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THE APPLICATION OF PUBLIC INTERNATIONAL RULES ON TREATY INTERPRETATION TO TAX TREATIES

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Introduction

"The problems of tax law are primarily and necessarily problems of interpretation."[1]

The main purpose of this essay is to discuss two of the most important rules for the interpretation of tax treaties provided by: i) the Vienna Convention on the Law of Treaties and ii) the Commentaries to the Model Convention to avoid double taxation of the OECD.

The first instrument above mentioned is regarded as part of Public International Law, therefore as, "the law that governs the relations between subjects of International law. It is the law which determines the rights and obligations subjects of International Law have vis-à-vis each other."[2]

When interpreting a tax provision, Jean Van Houtte indicates that three steps should be carried out: (i) the interpretation of the facts, meaning, the particulars of the situation giving rise to the charging of the tax; (ii) the analysis of the laws, regulations and international treaties; and (iii) determining the relationship between the facts and the legal provisions which may finally raise a tax obligation.[3]

In section 1.1 of the first chapter, the discussion will be focused on the origins of the Vienna Convention, including the first question raised within the International Law Commission of the United Nations about the importance of the codification of

[1] Van Houtte, Jean, "Principles of Interpretation in Internal and International Tax Law", p. 7.
[2] A.J. Quereshi "The Public International Law of Taxation", chapter 1, p. 1.
[3] ibidem p. 7.

customary rules in treaty provisions rather than in an expository code (as was the intention of some members of that Commission) at its origin.

The Vienna Convention on the Law of Treaties contains certain rules for treaty interpretation in articles 31, 32 and 33, that every signatory State of the Vienna Convention should follow in order to determine any obscure word or concept contained in an international agreement.

Notwithstanding the fact that these rules of interpretation are contained in three different articles, it was the intention of the International Law Commission to consider the process of interpretation as a single combined operation which would give the legally relevant interpretation. This matter will be analyzed in section 1.2 of chapter one of this essay in accordance with the commentary to former articles 27, 28 and 29 contained in the "Report of the Commission to the General Assembly".

Some of the most important doctrines about treaty interpretation will be discussed in the last section of chapter one, with the intention of including the range of positions concerning this topic.

The second chapter will be focused on the interpretation of tax treaties from the perspective of: i) the preparatory works of the International Law Commission and, ii) OECD recommendation and the body involved in the development of the OECD Model Convention and its Commentary.

The first part of the second chapter will be mainly focused on the lack of reference to the work of the OEEC (afterwards OECD) and the League of Nations in the records of the International Law Commission, regarding the codification of international rules that both bodies developed. That part will be complemented with an analysis of the possible legal basis that the Commentaries to the OECD Model may have in the Vienna Convention considering, again, the works of the International Law Commission.

The second part will focus on the legal basis of such Commentaries considering internal instruments of the OECD, such as the Recommendation adopted by the Council of the OECD on 23 October 1997 and its legal nature (rule 18 of the Rules of Procedure of the Organisation) by which the tax authorities are bound to apply the Commentaries if they considered it opportune.

Finally, some modifications to the Committee on Fiscal Affairs will be suggested which may be helpful to clarify the legal characterization of the Commentaries as an aid for interpretation.

1. Treaty interpretation in accordance to the rules of public international law: articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties.

1.1) The origins of the Vienna Convention on the law of treaties.

From 26 March 1968 to 24 May 1968 and from the 9 April to 22 May 1969, the United Nations Conference on the Law of Treaties met at Vienna, Austria, to conclude a Convention which would codify the existing customary law of treaties, opening it for signature on 23 May 1969. The Convention entered into force on 27 January 1980[4], after the deposit of the thirty fifth instrument of ratification or accession.[5]

The main purpose of the Vienna Convention on the Law of Treaties was to codify the legal rules which govern the conclusion, formation, interpretation and validity of treaties themselves; and to create a legal instrument that could ensure binding effects on the signatory parties and be enforced before international courts.

The first steps towards a convention on the law of treaties was taken by the International Law Commission of the United Nations at its first session in 1949, putting the codification of customary treaty rules on a raised plateau.

Notwithstanding the importance of this topic, it was not until 1955 that Sir Gerald Fitzmaurice (Special Rapporteur on the Law of Treaties) raised the first important

[4] Togo, was the 35th country that ratified this Convention, by the deposit on 28 December 1979 of the instrument of ratification or accession.
[5] Ian Sinclair, "The Vienna Convention on the Law of the Treaties", p. 1.

question which would afterwards lead to the conclusion of a convention on the law of the treaties: that the codification should take the form of an international convention or of an expository code.

Sir Gerald Fitzmaurice was convinced that an expository code should prevail against an international convention, concluding:

> "First, it seems inappropriate that a code on the law of treaties should itself take the form of a treaty; or rather, it seems more appropriate that it should have an independent basis. In the second place, much of the law relating to treaties is not especially suitable for framing in conventional form. It consists of enunciations of principles and abstract rules, most easily stated in the form of a code; and this also has the advantage of rendering permissible the inclusion of a certain amount of declaratory and explanatory material in the body of the code, in a way that would not be possible if this had to be confined to a strict statement of obligation."[6]

In 1956, the Commission approved the idea of working on a code rather than a treaty or convention, but after Fitzmaurice's descriptive reports and his election as judge to the International Court of Justice in 1960 the Commission reconsidered the fundamental issue about the codification of treaty rules, encouraged by some members of the Commission whose legal background appeared to be more in line with the idea that the establishment of general rules of a normative character should be contained in a Convention, rather than in an expository code.

[6] Yearbook of the International Law Commission (1956-II) 107, quoted by Sir Ian Sinclair in his book "The Vienna Convention on the Law of Treaties", p. 3.

Some of those ideas were stated in the Yearbook of the International Law Commission (1961-II), 128[7]:

> "(a) that an expository code, however well formulated, could not, in the nature of things, be so effective as a convention for consolidating the law; and
> (b) that the codification of the law of treaties through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished, which would be desirable in order to place the law of treaties upon the widest and most secure foundations."

One of the reasons for having a convention rather than an expository code was to involve countries in the formulation of that convention and thus to make them compromise, ratify it and observe it. Therefore, the Commission would finally comply with its main purpose: to codify existing customary treaty rules.

On the other hand, codifying those customary rules (in a convention rather than in an expository code) would make those rules enforceable before the International Court of Justice, considering that, in accordance with article 36 of its Statute, the jurisdiction of the Court comprises all matters provided in treaties and conventions in force.

In connection with this, article 38[8] of the same statute makes it clear that the function of the Court is to decide disputes submitted to it in accordance with International Law, establishing a hierarchical order for the application of law, considering international conventions as the first item that should be applicable.

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[7] Quoted by Sir Ian Sinclair in his book "The Vienna Convention on the Law of Treaties", p. 4.
[8] Refer to appendix I for the transcript of article 38 the Statute of the International Court of Justice.

In 1961 the Commission decided that the codification of the law of treaties should be completed in the form of a convention. This idea was subsequently affirmed in 1962 and ratified in 1965, not without hesitation of some States who argued that "*there was a certain logical inconsistency in drawing up a treaty on the method of drawing up a treaty, and that a treaty on treaties would inevitably create a dualistic system, since it would apply between the parties to it, whereas the customary law would continue to apply as between other States.*"[9]

In this regard, the work of the Commission during the period between 1961 and 1966 produced condensed texts that contained legal principles or rules to be applied, organized by clauses, permitting the parties to any particular treaty to agree otherwise.

The result obtained by the Commission was a Convention on the Law of Treaties, which contains all the topics that may fall into the framework of the law of treaties, and constitute a complete set of principles and rules governing it.

Notwithstanding this idea of the codification of existing customary rules, the final statement of the preamble of the Convention stated, "*the rules of international customary law will continue to govern questions not regulated by the provisions of the present Convention*".

[9] Statements by the representatives of Austria, France and Greece respectively at the 851st, 849th and 845th meetings of the Sixth Committee in 1965, quoted by Sir Ian Sinclair in his book "The Vienna Convention on the Law of Treaties", p. 5.

