ARTICLE

Tax Treaty Interpretation: Interaction Between Article 3(2) Organisation for Economic Co-Operation and Development Model Convention and Article 31 Vienna Convention

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Tax treaty interpretation is the cornerstone for the correct application of a convention. Due to its undeniable importance it is vital to know how to approach the intricate world of tax treaty interpretation. The objective of this article is to understand the interaction between Article 31 of the Vienna Convention on the Law of Treaties (VCLT) and Article 3(2) of the Organisation for Economic Co-operation and Development Model Convention (OECDMC), the way they interact and when to apply each of them, with special reference to the concept of 'context' which is used in both articles. The article addresses the nature and scope of the subject of interpretation, the interpretation rule in the VCLT and in Article 3(2) of the OECDMC. It further deals with the interaction between these two sets of rules, structuring their relationship in scenarios. The conclusion provides a brief overview of the main findings together with proposals on how to deal with some issues and a final statement that pursues for the enrichment of the research on tax treaty interpretation.

There is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation
– Arnold McNair [1]

1 Introduction

It has been discussed, without reaching an agreement, whether the set of rules that traditionally are used to interpret any treaty apply when interpreting a tax treaty jointly with the rules contained in the tax treaty or only the latter rules apply. That is to say, when interpreting a tax treaty, whether one should observe both rules of interpretation of the Vienna Convention on the Law of Treaties (VCLT) and Article 3(2) of the Organisation for Economic Co-operation and Development Model Convention (OECDMC), or should only take into account the latter.

Furthermore, Article 3(2) of the OECDMC makes reference to domestic law when a term is not defined, and the context does not require otherwise. This reference has not been uniformly understood, and the 'meaning and function of this provision has been the subject of intense debate and study',[2] and multiple questions have arisen in this regard (e.g. If there is more than one meaning of an undefined term in the domestic law for the purposes of the taxes covered by the treaty, which one should prevail or be applied).

In light of this, the objective of this article is to understand the interaction between Article 31 of the VCLT and Article 3(2) of the OECDMC, the way they interact and when to apply each of them, with special reference to the concept of 'context' which is used in both articles. The author has the conviction that it is vital to have clarity on how to interpret a tax treaty. This clarity will avoid or reduce misunderstandings between contracting parties that otherwise could end up causing double taxation or double non-taxation, which is against the scope and purpose of any tax treaty. This view makes this topic to be of a great interest.

2 Subject of Interpretation (Nature and Scope)

Every interpretation must begin with finding out the nature and scope of the subject to be interpreted. The

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1 Arnold McNair, *The Law of Treaties* 364 (Oxford: Oxford University Press 1961).

2 Edwin van der Bruggen, *Unless the Vienna Convention Otherwise Requires: Notes on the Relationship Between Article 3(2) of the OECD Model Tax Convention and Articles 31 and 32 of the Vienna Convention on the Law of Treaties*, 43(5) Eur. Tax. 142–156, at 142 (May 2003).

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term 'tax treaty' comprises two words: 'tax' and 'treaty', where the former will lead the scope, the latter will represent its nature. Keeping this in mind, when referring to nature, we understand the formal aspects of a tax treaty, what it encompasses, and the role that it plays in domestic law. When talking about the scope, we go to the material side of a tax treaty, i.e. the purpose, the range of it, the reason of its existence and what the concept pursues.

Traditionally, the definition used for the concept of treaty is the one contained in Article 2, subparagraph 1 (a) of the VCLT, according to which '"[t]reaty" 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'. However, the aforementioned article begins limiting the definitions therein contained by saying that those definitions are 'for the purpose of the present Convention'. This would mean that in principle, one should not use that definition for other purposes. In this regard, Villiger clearly appreciates that 'Article 2, subpara. 1(a) merely describes the term "treaty" within the framework of the Convention, but does not define it for purposes of international law or attempt to list the necessary conditions for the validity of treaties'.[3]

Despite the fact that this definition is limited to the purposes of the VCLT, it has been widely used and accepted in the international arena. In fact, the 'International Court of Justice (ICJ) has suggested that it reflects customary law. Most states endorse it, and scholars frequently cite it when defining the treaty concept'.[4] For this reason, nowadays it is accepted that the definition of treaty in the VLCT goes beyond its original range.

It is important to highlight that 'each treaty is, as it were, a microcosm laying down in its final clause the law of its own existence in its own terms'.[5] So, in order to respect each 'microcosm', the starting point when approaching to interpret it should be based on its own rules, and just when its rules are not enough one should consider elements from other sources, e.g. the VCLT. General assumptions cannot be made, and every instrument should be seen separately and independently from one another. Each tax treaty should be seen under its own lenses.

A first approach to the scope, or what we can call the general scope or scope in *lato sensu*, of a treaty could be by considering its title and objectives. It is customary that each treaty receives a 'name', e.g. Treaty on the Non-Proliferation of Nuclear Weapons, Treaty on Open Skies or Treaty on the Functioning of the European Union. The name gives a hint on the subject of a treaty, which in turn gives a hint on its scope.

In this sense, traditionally, tax treaties have received one out of three names[6]: (1) agreement between State A and State B for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital,[7] (2) agreement between State A and State B for the avoidance of double taxation with respect to taxes on income and capital[8], or simply, (3) agreement between State A and State B with respect to taxes on income and capital.[9] More recently, the Final Report on Action 6 (preventing the granting of treaty benefits in inappropriate circumstances) of the Organisation for Economic Co-operation and Development/G20 Base Erosion an Profit Shifting Project (BEPS), replaced the title of the OECDMC making it 'Convention between (State A) and (State B) for the elimination of double taxation with respect to taxes on income and on capital and the prevention of tax evasion and avoidance.'[10] This variety in names could lead to think that tax treaties could have different scopes and that some encompass more topics than others. However, this is a consequence of the variety of topics covered by a tax treaty.

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[3] Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* 83 (Leiden: Martinus Nijhoff Publishers 2009).

[4] *See* Duncan B. Hollis, *Defining Treaties*, in *The Oxford Guide to Treaties* 11–45, 12 (Duncan B. Hollis ed., Oxford: Oxford University Press 2012).

[5] Paul Reuter, *Introduction to the Law of Treaties* 29 (2d ed., London: Kegan Paul International 1995).

