

# USING THE VIENNA CONVENTION ON THE LAWS OF TREATIES FOR INTERPRETING TAX TREATIES

Mag. Dr. Manuel L. Hallivis Pelayo

1. The principle of common interpretation. 2. Interpretation of Tax Treaties. 3. Vienna Convention on the Laws of Treaties. 4. Applicability of VCLT to DTC's. 5. General rule of interpretation. 6. In good faith. 7. Ordinary meaning. 8. Context. 9. Subsequent agreement or practice. 10. Special Meaning. 11. Object and purpose. 12. Supplementary means of interpretation. 13. Interpretation of treaties authenticated in two or more languages.

First of all, I would like to thank the *Instituto Brasileiro de Direito Tributario*, especially to my very good friend its executive Director, counselor Joao Francisco Bianco for this invitation to write in this very important project. I will speak about the first steps of the interpretation of tax treaties. For that, allow me to repeat a very important warning from Qureshi: "Beware, Beware the interpreter! ... It is as much counsel about the interpreter as it is counsel for the interpreter, because the process of interpretation can be fraught with dangers...thus, with caution come opportunities..."<sup>1</sup>

In the past century, two phenomenon arouse that have made important changes in human and States interaction: on the one hand, globalization which has generated that every country needs from all the others; and, on the other hand, the concern for human rights, which has grown into the souls of every country and of every citizen of the world.

The impact of globalization in political, cultural, social, commercial and tax relationships has been very strong,<sup>2</sup> and has given way to an exponential growth of international transactions, which are simpler and faster each time. Besides that, it has generated competition among countries in order to attract investments by means of infrastructure, and better labor and taxation conditions.

The increase in commercial relationships has many implications: one of them, is that when a person carries out cross border transactions, he or she will be subject to two or more tax jurisdictions that could exert taxing rights from the same subject, which could lead to international double taxation.<sup>3</sup>

1 QURESHI, Asif H., *Interpreting WTO Agreements, problems and perspectives*, Cambridge University Press, Cambridge, 2006, p. 1.

2 Cfr. HALLIVIS PELAYO, MANUEL LUCIANO, *Interpretación de Tratados Internacionales Tributarios*, pp. 23-85 Porrúa, México, 2011.

3 For a deep inside in this topic see: VOGEL KLAUS et al, Klaus Vogel on Double Taxation Conventions, A COMMENTARY TO THE OECD-UN- AND US- MODEL CONVENTIONS FOR THE AVOIDANCE OF DOUBLE TAXATION OF INCOME AND CAPITAL WITH PARTICULAR REFERENCE TO GERMAN TREATY PRACTICE, translator John Marin, Kluwer Law and Taxation Publishers, pp. 2-3, Deventer, The Netherlands, 1991. Also: BÜHLER, OTTMAR, *Principios de Derecho Internacional Tributario*, trad. Fernando Cervera Torrejón, vol. XIV, pp. 43-47, Editorial de Derecho Financiero, Serie IV, *Tratados de Derecho Financiero y de Hacienda Pública*, Madrid, 1968; ORTIZ, SÁINZ Y TRON, S.

Most Countries and organizations such as the OECD and the UN have developed internal and international means for dealing with international double taxation. One of them is by means of Double Taxation Conventions (DTC).

Following Becerra, we can say that a DTC "...is an instrument by which two contracting States agree on the allocation of the right to tax the business profits or items of income of resident taxpayers undertaking business activities in both contracting states."<sup>4</sup> The main question here is which State has the right to tax an income or if both have that right and, if so, in which proportion.

So, DTC's are agreements that allocate taxing rights between sovereign States in order to avoid international double taxation and prevent evasion in cross border transactions. As any treaties, they are celebrated in good faith and following the *pacta sunt servanda* principle. Their main goals are to avoid international double taxation, avoid evasion, exchange of information, simplify Tax Systems and provide legal certainty

## I. THE PRINCIPLE OF COMMON INTERPRETATION

According to Vogel, the application of the DTC's takes place in three different and consecutive levels: first with the taxpayers, then with the tax authorities and, in a third level by the Courts.<sup>5</sup> So, it is necessary that those who deal with DTC's application (taxpayers, authorities and Courts) apply the Conventions in such a way that they follow as much as possible the terms agreed, for the sake of the parts involved, the taxpayers and, ultimately, trade, investment and international relationships.