This statement implies that although the Commission was involved in a codification or writing process, it recognized that some gaps might arise in the relationship between States, which customary law had to fill.

The Vienna Convention was organized as follows:

a) Conclusion, entry into force of treaties and reservations, (articles 6 to 25).

b) Observance, application and interpretation of treaties (articles 26 to 33).

c) Amendment and modification of treaties (articles 39 to 41).

d) Invalidity, termination and suspension of operation of treaties (articles 42 to 72).

Some procedural rules were also included, for instance:

a) Depositaries (articles 76 and 77).

b) Notifications (article 78).

c) Corrections (article 79) and

d) Registration (article 80).

1.2) Commentary of the International Law Commission to Articles 27, 28 and 29 (actually Articles 31, 32 and 33) to the 1966 draft Vienna Convention on the Law of the Treaties.

This section is based on the commentary to a draft of the Vienna Convention issued by the International Law Commission contained in the section Reports of the Commission to the General Assembly of the Yearbook of the International Law Commission of 1966.

It is important to point out that, due to the fact that the commentary to these articles was based on a preliminary draft, the change in the numbering and other minor differences have to be considered.

Articles 31, 32 and 33 were Articles 27 to 29, current paragraphs three and four of article 33 constituted one paragraph and, instead of the words, "*which best reconciles*" in Article 33, paragraph 3 of the final text the preliminary draft read, "*which as far as possible reconciles*".

In this regard, during the 1964 session the Commission provisionally adopted three articles on the interpretation of treaties as well as two Articles dealing with treaties having multilingual texts; but, due to the comments of some Governments, these five articles were reduced to three articles[10], incorporating Article 71 which referred to terms having a special meaning in Article 69: the general rule for interpretation and by amalgamating Articles 72 and 73 (multilingual treaties) into a single article.[11]

The first point raised in the commentary to Articles 27-29 of the very last draft, is the utility and the existence of rules of international law governing the interpretation of treaties, explaining that some jurists have expressed their doubts as to the existence in international law of any general rules for the interpretation of treaties.

On the other hand, the work done by Sir Gerald Fitzmaurice, Special Rapporteur of the commission up to 1960 in which he deduced six principles from the jurisprudence

[10] In the 1966 draft the number of these articles changed to articles 27, 28 and 29 respectively.
[11] Yearbook of the International Law Commission, 1966, Vol. II, p. 219.

of the Permanent Court and the International Court which he regarded as the major principles of interpretation were the basis, in conjunction with the resolution adopted by the Institute of International Law in 1956, for the work of the Commission. These principles were the following:

> "I Actuality (or textual interpretation);
> II, Natural or Ordinary Meaning; and subject to these two, the principles of
> III, Integration (or interpretation of the treaty as a whole); and
> IV. Effectiveness (*Ut res magis valeat quam pereat*). To these were added
> V, the principle of Subsequent Practice, according to which the effect actually given to a treaty by the parties, and their conduct in relation to it, is valid evidence as to its true meaning. In the period 1951-4, all these principles are reaffirmed or acted upon by the Court, or by individual judges, in such a way as to confirm their status as major principles of interpretation. In the light of certain pronouncements, however, it is proposed to add to the five principles above mentioned a further one, namely
> VI, the principle of Contemporaneity, or the interpretation of texts and terms in the light of the meaning they possessed, or the sense in which they were normally used at the same time when the treaty was concluded."[12]

In 1956 the Institute of International Law adopted a resolution[13] in which it formulated two articles containing basic principles of interpretation that contained some of the concepts and ideas that would finally be included in Articles 31, 32 and 33 of the Vienna Convention.

[12] British Yearbook of International Law, vol. 33, 1957, p. 203.
[13] Refer to appendix II for the transcription of this resolution.

The Institute of International Law considered that the text of the treaty with the ordinary meaning given to its terms should be the starting point for the interpretation of a treaty considering that it contains the agreement of the parties, taking into account also the context and the principles of international law.

It also concluded that recourse could be made to the *travaux préparatoires*, any subsequent application of the treaty by the parties and that the interpreter should also take into consideration the goals of the treaty.

In the same way, according to the commentary, the position of jurists in determining basic principles for the interpretation of treaties is different considering: i) the weight given to the text of the treaty as the authentic expression of the intentions of the parties; ii) the intentions of the parties as a subjective element distinct from the text; and, iii) the declared or apparent objects and purposes of the treaty[14].

Notwithstanding these three points, most of the jurists give importance to the text as a basis for the interpretation, giving, at the same time, weight to the intentions of the parties and to the objects and purposes of the treaty. This was the approach that the International Law Commission took on his first principle stated in Article 31 by referring, "*that a treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty…*".

The commentary to Articles 27, 28 and 29 makes reference to the fact that recourse to interpretation principles may not be an automatic application because it depends on

[14] Yearbook of the International Law Commission, 1966, Vol. II, p. 218.

the conviction of the interpreter that it is appropriate in the particular circumstances of the case, pointing out the fact that the principles of interpretation should be, "*principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document*".[15]

In this regard, and although the application of principles for interpretation of treaties depends on the particular context and on a subjective appreciation of the interpreter, the objective of the International Law Commission was to codify the few general principles which appear to constitute general rules for interpretation, and which in, general terms, could be regarded as the intention of the parties (*pacta sunt servanda*).[16]

In connection with the *pacta sunt servanda* rule, the Commission pointed out that when a treaty may be interpreted in two different ways, and one leads to inappropriate effects then the concept of 'good faith', the objects, and purposes of the treaty may be applied in order to obtain the correct interpretation, reflecting the real intention of the parties in accordance with the text of the treaty.

In the same way the Commission considered that Article 31 might be considered as a hierarchical legal order instead of considering it a single combined operation, which should be obtained by heading the article "General rule of interpretation" in the singular and as a general concept, and by underlining the connection between

[15] ibidem p. 220.
[16] ibidem. p. 220.

paragraphs one and two and between paragraph three and the two previous paragraphs.

Thus, the word ‘context’ in the opening phrase of paragraph two is intended to reflect the link between the elements of interpretation contained in said paragraph to the word ‘context’ in the first paragraph and thereby incorporate them in the provision contained in that paragraph.

Accordingly, the opening phrase, ‘there shall be taken into account together with the context’ of paragraph three is designed to incorporate into paragraph one the elements of interpretation contained in paragraph three, and finally the word ‘special’ in paragraph four serves to indicate its relation to the rule in paragraph one.

The purpose of the Commission was to find an arrangement to the elements of interpretation based on considerations of logic, rather than in an obligatory legal hierarchy, having the text and as the first element as a starting point of interpretation to be mentioned ‘the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

Similarly, ‘context’ is the next concept to be mentioned, since it is intimately related to the text, and it is again logic which suggests that subsequent agreement regarding the interpretation, subsequent to the practice of establishing the understanding of the parties regarding the interpretation and relevant rules of international law applicable in the relations between the parties should follow and not precede the elements in the

previous paragraphs and should not be considered in any way inferior to those which precede them.

Another issue that the Commission highlighted was the difference between supplementary means of interpretation contained in former Articles 69 and 70, giving special attention to the role of "preparatory works". The elements of interpretation in Article 31 place a high importance on the agreement between the parties which is not the case with preparatory works and consequently does not have the same character as an aid for interpretation.

Notwithstanding the above, it was the Commission's intention not to draw a rigid line between the supplementary means of interpretation (Article 32) and the elements of interpretation in Article 31 which was achieved by underlining that recourse to supplementary means (like preparatory work) was for the purpose of 'confirming' the meaning resulting from the application of Article 31 which reflects the link between both Articles and maintains the unity of the process of interpretation.

In the following paragraphs the discussion will be focused on the specific commentaries that the International Law Commission made for each of the interpretation Articles[17] included in one of the last drafts of the Vienna Convention on the Law of the Treaties contained in the Yearbook of 1966 of the International Law Commission, the main purpose of which is to study the editor's point of view at the time the Vienna Convention was written.

[17] Refer to annex III for the transcript of the articles in which the commentary of the International Law Commission was based.

Commentary to article 27 (article 31 nowadays).