[6] The Contracting Parties are free to title the tax treaty the way they want. However, three are the most common used titles. One can find other titles but are less usual, e.g. Belgium-Luxembourg tax treaty (1970) title is '*Overeenkomst tussen België en Luxemburg tot het vermijden van dubbele belasting en tot regeling van sommige andere aangelegenheden inzake belastingen naar het inkomen en naar het vermogen*', which can be translated as 'Convention between Belgium and Luxembourg for the avoidance of double taxation and the regulation of certain other questions relating to taxes on income and capital.' Austria-Belgium tax treaty (1971) title is '*Convention entre le Royaume de Belgique et la République d'Autriche en vue d'éviter les doubles impositions et de régler certaines autres questions en matière d'impôts sur le revenu et sur la fortune, y compris l'impôt sur les exploitations et les impôts fonciers*', which can be translated as 'Convention between the Kingdom of Belgium and the Republic of Austria for the avoidance of double taxation and the regulation of certain other matters with respect to taxes on income and capital including the business tax and land taxes.' The Isle of Man-New Zealand tax treaty (2009) title is 'Agreement between the government of the Isle of Man and the government of New Zealand for the allocation of taxing rights with respect to certain income of individuals and to establish a mutual agreement procedure in respect of transfer pricing adjustments.' The main difference in these titles is the inclusion of other taxes covered by the treaty, the inclusion of other subjects covered and/or the limitation of the scope of the treaty.

[7] *See* e.g. Greece-United States tax treaty (1950), Australia-Austria tax treaty (1986), Canada-Colombia tax treaty (2008), Netherlands-UK tax treaty (2008), China-Ecuador tax treaty (2013) and Liechtenstein-Malta tax treaty (2013).

[8] *See* e.g. Israel-Sweden tax treaty (1959), Austria-Liechtenstein tax treaty (1969), Armenia-Austria tax treaty (2002), Colombia-Switzerland tax treaty (2007), Serbia-Vietnam tax treaty (2013) and Serbia-United Arab Emirates tax treaty (2013).

[9] *See* e.g. Algeria-Austria tax treaty (2003), Austria-Kazakhstan (2004), Austria-San Marino tax treaty (2004), Austria-New Zealand tax treaty (2006), Austria-Denmark tax treaty (2007) and Austria-Bahrain tax treaty (2009).

[10] Para. 72, Final Report on Action 6, BEPS Project. OECD.

In fact, the Commentaries to the OECDMC ('Commentaries'), explain why one may find different titles:

> In both the 1963 Draft Convention and the 1977 Model Convention, the title of the Model Convention included a reference to the elimination of double taxation. In recognition of the fact that the Model Convention does not deal exclusively with the elimination of double taxation but also addresses other issues, such as the prevention of tax evasion and non-discrimination, it was subsequently decided to use a shorter title which did not include this reference.[11]

This means that in the case of tax treaties, one cannot unveil its scope by only taking into account its name.

The main purpose of a tax treaty is to avoid or reduce international juridical double taxation,[12] but it is not the only one. As mentioned in the Commentaries, tax treaties also deal with other topics such as tax evasion, tax avoidance and non-discrimination. However, this is not an exhaustive list of the topics covered by a tax treaty. For instance, the Commentaries to Article 23 clearly point that '[t]he purpose of this paragraph is to avoid double non taxation as a result of disagreements between the State of residence and the State of source on the facts of a case or on the interpretation of the provisions of the Convention',[13] i.e. not only tax treaties aim to avoid international double taxation, but also aim to avoid cases of double non-taxation. There are few other objectives or purposes of a tax treaty, e.g. the exchange of information,[14] but they are ancillary.

A second approach will be based on the specific scope or scope in *stricto sensu.* Normally, tax treaty models and tax treaties are organized in chapters,[15] where the first chapter contains the 'scope of the convention'.[16] This chapter, which only has two articles (persons covered and taxes covered), restricts the application of the treaty to certain subjects and to certain objects, i.e. a tax treaty does not simply apply because one of the parties is a contracting party, it also needs to cover the taxes concerned in order to be applicable.

As one can imagine, each tax treaty will have to be considered independently when approaching this scope because each one will cover different taxes and different subjects. However, in general, a tax treaty only covers taxes 'on income and on capital', thus, other taxes (e.g. Value Added Tax and Financial Transaction Taxes) are not part of the scope of the treaty.[17] Regarding the persons, tax treaties only cover certain residents of the Contracting States, which are mainly individuals and taxable entities.

Keeping in mind both the general scope and the specific scope will be of great help when interpreting. These scopes interact as concentric circles, whereby the specific scope will be the core circle while the bigger one will hold the general scope, setting the boundaries and the direction towards which one should look.

An interpretation must start in the core circle. When a term is not defined in a tax treaty or it is partially defined, one should fill that blank with the domestic law, starting with the law applicable to the subject and objects covered by the specific scope – not forgetting that the specific scope is inside the general scope. This is the reason why one should harmonize both scopes. In a case that there is no domestic definition within the core circle or the definitions available go against the general scope, one should get out of the first circle and look for definitions in the domestic law that, even though are not applicable to the taxes and persons covered by the treaty, are tax-related. Lastly, if the latter definition does not exist or goes against the general scope, as a last resort, one should look any definition applicable in domestic law, without consideration of whether it is tax-related or not.

3 Rule of interpretation in the VCLT

On the application of the VCLT, it is important to highlight two remarkable aspects. On one hand, it is noteworthy that the VCLT currently has 114 parties[18] and that some of its provisions are considered to be customary law, i.e. provisions that are considered customary law are applicable even to those States that have not ratified the Convention (e.g. France and United States). The articles regarding treaty interpretation are examples of provisions

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[11] S. 16 of OECD Comm. on introduction (2014). In spite of this, the Final Report on Action 6 of the BEPS project decide to replace the title of the OECDMC to include again the reference to the prevention of tax evasion and, this time, it also include an express reference to tax avoidance. This reference will be also included in the next edition of the s. 16 of OECD Comm. on introduction.