This means that we should seek that in all similar cases, the interpretation be the same by all interpreters. For legal certainty of all involved, it is not feasible, nor fare, that similar cases are solved in different ways and/or achieve contradictory results.

In doctrine, this is called "common interpretation", which means that treaties should be interpreted in the same way by both countries involved, and is an obvious goal, because if we want DTC's to succeed we need them to be interpreted and applied in the same way.

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C., *Tratados Internacionales en Materia Fiscal, Análisis y Comentarios*, pp. 3-8, Themis, Colección Tratados Internacionales, México, 1998; y HALLIVIS PELAYO, MANUEL, *op. cit.*, pp. 23-67.

<sup>4</sup> BECERRA, Juan Angel, *Interpretation and Application of Tax Treaties in North America*, IBFD, Amsterdam, p. 62.

<sup>5</sup> VOGEL, Klaus, "The Influence of the OECD Commentaries on Treaty Interpretation", *Bulletin, Tax Treaty Monitor*, IBFD, Amsterdam, December 2000, p. 614.

The objects and purposes of the DTC's, cannot be achieved with unilateral interpretations and is because of this that most authors have pushed for a consistent or "uniform" interpretation.<sup>6</sup> Vogel and Prokisch consider that both parts should apply the provision of a DTC in the most consistent way and that it is reasonable to look for the interpretation that is more acceptable for both parts (common interpretation principle).<sup>7</sup> That is the reason to look for rules of interpretation that allow DTC's to achieve their objectives and purposes. If both parts reach the same results, they will have achieved the goals of interpretation.

## II. INTERPRETATION OF TAX TREATIES

To get started, it is necessary that we undertake the task of briefly stating what does tax treaty interpretation means, and how it is done. As Becerra and Wouters say, quoting the International Law Commission (ILC), the interpretation of treaties is an art, not an exact science.<sup>8</sup> There are no particular methodologies for special fields of law. Thus in international law, one also uses the grammatical, the systematic, the teleological and the historical interpretation methods.

Moyano has done a very deep analysis of tax treaty interpretation, starting with pointing out that it should be understood as "...an intellectual operation that is done to determine its sense". Nonetheless, and precisely in order to determine its content and concept, he considers that the treaty has life of its own and, therefore, its own meaning and, for that, he quotes the last report (1966) of the ILC in which it was clearly set forth, that the starting point of interpretation lies in elucidating the sense of the text, and not in investigating *ab initio* the intention of the parties.<sup>9</sup> He also thinks that treaty interpretation should guarantee the stability of international relationships.<sup>10</sup>

For that, the interpretation of DTC's must be adequate and consistent among both contracting States.<sup>11</sup> Interpretation of tax treaties tells us what a treaty says, not what it should say.

In fact, according to the World Trade Organization, "...the primary purpose of treaty interpretation is to identify the common intention of the parties..."<sup>12</sup> "This also means that the common intentions cannot be determined with reference to the subjective and unilateral expectations of one of the parties alone."<sup>13</sup>

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6 RIBES RIBES, AURORA, Convenios para Evitar la Doble Imposición Internacional; Interpretación, Procedimiento Amistoso y Arbitraje, ER, España, 2002, p. 73, DE JUAN PEÑALOSA, JOSÉ LUIS, "Cuestiones de Fiscalidad Internacional en España", in Crónica Tributaria, No. 46, 1983, p. 107.

7 VOGEL, KLAUS y PROKISCH G., RAINER, "Ponencia General, Version española", 47º Congreso de la International Fiscal Association en Florencia, 1993", in Cahiers de Droit Fiscal International, volumen LXXVIII a, subject 1: Interpretación de los convenios de doble imposición, Kluwer Law and Taxation Publishers-IFA, Deventer, 1993, pp. 131-132.

8 BECERRA, Juan Ángel, op. cit., p. 47.

9 ONU/, A/Conf.39/11/Add.2, p. 43, quoted by MOYANO BONILLA, César, "La Interpretación de los Tratados Internacionales según la Convención de Viena de 1969", electronic versión of Integración Latinoamericana, October 1985, synthesis of La Interpretación de los Tratados Internacionales, published in Montevideo, p. 34.