The Commission's first commentary was to remark that the text must be the authentic expression of the intentions of the parties, so the starting point for interpretation should be the elucidation of the text rather than an investigation *ab initio* of the intention of the parties.

The Commission's view is based on the jurisprudence of the International Court of Justice, which has pronounced that the textual approach to treaty interpretation is regarded by it as established law, in the United States Nationals in Morocco case the Court concluded that is not the function of interpretation to revise treaties or to read into them what they do not contain expressly or by implication.[18]

The first paragraph contains three principles:

a) Interpretation in good faith, which arises from the *pacta sunt servanda* principle;

b) The parties are to be presumed to have the intention which appears from the ordinary meaning of the terms used by them; and,

c) The ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose, stressing the fact that the Permanent Court has concluded that the context is not merely the

[18] ibidem p.221.

> article or section of the treaty in which the term occurs, but the treaty as a whole considering the statement of the object and purpose of the treaty in the preamble in order to interpret a particular provision.[19]

Paragraph two of Article 27 seeks to define what is comprised in the "context" for the purposes of treaty interpretation, being clear that the preamble forms part of a treaty for this purpose, but the important question is what other documents or how far other documents should be considered as part of a treaty for interpretation purposes.

Two documents are proposed to be included or treated as part of the context: (i) any **agreement** relating to the treaty which was **made between all the parties**.....and (ii) any instrument which was made with the conclusion of the treaty and **accepted by the other parties** as an instrument related to the treaty. Arising from this "definition" of context the Commission concludes that has to be clear that unilateral documents could not be regarded as forming part of the context.

On the other side, the fact that an agreement between the parties could be considered as part of the context does not lead to the immediate conclusion that that agreement should be considered for interpretation purposes; the intention of the parties being the decision point in order to determine if one agreement should be included as part of the context.

The Commissions' intention was not to give a treatment to these documents, "*as mere evidence to which recourse may be had for the purpose of resolving an ambiguity or*

[19] ibidem p. 221.

obscurity, but as part of the context for the purpose of arriving at the ordinary meaning of the terms of the treaty."[20] This means that bilateral agreements between the parties should be considered as part of the context, if the parties agree therefore, in order to obtain the ordinary meaning of a concept in terms of the first paragraph of this article.

The Commissions' reasoning and the language used in this article, leads us to the conclusion that the context is going to be used only to obtain the ordinary meaning of the treaty terms. After a meaning of the words has been obtained, and in the case obscure or ambiguous terms prevails, then the interpreter may start the interpretation process of the treaty as provided in the first paragraph of Article 27.

Paragraph 3 adds three issues that should be considered as part of the context: "the subsequent agreement between the parties regarding the interpretation of the treaty, subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation and relevant rules of international law applicable in the relations between the parties."[21]

In connection with the first point, the Commission states that "*it is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty, it is to be regarded as forming part of the treaty*",[22] and represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.

[20] ibidem p. 221.
[21] Article 27 of the 1966 draft.
[22] ibidem p. 221.

This should be understood as meaning that when the parties reach an agreement for the interpretation of a particular term before the treaty is concluded, and that interpretation may be considered as part of the treaty and will have binding effects on the parties.

On the other hand, the parties subsequent practice may be considered as an understanding of the interpretation of the treaty terms which for the Commission constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.

Notwithstanding that it has been recognized by the jurisprudence of the international tribunals that recourse to subsequent practice could be done in order to confirm the meaning of the text which it considered to be unambiguous[23] the Commission made the clarification that the value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms.[24]

This principle may raise legal uncertainty for the companies and individuals which are subject to the application of a tax treaty because its application may be subject to what the Contracting States understand as subsequent practice, and in the less favorable scenario the subsequent practice of the competent authorities of both States may not be in accordance with what has been agreed in the treaty.

The relevant rules of international law applicable in the relations between the parties are the third issue included in this section of article 27 and should be considered as

[23] Corfu Channel Case, I.C.J. Reports 1949, p. 25.
[24] ibidem p. 222.

part of the context, which in the draft of 1964 appear with a different language: "in the light of the general rules of international law *in force at the time of its conclusion*".

The change in the wording was made according to the suggestions of some Governments that this provision must reflect the evolution of the law on the interpretation of legal terms in a treaty rather than the law in effect at the time of the treaty, which is a very important topic that will be included in the next chapter with the analysis of the static or ambulatory provisions applicable according to article 3(2) of the OECD Model Convention.

The Commission concluded that the rules for the interpretation of treaties in any given case were dependent on the intentions of the parties and therefore it should omit the temporal element and revise the reference to international law.

Finally, paragraph four of this article states that a special meaning shall be given to a term if it is established that the parties so intended. This language raises many questions of the Governments considering that it was not necessary, although some members of the Commission suggested that it should be included with the idea "that technical or special use of the term normally appears from the context and the technical or special meaning becomes, as it were, the ordinary meaning in the particular context"[25].

[25] ibidem p. 222.

In this regard it was the intention of other members of the Commission to include it to emphasize that the burden of proof lies on the party invoking the special meaning of the term, pointing out that this issue aroused in the resolution of the International Court of Justice in the *Legal Status of Eastern Greenland*[26] case.

Commentary to article 28 (article 32 nowadays).

The application of this article is only intended to confirm the meaning of the terms obtained from the application of the interpretation in article 28, therefore the title of this article is "Supplementary means of interpretation".

Notwithstanding this dependant existence of this article the Commissions' commentary insists that the word "supplementary" emphasizes that article 28 does not provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in article 27.[27]

Subparagraph (a) and (b) admits the use of this means of interpretation, when there is no clear meaning of the result obtained from the application of article 27 and if this result is manifestly absurd or unreasonable.

On the other hand the Commission did not make any effort in defining what should be understood by *travaux préparatoires* considering that doing so would possibly exclude relevant documents or evidence.

[26] P.C.I.J. (1933), Series A/B, NO. 53, p. 49.
[27] ibidem p. 223.

The Commission also referred to the *Territorial Jurisdiction of the International Commission of the River Oder*[28] case in which the Permanent Court decided that due to the fact that some States had not participated in the negotiations of the Treaty of Versailles then the *travaux préparatoires* should not be considered as a supplementary means of interpretation.

This resolution was in some way not shared by the Commission considering that a State which has not participated in the drafting of the treaty may be able to request the *travaux préparatoires,* but it also recognized that it may be practically inconvenient in regard to multilateral treaties which are open to general accession. Accordingly, the Commission decided not to include any special provision regarding the *travaux préparatoires* in the case of multilateral treaties.

The concept of *travaux préparatoires* is very important for the interpretation of tax treaties because the Commentaries may be regarded as part of the *travaux préparatoires*, although it seems to be difficult to sustain this argument before the tribunals for the reasons that will be argued in the next chapter.

Commentary to article 29 (article 33 nowadays).

The general rule for the interpretation of treaties in two or more languages is the equality of the languages and the equal authenticity of the texts in the absence of any provision to the contrary.

[28] P.C.I.J. (1929), Series A, No. 23.

Paragraph one of this article is necessary considering that in many cases the treaties provide expressly that only certain texts are to be authoritative and on the other hand a multilingual treaty may provide that in the event of divergence between the texts a specified text is to prevail.

In this regard, the Commission points out the question concerning whether the "master" text must be applied automatically as soon as the slightest difference appears, or should recourse to the normal means of interpretation have to be done before concluding that there is a case of divergence.

The Commission doubted if it would be appropriate for it to resolve the problem in a formulation of the general rules of interpretation, and considering that it was a question essentially of the intention of the parties in inserting the provision in the treaty, the Commission concluded to make a reservation in paragraph one of cases where the treaty contains this type of provision.

Paragraph two of this article provides for the case in which a version of the treaty, although authenticated, has been accepted by the parties as authentic for the purposes of interpretation.

In its commentary the Commission stressed the fact that in law only one treaty should be considered, on the understanding that there is only one set of terms accepted by the parties and only one common intention with respect to those terms, even when two texts are considered as authentic.