[12] S. 3 of OECD Comm. on introduction (2014). However, if domestic law of both Contracting Parties provide unilateral relief, one may conclude that avoiding or reducing double taxation will not be the main purpose of the treaty. Still, under that hypothetical scenario, a tax treaty will include clauses distributing taxing powers and a method to relieve double taxation. Therefore, despite that avoiding double taxation will perhaps not be the trigger to conclude a tax treaty between these States, if they end up for other reasons concluding one, it will contain clauses that will still aim to avoid double taxation.

[13] S. 56.1 of OECD Comm. on Art. 23 (2014).

[14] Brian J. Arnold & Michael J. McIntyre, *International Tax Primer* 106 (2d ed., Kluwer Law International 2002).

[15] The USMC does not have chapters.

[16] In the case of the USMC, its first article covers the 'general scope'.

[17] However, it is noteworthy that there are provisions under tax treaties that include taxes of every kind and description. In this sense, following the OECDMC 2014, articles on non-discrimination (Art. 24 para. 6), on exchange of information (Art. 26 para. 1) and on assistance in the collection of taxes (Art. 27 para. 1), are examples of provisions that add, within their scope, other taxes.

[18] According to the UN Treaty Collection which can be accessed on https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=en. Last accessed on 27 Jan. 2016.

that are considered to be customary law.[19] On this regard, Linderfalk considers that 'Articles 31–33 of the Vienna Convention on the Law of Treaties should therefore be seen as evidence, not only of the rules of interpretation that apply according to the convention between its parties, but also of the rules that apply according to customary international law between states in general.'[20]

On the other hand, Article 4 of the Convention provides that the VCLT is not retroactive, i.e. it does not apply to treaties concluded before the VCLT came into force.[21] Thus, in principle, treaties concluded before 27 January 1980 cannot be interpreted under the rules provided in Articles 31–33. Nevertheless, it should be borne in mind that Articles 31 and 32 of the VCLT contain customary interpretation principles that existed before the VCLT. Therefore, one can use these rules to interpret treaties concluded before 1980. Regardless of what is provided in Article 4 of the VCLT, one can use the interpretation provisions of the VCLT to interpret any treaty irrespective of the date of conclusion.[22]

Traditionally, the relationship between Articles 31 to 33 of the VCLT has been seen as 'scaffolding',[23] where Article 31 is the starting point, and, depending on the circumstances, one can, eventually, go to Articles 32 and 33, i.e. Article 32 provides supplementary means to confirm the interpretation made under Article 31 and also to determine the meaning when Article 31 is not enough and there is ambiguity, and Article 33 would be applicable when dealing with treaties authenticated in more than two languages.

In the interaction between the articles on treaty interpretation, eloquently are Malcom's words:

> Where the interpretation according to the provision of article 31 needs confirmation, or determination since the meaning is ambiguous or obscure, or leads to a manifestly absurd or unreasonable result, recourse may be had to supplementary means of interpretation under article 32. These means include the preparatory work (*travaux préparatoire*) of the treaty and the circumstances of its conclusion and may be employed in the above circumstances to aid the process of interpreting the treaty in question. Nevertheless, the International Court has underlined that 'interpretation must be based above all upon the text of the treaty'.[24]

The answer could seem unclear, especially since one can find supporters on each side. For instance, in the *Deep Vein Thrombosis and Air Travel Group Litigation* case the UK House of Lords said that:

> article 31 of the Vienna Convention on the Law of Treaties provides that a treaty shall be interpreted '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'. This is the starting point of treaty interpretation to which other rules are supplementary: see article 31.2; 31.3; 31.4; and 32.[25]

However, we consider that this approach is not correct, and that Article 31 as a whole should be seen as a single rule. In fact, Article 31 of the VCLT is titled 'general rule of interpretation'. As one can see from its wording, it refers in singular to the term 'rule', and it does not say 'rules', which allows us to consider the article as one single general rule of interpretation. Rule that is divided in four paragraphs and that needs to be seen as one.

Moreover, the International Law Commission (ILC) of the United Nations (UN) said that:

> [t]he Commission, by heading the article 'General rule of interpretation' in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means

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[19] For some scholars, it is not sufficiently unequivocal that Articles 31 and 32 are customary law. E.g., Villiger considers that '[i]t can be concluded that there is indeed emerging customary law (…) However, the picture is not sufficiently unequivocal, particularly since Article 31 leaves considerable flexibility to the interpreting agency'. *See* Villiger, *supra* n. 3, at 440. Moreover, 'It is noteworthy that the International Court of Justice stated in the Judgment on the Arbitral Award of 31 July 1989 that " … [a]rticles 31 and 32 of the Vienna Convention on the Law of Treaties … may in many respects be considered as a codification of existing customary international law … " (I.C.J. Reports 1991, pp. 69–70, para. 48)', *see* Karl Zemanek, 'introductory note to the Vienna Convention on the Law of Treaties', in *The Audiovisual Library of International Law of the UN.* http://legal.un.org/avl/ha/vclt/vclt.html (accessed 27 Jan. 2016).

[20] Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* 7 (Springer 2007).

[21] Article 4 of the VCLT provides: 'Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.'

[22] In the Belgium/Netherlands ('Iron Rhine Arbitration'), the arbitral tribunal said that '[i]t is now well established that the provisions on interpretation of treaties contained in Articles 31 and 32 of the Convention reflect pre-existing customary international law, and this may be (unless there are particular indications to the contrary) applied to treaties concluded before the entering into force of the Vienna Convention in 1980. The International Court of Justice has applied customary rules of interpretation, now reflected in Articles 31 and 32 of the Vienna Convention, to a treaty concluded in 1955 (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J Reports 1994*, p. 6 at pp. 21–22, para. 4); and to a treaty concluded in 1890, bearing on rights of States that even on the day of the Judgment were still not parties to the Vienna Convention (*Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1045 at p. 1059, para. 18). In the Sovereignty over Pulau Ligitan and Pulau Sipadan case, the Court noted that Indonesia was not party to the Vienna Convention, but nevertheless applied the rules as formulated in Articles 31 and 32 of the Convention to a treaty concluded in 1891 (…) There is no case after the adoption of the Vienna Convention in 1969 in which the International Court of Justice or any other leading tribunal has failed so to act', *see* Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway (Belgium/Netherlands) (2005) XXVII RIAA 35, 62 [para. 45].

