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INNOVAZIONE E DIRITTO

Interpretation of income tax treaties: an issue that is still commonly discussed

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ABSTRACT

Il tema dell'interpretazione dei trattati contro la doppia imposizione è tuttora molto discusso in dottrina. Cinque sono i metodi interpretativi più seguiti: quello soggettivo, il testuale, il sistematico, il teleologico ed il logico.

Di fondamentale importanza sono anche le linee interpretative emanate dai Ministeri del Tesoro interni a ciascuno Stato contraente, quelle contenute nei Commentari ai principali modelli di convenzioni internazionali in materia tributaria, nonché infine le norme contenute nella Convenzione di Vienna del 1969. Quest'ultima, in particolare, definisce agli artt. 31-33 il quadro normativo di riferimento per l'interpretazione dei trattati internazionali, nel cui genus sono ricompresi i trattati contro la doppia imposizione fiscale. Infine, si pone il problema della qualificazione dei termini convenzionali secondo il diritto internazionale o il diritto interno.

CONTENTS: 1. Introduction - 2. Articles 31-33 of the Vienna Convention on the Law of Treaties - 3. The OECD/UN Commentaries as important sources of interpretation – 4. Conclusion: the problem of the legal terms qualification according to the international law or the internal law

1. *Introduction.*[136]

A still commonly discussed issue about income tax treaties is how to interpret them.[137]

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[136] The system of citation used in this Article is that of "THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 19th 2010)."

[137] See, on the topic of the interpretation of tax treaties, R. SH. ARYAL, INTERPRETATION OF TREATIES: LAW AND PRACTICE (2003); D.J. BEDERMAN, CLASSICAL CANONS: RHETORIC, CLASSICISM AND TREATY INTERPRETATION (2001); id., *Revivalist Canons and Treaty Interpretation*, 41 UCLALR 953 (1994); A. BREDIMAS, METHODS OF INTERPRERATION AND COMMUNITY LAW (1978); M. Bos, *Theory and Practice of Treaty Interpretation*, 27 NILR 3 (1980); H.W. Briggs, *The travaux preparatoires of the Vienna Convention on the Law of Treaties*, 65 AJIL 705 (1971); OTTMAR BÜHLER, INTERNATIONALES STEUERRECHT UND INTERNATIONALES PRIVATRECHT, EIN SYSTEMATISCHER VERSUCH (1960); L. Condorelli, *Interpretazione giurisdizionale e interpretazione autentica di trattati nell'ordinamento internazionale*, 56 RIV. DIR. INT. 224 (1973); M. CHRÉTIEN, A LA RECHERCHE DU DROIT INTERNATIONAL FISCAL COMMUN (1955); E. Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VIR. J INT'L L. 431 (2004); R. GARDINER, TREATY INTERPRETATION (2008); WILLIAM JOHN GIBBONS, TAX FACTORS IN BASING INTERNATIONAL BUSINESS ABROAD. A STUDY OF THE LAW OF THE UNITED STATES AND OF SELECTED FOREIGN COUNTRIES (1957); A. Glashausser, *Difference and Deference in*

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The theory of legal interpretation developed exponentially during the nineteenth and twentieth centuries. Over this period several theories alternated in terms of importance and preponderance.

Five main methods can be considered:

1) the subjective or historical method,[138] according to which in the interpretive process of a treaty it is fundamental to understand the real intentions of the negotiating countries;

2) the textual or grammatical method,[139] that concentrates on the treaty text;

3) the contextual or systematic method, which considers the meaning of words in their nearer and wider context;

4) the teleological or functional method, that focuses on the object and purpose of a treaty, beyond the treaty text; and

5) the logical method, that prefers rational techniques of reasoning and abstract principles, e.g. *per analogiam*.

Moreover, the principal documental interpretive sources are:

-Treasury Department Technical Explanations that serve as an official guide to explain, interpret, and often apply the particular provisions of the treaty;