10 MOYANO BONILLA, César, op. cit., p. 32.

11 BECERRA, Juan Ángel, op. cit., p. 47.

12 EC-Computer Equipment (AB), par. 84 y EU-Chiq, par. 7.94: QURESHI, Asif H., op. cit., p. 9, note 15.

13 Ibidem.

Now, the question is, how can we achieve that result in a proper, consistent way? Because, as it is said by Baker, DTC's, as international treaties, should be subject to the same interpretation rules for all treaties.<sup>14</sup> Where can we go? The answer lies in the Vienna Convention on the Law of Treaties.

### III. VIENNA CONVENTION ON THE LAWS OF TREATIES

The Vienna Convention on the Laws of Treaties,<sup>15</sup> precisely represents the codification of customary international law and has it as its fundamental base in the respect to the sovereignty of each State and the fulfilment of all international commitments (*pacta sunt servanda*) giving an acceptable guidance with respect to the procedures to negotiate international treaties and the applicable rules for its accomplishment. Its scope is that it applies only to treaties between States.

Now, in order to interpret DTC's we have to comment that, due to its importance, the International Law Commission (ILC) of the UN started in 1949 a project of codification that ended on May 22, 1969,<sup>16</sup> when it was approved in the Vienna Convention,<sup>17</sup> and entered in force in most of the world on January 27, 1980.<sup>18</sup>

This Convention, the Vienna Convention on the Laws of Treaties (VCLT) represents the codification of international law, and has its base in the fulfillment of international commitments giving a reasonable guidance to the procedures for negotiating, interpreting and applying international treaties and the rules for its compliance.<sup>19</sup> The VCLT codifies International Law rules and applies to treaties entered into from January 27, 1980. All countries recognize its influence because it represents "the codification of International Law...that bonds all nations..."<sup>20</sup> We agree with García Novoa who, as many other authors, considers the VCLT "a treaty about treaties".<sup>21</sup>

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14 BAKER, Philip, Double Taxation Conventions, R.O., 2001, p. E-1.

15 Signed by México May 23, 1969, approved November 29, 1972, published in the Diario Oficial de la Federación on March 28 1973, ratified November 25, 1974, entering into force on 27 January 1980.

16 "In 1947, was established by the General Assembly of the United Nations, the International Law Commission to promote a progressive development of international law and its codification...During 1962 and 1966 the ILC worked intensively on the codification of the law of treaties, on the basis of six reports prepared by its fourth and final Special Rapporteur on the subject, Sir Humphrey Waldock. The ILC completed its monumental work in 1966 when it submitted a draft convention on the law of treaties to the General Assembly of the United Nations, accompanied by a Commentary and a Recommendation... that the General Assembly should convene an international conference of plenipotentiaries to study the draft and to conclude a convention on the subject. The United Nations Conference on the Law of Treaties was convened pursuant to the General Assembly Resolution 2166 (XXI) of 5-XII-1966 and 2287 of 6-XII-1967. The Conference held two sessions, both in Vienna, the first session from 26 March to 24 May 1968 and the second session from 9 April to 22 May 1969. The Convention was open for signature by all States Members of the United Nations until November 1969, at the Federal Ministry for Foreign Affairs of Austria, and subsequently, until 30 April 1970, at the United Nations Headquarters, in New York. 46 States signed the Convention and in accordance with Article 84 (1) of the Vienna Convention on the Law of Treaties, the Vienna Convention entered into force on 27 January 1980 for the 35 States that deposited their instrument of ratification or accession with the Secretary-General of the United Nations on or before 28 December 1980. Today the Vienna Convention has entered into force for 98 States the International Law Commission (ILC): "...confined itself to isolate and codify the general principles which appear to constitute general rules for the interpretation of treaties": ENGELEN, Franciscus Antonius, Interpretation of Tax Treaties under International Law, A study of Articles 31, 31 and 33 of the Vienna Convention on the Law of Treaties and their application to tax treaties, IBFD, Volume 7, Doctoral Series, Amsterdam, 2004.