The existence of treaties in different languages may result in minor or major discrepancies in the meaning of the texts, but when the meaning of the terms is ambiguous or obscure in one language but is clear and convincing in another, the multilingual character of the treaty facilitates the interpretation of the text where the meaning is doubtful.

Although multilingual in expression the treaty remains a single treaty, with a single set of terms governed by articles 27 and 28, based on the principle of equal authority of the authentic texts and which terms are presumed to have the same meaning in each text so this presumption may lead the interpreter to find a common meaning for the texts before preferring one to another.

In connection with this matter the Commission insists that "*whether the ambiguity or obscurity is found in all the texts or arises from the plurilingual form of the treaty, the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules for the interpretation of treaties.*"[29]

This statement lead to the conclusion that the existence of multilingual treaties does not justify the interpreter preferring one text to another, and does not use the means of interpretation established in articles 27 and 28. The first step for the interpreter of a multilingual treaty is to reconcile the texts and therefore to ascertain the intention of the parties.

[29] ibidem p. 225.

Paragraph three of article 29 presumes that the terms of a treaty have the same meaning in each authentic text, but it also provides that in the event of a divergence between the texts of the treaties, the interpreter should seek and adopt the meaning of the words that best reconcile the different texts.

In its commentary the Commission made reference to the *Mavrommatis Palestine Concessions case*[30] in which the Permanent Court, some jurists thought, laid down a general rule of restrictive interpretation in cases of divergence between authentic texts, when it said:

> "where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it [the Court] is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties.[31]"

The Commission was clear that by stating that this resolution of the Court was not intended to lay down a general rule of restrictive interpretation rather than the intention of the Court to harmonize the terms of a multilingual treaty which in the particular case was made by a restrictive interpretation but should not be the general rule, and emphasizes that this case gives strong support to the principle of conciliating (harmonization) the texts.

[30] P.C.I.J. (1924), Series A, No. 2, p. 19.
[31] ibidem p. 225.

1.3) Doctrines about treaty interpretation.

Authors have been very prolific in regard to the interpretation of treaties stating in most cases similar principles for interpretation, the starting point being two main sources: resolutions of the International Court of Justice and the commentary made by the International Law Commission (which was part of section two of this essay).

For Sir Ian Sinclair the main schools of thought regarding treaty interpretation are: first that the primary goal of treaty interpretation is the intention of the parties (subjective); and second that the intentions of the parties are reflected in the text of the treaty and the primary goal may be to ascertain the meaning of this text (objective). Finally there is a third school of thought which asserts that the interpreter must ascertain the object and purpose of a treaty and then give effect to it (teleological) which are not mutually exclusive.[32]

For this author the recourse to the *travaux préparatoires* serves to distinguish the adherents of the 'textual' approach from the adherents of the 'intention' approach, considering that those who give significance to the text of a treaty do not give much importance to the *travaux préparatoires*, which provides useful evidence as to the intentions of the parties.

Even those who prefer the textual approach rather than the intention of the parties, may think that recourse to the *travaux préparatoires* may be useful in order to elucidate the meaning of the text, rather than to ascertain the intentions of the parties.

[32] Ian Sinclair, The Vienna Convention, p. 115.

For Sir Ian Sinclair the doctrinal disputes are conducted on two different levels. Firstly, those who are seeking to describe the process of interpretation and who, accordingly, focus attention upon the materials the interpreter should consult, and secondly those who are seeking to establish certain principles or rules as to the relative value or weight to be attributed to the materials to be taken into consideration.

In this regard the Vienna Convention reflects the relative value and weight of the elements to be taken into account in the process of interpretation rather than to describe the process of interpretation itself, which does not imply a rigid hierarchy between the general rule and the supplementary means, as discussed in the last section.

The Vienna Convention also draws a clear line between the intrinsic and the extrinsic techniques of interpretation, in which the intrinsic method utilizes only those elements which are contained in the treaty itself and the extrinsic methods utilize elements external to the treaty.

Finally, Sir Ian Sinclair concludes that the interpreter should have recourse to all the materials which will furnish him with evidence as to what is the meaning to be attributed to the text, including the *travaux préparatoires* of the treaty, and the circumstances of its conclusion, and only when the interpreter has available to him all the necessary materials that he will be in a position to assess their relative value and weight in the light of the rules laid down in the Convention.[33]

[33] Ian Sinclair, The Vienna Convention, p. 117.

On the other hand, Arnold McNair in his book "**Law of Treaties**" defines the process of interpretation "*as the duty of giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances*".[34]

This same author referring to the "wilderness" of conflicting decisions of tribunals and opinions of writers concludes that the principles of interpretation may be considered as our servants instead of our masters otherwise these guides can be very misleading.[35]

This idea suggests that the interpreter should be free to have recourse of any document or circumstance in order to clarify the terms agreed upon by the parties without any restriction which in some cases is the way to elucidate the terms of a treaty, but in some other circumstances may lead to a breach of legal certainty, considering that the parties may wish that the interpreter bases its work on agreed interpretation rules (like the Vienna Convention and in the case of tax treaties on article 3(2) of the OECD Model Convention).

For this author the following are the most important principles for the interpretation of treaties:

a) Plain terms:

[34] McNair Arnold, "Law of Treaties", p. 365.
[35] ibidem p. 366.

The starting point for treaty interpretation with regard to this principle is to give effect to the plain terms of a treaty, or construing words according to their general and ordinary meaning, and which cannot obstruct the essential quest in the interpretation of treaties, namely to search for the real intention of the contracting parties in using the language employed by them.[36]

This concept of plain terms can be seen from two different points of view. The first when a term may be plain absolutely, and the other when a tribunal adjudicating the meaning of a term in a treaty does it relatively, which means that term in relation to the circumstances in which the treaty was made and in which the language was used.

The concept of plain terms implies the presumption that the terms of a treaty should be interpreted according to their general and ordinary meaning but also to accept that the interpreter should take into consideration the circumstances in which they are used before seeking to attach any other meaning to them.

b) Aim and purpose of the treaty and the treaty as a whole:

The interpreter has to bear in mind the overall aim and purpose of the treaty, considering that the parties had expressed its rights and obligations in the treaty itself.

In the same way a treaty should be considered as a whole and not to focus attention only in isolated provisions understanding that for this purpose could be considered, according to the circumstances, the complete treaty or a self contained part.

[36] ibidem p. 366.

In order to support this point McNair quoted an argument held by Dr. Lushington in *The Ionian Ships* case where he points out the necessity of looking the treaty as a whole instrument because "*terms, however strong and clear in themselves, whatever meaning may be attributed -necessarily attributed- to them standing alone, may be modified by the other parts of the same instrument…the whole treaty creates one obligation.*"[37]

c) Rule of effectiveness:

The rule of effectiveness is explained by McNair with the following statement (referring it as frequently invoked by the parties in an international tribunal): "*If you do not construe the treaty in the way I am asking you to follow, you will deprive it of the effect which the expressed intention of the parties desired for it.*"[38]

This rule means that tribunals have to ascertain the purpose of the treaty and to give effect to it, unless there is something in the language used by the parties which precludes the tribunal from doing so.

d) Rule of liberal construction:

McNair refers to this rule as a common but not very helpful rule by which the treaties should receive a liberal or extensive rather than a strict construction, based more on the good faith of the parties in the application of the treaty and referring to the

[37] ibidem p. 381-382.
[38] ibidem p. 383.

resolution of the *Polish Postal Service in Danzig*[39] case in which the court concluded that this rule may "be applied only in cases where ordinary methods of interpretation have failed."[40]

e) General and special words:

This rule is based more on common law doctrines rather than in international law giving effect to special words rather than to general words, notwithstanding the fact that before applying this principle, the general words must indicate a *genus*.

This rule may be illustrated with the *British Counter*[41] case presented to the Tribunal of Arbitration in the *Behring Sea Dispute*, in which it was necessary to use express terms in order to establish an exception from a general proposition, being one of the points in controversy if the Behring Sea was intended to be included in the phrase Pacific Ocean.[42] The tribunal concluded that the Behring Sea was included in the phrase Pacific Ocean.

f) Preparatory works:

McNair's approach of this issue is considering it more a question of admissibility of evidence rather than a matter of law, and to what extent international courts and tribunals are entitled to look at documents, such as memoranda, minutes of

[39] I.C.J. Reports, 1949, p. 174.
[40] ibidem p. 386.