Treaty Interpretation, 50 VILL. L. REV. 25 (2005); M. HEYMANN, EINSEITIGE INTERPRETA-TIONSERKLÄRUNGEN ZU MULTILATERALEN VERTRÄGEN (2005); W. Hummer, *"Ordinary" versus "Special" Meaning*, 26 OZÖR 87 (1975); F. G. Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference*, 18 ICLQ 318 (1969); I. Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 MICH. J. INT'L L. 371 (1991); A. Koziowski, *Interpretation of Treaties in the Light of the Relationship between International Law and the Law of the European Communities (European Union)*, 26 POLISH YBIL 115 (2002/2003); W. Lang, *Les règles d'interprètation codifiées par la Convention de Vienne sur le Droit des Traltés et les divers types de traités*, 24 OZÖR 113 (1973); G.P. McGinley, *Practice as a Guide to Treary Inrerpretation*, 9 FLETCHER F. 211 (1985); C. McLachlan, *The Principle of Systemic Interpretation and Article 31 (3)(c) of the Vienna Convention*, 54 ICLQ 279 (2005) ; J. G. Merrills, *Two Approaches to Treaty Interpretation*, 4 AUSTRALIAN YBIL 55 (1968-1969); S. MOYANO BONILLA, LA INTERPRETACIÓN DE LOS TRATADOS INTERNACIONALES (1985); *id.*, *La interpretacion de los tratados internacionales según la Convención de Viena de 1969*, 10 INTAL/IL 32 (1985) ; B.S. Murty, *The Content of Treaty Prescriptions-The Problems of Interpretation*, 19 INDIAN YBIL 169 (1986); S. E. Nahlik, *L'interprétation des traités internationaux à la lumière de la codification du droit des traités*, 9 WROCLAW 99 (1976); D. Pratap, *Interpretation of Treaties, in* ESSAYS ON THE LAW OF TREATIES 55 (S. K. Agrawala ed., 1971); Ch. Schreuer, *The Interpretation of Treaties by International Courts*, 45 BYBIL 255 (1971); S. SCOTT, THE POLITICAL INTERPRETATION OF MULTILATERAL TREATIES (2004); L. B. Sohn, *Settlement of Disputes Relating to the Interpretation and Application of Treaties*, 150 RC 195 (1976); S. SUR, L'INTERPRÉTATION EN DROIT INTERNATIONAL PUBLIC (1974); S. Torres Bernárdez, *Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the law of Treaties, in* LIBER AMICORUM I.SEIDL-HOHENVELDERN 721 (B. Hafner ed., 1998); D. Vagts, *Treaty Interpretation and the New American Ways of law Reading*, 4 EJIL 472 (1993); B. Vitanyi, *L'interprétation des traités dans la théorie du droit naturel*, 84 RGDIP 525 (1980); I. VOICOU, DE L'INTERPRÉTATION AUTHENTIQUE DES TRAITÉS INTERNATIONAUX (1968); J. C. Wolf, *The Jurisprudence of Treaty Interpretation*, 21 UCDLR 1023 (1988); E. S. YAMBRUSIC, TREATY INTERPRETATION: THEORY AND REALITY (1987); M. K. Yasseen, *L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités*, 151 RC 1 (1976).

[138] Sir Hersch Lauterpacht has been the most important exponent of this method.

[139] See Max Huber, as one of the most representative of this method.

-OECD Commentary and UN Commentary that contains explanatory materials written by the OECD or by the United Nations; and

-the Vienna Convention on the Law of Treaties with its Commentaries.

In fact, the two main models of international treaties for avoidance of double taxation, the OECD model and the United Nations model, are served by Commentaries that explain and sometimes expand the meaning of the provisions included in them.

In addition to the aforementioned Commentaries, an important document in the interpretative process of international tax treaties is the Vienna Convention, with its Commentaries.

2. *Articles 31-33 of the Vienna Convention on the Law of Treaties.*

The Vienna Convention on the Law of Treaties[140] was done in Vienna on May 23, 1969, ratified by the Italian Republic by the law 12 February 1974 no.112, entered into force on January 27, 1980. The Vienna Convention applies only to treaties that are concluded by states.[141]

Especially, this Convention applies to any treaty that is the constituent instrument of an international organization, as well as to any treaty adopted within an international organization without prejudice to any relevant rules of the organization. It regulates the processes of conclusion and entry into force of treaties, the requirements of validity and effectiveness of themselves.

In the interpretive process of tax treaties, Articles 31-33 of this Convention have a special importance.[142] These Articles are often followed by states which may not officially subscribe

[140] The Vienna Convention is divided into:
-Part I: Introduction (articles 1-5);
-Part II: conclusion and entry into force of treaties (articles 6-25);
-Part III: observance, application and interpretation of treaties (articles 26-38);
-Part IV: amendment and modification of treaties (articles 39-41);
-Part V: invalidity, termination and suspension of the operation of treaties (articles 42-72);
-Part VI: miscellaneous provisions (articles 73-75);
-Part VII: depositaries, notifications, corrections et registration (articles 76-80); and
-Part VIII: final provisions (articles 81-85).