17 CALVO NICOLAU, ENRIQUE, Tratado del Impuesto sobre la Renta, tomo I, p. 41, Themis, México, 1995.

18 Signed by Mexico May 23, <http://proteo2.sre.gob.mx/tratados/SRE>.

19 SEARA VÁZQUEZ, Modesto, Derecho Internacional Público, 22ª ed., Porrúa, México, 2005, pp. 74-75 y 86, and ANZILOTTI, DIONISIO, Curso de Derecho Internacional, traducción de la 3ª edición: Julio López Oliván, tomo I, 1ª edición, Reus, Madrid, 1935, p. 62.

20 ARNOLD, BRIAN J. and MCINTYRE, MICHEL J., International Tax Primer, 2 Kluwer Law International, The Hague, 2002, pp. 112-113.

21 GARCÍA NOVOA, César, "Interpretación de los Convenios de Doble Imposición Internacional", in Estudios de Derecho Tributario Internacional. Los Convenios de Doble Imposición, coord. Juan Pablo Godoy Fajardo, ICDDT-LEGIS, Bogotá, 2006, pp. 15-17.

However, what is more relevant for the purpose of this paper, is that the VCLT, in its articles, establishes a set of rules or canons of interpretation, which do not seek to codify all existing maxims, but to look for a balance among the main schools of international interpretation. For the IBFD<sup>22</sup> it contains the “...generally accepted rules applying to tax treaties, the conclusion of treaties, their observance, application and interpretation...”<sup>23</sup>

Nonetheless, its relevance relies in that it establishes a set of interpretation rules that seek for a balance among the main schools of interpretation. In fact, as Wattel and Marres suggest, VCLT contains one special section (3), concerning treaty interpretation and its rules are a codification of non-written public international Law which was binding before it was codified by the VCLT (Art. 4), so it can be assumed that section 3 can be considered as part of those rules of the *ius gentium*.<sup>24</sup>

#### IV. APPLICABILITY OF VCLT TO DTC'S

We must start this section by saying that tax treaties *are international agreements*, thus, VCLT is applicable in order to determine their interpretation. For the IBFD, the purpose of the Vienna Convention is basically to codify existing rules of international law rather than creating new provisions...” and contains the “...generally accepted rules applying to tax treaties, the conclusion of treaties, their observance, application and interpretation...”<sup>25</sup>

In doctrine, authors of both civil and common law countries, recognize that the interpretation of tax treaties is ruled by the VCLT, because its provisions are applicable to all types of treaties even for countries that have not signed the VCLT, because they “...represent a codification of customary international law which is binding on all nations.”<sup>26</sup>

Besides that, according to the WTC's jurisprudence, “...the primary purpose of treaty interpretation is to identify the common intention of the parties and that the rules contained in Articles 31 and 32 of the Vienna Convention have been developed to help assessing, in objective terms, what was or what could have been the common intentions of the parties to a treaty.”<sup>27</sup>

It has been discussed its usefulness in tax matters, and doctrine has decided that it is very useful not only because of its compelling nature, but because tax treaties are international agreements, thus, Arts. 31 to 33 VCLT are applicable in order to determine their interpretation.

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22 “International Bureau of Fiscal Documentation”.

23 IBFD, op. cit., p. 477.

24 WATTEL, Peter J. y MARRES, Otto, op. cit., p. 225.

25 IBFD, IBFD International Tax Glossary, 5ª ed., Editor Barry Larking, Amsterdam, 2005, p. 479.

26 ARNOLD, BRIAN J. y MCINTYRE, MICHEL J., op. cit., pp. 112-113.

27 EU-Chi, par. 7.94, QURESHI, Asif H., op. cit., p. 9, note 15.

For example, as Sergio André Rocha says: "...there are no arguments that support the view that DTC's, which are international treaties like any others, are excluded from the field of the rules of interpretation contained in the VCLT. What can be said...is that such rules, just like any other rules of interpretation, have an extremely limited function as regards to the control of the activity of the interpreter"<sup>28</sup> Baker says that DTC's are governed by the rules of the International Public Law, and especially by the VCLT of May 23, 1969 and, although they can be considered as a special type of treaties, VCLT should be applied to them.<sup>29</sup> Also, García Novoa says that there is not juridical base to exclude them as treaties, because its particularities cannot eclipse their real nature as international treaties.<sup>30</sup>