[42] ibidem p. 393.

conferences and drafts of the treaty under negotiation, all comprise as preparatory works, for the purpose of determining the meaning of the intentions of the parties.

In this regard the practice of the Permanent Court and the International Court of Justice has not been very useful in determining the acceptance or not of preparatory works for treaty interpretation, showing reluctance to exclude it and at the same time to give a decisive role to it.

In the *Lotus*[43] case the court concluded that there was no need to have regard to preparatory work if the text of the treaty was sufficiently clear in itself. Notwithstanding this rule, in the *European Commission of the Danube*[44] case the court concluded that there was no need to refer to the protocols of the convention considering that the text was sufficiently clear, if however some doubt may arise of the true meaning of the words "*it will be shown later on that the preparatory work fully confirms the conclusion at which the Court has now arrived.*"[45]

The conclusions of the Court are based on the fact that the use of preparatory work is conditioned to the non clearance of the text itself, being this source of interpretation a secondary element that the interpreter should take into consideration when the terms of the treaty are obscure or lead to an unreasonable result.

It is important to point out that preparatory work is intended to show the common intention of the parties (as stated by the International Law Commission) so it should exclud the use of unilateral preparatory work, therefore as preparatory work could be

[43] I.C.J. (1927), Series A, No. 10.
[44] I.C.J. (1927) Series B, No. 14.
[45] ibidem p. 414.

considered an earlier draft discussed by both parties or an exchange of letters between them in which could be reflected the common intention of the parties.

g) Bilingual and plurilingual treaties:

It has been already mentioned in the second section of this chapter that the interpreter of bilingual or multilingual treaties has to consider that in the absence of a provision to the contrary neither text is superior to the other, and one text should help one another, so it would be permissible to interpret one text by reference to another.

In this regard the texts must be considered together and if the result of this process reveals a divergence then the interpreter may be able to adopt a text declared in the treaty to prevail, which reflects that all the texts should be conceived as containing the will and agreement of the parties.

2. – Interpretation of tax treaties based on the Commentaries to the Model Tax Convention on Income and on Capital of the OECD.

The purpose of this chapter is to analyze the legal basis of the Commentaries to the Model Tax Convention on Income and on Capital of the OECD (Commentaries) from the perspective: i) of the Vienna Convention on the Law of Treaties and its preparatory works; ii) OECD instruments and finally iii) from the body involved in its development.

This chapter starts with the analysis that the author made of the meetings of the International Law Commission and the Reports of that body to the General Assembly of the United Nations in connection with the drafting of the interpretation articles of the Vienna Convention and the relationship with the Model Tax Convention on Income and Capital of the OECD and its Commentaries.

On the other hand the governments of the OECD Member States apply the Commentaries when a controversy arises between taxpayer and tax authorities basing this application mainly in the Recommendation that the OECD Council have made. Therefore, the legal basis of this application is not that clear and a substantial modification may be carried out in order to preserve the taxpayer's rights and to achieve a real harmonization of international tax rules, and more important, its interpretation.

Finally, in order to clarify the legal characterization of the Commentaries as an aid for interpretation not only legal amendments could be done but also a rearrangement of the composition of Committee on Fiscal Affairs of the OECD could lead Member

States to the adoption of that instrument either as a domestic law or as part of the treaties agreed.

2.1) The Vienna Convention on the Law of Treaties and the Commentaries to the Model Tax Convention on Income and Capital of the OECD.

a) Preparatory works of the Vienna Convention on the Law of Treaties.

The work of the International Law Commission started as a response to the mandate provided by article 13 of the United Nations Charter which stated that one of the principal functions of the General Assembly was to "encourage the progressive development of international law and its codification", the result was the enactment of the Statute of the International Law Commission and a commission with the same name.

The selection of the topics for codification was the main issue in the fourth, fifth, sixth and seventh meetings; several topics were brought to the attention of the Commission, among others: subjects of international law, fundamental rights and duties of states, law of nationality, obligations of territorial jurisdiction, law of treaties, etc.[46]

In this way, it was in the last mentioned meeting that finally the Commission agreed the three topics that would be subject to codification: law of treaties, arbitral

[46] Yearbook of the International Law Commission 1949 p. 31, 37, 46 and 55.

procedure and the régime of the high seas, being the first of these topics the one that would have all the attention of the Commission.[47]

It is important to give some attention to the topics in which the Commission focused because fiscal matters were never considered neither in the discussions within the Commission nor in the final decision of the topics for codification.

This could be understood considering that some topics may be more important at that time when the spirit of the Second World War was still present and the United Nations had a very important task: to become an international forum for the solution of problems that may put in danger world peace again.

Notwithstanding, it is surprising that none of the members of the Commission, whose main objective was the codification of international rules did not mention during the discussions the idea of codifying international tax rules or continuing with the works developed up to that point by its predecessors, ignoring the work carried out by the League of Nations in this regard during its 25 year period of existence and which resulted in the development of two model tax conventions,[48] *i.e.* the codification of international tax rules in order to avoid double taxation.

On the other hand, in 1956, the Organisation for European Economic Cooperation (OEEC) set up a Fiscal Committee and in 1958 "instructed it to submit a draft Convention for the avoidance of double taxation with respect to taxes on income and

[47] ibidem p. 58.
[48] These are the so-called models of Mexico and London in 1943 and 1946, respectively. A.J. Van den Tempel, "Relief from Double Taxation (collection Development in Taxation since World War I), IBFD, 1967, p. 7.

capital, together with concrete proposals for the implementation of such a Convention",[49] therefore this Committee developed its first draft (released in 1963) and continued with its works during the same period of time as the International Law Commission (1949-1969) developed the Vienna Convention.

From the analysis of the records and reports of the International Law Commission, it seems that its work and the one carried out by the OECD were in a similar direction and at the same time but with no communication between both bodies and no mention at all of the work in which each body was involved.

Moreover, article 26, paragraph 1 of its Statute confers on the Commission general power to "consult with any international or national organizations, official or non-official" and paragraph 4 recognizes the "advisability of consultation by the Commission with intergovernmental organizations whose task is the codification of international law, such as those of the Pan American Union".[50] In this regard the Commission has hold meetings with the Inter-American Juridical Committee, the Asian-African Legal Consultative Committee, the European Committee on Legal Cooperation and the Arab Commission on International Law, although it appears that no meeting was held with the OEEC (OECD afterwards).

Although, it would have been desirable that if two international bodies are developing instruments which are going to set the basis for the conclusion of conventions, one with a broader scope, the Vienna Convention on the Law of Treaties, and the other one with a more specific object, the OECD Model Convention, the cooperation

[49] K. Messere "The 1992 OECD Model Treaty: the Precursors and Successors of the New OECD Model Tax Convention on Income and Capital", IBFD, August 1993, p. 2.
[50] http://www.un.org/law/ilc/ilcintro.htm#relbods

between both bodies would be desirable. Therefore, if both bodies had worked with more communication maybe some issues that had not been resolved up to this days had been resolved; let's suppose that before the Fiscal Committee of the OECD released its draft in 1963 or even after, meetings between both bodies had been made in order to analyze that the latter was preparing a model for the conclusion of a convention for avoiding double taxation, but also that its interpretation would be attached in a separate instrument.

Considering the content of the records of the International Law Commission the members of that body would have been "surprised" that an international organization was developing a model in which its Member States could base its works to conclude a convention to avoid double taxation, that its interpretation had to be in accordance with the terms provided by a separate instrument and which were bound to follow when interpreting and applying that convention.

The response on these two issues, maybe, would have been that the Vienna Convention only applies to treaties and not to models which are not treaties. Regarding the second issue the Commission would have said that the principles stated by Sir Gerald Fitzmaurice[51] were to be followed with independence of the object and purpose of the treaty and the discussion would have focused on the legal nature of the Commentaries of the Fiscal Committee and if they could fit in any of the interpretation provisions of what would later be known as the Vienna Convention and maybe some important elements would have been added to clarify the legal nature of the Commentaries and its relation to the Vienna Convention.