[23] Richard Gardiner, *The Vienna Convention Rules on Treaty Interpretation*, in *The Oxford Guide to Treaties* 475–506, at 477 (Hollist, Duncan B. ed., Oxford: Oxford University Press 2012).

[24] Malcom N. Shaw, *International Law* 935–936 (6th ed., Cambridge: Cambridge University Press 2008).

[25] House of Lords (UK), 8 Dec. 2005, *Case Deep Vein Thrombosis and Air Travel Group Litigation* (2005) UKHL 72, para. 31.

> of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, Article 27 [now 31] is entitled 'General rule of interpretation' in the singular, not 'General rules' in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule.[26]

The general rule of interpretation consists of interpreting in good faith, using the ordinary meaning of the terms in their context and in light of its object and purpose, i.e. we have four elements to keep in mind: (1) good faith, (2) ordinary meaning, (3) context, and (4) object and purpose.

Regarding the concrete meaning of good faith, it is not an easy and tangible concept. But in broad terms, it means to act honestly, honourably. The Cambridge Dictionary defines *bona fide* as having 'good or sincere intentions', while the Oxford Dictionary defines it as 'genuine, real'.

Villiger's opinion in this regard is that:

> [w]hen interpreting a treaty, good faith raises at the outset the presumption that the treaty terms were intended to mean something, rather than nothing. Furthermore, good faith requires the parties to a treaty to act honestly, fairly and reasonably, and to refrain from taking unfair advantage. Legitimate expectations raised in other parties shall be honoured (*Vertrauensschutz*). A right, which has been forfeited, may no longer be claimed (*venire contra factum proprium*). The prohibition of the abuse of rights, flowing from good faith, prevents a party from evading its obligations and from exercising its rights in such a way as to cause injury to the other party.[27]

To sum up, interpreting in good faith has two implications. On one hand, it implies that the starting point of any interpretation is that the text has an intended meaning. On the other, when interpreting one should do so with sincere and honest intentions, i.e. one should not force the text to mean something, but one should let the text speak by itself. One needs to be neutral, impartial.

As a consequence of interpreting in good faith, one should read the words according to its ordinary meaning. However, as can be expected, a single word can have different ordinary meanings,[28] reason why one needs to determine the ordinary meaning in their context and in the light of the object and purpose of the treaty being interpreted.

We concur with Gardiner's view, according to which:

> it has to be accepted that there is commonly no single 'ordinary' meaning of a word and thus there is the need for a direct link to the context and the treaty's object and purpose. That linkage immediately qualifies any impression that the ordinary meaning is simply a literal approach. Context and object and purpose are not additional or optional elements. They are pointers to the appropriate ordinary meaning and this must also be put in the crucible.[29]

In this sense, it turns fundamental to determine whether Article 31(2) constitutes a special definition of context or not. For this purpose, it is helpful to begin with the wording of this article. 'The context for the purpose of the interpretation of a treaty shall comprise.' From this sentence, one can deduct at least three vertebral elements: (1) for the purpose, (2) shall, and (3) comprise. The first of these elements suggests the scope of this paragraph, i.e. the content of this provision is applicable when the purpose pursued is to interpret a treaty, any treaty. It is generic. The second element, points out that the components that are going to be listed will be present within the concept of context in all situations since it is couched in mandatory terms, therefore it is of mandatory observance. Finally, the third element allows us to conclude that the components listed in Article 31(2) are not exhaustive; hence, context includes those components but it is not limited to them. From this analysis, one can conclude that Article 31(2) is not *per se* a definition,[30] but it contributes to the meaning of context, that is to say, it provides a framework, through examples, of items included within the context.

Same conclusion can be reached when analysing the wording of this article in other authentic languages of the VCLT, i.e. when looking to the French (*Aux fine de l'interprétation d'un traité, le contexte comprend*) and Spanish (*Para los efectos de la interpretación de un tratado, el contexto*

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[26] International Law Commission, *Report of the International Law Commission on the Work of the Second Part of Its Seventeenth Session*, in *Yearbook of International Law Commission, vol. II* (1966), commentaries to Art. 27, para. 8.

[27] *See* Villiger, *supra* n. 3, at 425–426.

[28] This phenomenon is known as 'homonyms', i.e. words that have the same spelling (or sometimes the same pronunciation) but different meanings. From language to language the number of homonyms change, but still having more than two meanings represent an interpretation issue, since the interpreter must choose one of the meanings to be applicable. For instance, in English, the word 'double' has thirty-six meanings according to the Oxford Dictionary, while the same word in Spanish (*doble*) has twenty-one meanings according to the *Diccionario de la Real Academia Española.*

[29] *See* Gardiner, *supra* n. 23, at 480–481.

[30] Despite of this view, there are those that consider that Article 31(2) constitutes a definition of context. *See* e.g. *The New US-Belgium Double Tax Treaty: A Belgian and EU Perspective* 63 (Anne van de Vijver ed., Brussels: Larcier 2009); Francis 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*, in *The Law of Treaties* 297–325, at 314 (Davidson, Scott ed., Dartmouth Publishing Co. and Ashgate Publishing Co. 2004).

comprenderá) versions, one can see that this phrase was carefully translated and it has the same outcome. All of them are clear to provide that context shall comprise */comprend /comprenderá* the items therein listed. The result would be different if the article would have said: the context 'shall comprise exclusively */comprend seulement /comprenderá exclusivamente*'. Therefore, from the analysis of the initial wording of Article 31(2) one reaches the same conclusion, this article provides what can be called an 'open definition', i.e. it is not an exhaustive definition, it only provides certain items that the concept of context must have under any circumstance, but does not close the door to other items.

However, it is noteworthy that despite the former interpretation, the ILC referred to Article 31(2) as a 'definition' of context, i.e. they intended to include a definition in Article 31. Initially, context was meant to be the text of the treaty (including preamble and annexes), though, the ILC decided to enlarge the understanding of context by expressly including certain items in the concept of 'context' for interpretation purposes, and that is why they included any agreement/instrument related to the conclusion of the treaty as a constitutive part of context. One concern of Manfred Lachs and explained by Roberto Ago (Chairman of the 766th Meeting) was that 'if necessary, he was prepared to agree that no attempt should be made to define "context"; but if the Commission decided that such a definition was necessary, it would have to be very broad, for it would be very dangerous to omit any factor of importance'.[31] Nevertheless, no further comment on the broadness of the definition was done, but in 1966, in the 869th meeting, again it was expressed that 'The commission should also decide whether it wished to retain the definition of context of the treaty in article 69 [today Article 31], and how the question of preparatory work should be treated.'[32] In light of this, we think that here we may find the reason of the wording of Article 31(2). The ILC did not want to close the door to any material that could be part of the context.