Brian J. Arnold and Michael J. McIntyre also consider that "The interpretation of tax treaties is governed by customary international law, as embodied in the Vienna Convention on the Law of Treaties. The interpretative rules of the Vienna Convention apply to all treaties, not just tax treaties. Most countries, with the notable exception of the United States, have signed the Vienna Convention. Even countries that have not signed the Vienna Convention may be bound by its provisions because those provisions represent a codification of customary international law, which is binding on all nations."<sup>31</sup>

Uckmar, Corasanti, Capitani, Asorey and Billardi, consider that the interpretation principles that appear in the DTC's are present in the VCLT, and even though it contains only general rules, the DTC's should be interpreted according to the VCLT<sup>32</sup> Wouters and Vidal agree with this view and consider that when judges interpret a DTC, they should be guided by a set of international law principles, instead of domestic rules, and those principles are contained in Articles 31 to 33 of the VCLT.<sup>33</sup>

So, the principles for interpreting treaties are set forth by articles 31, 32 and 33 of the VCLT and are, in words of Seara, rules that "international practice has authorized and the Vienna Convention has retaken", Now, we should analyze Articles 31 to 33 of the VCLT:

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28 ROCHA, Sergio André, *Interpretation...*, Kluwer, p. 117

29 BAKER, Philip, *op. cit.*, p. E-2.

30 GARCÍA NOVOA, César, "Interpretación de los Convenios de Doble Imposición Internacional", *op. cit.*, pp. 15-17.

31 ARNOLD, BRIAN J. y MCINTYRE, MICHEL J., *op. cit.*, pp. 112-113

32 UCKMAR, VÍCTOR, CORASANTI, GIUSEPPE, CAPITANTI DI VIMERCATE, PAOLO DE, ASOREY, RUBÉN O. y BILLARDI J., CRISTIÁN, *Manual de Derecho Tributario Internacional*, trad. Cristian Billardi, La Ley, Buenos Aires, 2011, p. 30.

33 WOUTERS, JAN y VIDAL, MAARTEN, "Non-tax treaties: domestic courts and treaty interpretation", Chapter I de *Courts and Tax Treaty Law*, coord. Guglielmo Maisto, vol. 3: *EC and International Law Series*, IBFD, Amsterdam, 2007, p. 21.

## V. 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 or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement 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.”

As Avery Jones has said, article 31 basically establishes three principles “...1.-interpretation in good faith. 2. The parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them. 3. The third principle is one both of common sense and good faith: 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.”<sup>34</sup>

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<sup>34</sup> AVERY JONES, John, “The interpretation of tax treaties with particular reference to article 3 (2) of the OCDE Model Convention”, *British Tax Review*, 1984, pp. 82. Para. 12 of the Commentary on Art. 27 of the Draft Vienna Convention, Report of the International Law Commission on the work of its Eighteenth Session (4 may-19 July 1966), Document A/CN. 4/191. Yearbook of the International Law Commission (1966), vol. II at 220, Para 11.

## VI. IN GOOD FAITH

Article 31 starts by establishing that “A treaty shall be interpreted **in good faith...**” With this, each part of the DTC must take into account what was negotiated. Good faith is a basic juridical principle, something that we have to admit as contrary to abuse and deception, something that is honest and fair.<sup>35</sup>

Good faith is one of the cornerstones of the United Nations System, Other say that it is “the very foundation of international law” or “the basis of all international legal order” according to Black, means “Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry...An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law...”<sup>36</sup> We can understand it with two approaches: Subjective, which refers to the criterion when negotiating a treaty, to an honest spirit of loyalty and rightfulness that should prevail in every State when negotiating a treaty, and objective, which refers to the criterion when applying a treaty in all legal matters arising from the application of it.<sup>37</sup> As Engelen says, it is a principle “...which ought to govern all international relations”<sup>38</sup>

The principle of good faith is also directly related to the *pacta sunt servanda principle*, which is recognized by the Vienna Convention in its Article 26, which establishes that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

It is a Main Principle of International Law. If it did not exist, international relationships would not be possible. This article not only provides that every treaty in force is binding upon the parties to it, but also that it must be performed by them in good faith. It is complemented by art. 27, which establishes that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.<sup>39</sup>

According to Engelen, the most important manifestation of the principle of good faith is this rule, which, in words of Cheng “...is now an indispensable rule of international law, is but an expression of the principle of good faith which above all signifies the keeping of faith, the pledged faith of nations as well as that of individuals.”<sup>40</sup>

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35 WOUTERS, Jan y VIDAL, MAARTEN, op. cit., p. 34.