[51] Those referred in the first chapter of this essay.

b) Legal basis of the Commentaries of the OECD Model Convention in the Vienna Convention.

As discussed in the first chapter of this essay the Vienna Convention on the Law of Treaties establishes certain provisions for the interpretation of treaties, and is therefore applicable to tax treaties. Articles 31, 32 and 33 give the principles for the interpretation of treaties, by providing certain rules that the interpreter should follow in order to elucidate the meaning of the terms agreed by the parties.

Article 31 provides a general rule for interpretation establishing three main principles: i) interpretation in good faith, ii) ordinary meaning of the words and iii) this should be considered in the context and in the light of its object and purpose. In this regard the treaty interpreter should give more weight to the text of the treaty which reflects the way in which the parties appear to agree but trying to reconcile it with the object and purpose which in the case of a tax treaty is mainly the avoidance of double taxation.

Good faith is a principle of treaty interpretation that is essential if the *pacta sunt servanda* rule is to have a real meaning, this means that good faith and the object and purposes of the treaty have to prevail in order to obtain the real interpretation of the treaty. This is also known as the rule of effectiveness[52] by which the interpreter has to attribute to the provisions of the treaty a meaning which is in accordance with the letter and spirit of the treaty.

[52] Yearbook of the International Law Commission 1966, Vol. II, p. 219.

To determine the object and purpose of a tax treaty is in general terms an easy question considering that they are agreed mainly in order to avoid double taxation, but the problem is to determine which state has the right to tax certain transactions and good faith may not be helpful, unless a mutual agreement procedure is carried out, because both states may have strong arguments, in the absence of a clear definition, to tax the same transaction and may not want to give up its taxation rights.

On the other hand, to determine the ordinary meaning of the terms of a tax treaty is a difficult task because the interpreter may not find in common instruments, such as a dictionary, the most appropriate definition of a pure tax concept, therefore it is not clear that for tax treaties undefined terms could have an ordinary meaning and recourse to specific instruments should be made so the idea of attributing an ordinary meaning to an ambiguous term may not always be possible regarding tax matters.

Another issue that should be considered is whether by ordinary meaning could be understood the meaning given by the Commentaries to the Model Convention of the OECD which only reflects the interpretation that a group of tax experts gives to certain terms.

The second paragraph of the same article clarifies what should be understood by context providing that it should include: i) the text of the treaty, its preamble and annexes, but also ii) any agreement relating to the treaty which was made between the parties in connection with the conclusion of the treaty and iii) any other instrument in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

In order to conclude if the Commentaries could be considered as part of the context in the terms above described, an analysis of that provision should be carried out. The paragraph states that the context includes the text of the treaty (subject to interpretation), any agreement between all the parties in connection with the conclusion of the treaty and any instrument made by one or more parties in connection with the conclusion of the treaty if it has been accepted by the other parties as an instrument related to the treaty.

In this regard, the Commentaries could not be considered as part of the treaty unless the parties agree to consider them as part of the terms of the treaty and in that case should be attached to the treaty subject to the approval of the Parliament (in those countries where this legislative act is necessary to incorporate the treaty in the legal system of the country).

On the other hand, the OECD Model Convention is not a treaty *per se* although is an instrument in which the countries could base its work when negotiating double tax treaties[53] therefore the Commentaries, as an interpretation given to an instrument not considered as a treaty could not be regarded as an agreed instrument between the treaty parties.[54]

In the same way, paragraph 29 of the Introduction to the OECD Model Convention and Commentary provides that "although the Commentaries are not designed to be

[53] Philip Baker, "Double taxation conventions: a manual on the OECD Model Tax Convention on Income and Capital", Sweet & Maxwell, 2001 p. E-13.
[54] Hugh Ault, "The Role of the OECD Commentaries in the Interpretation of Tax Treaties", Intertax, 1994/4, p. 145.

annexed in any manner to the convention signed by Member countries, which unlike the Model are legally binding international instruments….." Therefore the Commentaries could not be considered as part of the treaty, unless the parties so agree.

It is important to point out that when considering the context the interpreter of a tax treaty has to review the documents strictly related to the treaty subject to interpretation, meaning those instruments that it had been agreed by the parties as part of the treaty, otherwise a breach of the principle of legality is likely to happen.

Moreover, the language used in this paragraph reflects the intention of the International Law Commission that any instrument that is used for the interpretation of a treaty has to be agreed by the parties. This means that unilateral materials[55] cannot be considered as part of the context under the terms of paragraph 2 of article 31, unless they are made in connection with the conclusion of the treaty and are accepted by the other party. The International Law Commission clarified that although agreed instruments may be considered as part of the context this does not necessarily means that it should be considered as part of the treaty and its incorporation will depend on the intention of the parties.

This is relevant because although the Commentaries are agreed between the OECD Member States, in order to consider it as part of the treaty subject to interpretation, the parties have to explicitly agree that recourse to the Commentaries will be made when an interpretative issue arises.

[55] Yearbook of the International Law Commission, 1966, Vol. II, p. 221.

The third paragraph of this article refers to other instruments that have to be considered together with the context, such as i) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, ii) any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation and iii) any relevant rules of international law applicable in the relations between the parties.

Unless the parties agree to consider the Commentaries as an agreement for the interpretation of the treaty, this instrument may not be regarded as a subsequent agreement and on the other hand, it is not possible to conclude that the Commentaries could be considered as a subsequent agreement between the parties regarding the interpretation of the treaty because many of the tax treaties intended to avoid double taxation have been agreed based on the Model Convention and its Commentaries released by the OECD, therefore the Commentaries are not a subsequent practice rather an instrument existing before the treaty has been agreed.

Subparagraph b) refers to any subsequent practice carried out by the parties, which do not reflect the reference to any instrument or document, *i.e* the Commentaries are an instrument that reflects the interpretation of the Committee on Fiscal Affairs but the subsequent practice of the parties has not been considered in any document or instrument, and in the case where the subsequent practice of the parties is contained in a document it would be regarded as an agreement between the parties, rather than as a subsequent practice.

Subparagraph c) refers to any other relevant rules of international law, which is not an hypothesis applicable to the Commentaries due to the fact that this instrument could not be regarded as a rule of international law, considering that international law is defined as the "lawmaking among countries or intergovernmental organizations, displaying structural and procedural characteristics that are the same as national legislation."[56] According to this definition the "international legislative process" should be similar as the domestic legislative process carried out by the governments of each country which means (in a democratic society) that a Parliament, assembly or group of people elected by the majority of the citizens give its approval to those provisions which should be considered as law with binding effects and enforceable before tribunals.

From an international law point of view the treaties agreed by the government officials are subject to the approval of that elected assembly (legislative branch which, depending on the country, could take different names), therefore the Commentaries could not be considered as international law because this instrument has not received the approval of any legislative body which could give it the character of law.