Moreover, in the Report of the ILC on the work of its eighteenth session, on the commentaries to Article 27 [today Article 31], it explains that:

> [p]aragraph 2 seeks to define what is comprised in the 'context' for the purposes of the interpretation of the treaty (…) The principle on which this provision is based is that a unilateral document cannot be regarded as forming part of the 'context' within the meaning of article 27 unless not only was it made in connection with the conclusion of the treaty but its relation to the treaty was accepted in the same manner by the other parties. On the other hand, the fact that these two classes of documents are recognized in paragraph 2 as forming part of the 'context' does not mean that they necessarily to be considered as an integral part of the treaty (…) What is proposed in paragraph 2 is that, for purposes of interpreting 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.[33]

What we can conclude is that despite the wording of Article 31(2), this article is a definition, it was meant to be a definition, so one should respect that intention. However, it is an open definition, with a particular lead, only bilateral text-based material and unilateral instruments agreed by the other parties can be considered to be context and they must have a direct relation with the conclusion of the treaty, in the sense that they are formally related to the treaty. In fact, Amado explains that, 'Vattel had already had a respect for the written text – the "context" as it was now called – and had urged that words should be interpreted according to the meaning attached to them at the time of the treaty's conclusion',[34] i.e. the view of context is limited to text for these purposes.

In light of this, it can be concluded that Article 31(2) has an open definition which provides a list of items that are contained in the context, and that, this list is not exhaustive, but gives a frame of what can be considered context: only bilateral text-based material and unilateral instruments agreed by the other parties and formally related to the treaty.

Thus, '[a]n interpretation based on article 31(2) of the Vienna Convention may be referred to as based on the "internal" context, and an interpretation based on other sources, as based on the "external" context'.[35] What in this case is called 'external' context, more than context, it is additional elements that the interpreter can take into account besides the context, as shown in Article 31(3). For this reason, if Article 31(3) commences saying that the elements therein shall be taken into account together with the context, it is reasonable to conclude that those items are not in *stricto sensu* context.

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[31] International Law Commission, *Report of the International Law Commission on the Work of Its Eighteenth Session*, in *Yearbook of International Law Commission, vol. II* (1966), commentaries to Art. 27, para. 63.

[32] International Law Commission, *Yearbook of International Law Commission, vol. I part II* (1966), 869th Meeting, para. 57.

[33] *See* International Law Commission, *supra* n. 31, at para. 13.

[34] International Law Commission, *Yearbook of International Law Commission, vol. I part II* (1966), 870th Meeting, para. 75.

[35] *International Tax Glossary* (Julie Rogers ed., 6th rev. ed., Amsterdam: IBFD, 2009)94.

The ILC made clear that Article 31(3) is not meant to be context but it is equally important. The subsequent practice will be a representation of the intention of the parties, and should be taken into account. The ILC, in the 870th Meeting discussed that:

> [a] subsequent agreement concerning the interpretation of the treaty, or a tacit agreement revealed by the practice of the parties in the application of the treaty, should not be placed on the same footing as the context. Those agreements could be considered at the same time as the context, but they should not be deemed to form part of the context.[36]

This allows us to reaffirm our position according to which Article 31(3) is not context, but has the same status for interpretation as if it were context.

It is important to clarify that the object and purpose in Article 31(1) alludes to the object and purpose of the treaty, which cannot be confused with the object and purpose of the clause within a treaty that contains the term subject of interpretation. This view is harmonic with the context concept. The treaty should be seen as a whole instead of a group of clauses, i.e. each clause may have its own object and purpose, that eventually contributes to the general object and purpose of the treaty; however, towards finding the ordinary meaning of a term, one should do so in the light of the object and purpose of the treaty.

It is noteworthy that the parties may not only give a term a special meaning, but may also adopt special rules of interpretation. We concur with Gardiner's view on this point, '[t]his is subject to one caveat since the Vienna rules allow parties to attribute special meanings to terms if they deliberately so choose; and it may well follow that they could choose to apply their own specific rules of interpretation as a means of achieving their owns special meaning'.[37] In this sense, the rule of interpretation contained in tax treaties in Article 3(2) can be seen as a special rule of interpretation agreed by the parties.

In sum, when the parties intend to give a special meaning to a term or to adopt special rules of interpretation, the general rule of interpretation of Article 31 of the VCLT provides that the contracting parties shall use the special meaning over the ordinary meaning, and that equally a special rule of interpretation shall prevail over the general rule of interpretation contained therein.

4 Interpretation rules under the OECDMC

Having discussed the nature and scope of tax treaties and the treaty interpretation rules under the VCLT, it is time to address the interpretation provision that is usually included in tax treaties. In this regard, we will use the model provision of the 2014 OECDMC, namely Article 3 (2). This provision in turn, is identical to Article 3(2) of the 2011 United Nations Model Convention, which allows us to say that the considerations herein will also be applicable to the latter MC. Moreover, other MC, like the 2016 United States Model Convention,[38] have a similar wording, thus the comments regarding the common wording will be, in principle, applicable.

Despite this, it is important to keep in mind that Contracting Parties may adopt another text for the interpretation provision of the treaty being concluded,[39] or even may not adopt any interpretation provision at all.[40] So, each treaty has to be analysed individually.

Article 3(2) commences: 'as regards the application of the Convention'. This phrase has remained unchanged since the 1963 Draft, and its importance lays on establishing a temporal framework to use Article 3(2), i.e. only when 'applying' the convention we will be allowed to use what is provided therein. For this reason, we need to determine when does a contracting party apply a treaty. We agree with Avery Jones' view, according to which 'application' occurs when the treaty limits the taxing rights of one of the contracting parties, i.e. when the source State is determining whether it can tax, tax with a limitation or not tax certain income at all. [41] However, there are those, like Vogel, which consider that '"application" is every decision by a tax authority or a court of law on a tax question for which the treaty is considered or should be considered. Therefore, the exemption of income pursuant to a DTC constitutes a treaty "application", as does the decision that a treaty is not controlling in a particular case'.[42]

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[36] *See* International Law Commission, *supra* n. 34, at para. 59.