[141] Article 1 (Scope of the present Convention), in fact, establishes "the present Convention applies to treaties between States."

[142] The section 3 of the Part III is about "Interpretation of Treaties".

Article 31 "General rule of interpretation" states "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:

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to the Vienna Convention because those Articles include provisions that can be considered as customary international law.

According to Article 31(1) a treaty must firstly be interpreted in good faith. Good faith is "one of the basic principles governing the creation and performance of legal obligations"[143] and creates the presumption that treaty words were written to mean something, rather than nothing.

Moreover, good faith requires that the concluded parties should act fairly, honestly, and reasonably, and avoid to take unjust benefits. Behaving in good faith means that all the parties to a treaty expect that "pacta sunt servanda" and that they will not evade their obligations and will not exercise their rights in order to damage the other parties.

Continuing the analysis of Article 31, a treaty must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context."

The ordinary meaning is the point where the interpretive process starts and it means that the term must be interpreted in accordance with its current and usual meaning, put in the context of the treaty. It is possible for the same term to have several normal meanings, but we should choose the normal meaning related to the entire context of the treaty and related

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(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."

Article 32 "Supplementary means of interpretation" states "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."

Article 33 "Interpretation of treaties authenticated in two or more languages" states "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."

[143] Nuclear Tests Cases, I.C.J. Reports 1974 268, para. 46.

to the common intention of the parties. However, the parties of a treaty can give to a term a special meaning, according to Article 31(4).

The context includes, in addition to the text of the treaty, its preamble and annexes (e.g. protocols to a treaty), and also the other means mentioned in Paragraphs 2 and 3. Specifically, it includes:

-agreements between parties drawn up in connection with the conclusion of the income tax treaty (ITT), e.g. exchanges of letters between the concluding countries after the original signature of the treaty;

-any instrument made by one party and accepted by the other parties, which is in connection with the conclusion of the ITT (e.g. explanatory memoranda issued by the Treasury Department of the Home Country of one party after conclusion of ITT, which give the state interpretation of the provisions of the treaty).

The means mentioned in Paragraphs 2 and 3 (a-b)[144] can only be used if all the parties to the treaty have concluded an agreement about the interpretation of a particular term of the treaty, or if the involvement of one or more of the parties through an instrument or subsequence practice has happened with the consensus of the other parties."

So, I agree with the theory that Paragraphs 2 and 3 (a-b) represent a kind of authentic interpretation accepted by all parties of the treaty, and this interpretation could have a binding force just because it arose from the parties of the treaty.

By the agreements or instruments mentioned in Paragraphs 2 and 3 (a-b), the negotiating parties can also amend, extend or delete part of the text in the treaty.

Article 31(2) mentions several means that originate before the conclusion of the treaty and are connected with it, while the interpretive means contained in Paragraph 3(a-b) differ in that they originate after the drawing up of the agreement.

Article 31(3)(c) addresses "any relevant rules of international law." The rules of international law are one of the general means of interpretation provided by Article 31. They have the same value of the notion of sources of international law, but they must be "applicable in the relations between the parties," meaning that they must be binding on all the concluded parties.

Those rules can be customary rules or general principles of international law, but must be in force when the interpretation of the treaty has to happen.

If they are customary rules, they can be equal to the treaty rules.

[144] See *supra* note 7.

Moreover, Paragraph 4 of Article 31 mentions "a special meaning" that the parties can give to a term of the treaty.

A term has a special meaning when the meaning of the term is not the usual meaning, and we can understand clearly that the parties intended to give a different meaning to the term. Technical or historical contexts or specialized treaties often contain special meanings.

Article 2[145] of the Vienna Convention could be an example of the aforementioned special meanings. The purpose of Paragraph 2 of Article 2 is to underline the autonomy of the parties to establish a special meaning of the term.

This intention should transpire in good faith from one of the interpretive authentic means mentioned above and contained in Paragraphs 2 and 3 (a-b) of article 31.

The Vienna Convention Commentaries on Articles 31-33 say, at Paragraph 17, that there is a relationship between ordinary meaning expressed in Article 31(1), and special meaning addressed in Article 31(4), but the burden of proof is on the party asserting that a term has a special meaning as an exception to the ordinary meaning.

Eventually, according to Article 31(1) a treaty must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty …… in the light of its object and purpose."[146]

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[145] Article 2 (Use of the terms) states: "1. For the purposes of the present Convention:

(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(c) "full powers" means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

(d) "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

(e) "negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty;

(f) "contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(g) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

(h) "third State" means a State not a party to the treaty;

(i) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State."