It is important to mention that the Supreme Court of Canada resolved in the *Crown Forest Industries Ltd.*[57] case that "a court may refer to extrinsic materials which form part of the legal context (these include accepted model conventions and official commentaries thereon) without the need first to find an ambiguity before turning to such materials." This decision may be criticize on the following grounds:

[56] Black's Law Dictionary, 7th edition, p. 822.
[57] R. v. Crown Forest Industries Ltd. (1995) 95 D.T.C. 5,389.

a) According to the Vienna Convention and its preparatory works a tribunal may refer to extrinsic material (an instrument different from the treaty itself) if the parties agree to, this is, if the parties in the particular case wanted that the Commentaries to the Model Convention of the OECD may be referred as an aid for interpretation of the terms of the treaty they should have explicitly stated that in the treaty, otherwise a breach of the principle of legality may be likely to happen.

b) On the other hand, the Court affirms that recourse to extrinsic material could be made even if no doubt or ambiguous term arises, which is not the accepted way by the Commission to start the interpretation process considering that the text of the treaty has to be analyzed before the interpreter uses extrinsic aids for the interpretation of the treaty, this principle was established by the International Law Commission when commenting on article 27 (31 nowadays) affirming:

> "The article as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."[58]

Finally, paragraph four of this article provides that a special meaning shall be given to a term if it is established that the parties so intended, which again reflects that above all the agreement of the parties is the factor that determines whether a special meaning should be given to a term. This is, if the parties agree to give a different or special interpretation to a concept in the treaty that will be the meaning that should prevail when the treaty may be subject to interpretation, either by an administrative authority

[58] Yearbook of the International Law Commission 1966, Vol. II., p. 220

or by the judiciary. In this regard, the International Law Commission states that the burden of proof, that a special meaning has been agreed by the parties, lies on the party invoking the special meaning of the term, otherwise an ordinary meaning should be given to that term.[59]

Article 32 of the Vienna Convention could be regarded as a provision that gives supplementary options (but should not be considered as an autonomous means of interpretation, rather than a complement of article 31) to the interpreter by authorizing him to review the preparatory work and the circumstances of its conclusion when the interpretation of the treaty leaves the meaning ambiguous, obscure or the result is manifestly absurd or unreasonable. This provision is intended to confirm the interpretation obtained by the application of article 31, so if the interpretation concluded by the application of that article is in accordance with the object and purpose of the treaty and does not result in ambiguous, obscure or in a manifestly absurd or unreasonable interpretation, then this article should not be applicable.

It is important to point out that the International Law Commission did not consider the existence of preparatory work related to a model that could be used as a basis for the development of tax treaties between the countries (like the OECD Model Convention). Therefore, from the language used in the discussions and the cases quoted by that Commission when referring to preparatory works the Commission intended to refer to those related to the specific treaty subject to interpretation, so the Commentaries as being drafted for a Model Convention which is the basis many governments adopt when negotiating a tax treaty, could not be considered as intended

[59] ibidem p. 222.

to interpret an specific tax treaty rather than to be considered as the interpretation given to the Model Convention.

Notwithstanding this fact, it has to be said that if the parties based its negotiations on the OECD Model Convention[60], the Commentaries could be considered as part of the preparatory works although is not clear and may not have great support before the tribunals considering that the Commentaries are not referred to the specific treaty subject to interpretation, and the courts when deciding a controversy may only resolve upon the facts and documents directly related to the case and the Commentaries may not be considered as directly related to that specific treaty therefore to the case.

Although, this view was taken by the High Court of Australia in the *Thiel v. Federal Commissioner of Taxation*[61] case affirming that:

> "Whilst the Model Convention and Commentaries may not strictly amount to work preparatory to the double taxation agreement between Australia and Switzerland, they are documents which form the basis for the conclusion of bilateral double taxation agreements of the kind in question and, as with treaties in pari materia, provide a guide to the current usage of terms by the parties. They are, therefore, a supplementary means of interpretation to which recourse may be had under Art.32 of the Vienna Convention."

This decision of the High Court of Australia ignored that the term supplementary means of interpretation concept of the Vienna Convention refer to the *travaux*

[60] Prof. Philip Baker, states that the Commentaries may be relevant "when for example it is clear that the specific treaty has been concluded using negotiating texts based on the OECD Model", "Double taxation conventions: a manual on the OECD Model Tax Convention on Income and Capital", Sweet & Maxwell, 2001 p. E-19.
[61] Thiel v. F.C.T. (1990) 90 A.T.C. 4,717 (High Court of Australia).

préparatoires of the treaty subject to interpretation not to a different instrument as the Commentaries which are made to a Model Convention.

On the other hand, unless agreed by the parties the Commentaries could not be considered as *"documents which form the basis for the conclusion of bilateral double taxation agreements"* this means that the parties had to reflect in the text of the treaty or in any other related agreed instrument that that was their intention, otherwise any document could be considered as a valid instrument for the interpretation of a double tax treaty and that cannot follow from the preparatory work of the International Law Commission but neither from the language of the Vienna Convention.

Finally, article 33 refers to the solutions that the parties could give to conflicts arising due to the different languages in which a treaty is authenticated and the third paragraph states that if a different meaning arises from the comparison of the texts of a treaty in different languages then the meaning which as far as possible reconciles the texts shall be adopted.

In this case the Commentaries could give another solution to this situation by giving uniformity to the interpretation of a treaty due to the fact that this instrument has been released in French and English in almost identical terms, therefore a unique interpretation could be made of the terms agreed by the parties. Although, reference to external aid for the interpretation of the terms of a treaty which could have a different meaning due to the different languages in which the treaty has been agreed should be explicitly stated in the treaty by the parties.

It is important to point out that the Commentaries had been released by the Committee on Fiscal Affairs in English and French, a fact that raises the question: up to what extent the tax authorities of the Member States of the OECD can be bound by an instrument which is not developed and released in the official language of the country therefore its difficult to conceive that an act of authority, such as a tax assessment or sentence could be based in a language different from the official one.

2.2.- Legal basis of the OECD Commentaries as an aid for interpretation in OECD instruments.

a) Recommendation of the OECD Council.

The legal basis for the application of the Commentaries by the tax authorities of the member states can be found in the "Recommendation of the OECD Council Concerning the Model Tax Convention on Income and on Capital" adopted by the Council of the OECD on 23 October 1997, which indicates that:

> "THE COUNCIL,……
>
> I. RECOMMENDS the Governments of Member countries:
>
> 1……
>
> 2. when concluding new bilateral conventions or revising existing bilateral conventions, to conform to the Model Tax Convention, as interpreted by the Commentaries thereon;
>
> 3. that their tax administrations follow the Commentaries on the Articles of the Model Tax Convention, as modified from time to time,

> when applying and interpreting the provisions of their bilateral tax conventions that are based on these Articles."

Considering this recommendation the tax authorities should follow the interpretation proposed by the Commentaries when an interpretative issue arises between taxpayer and tax authorities therefore it is important to give some attention to the legal nature of a recommendation in order to make a conclusion about its legal force therefore its binding effects.

b) Rules of Procedure of the OECD.

According to article 5 of the OECD Convention, the organization, in order to achieve its aims, may:

> "(a) take decisions which, except as otherwise provided, shall be binding on all the Members;
> (b) make recommendations to Members; and
> (c) enter into agreements with Members, non-member States and international organisations."

On the other hand, rule 18 of the Rules of Procedure of the OECD adopted by its Council on 30th September 1961[62] refers to the character of the recommendations affirming that:

"V. ACTS OF THE ORGANISATION

Rule 18

[62] Resolution OECD/C(61)21.

> b) Recommendations of the Organisation, made in accordance with Articles 5, 6 and 7 of the Convention, shall be submitted to the Members for consideration in order that they may, if they consider it opportune, provide for their implementation."

From these quotations it could be concluded that: i) the legal foundation for the issuance of recommendations by the Council to Member States is article 5 of the OECD Convention, and ii) those recommendations could be either implemented by the Member State or not, if it is considered opportune.[63]

This means that the governments and, specifically, the tax authorities should unilaterally examine whether the Commentaries are applicable or not. This could lead the tax authorities to have two different approaches to this matter: the first one, which is that the tax authorities may apply the Commentaries to a certain taxpayer in a certain situation, but not to another taxpayer in the same situation; the second approach may be the general application or non application to all taxpayers.

This examination from the tax authorities could lead (in the first approach referred) to a breach of the principle of legality[64] considering that it gives a very broad range to the authorities to conclude whether the Commentaries, or a part of them, could be applicable to a specific issue subject to its consideration, and from that unilateral and in some cases unequal determination, conclude whether a certain transaction is subject

[63] Professor Klaus Vogel in his article "The Influence of the OECD Commentaries on Treaty Interpretation" states that "a recommendation is not opportune when it conflicts with a binding international treaty", p. 614, December 2000, Bulletin Tax Treaty Monitor.

[64] Mr. Jean Van Houtte in its publication "Principles of Interpretation in Internal and International Tax Law", p. 10, refers to two specific aspects that should be considered when interpreting tax laws: i) the autonomy of tax law and on the other hand, the "origin of the tax obligation, namely the unilateral will of the public authority *expressed in accordance with certain constitutional requirements* (the principle of legality)." (italics added)

to be interpreted by the Commentaries or not. It is because of this unilateral decision of the governments of the Member States to choose whether or not to adopt the Commentaries that it seems to be difficult that this instrument could be regarded as part of a legal system with binding effects to the taxpayers.

