and purpose, and drafting history of the bilateral treaty provision, indicates that the rule either is not at all taken from the OECD model or has not been merely copied from the OECD model, without intending to change its content. If there is an indication that this has been the case, the authentic languages may have a lot of weight. However, if sufficient similarities with the corresponding provision of the OECD model have been established, further interpretation will focus on the English and the French texts of the OECD model. Contrary to the practice of some courts in countries that are neither English- nor French-speaking, not much emphasis should be given to the analysis of the text in any other language.<sup>79</sup> Even in countries where the original languages of the OECD model are spoken, however, there is a certain risk that this may happen. As Gardiner put it: “A temptation to which the English courts understandably tend to succumb, is to assume that the process of bringing a treaty into English law by legislation excuses them from considering fully the international law origins of treaties.”<sup>80</sup> In treaty law, we should overcome such a temptation and fully consider the OECD roots of treaty provisions taken from the OECD model.

The result of this brief study is not surprising and is in line with a position scholars have been pleading for in the past.<sup>81</sup> Indeed, it would be surprising if articles 31 to 33 of the VCLT would prevent taxpayers, tax authorities, and courts from putting a strong emphasis on the English and the French versions of the OECD model. The VCLT rules do not work mechanically.<sup>82</sup> The strength of their

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79 See further Michael Lang, “Einkünfteermittlung im Internationalen Steuerrecht,” in Johanna Hey, ed., *Einkünfteermittlung*, Deutsche Steuerjuristische Gesellschaft, vol. 34 (Köln: O. Schmidt, 2011), 353-68, at 355 et seq.: The interpretation of the term “income” (which is considered to be an important tax treaty term; in this respect see Shelton, *supra* note 5, at 619) is often incorrectly influenced by the translation it was given in a specific bilateral tax treaty.

80 Gardiner, *supra* note 20, at 626.

81 See Vogel, *supra* note 73, at 378.

82 Gardiner, *supra* note 20, at 628.

provisions is in their flexibility.<sup>83</sup> If one “regards the literal interpretation merely as the starting point for a full-scale investigation into the spirit, objects and purposes . . . then disparities between linguistic formulations are no longer the central problem of interpretation for whose solution special rules have to be developed.”<sup>84</sup> An analysis of articles 31 to 33 and their drafting history reveals a reluctance to set rigid canons of interpretation, supporting the variations seen in international jurisprudence.<sup>85</sup> As Aust has put it: “Good interpretation is often no more than common sense.”<sup>86</sup>

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83 Villiger, *supra* note 55, at 449.

84 Stevens, *supra* note 14, at 719.

85 Shelton, *supra* note 5, at 633.

86 Aust, *supra* note 27, at 202.