[37] *See* Gardiner, *supra* n. 23, at 493.

[38] The main difference is that, besides the reference to the context, before going to domestic law one should also take into account any agreement to a common meaning between the competent authorities.

[39] *See* e.g. treaty between Argentina and Bolivia (1980) and treaty between Germany and Sweden (1992).

[40] E.g. Argentina-Spain tax treaty (1992) – this treaty effects ceased on 1 Jan. 2013; and the Andean Community tax treaty (2004). This multilateral tax treaty – which contracting parties are Bolivia, Colombia, Ecuador and Peru – does not contain an interpretation provision, but its Article 20 provides that any interpretation must consider the purpose of the treaty. The erstwhile Andean Community tax treaty (Decision 70 of 1971) did contain a *renvoi* clause, according to which any expression therein not defined will have the meaning used under the applicable domestic law. It is noteworthy, that this *renvoi* clause did not refer at any moment to the context.

[41] John F. Avery Jones, *Article 3(2) of the OECD Model Convention and the Commentary to It: Treaty Interpretation*, 33(8) Eur. Tax. 252–257, at 255(Aug. 1993).

[42] *See* Klaus Vogel, *Klaus Vogel on Double Tax Conventions: A Commentary to the OECD, UN and US Model Conventions for the Avoidance of Double Taxation on Income and Capital, with Particular Reference to German Treaty Practice* 169 (3d ed., Kluwer Law International 1997).

The phrase 'at any time', jointly with the phrase 'at that time', were added in Article 3(2) in the 1995 amendment with the intention of clarifying which law was applicable when interpreting a treaty, the law in force when the treaty was concluded or the law in force when applying it. Before these amendments, there was no certainty on whether one should follow static or an ambulatory interpretation because Article 3(2) did not specify, thus scholars largely discussed it.[43] With this amendment the OECD clarified that one should follow an ambulatory interpretation, i.e. whenever a Party is applying the treaty the law applicable will be the law in force at that moment.

Current OECD commentaries to Article 3(2) commence stating that '[t]his paragraph provides a general rule of interpretation for terms used in the Convention but not defined therein'.[44] From this affirmation we can subtract that: (1) we are dealing with a general rule of interpretation, (2) it has a purpose, i.e. it is intended 'for' something, and (3) it is for terms not defined in the treaty.

Regarding the first point, we have to be aware that, indeed, we are dealing with an interpretation rule. However, the description of general has to be understood in the scope of the treaty, i.e. the rule is general with respect to a treaty, it applies to all the provisions of a treaty, but it only applies to that treaty and not to any other. From the point of view of the law of treaties, this is a special interpretation rule. A general rule of interpretation would be, e.g. Article 31 VCLT, which is applicable to every treaty, unless a treaty contains a special rule of interpretation, in which case the special rule will prevail over the general rule. In this regard, the Final Report on the BEPS Action 6, proposed a revised version of the section on 'Improper use of the Convention' currently found in the Commentary on Article 1. According to its new paragraph 26.5, 'the interpretation of tax treaties is governed by general rules that have been codified in Articles 31 to 33 of the Vienna Convention on the Law of Treaties [and that] these general rules do not prevent the application of similar judicial doctrines and principles to the interpretation of the provisions of tax treaties'.[45]

With respect to the second point, the commentaries clearly state that the interpretation rule is *for* undefined terms, which means that the rule contained therein has a limited purpose. Article 3(2) does not deal with all possible interpretation issues, it only deals with one: how to proceed when having to interpret an undefined term.

In relation to the third and last point, the interpretation rule is for undefined terms, which implies that we need to know when a term is not defined. A word or a term may have different definitions. This possibility, of having more than one definition, is inherent with language, that is why it becomes necessary to look at words in their context, because this will be the final threshold to determine whether a term is defined or not. In other words, we may think a word is defined in a tax treaty, but it will have to go first through the context threshold, once we have reviewed that a definition fits in the context, a term can be considered to be defined for the purposes of Article 3(2) of the OECDMC.

Context, according to the Cambridge Dictionary, has two meanings, one as 'cause of event' according to which context is 'the situation within which something exists or happens, and that can help explain it', and another as 'language' according to which context is 'the text or speech that comes immediately before and after a particular phrase or piece of text and helps to explain its meaning'. Correspondingly, the Oxford Dictionary has also two meanings. One, 'the circumstances that form the setting for an event, statement, or idea, and in terms of which it can be fully understood'; and, two, 'the parts of something written or spoken that immediately precede and follow a word or passage and clarify its meaning'.

As we can see, we have two ordinary meanings of context according to the dictionary. One, refers to the text surrounding the target to be interpreted, i.e. the preceding and succeeding words in the same article, other articles within the same treaty – with special reference to those contained in the same section, chapter, etc. – and, in general, all the text around a term (we may call this first meaning, the 'objective' context). And, two, refers to the situations surrounding an event, a fact, regardless of the kind of situation (we may call this as the 'subjective' context).

The OECDMC commentaries also do not bring clarity on what context actually is. They only suggest, on one hand, that the context is determined in particular by the intention of the parties. The concept of intention, following Klabbers, is an awkward concept,[46] '[n]ot only is intent difficult to identify, but it also imbues those who conclude agreements with a psychological state they may never really have had'.[47] Moreover, the intention permeates the text of a treaty, so the most relevant aspect of the intention must be within it. In this regard, the ILC commented that:

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[43] *See* John F. Avery Jones et al., *The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model-I*, 1 Brit. Tax Rev. 25–48 (London, 1984).

[44] S. 11 of OECD Comm. on Art. 3 (2014).

[45] Para. 59, Final Report on Action 6, BEPS Project. OECD.

[46] *See* Jan Klabbers, *The Concept of Treaty in International Law* Ch. 2 (The Hague: Kluwer 1996).

[47] *Ibid.*, at 65.