[146] See on the topic Buffard/Zemanek, *The "Object and Purpose" of a Treaty: An Enigma?*, 3 AUSTRIAN RIEL 311 (1998); V. Crnic-Grotic, *Object and Purpose of Treaties in the Vienna Convention on the Law of Treaties*, 7 ASIAN

Those terms include a treaty's aims, its nature and its end. Objects and purposes of a treaty can be several, but one of the most important is to maintain the balance of rights and obligations generated by the treaty.

That part of Article 31(1) expresses the teleological or functional approach of the interpretive process.

Article 32[147] states the ability to use supplementary means of interpretation, like the treaty preparatory work and the circumstances of the treaty conclusion. These means are only examples, so they do not block other interpretive supplementary means. The "preparatory work of the treaty" has a fundamental importance. It includes all documents created by the parties during the negotiation process until the conclusion of the treaty. Examples of preparatory work are memoranda, statements and observations of the governments of the negotiating states conveyed to each other. We can also consider diplomatic exchanges between the parties, treaty drafts and negotiation records to be other examples.

The circumstances of the conclusion of the treaty include the political, social and cultural factors encircling the signature of the agreement.

Other supplementary means of interpretation could be the preparatory work of previous versions of the treaty, the interpretive declarations generated by the parties, any internal documents, etc.

All the parties of the treaty should agree about those means of interpretation to use them in the interpretive process; under this condition, they can only be used with the other means of Article 31 to aid the process of interpretation.

In fact, according to Article 32, the employment of the supplementary means of interpretation is possible only after using the means of the General Rule of Interpretation in Article 31.

They may be used to confirm the meaning caused by the use of Article 31, or to establish the meaning when the interpretation leads to a result that is ambiguous or obscure, or when, using the interpretive means contained in Article 31, the result is manifestly absurd or unreasonable.

YBIL 141 (1997); Jan Klabbers, *Some Problems Regarding the Object and Purpose of Treaties*, 8 FINNISH YBIL 138 (1997); Ulf Linderfalk, *On the Meaning of the "Object and Purpose" Criterion, in the Context of the Vienna Convention on the Law of Treaties, Article 19*, 72 NORDIC JIL 429 (2003). Moreover, see Italian Supreme Court (Corte di Cassazione), case no. 7950, 1995, in Giur.It. 1997, at 697.

[147] See *supra* note 7.

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As an effect, it can be inferred that Article 32 allows the use of those means of interpretation in a lot of different situations, and the only limit is that they may not be invoked before using the means contained in Article 31.

Article 33[148] is concerned about treaties authenticated in different languages. In fact, several difficulties can arise if multiple systems of law use the same terms but with different legal concepts. An example of this difficulty is which language's texts would be used to interpret the treaty and how to proceed if the various language texts are not equal.

According to Article 33, there is a presumption of the equality of all authenticated languages and a presumption of the equal authenticity of the texts, with the only exception being when it is established that, in case of divergence, a particular text shall apply. In that case other authenticated texts shall not be considered.

By agreements of the negotiating parties some language texts may be authoritative only between some parties.

A language different than those authenticated will not be taken into consideration as an authentic text, as much as authoritative, for the interpretation of a multilingual treaty, unless the treaty or the parties state differently; in the first case, it might be used as a supplementary mean of interpretation under Article 32.

Paragraph 3 of Article 33 repeats the presumption of equality of all authenticated terms in the various language texts that should be unified, constituting only one treaty with only one set of terms expressing only one intention of the parties. As an effect, it is possible to read one single term and infer that it has the same meaning in all other texts.

That presumption is not true if the parties expressed the desire that a particular version apply in accordance with Paragraph 1, or if there are different meanings not removable by Articles 31 and 32.

In the aforementioned last case, according to Paragraph 4 it is necessary to reconcile the meanings of the various authentic texts, with regard to the treaty object and its purpose.

The object and the purpose of the treaty can be found in many different manners, e.g. it can be found in original treaty drafts or in non-authentic official language texts. However, any supplementary means of interpretation can be used.

Paragraph 4 also repeats the exception that the treaty can state or negotiating countries can agree that a particular text applies in accordance with Article 33 (1).

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[148] See *supra* note 7.

It must be added that the rules of interpretation contained in Articles 31-33 are not a complete statement of all the interpretive principles found in the decisions of the international tribunals and that they are not codified in OECD/UN Commentaries.

3. *The OECD/UN Commentaries as important sources of interpretation.*

I have already written that other important sources in the interpretive process of tax treaties are the OECD Commentary and the UN Commentary which contain explanatory materials written by the OECD or by the United Nations.