36 BLACK, HENRY CAMPBELL, Black's Law Dictionary, p. 822, 4a edition revised, West Publishing Co., St. Paul, Minn., 1968.

37 WOUTERS, JAN y VIDAL, MAARTEN, Chapter 2. “The International Law Perspective” en Tax Treaties and Domestic Law, cord. Guglielmo Maisto, p. 34, IBFD, vol. 2 EC and International Tax Law Series, the Netherlands, 2006.

38 ENGELLEN, FRANCISCUS ANTONIUS, Interpretation of Tax Treaties Under International Law, A study of Articles 31, 31 and 33 of the Vienna Convention on the Law of Treaties and their application to tax treaties, IBFD, Volume 7, Doctoral Series, Amsterdam, 2004, pp. 136-137.

39 Idem, p. 125.

40 Idem, p. 542.



## VII. ORDINARY MEANING

Article 31 continues with: “... in accordance with the ordinary meaning to be given to the terms of the treaty ...” With this, the VCLT adopts the textual approach which, in words of Martin, means that we have to start with the text.<sup>41</sup>

This Article is “...based on the view that the text must be presumed to be the authentic expression of the intentions of the parties...once it is established...that the starting point of interpretation is the meaning of the text.”<sup>42</sup> According to Moyano, the International Law Commission had to take into account this method of interpretation, because of a series of reasons that all the representatives of the various Countries let clear. For example, the representatives of the USSR made it clear that text is the main source of intention of the parties involved because that intention is concreted in words.<sup>43</sup> According to Pastor Ridruejo, text is the authentic expression of the will of the parties involved in a treaty.

Also, the delegates of other countries recognized that it is the best way to know what the intention of the States is. It is far less random, more accurate and fair in order to discover the intention of the parties involved in the treaty. Nonetheless, we have to say that the ordinary meaning to be given to a term is far from synonymous to its dictionary meaning. The ordinary meaning in a particular treaty context might very well be of a highly technical nature.<sup>44</sup>

## VIII. CONTEXT

Article 31 continues with: “... in their context ...”, “Context” means “the parts of something written or spoken that immediately precede and follow a word or passage and clarify its meaning. 2. The circumstances relevant to something under consideration.”<sup>45</sup> Professor Vogel had a phrase that illustrates this procedure: “we have to see what else is in the context” So, we have to look if context gives us a clue for our interpretation, and for that we can recourse to the systematic approach<sup>46</sup>

Article 31(2) establishes that 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 relating to the treaty.”

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41 MARTIN, Philippe, “Courts and tax treaties in civil law countries”, *Courts and Tax Treaty Law*, coord. Guglielmo Maisto, vol. 3 de EC and International Law Series, IBFD, Amsterdam, 2007, pp. 82-83.

42 AVERY JONES, JOHN, “The interpretation of tax treaties with particular reference to article 3 (2) of the OCDE Model Convention”, *British Tax Review*, 1984, pp. 15-16.

43 MOYANO BONILLA, CÉSAR, *op. cit.*, p. 38.

44 ENGELEN, FRANCISCUS ANTONIUS, *op. cit.*, p. 542

45 OXFORD ENGLISH REFERENCE DICTIONARY, Second Edition, Oxford University Press, 2003, p. 310.

46 VOGEL, Klaus, “The Influence of the OECD Commentaries on Treaty Interpretation”, *op. cit.*, p. 614

According to Avery Jones, “The fact that these two classes of documents are recognized in paragraph 2, as forming part of the context does not mean that they are necessarily to be considered as an integral part of the treaty...these categories of documents should not be treated as mere evidence to which recourse may be had for the purpose of resolving an ambiguity or obscurity, but as part of the context for the purpose of arriving at the ordinary meaning of the terms of the treaty. Not unilateral documents.”<sup>47</sup>

## IX. SUBSEQUENT AGREEMENT OR PRACTICE

Article 31(3) establishes that “...there shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.”