> [t]his article [referring to current article 31 of the VCLT] 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 (…) The textual approach, on the other hand, commends itself by the fact that, as one authority has put it '*le texte signé est, sauf de rares exceptions, la seule et la plus récent expression de la volonté commune des parties*'.[48] Moreover, (…) the Court has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by necessary implication, contain.[49]

On the other hand, the second element considered by the commentaries, is the meaning given to the term in question in the legislation of the other Contracting State. However, from our point of view, this is context but under another context, i.e. it cannot be the context in the sense to which Article 3(2) refers. If we consider that the meaning under domestic law is also comprised by the context of Article 3(2), there would be fewer reasons to follow an ambulatory interpretation because there would be fewer changes in domestic law. For the sake of discussion, if the context also includes the domestic law applicable at the moment of concluding a treaty, and keeping in mind that the meaning given to an undefined term has to go through the context, one can say that changes in domestic law have to be compatible with the law applicable when concluding the treaty. This will mean that changes of domestic law will be restricted by the domestic law itself, allowing only changes that are in accordance with an old law. This would be against the sovereignty of any State. A State should be free to change its law freely without consideration of whether the change goes along with a previous law or not. A State will be free to make any good faith change. This context (i.e. the one considering the meaning under the domestic law) fits more on what commentaries called 'factual context'. Commentaries to the OECDMC refer to this concept only once in the commentaries to Article 1, where they say:

> The results described in the preceding paragraph should obtain even if, as a matter of the domestic law of the State of source, the partnership would not be regarded as transparent for tax purposes but as a separate taxable entity to which the income would be attributed, provided that the partnership is not actually considered as a resident of the State of source. This conclusion is founded upon the principle that the State of source should take into account, as part of the factual context in which the Convention is to be applied, the way in which an item of income, arising in its jurisdiction, is treated in the jurisdiction of the person claiming the benefits of the Convention as a resident.[50]

This other context, the factual context, is integrated by the circumstances and situations surrounding the conclusion of the treaty, specially the domestic law of each party that was in force in that moment. This approach will be especially useful, when, for example, a State changes its domestic law and, as consequence, it overrides the tax treaty. As we will discuss in a further chapter, if a term is not defined in a tax treaty one can fill that lack of meaning with domestic law, unless the context otherwise requires. The factual context thus, could be of great help as a way of measuring the changes in domestic law in the event of any treaty override controversy.

Taking into account the different points just expressed, we consider it reasonable to conclude that the ordinary meaning of the term 'context' within Article 3(2) of the OECDMC, is the first of the two possible ordinary meanings, i.e. the context is the text that comes immediately before and after a particular phrase or piece of text and helps to explain its meaning. The context will be, therefore, the line where a term is, the article, the chapter, the entire treaty seen as a whole.

Despite the above, nothing impedes the contracting parties from agreeing on what context will comprise for purposes of the treaty. However, it is unfortunate that this is not a common practice. It could avoid interpretation issues since it is largely discussed what actually is comprised within the concept of context. The least parties could do when agreeing on an interpretation clause, would be to make such a clause as clear as possible, trying to avoid any interpretation difficulty over it.

The context works as a threshold that helps the interpreter to determine when a meaning fits into a term. If we include commentaries into the context, it would be like saying that the content of the commentaries will also be a determiner of the meaning to be applied to a term. This will lead to the result that domestic law indirectly will have to follow the commentaries otherwise domestic law will not be applicable. In other words, and following a syllogism, if commentaries are context, and context limits the domestic law applicable, commentaries limit domestic law.

From our perspective, the utility that commentaries may have for purposes of treaty interpretation is as a last

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[48] This can be translated as: 'The signed text is, with rare exceptions, the only and the most recent expression of the common intention of the parties.'

[49] International Law Commission, *Report of the International Law Commission Covering the Work of Its Sixteenth Session*, in *Yearbook of International Law Commission, vol. II* (1964), commentary to Art. 69, para. 9.

[50] S. 6.3 of OECD Comm. on Art. 1 (2014).

resort, i.e. if a term is not defined in the treaty, Article 3 (2) will be applicable; therefore, we will go to domestic law. However, if there is no domestic meaning, the result will be that Article 3(2) does not apply. Consequently, we will need to apply the rules in VCLT. Under the latter rules, one needs to look for the ordinary meaning, which can be present in a dictionary or any other well-known source, as the commentaries are. We may thus use the meaning of a term defined in the commentaries, provided that it fits in the context and the object and purpose of the treaty.

Despite of this view, scholars have extensively discussed the relation that the commentaries have with tax treaty interpretation. Some authors consider that the commentaries are context because they fall into Article 31(3)(c) of the VCLT, others consider that they are part of the *travaux préparatoires* of a tax treaty within Article 32 of the VCLT, others consider that the commentaries fall into the concept of 'special meaning' in Article 31(4). There is in any case, no certainty on how commentaries legally affect a treaty, but what is almost a consensus is that the commentaries are a fundamental tool for treaty interpretation.[51]

5 Interaction between article 3(2) of the OECDMC and article 31 of the VCLT

As a general rule, every treaty must be interpreted following the VCLT rules. As an exception, the VCLT will not apply if the parties of a treaty agree so. If parties intended to agree on a special meaning of a term, that special meaning should prevail over an ordinary meaning (Article 31(4) VCLT). The principle contained therein extends also to any agreement regarding treaty interpretation. Consequently, if parties agree to follow particular rules of interpretation, VCLT will respect that. Moreover, keeping in mind the nature of the VCLT interpretation rules, i.e. they are the general rule; it is vital to understand that the general rule will give space to the special rule. Consequently, the general rule will be applicable in all cases not covered by the special rule.

In light of this, it is important to know the scope of each set of rules in advance in order to determine when one rule starts to apply and when the other ceases. The scope of Article 3(2) of the OECDMC is to provide a solution when dealing with an undefined term. At the same time, the VCLT rules have two basic scopes: on one hand, a general interpretation rule dealing with any matter, i.e. undefined terms, gaps, contradictions, etc.; and, on the other, a special rule dealing with multilingual treaties. Based on the scope of these rules, a first conclusion that can be drawn is that both set of rules have a different scope, allowing the tax treaty interpreter to know beforehand which rules should be considered.