In this regard, with the idea of preserving the rights of taxpayers instead of a recommendation, the adoption by Member States of the Commentaries as an aid for interpretation should be made by a decision of the Council of the OECD and it would be clear that the Member States of the OECD would interpret the Double Tax Conventions agreed with other states based in the Commentaries.

Paragraph a) of rule 18 of the Procedural Rules of the OECD provides:

> "V. ACTS OF THE ORGANISATION
>
> Rule 18
>
> a) The Decisions of the Organisation, taken in accordance with Articles 5, 6, and 7 of the Convention, may be:
>
> > i) decisions binding on the Members which the latter shall implement after they have complied with the requirements of their appropriate constitutional procedures;"

Therefore Member States would have to carry out the constitutional domestic procedures necessary for the incorporation of the Commentaries either in its domestic legislation (for example by enacting an interpretation act applicable to tax treaties) or in each of the treaties agreed by the state.

In this way, if the Commentaries are adopted as a domestic law or as part of the treaty it would be clear to what extent the terms of the tax treaty are to be interpreted by the tax authorities considering that it would be regarded as an enforceable provision, and the right to the taxpayer to challenge them under the domestic procedure laws of the country would be preserved.

It is important to point out that if the Commentaries are adopted in domestic law a further process of harmonization at the domestic level would have to be made in order to have equal domestic definitions of the same term.

2.3.- Composition of the Committee on Fiscal Affairs of the OECD.

A committee integrated by government officials only.

The legal characterization of the Commentaries may be clarified not only by carrying out pure legal modifications as previously referred, but also by the composition and the way the Committee on Fiscal Affairs works, therefore the intense involvement of different sectors may be desirable.

Although the work of the OECD has been productive, the composition of the Fiscal Committee could lead us to think that the work developed reflects only the intention of the tax authorities of the Member States participating in the organization rather than the ideas which the different sectors within each Member State may have[65]. Therefore, the documents developed by the Committee should be given a relative or limited legal force in each Member State, considering that no real parliamentary work

[65] For example the business community.

has been carried out in order to develop the international rules for avoiding double taxation.

In the past, the League of Nations used to work with experts appointed by its governments but spoke in their personal capacity and could freely offer and work out all sorts of suggestions without being responsible to their governments.[66] Although, one important deficiency could be that the governments may not support the conclusions reached by that body and its work may not have a real influence in the international tax field, but the combination of both models (the one used by the League of Nations and the existing one by the OECD), may lead to the development of well accepted international rules and a clarification of the legal nature of the Commentaries.

In this regard, the composition of the Fiscal Committee could be rearranged in order to include one non government official of each member state of the organization, although the practical difficulties that could arise, this could be either a member of the parliament of each country or an independent specialist with the idea that this person would be the voice of the different sectors of a community, mainly the voice of the taxpayers.[67]

An effort by the OECD to include the business community has been done by setting up Technical Advisory Groups (TAGs)[68] intended also to include non-OECD

[66] Relief from Double Taxation (collection: Developments in Taxation since World War I), A.J. Van den Tempel, IBFD, 1967, p. 18.
[67] It is important to point out that for the discussion of the "Draft on the Attribution of Profits to Permanent Establishments" working party 6 involved not only the business community but also banking associations and advisory firms.
[68] Speech by Mr. Gabriel Makhlouf to the CIOT European Branch Conference on 7 March 2003.

members in meetings for the discussion of specific topics, like the one held in Ottawa in 1998, but the creation of a separate group will not lead to a real discussion of the most important topics in which the Committee of Fiscal Affairs is involved therefore an active and permanent participation of different sectors is desirable.

The incorporation of non government officials of each Member State will enrich the discussions of the Committee on Fiscal Affairs of the OECD and the work developed by this organization would reflect the outlook of diverse sectors. In the same way, the decisions taken by the Committee on Fiscal Affairs would have a broader influence because the views of taxpayers and tax authorities would be discussed and those decisions may have fewer barriers, in order to be considered as part of the legal system of the member states, and an authentic "codification" of international tax rules might be achieved and the legal characterization of the Commentaries may be clarified.

Conclusions.

The rules for interpretation provided by the Vienna Convention in articles 31, 32 and 33 are applicable to tax treaties and should be considered as a single combined operation, rather than separate provisions applicable independently one of the other.

The lack of reference in the preparatory works of the International Law Commission to the work developed by the League of Nations and the OEEC regarding the codification of international tax rules shows the little importance that that Commission gave to this topic.

On the other hand, under the provisions of its Statute the International Law Commission was empowered to hold meetings with international organizations but no communication was held between this body and the Fiscal Committee notwithstanding they worked in parallel in time and with similar objectives, the codification of international rules, although the scope of both organizations was different, an intense cooperation might have been expected.

According to the preparatory works of the International Law Commission and the language of article 31 of the Vienna Convention, no legal basis for the application of the Commentaries can be found because it was the intention of the Commission that any instrument that could be regarded as an aid for treaty interpretation should be agreed between the parties of the treaty, rather than considering instruments addressed to model conventions as valid for interpretation purposes.

The concept of preparatory works provided in article 32 of the Vienna Convention was not drafted with the existence of a model convention in mind. On the other hand, the Commentaries could not be regarded as a part of the preparatory work of a specific tax treaty because they are Commentaries to a Model Convention, therefore no legal basis may be found under the provisions of article 32 of the Vienna Convention.

The legal basis for the application of the Commentaries by the OECD Member States can be found in the recommendation of the OECD Council which according to rule 18 of the Rules of Procedure of the OECD has to be analyzed by the governments and if is considered as opportune it could be implemented.

In order to clarify the legal characterization of the Commentaries and its application as an aid for interpretation it should be regarded as a decision of the Organization rather than as a recommendation and should be adopted as part of the legal system of the country, therefore with binding effects. This modification would preserve the right to the taxpayer to challenge the Commentaries as an aid for interpretation under the domestic procedure laws of the country.

Due to the composition of the Committee on Fiscal Affairs the work developed by the OECD contains the point of view of one part of the tax relationship (taxpayer-tax authorities) so in order to enrich the discussions of this Committee a non government official should be included (someone not from the Executive branch) from each Member State.

The inclusion of a non government official would lead to a major harmonization of the international tax rules considering that its provisions would include not only the views of the tax authorities but also the outlook of the different sectors mainly involved in the application and interpretation of these rules.

APPENDIX I

"*Article 38*

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."

APPENDIX II

"*Article premier*

1) L'accord des parties s'étant réalisé sur le texte du traité, il y a lieu de prendre le sen naturel et ordinaire des termes de ce texte comme base de interpretation. Les terms des dispositions du traité doivent être interprétés dans le contexte entire, selon la bonne foi et à la lumière des principes du droit international.
2) Toutefois, s'il est établi que les termes employés doivent se comprendre dans un autre sens, le sens naturel et ordinaire de ces termes est écarté.

Article 2

1) Dans le cas d'un différend porté devant une jurisdiction internationale il incombera au tribunal, en tenant compte des dispositions de l'article premier, d'apprécier si, et dans quelle mesure, il y a lieu d'utiliser d'autres moyens d'interprétation.
2) Parmi les moyens légitimes d'interpréter se trouvent:

a) Le recours aux travaux préparatoires;
b) La pratique suivie dans l'application effective du traité;
c) La prise en consideration des buts du traité."

APPENDIX III

"***Section 3: Interpretation of treaties***

Article 27. *General rule of interpretation*

1. 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty;

(b) Any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 28. *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 27, or to determine the meaning when the interpretation according to article 27:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable.

Article 29. *Interpretation of treaties 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 that 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. Except in the case mentioned in paragraph 1, when a comparison of the texts discloses a difference of meaning which the application of articles 27 and 28 does not remove, a meaning which as far as possible reconciles the texts shall be adopted."

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