This means that any agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation. Its importance is obvious: it is the objective evidence of the understanding of the parties as to the meaning of the treaty, which by virtue of Article 31(3) is binding.<sup>48</sup>

## X. SPECIAL MEANING

Another very important rule, that prevails over all the others is that of paragraph 4 of Article 31, which states that: “A special meaning shall be given to a term if it is established that the parties so intended.”

This is a logical approach, because if the treaty itself gives the definition of a term, it prevails over other meanings found in the text or in the context. We just have to warn that in these cases, the burden of proof lies on the party invoking the special meaning of the term. This leads us to underline the importance of a good definitions section in every treaty. Also, according to García Novoa, with this, the VCLT keeps the idea that the search for the intention of the parties assumes a central role in the interpretative process of tax treaties.<sup>49</sup>

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47 AVERY JONES, John, *op. cit.*, p. 83.

48 *Idem*, p. 84.

49 GARCÍA NOVOA, CÉSAR, *op. cit.*, p. 21.

## XI. OBJECT AND PURPOSE

Finally, the general rule of paragraph 1 of Article 31, finishes with the phrase “And in the light of its object and purpose.” The object and purpose of a treaty can be found in the preamble of the agreement and can also be discerned from the agreement as a whole... as the World Trade Organization has said: the starting point for ascertaining ‘object and purpose is the treaty itself, in its entirety.’<sup>50</sup>

In Double Taxation Conventions, their main object is to avoid international juridical double taxation, in order to facilitate international transactions of goods, services, capital and technology. Also, they deal with the exchange of information and assistance in the collection of taxes, and “...since January 2003, paragraph 7 of the introduction of the OECD Model Tax Convention explicitly states that it is also a purpose of tax treaties to prevent tax avoidance and evasion.”<sup>51</sup>

But the question is ¿how to use object and purpose in tax treaty interpretation? In cases where a tax treaty is open to two interpretations one of which does and the other does not eliminate double taxation, good faith and the object and purpose of the treaty demand that the former interpretation be adopted. “...The object and purpose of a treaty are relative to the text of the treaty and can only be given effect in so far as this does not do violence to its actual terms. Therefore the application of any teleological principles of interpretation that require that a treaty is always given its maximum effect in order to ensure the achievement of its underlying objects and purposes would undermine the primacy of the text and is, therefore, not in accordance with Articles 31 and 32.”<sup>52</sup>

In particular, it must be emphasized that the meaning resulting from Article 31 that leads to a result that is not consonant with the apparent object and purpose of the treaty does not in or of itself justify a departure from that meaning, for this would open the door to teleological interpretations going beyond what is expressed or necessarily implied in the terms of the treaty and would thus undermine the primacy of the text for purposes of interpretation.<sup>53</sup>

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50 QURESHI, Asif, *op. cit.*, p. 18.

51 ENGELEN, Frank, *op. cit.*, pp. 428-429.

52 *Idem*, p. 429.

53 AVERY JONES, JOHN F., *op. cit.*, p. 86.

## XII. SUPPLEMENTARY MEANS OF INTERPRETATION

Art. 32 establishes that “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 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

Relating Art. 32, we will only say, following Avery Jones, that the supplementary means of interpretation, are of secondary importance. They are not part of the general rule and preparatory work does not have the same authentic character as an element of interpretation, and can only be used when the result of the use of Article 31 leaves the meaning obscure; or leads to a result which is manifestly absurd or unreasonable. Such situations are quite rare and mainly relate to drafting errors or texts that are otherwise materially defective.<sup>54</sup>

About what constitutes “practice”, the Appellate Body of the World Trade Organization, has established that “...in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a ‘concordant, common and consistent’ sequence of acts of pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant.”<sup>55</sup>

According to Vogel, supplementary means are used only to confirm the result of an interpretation that we already found when using Article 31 which otherwise would remain obscure or ambiguous. We can also say, that the word supplementary emphasizes that article 32 does not provide for alternative, autonomous means of interpretation but only for means to aid an interpretation governed by the principles contained in article 31.<sup>56</sup>

This supplementary means of interpretation “...may be regarded as decisive only in situations where the application of the general rule of interpretation leads to a result that, in the particular context, is so absurd or unreasonable that it is clear from the very outset that it cannot reasonably be what the parties intended. Needless to say, such situations are quite rare and mainly relate to drafting errors or texts that are otherwise materially defective.”<sup>57</sup>

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<sup>54</sup> Ibidem.