These Commentaries go with the two main models of tax treaties: the OECD model and the United Nations model.

There is no consensus concerning the relationship between Articles 31-33 of the Vienna Convention and the OECD and the UN Commentaries.

According to some commentators, the Commentaries can be applicable to establish the ordinary meaning of agreement terms under Article 31 (1).[149] Others think that Paragraph 2 of Article 31 can be referred.[150]

Some commentators suggest that the Commentaries can fall within Paragraph 3 of Article 31;[151] some others say that they are covered by Paragraph 4,[152] so they may express "*a special meaning.*" Still other commentators think that the Commentaries are a preparatory work to a tax treaty which use is permitted in order to interpret it under Article 32.[153]

In this way the Commentaries are considered, according to Article 32, a supplementary means of interpretation that can be used either to confirm a meaning caused by the application of Article 31 or to interpret the meaning of some words according to Article 31 when it is ambiguous.[154]

It should be noted that Article 32 of the Vienna Convention does not contain an accurate definition of supplementary means of interpretation, but only specifies that supplementary

149 See, KLAUS VOGEL, KLAUS VOGEL ON DOUBLE TAXATION CONVENTIONS (3d ed. 1997); REIMER EKKEHART, INTERPRETATION OF TAX TREATIES (1999).

150 See, Kees van Raad, *Interpretatie van Belastingverdragen*, 47 MAANDBLAD BELASTING BESCHOUWIGEN 49 (1978).

151 Richard Vann, *Interpretation of Treaties in New Holland, in* A TAX GLOBALIST: ESSAYS IN HONOUR OF MAARTEN J. ELLIS (2005).

152 See Hugh Ault, *The Role of the OECD Commentaries in the Interpretation of Tax Treaties, in* ESSAYS ON INTERNATIONAL TAXATION IN HONOR OF SIDNEY I. ROBERTS (H.H. Alpert and K. van Raad eds., 1993).

153 See, David Oliver, *Employees and Double Taxation Agreements*, BRIT. TAX REV. 529 (1995).

154 See MICHAEL EDWARDES-KER, TAX TREATY INTERPRETATION: THE INTERNATIONAL TAX TREATIES SERVICE (1994).

means of interpretation can be "travaux préparatoires et [..] circonstances dans lesquelles le traité a été conclu."[155]

However, the Commentaries often not only provide the meaning of single term, but are much more extensive than what can be considered the explanation of a term.

Either OECD Council or the Committee on Fiscal Affairs (CFA) have stated that the Commentaries are not legally binding, and also Paragraph 29 of the Introduction to the OECD Commentary declares "…the Commentaries…can….be of great assistance in the application and interpretation of the conventions and, in particular, in the settlement of any disputes…….Commentaries….are of special importance in the development of international fiscal law."

The OECD Council adopted on October 23, 1997 a Recommendation in which it recommended to the Governments of Member countries "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 bi-lateral tax conventions that are based on these Articles."

The most common opinion is that the Commentaries are "soft law," which means that they are non-binding written instruments and they do not have a specific role in the international law, but they provide to the member countries only a possible way to interpret the tax treaties.

As a consequence, it can be inferred that the Commentaries cannot be considered a basis to establish that the parties of a tax treaty wanted to attribute to some undefined words special meanings under Article 31(4).

The Italian Supreme Court[156] has stated that the OECD model is not binding in the tax treaty law interpretation and therefore, in Italy, some commentators[157] think that this statement of the Court could be extended also to the Commentaries.

Some other commentators suggest[158] that when a tax treaty is between two member countries of the OECD, the Commentaries may be an agreement relating to the treaty and made between the same parties in connection with the conclusion of the treaty, so it can be referred to Paragraph 2(a) of Article 31[159] of the Vienna Convention.

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[155] The original French words give better the intrinsic idea of the law.

[156] See Italian Supreme Court (Corte di Cassazione), case no. 112, 2000, in Boll.Trib. 2000, at 1026.

[157] See G. Bizioli, *Tax Treaty Interpretation in Italy, in* TAX TREATY INTERPRETATION (Michael Lang ed., 2001).

[158] See ANTHONY AUST, MODERN TREATY LAW AND PRACTICE (2000).

[159] See *supra* note 7.

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Therefore, while according to the Vienna Convention Commentaries Articles 31-32 do not constitute a complete statement of all interpretive rules of tax treaties, on the other hand, the OECD/UN Commentaries, as they existed at the time when the tax treaty based on an OECD/UN model was negotiated, are clearly very good aids to understand the meaning of particular provisions included in the tax treaty.[160]

That is truer when the parties negotiating a tax treaty are members of OECD/UN. As a consequence it can be inferred, in absence of evidence to the contrary, that they wanted to adopt the interpretation provided by the Commentaries that were current at the time of the negotiation.

It is also clear that any interpretation of tax treaty provided by the OECD/UN Commentaries will not be applied if the negotiating parties stated otherwise in a protocol to the particular treaty or if there are some different elements from which it can be concluded that there was a different desire of the parties.

About later Commentaries, that are not current at the time of the concluding treaty, the very discussed question is whether Commentaries, which have been added or changed after the completion of the negotiation process, keep the same role in the process of interpretation of a tax treaty.

The difficulty arises when the subsequent Commentary fills a gap in the existing Commentary by covering matters not previously mentioned at all, or it amplifies the existing Commentary by adding new examples or arguments to what is already there, or it records what states have been doing in practice, or it contradicts the existing Commentary.

According to the *section* 38 of the Statute of the International Court of Justice, the value of the aforementioned Commentaries will depend on the opinion of the Court that will establish if the Commentaries provide a reasonable interpretation of the particular provision included in a treaty.

[160] In FEDERAL INCOME TAX PROJECT, INTERNATIONAL ASPECTS OF UNITED STATES TAXATION II PROPOSALS OF THE AMERICAN LAW INSTITUTE ON UNITED STATES INCOME TAX TREATIES 54 (1992) we can read "the OECD Model Treaty and the accompanying Commentary are the benchmarks against which income tax treaties between developed countries are negotiated. Many treaties, including most U.S. treaties, incorporate language of the OECD Model Treaty or, in some cases, deliberately modify it for specified reasons. While the OECD materials undoubtedly do not rise to the level of customary international law, they occupy a unique position in the hierarchy of international tax materials. In practice both administrators and tax advisors automatically consult these materials when attempting to understand the meaning of treaty provisions. It would be wholly unrealistic, at least in the absence of strong evidence to the contrary, to think that treaty negotiators who adopted language derived from the OECD text were not familiar with and therefore did not knowingly accept the common meaning of that language as agreed among the OECD member countries."

Some authors suggest[161] that the subsequent Commentary generally can be taken into account under Article 31 Paragraph 3(a) or (b) of the Vienna Convention in interpreting tax treaties that are previous in time.

Other authors[162] are of the view that later Commentaries should not affect interpretation of already concluded treaties.

Others,[163] moreover, think that the subsequent Commentary can only clarify the meaning of concluding treaties; so, in this case, it has a very great weight even though it is later in time.

In our view, the later Commentaries are not part of the "legal context" of the treaty according to Articles 31 and 32 of the Vienna Convention and it can be supposed that they have not been in the minds of the treaty negotiators at the time of negotiation of a tax treaty; there is no evidence about the intention of the negotiating countries to interpret the words included in the convention according to the suggestions of the more recent Commentaries.

As a consequence, in our view the later Commentaries could be considered only if they help to better understand some terms of the treaty that are already almost clear in their meaning, but if the subsequent Commentary fills a gap in the existing Commentary, or if it amplifies the existing Commentary, or if it contradicts the existing Commentary, then it should not have any consideration.

Thinking differently, one might attribute to the concluded treaty a meaning that the parties of the agreement could not have wanted to give at the time of the conclusion.

The problem of the later Commentaries introduces another important issue about the interpretive process of the tax agreements. In fact there are two methods of interpreting meanings of legislative terms "the static approach" and "the ambulatory approach."

Static interpretation means that only the meaning that the term has at the time that the tax treaty was entered into force should be considered.

According to the ambulatory interpretation, the term takes on the meaning that it has been amended from time to time.

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161 M. Waters, *The Relevance of the OECD Commentaries in the Interpretation of Tax Treaties, in* PRAXIS DES INTERNATIONALEN STEUERRECHTS, FESTSCHRIFT FÜR HELMUT LOUKOTA (Michael Lang and Heinz Jirousek eds., 2005).

162 See Michael Lang, *Later Commentaries of the OECD Committee on Fiscal Affairs, Not to Affect the Interpretation of Previously Concluded Tax Treaties*, 25 INTERTAX 7 (1997).

163 See KLAUS VOGEL, *supra* note 12.

Innovazione e Diritto

In our view, the ambulatory method must be preferred because it allows that the tax agreement accommodates changes that happen in the countries involved in the agreement without the need to renegotiate the tax treaty.