<sup>55</sup> QURESHI, ASIF H., *op. cit.*, p. 21, note 42.

<sup>56</sup> VOGEL, KLAUS, “The Influence of the OECD Commentaries on Treaty Interpretation”, *op. cit.*, p. 614.

<sup>57</sup> AVERY JONES, JOHN F., *op. cit.*, p. 86.

### XIII. INTERPRETATION OF TREATIES AUTHENTICATED IN TWO OR MORE LANGUAGES

Art. 33. "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." About Article 33 related to treaties authenticated in two or more languages the rules are very simple and I can only say that It needs to be stressed that in law there is only one treaty- one set of terms accepted by the parties and one common intention with respect to those terms- even when two authentic texts appear to diverge. Prevailing third language (often English) is common in European treaties.

According to Avery Jones, It needs to be stressed that "...there is only one treaty- one set of terms accepted by the parties and one common intention with respect to those terms- even when two authentic texts appear to diverge."<sup>58</sup>

Following the VCLT, I have developed a very simple methodology for interpreting tax treaties, which has been accepted by the Federal Tax and Administrative Court of Mexico. This can be summarized by following these steps (and answering the following questions):

#### **1. - Identify the income**

Verify if that income is taxed according to internal tax law.

¿Is that income taxed under Mexican law?

If the facts of the case lead to non-taxable income, there is no point in going any further. If it is not taxed there is no point in going any further, because there is not going to be tax to be paid and, obviously, benefits to apply.

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<sup>58</sup> Idem, p. 87,

## 2. - ¿is the taxpayer a resident of a foreign country?

If the taxpayer is not a foreign resident he will have to pay

¿Is there a DTC with that country?

If there is a Tax Treaty, qualify the income and determine if there is a benefit to be applied

¿Does it apply in this case?

## 3. - Application of DTC's:

Apply the VCLT in the order of arts. 31 and 32:

Ordinary meaning, (unless there are an special meaning)

If not enough, look at the context

Check if result is according to the treaty's object and purpose

(if two alternatives, take that which avoids double taxation)

If necessary use MAPS (if they are accepted by Courts)

In case of an *undefined term* (for that sole purpose): use of Article 3(2) of the tax treaty:

Domestic Tax Law meaning first, and, if necessary, go to any other applicable domestic law

If it is necessary use of the Commentaries of MCOECD, jurisprudence and doctrine in that order

Only use supplementary means of interpretation in order to confirm the result when it is manifestly absurd or unreasonable

#### 4.- Satisfy application procedures of domestic law

(i.e. Art. 5 Mexican Income Tax Law)

¿Has the taxpayer made its choice to be withheld or to file a refund

1. - As you can see in *step number one* we first have to *Identify the income* in order to verify if that income is taxed according to domestic tax law. If the facts of the case lead to non-taxable income, there is no point in going any further, but, on the contrary, if there is tax to be paid, we need to go to the *second step*, which initiates by asking ourselves if *the taxpayer is a resident of a foreign country?* Because if the taxpayer is not a foreign resident he will have to pay as any other resident. If the taxpayer is a foreign resident then we will have to ask ourselves if there is a Tax Treaty with his country, because if there is not a treaty the taxpayer will have to rely mainly on unilateral means of relief (if there is any) But, if there is a Treaty with that country we have to determine if that Convention applies in this case, and for that we have to qualify the income and determine if there is a benefit to be applied. In double residence, we will have to use the untie rules of the treaty.

The *third step* leads us to interpret the Treaty using the Vienna Convention, looking first to see if there is a special meaning, then to the ordinary meaning. If this is not enough, we have to look at the context and if there are two alternatives of interpretation use the one that eliminates double taxation. Then if we find an undefined term we have to go to Art. 3 (2). After that and only if it is necessary we will go to the Commentaries and jurisprudence and doctrine.

And finally, the *fourth step* is that if there are application procedures as, for example, to prove residence, we will have to comply with them. You can see that this methodology consists in that we should first interpret the treaty using the Vienna Convention methodology and, if the treaty gives us the answer, we should use it.