Moreover, the ambulatory method prevails according to the rules of interpretation contained in Articles 31-33 of the Vienna Convention, even though it must be clear that the parties of a treaty cannot amend their tax agreements by the use of the ambulatory interpretation, thus avoiding, in this way, to renegotiate the tax agreements.

By analysis of Article 31-33 of Vienna Convention, and by analysis of OECD/UN Commentaries, it can be inferred that the intention of the parties is very important in the interpretive process in international law.

This intention must be inferred from the text of the treaty itself and it is not to be derived from any subjective determination; as well as the intention of the parties must be objective, not subjective.

To better understand the intention of the parties, one can use the interpretation principles of "logic and good sense" as "guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they have employed in the document."[164]

Moreover, the OECD model and most treaties have an express provision that the competent authorities of the negotiating countries can resolve by "interpretive mutual agreement" doubts cast by the interpretation or application of the treaty.

Those competent authorities may also consult together for the elimination of double taxation in cases not provided for in the treaty (legislative mutual agreements).

It is common opinion that the mutual agreements fall within Article 31, Paragraph 3(a), of the Vienna Convention and they may have binding effect, such as they must be considered in the interpretative process of the treaty.

I have clarified that the Commentaries can be considered means of "soft law," so they are non-binding. Now one should ask themselves if the Commentaries, in fact, generate a binding obligation in international law, either on the basis that they have become recognized as customary law or on the basis of good faith, and, in case they create a binding obligation

[164] Paragraph 4 of the Vienna Convention Commentaries to Articles 31 and 32. In paragraphs 11 and 12 of the Vienna Convention Commentaries to Articles 31 and 32 we can read "[Article 31] is based on the view that the text must be presumed to be the authentic expression of the intentions of the parities, and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation ad initio into the intentions of the parties …..the parties are presumed to have the intention which appears from the ordinary meaning of the terms used by them."

in international law, if they become part of domestic law, and if they may be applied as binding rules by domestic courts in tax cases.

The Commentaries do not have the necessary requests to be considered customary law (repetictio facti e opinio iuris sive necessitatis); in fact, they change constantly and they fail to be supported by the requisite "opinio iuris."

Neither, according to the principle of good faith, can they be considered binding; in fact, this principle cannot by itself create legally binding obligations in international law.

Therefore, Commentaries cannot themselves be considered binding, but I agree with that opinion, according to which[165] they become binding when the parties of tax treaties clearly want to attribute to some words in the convention a special meaning according to the interpretation included in the Commentaries.

I mean that a clear reference given by the concluding countries to the interpretative rules included in the Commentaries is sufficient to make them binding, with any legal consequences.

In case that they can be considered in fact binding, the rules to transform the provisions of the Commentaries in domestic law, so as to give them a domestic legal status, are very different between countries.

For example, in the United States of America international law is considered to be part of the internal law without the need for any Congressional or Presidential action. The Court will apply it directly, as such as the customary international law, if the international law does not conflict with domestic law and with the Constitution.

In Italy the process of incorporation of international legal dispositions into domestic law may happen following one of two different procedures called the ordinary procedure and the special one.

As the ordinary method, all text of the international act is exactly incorporated in the national law, so that the internal law uses the same words as the international law. In this way, the international law is transformed into internal law.

As the special procedure, the incorporation of the international source into the Italian legislative system happens merely by reference.

[165] See MICHAEL EDWARDES-KER, *supra* note 17.

Because of the Constitutional provision, the customary international law enters directly into the internal legal system without any further act of implementation;[166] they automatically become part of Italian law.

According to the classic theory of interpretation, when tax treaties become parties of the legal domestic system, they must be interpreted only by the internal interpretive rules of the country.

4. *Conclusion: the problem of the legal terms qualification according to the international law or the internal law.*

To conclude our issue about the interpretation of tax treaties, it should be emphasized that some problems of qualification may arise when a Convention uses terms that are part of, at the same time, either the international law or the internal law.

Sometimes, tax income treaty solves this problem of qualification by explaining the special meaning of these terms. In other cases, tax convention relates to the internal law of one of the two concluding countries.

On this topic, some commentators[167] suggest three different solutions:

1) qualification under *lex fori*, means that each concluding country gives to the terms meaning that they have in its domestic law. This method has the advantage that the domestic courts know the internal law better than the international law, but with this method some problems may arise because each concluding state might apply the convention differently. As a consequence, new situations of double imposition could be created;

2) qualification under *lex* of the country source, according to which all parties of the tax treaty decide to give to the terms the meaning that they have in the legal system of the source country. This method allows giving a unique meaning to the terms in the convention, but could facilitate the concluded countries by giving to the treaty's terms the widest meaning. That unfair effect is not in line with the purpose of the tax conventions that try to equally divide the tax sovereignty between the parties of the treaty;

3) independent qualification, means that all parties of the tax income agreement try to give to the terms of the treaty a sole meaning according to the entire context. This method

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[166] **Article 10(1)** of the Italian Constitution states "the Italian legal system conforms to the generally recognised principles of international law (l'ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute)."

[167] See, *e.g.*, KLAUS VOGEL, *supra* note 12.

allows one interpretation of the terms so that the courts of the concluded countries can decide in the same way.

A possible solution is provided by the OECD model. Article 3(2), in fact, states "as regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State."

The application of Article 3 of the OECD model is advocated by the Italian Supreme Court, according to which "la tesi prospettata dalla ricorrente, che si basa essenzialmente sull'applicazione di regole interpretative contenute nella Convenzione di Vienna sul diritto dei trattati, non considera le speciali regole interpretative dettate dalla Convenzione Italia-U.S.A. contro le doppie imposizioni del 1984. La Convenzione non contiene una definizione, né del diritto d'autore, né degli "altri casi", secondo la previsione dell'art. 12., par. 2, lett. c). Si pone, quindi, un problema di qualificazione, per la cui risoluzione l'art. 3, par. 2, della Convenzione dispone che: "Ai fini dell'applicazione della presente Convenzione da parte di uno Stato contraente, le espressioni ivi non definite hanno il significato che ad esse è attribuito dalla legislazione di detto Stato relativa alle imposte cui si applica la presente Convenzione, a meno che il contesto non richieda una diversa interpretazione". Si tratta di una regola, definita come "general renvoi clause", ripresa dalla corrispondente norma (art. 3, par. 2) del modello O.C.S.E. di Convenzione contro la doppia imposizione, costantemente ripetuta nei vari testi succedutisi nel tempo. E' quindi chiaro che la definizione di diritto d'autore deve essere rinvenuta, ai fini dell'applicazione della norma convenzionale, nell'ordinamento dello Stato della fonte."[168]

[168] Italian Supreme Court (Corte di Cassazione), case no. 21220, 2006.

LIST OF ABBREVIATIONS

AJIL= American Journal of International Law
Asian YBIL= Asian Yearbook of International Law
Austrian RIEL= Austrian Review of International and European Law
Australian TF= Australian Tax Forum
Australian YBIL= Australian Yearbook of International Law
Boll. Trib.= Bollettino Tributario
Brit. Tax Rev.= British Tax review
Bull. Int'l Fisc. Doc.= Bulletin for international fiscal documentation
BYBIL= British Yearbook of International Law
CFDI= Cahier de Droit Fiscal International
Dir. Prat. Trib. Internaz.= Diritto e Pratica Tributaria Internazionale
EJIL= European Journal of International Law
ET= European Taxation Journal
Finnish YBIL= The Finnish Yearbook of International Law
Fletcher F.= The Fletcher Forum
Giur. It.= Giurisprudenza Italiana.
I.C.J. Reports = International Court of Justice Reports.
ICLQ= International and Comparative Law Quarterly
Indian YBIL= Indian Yearbook of International Law
INTAL/IL= Integración Latinoamericana. Instituto para la Integración de América Latina. B.A.
Int'l Tax & Bus. Law= International Tax and Business Lawyer
Intertax= Intertax
Mich. J. Int'l L.= Michigan Journal of International Law
NILR= Netherlands International Law Review
Nordic JIL= Nordic Journal of International Law
OZöR= Osterreichische Zeitschrift für offentliches Recht
Polish YBIL= Polish Yearbook of International Law
RC= Recueil des Cours de l'Académie de droit international de La Haye
RGDIP= Revue Générale de Droit International Public
Rev. Crit. DIP= Revue Critique de Droit International Privé
Riv. Dir. Internaz.= Rivista di Diritto Internazionale
Riv. Dir. Trib.= Rivista di Diritto Tributario
RJT= Revue Juridique Themis
T. Int'l Comp. L. J.= Temple International & Comparative Law Journal
UCDLR= University College Dublin Law Review
UCLALR= University of California Law Review

Vill. L. Rev.= Villanova Law Review
Vir. J Int'l L.= Virginia Journal of International Law
Wroclaw= Archivum iuridicum Cracoviense
ZaöRV=Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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