Another aspect to bear in mind is the objective pursued by the interpreter, i.e. whether the interpreter will apply a tax treaty or will just study it. As explained earlier, a treaty is applied when the source State is determining how to tax certain income. Accordingly, if one is not applying the treaty, in a strict sense the interpretation method will be immaterial since we are doing an 'unofficial' interpretation, an interpretation that will not affect the tax environment. In any case, since interpretation is an intimate mental process in which one looks for a reasonable understanding, where the only playground is the mind and there is no need of written memories recording the exact process of interpretation, and remembering that both set of rules are quite similar, the outcome in an unofficial interpretation should be the same under VCLT and Article 3(2) of the OECDMC.

Another interaction point of these rules is the way they deal with an interpretative issue, i.e. if the special rule does not provide a solution, the general rule will apply. Thus, under Article 3(2), if a term is not defined under domestic law, there is nothing else the interpreter could do. Nevertheless, an interpretation issue cannot overcome the interpreter's will to fathom a provision in a tax treaty. For this reason, if Article 3(2) does not provide an answer to the problem, one can take recourse to the VCLT.

This latter interaction is of great importance. The sole fact that Article 3(2) does not provide a solution, is not sufficient to conclude that a provision in a tax treaty does not apply. With this we mean that, for the sake of discussion, if a non-tax branch of the law contains the meaning of a term, and in turn this term is not applicable under a domestic scenario to the taxes covered by the treaty, then Article 3(2) cannot be applied. Therefore, we will need to interpret under the VCLT, where nothing prevents us from using that meaning in the unrelated non-tax branch of the law as an ordinary meaning. If we consider that meaning to be an ordinary meaning under Article 31(1) of the VCLT and we surpass the context and object and purpose threshold, that meaning would be applicable.

One last approach to the interaction is when an interpretation issue triggers compatible scopes of the interpretation rules. As mentioned, the VCLT has two scopes, and Article 3(2) has only one. If we are dealing with an undefined term in a multilingual tax treaty, both Article 33 of the VCLT and Article 3(2) will apply simultaneously.

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[51] *Convenios Fiscales Internacionales y Fiscalidad de la Unión Europea* 72–73 (José Manuel Calderón Carrero ed., 2d ed., Bilbao: Wolters Kluwer 2010).

Accordingly, it can be concluded that:

(1) if we are not applying a treaty, Article 3(2) does not necessarily apply, and the interpreter may choose whether to use Article 3(2) or the VCLT;

(2) if we are not dealing with an undefined term, Article 3(2) does not apply but VCLT does;

(3) if we do not obtain a meaning for an undefined term from Article 3(2), then we can use the VCLT; and,

(4) if we are dealing with an undefined term in a multilingual treaty, both Articles 3(2) and 33 of the VLCT will apply.

Notwithstanding the interaction between Article 3(2) and the VCLT rules, we would like to point out the resemblance between these two. For this, we would like to refer to three aspects: the good faith (*bona fide*), the ordinary meaning versus the 'undefinition' requirement, and the context.

First, treaties must be interpreted in accordance with the good faith principle under both sets of rules. Under the VCLT, Article 31 expressly provides that 'a treaty shall be interpreted in good faith', whilst good faith is not mentioned in Article 3(2). However, parties must perform a treaty in good faith in accordance with the *pacta sunt servanda* principle (Article 26 VCLT). Consequently, an interpretation under Article 3(2) must be done in good faith as well.

Second, despite the different wordings, the scope of Article 3(2) falls within the scope of the VCLT rules. On one hand, Article 3(2) provides that any term not defined in the treaty will have the meaning that it has under domestic law, unless the context requires otherwise. In other words, we are going to look for a meaning or a group of meanings that could be applicable to a term. Once we have them, we will test them against a threshold (the context), the meaning surpassing that threshold will be used in the treaty. On the other hand, Article 31 of the VCLT provides interpretation should be done 'in accordance with the ordinary meaning to be given to the terms of the treaty', i.e. keeping in mind that words itself are empty and we fill them with meanings, this article suggests that one should fill terms with their ordinary meaning. This leads to two aspects of the rules: one, this applies to undefined terms. If a term is defined in a treaty, in accordance to Article 31(4), that meaning should prevail over the ordinary meaning. Two, there may be different ordinary meanings, in which case we will determine which of this meanings will apply in accordance with the threshold of the treaty (i.e. the context). Therefore, both Article 3(2) and Article 31 of the VCLT deal with undefined terms and the meaning to be given has to exceed a threshold named context.

Third, both articles include the concept of context. The 'context' referred in Article 3(2) and in Article 31 of the VCLT has the same purpose and extent. This conclusion can be reached by interpreting Article 3(2) using the VCLT. Since the term 'context' is not defined we need to look for its ordinary meaning, when doing so dictionaries usually give two meanings to it, so we need to test both meanings under the concept of context that is defined in Article 31(2) of the VCLT. From this we conclude that the meaning that fits better according to the context of the term is the *text surrounding a term, within the same article, chapter and the treaty looked as a whole.* Moreover, in accordance to Article 31(3)(c) when interpreting we need to consider, together with the context, the international law applicable to the parties, which leads us to the role of the VCLT. The VCLT is international law applicable, and Articles 31 and 32 are customary law. Therefore, the 'context' in Article 3(2) and Article 31 of the VCLT are the same.[52]

In the light of the resemblance between Article 3(2) and the rules of interpretation under the VCLT, it is reasonable to conclude that from a practical point of view these set of rules provide the same outcome when interpreting. Moreover, when considering the factual context in which Article 3(2) was born, one will arrive to the conclusion that its importance has vanished.

Article 3(2), as we know it nowadays, first came into existence in the tax treaty practice in 1945. In those days, international law was not codified yet and there were many issues around treaty interpretation. Its inclusion into tax treaties was useful for such times. Due to the increasing practice of including an interpretation clause in tax treaties, the OECD introduced Article 3(2) in its 1963 Draft and explained this inclusion in the accompanying commentaries to the 1963 Draft as '[t]he rule of interpretation laid down in paragraph 2 corresponds to similar

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[52] S. 12 of OECD Comm. on Art. 3 (2014), provides that 'The context is determined in particular by the intention of the Contracting States when signing the Convention as well as the meaning given to the term in question in the legislation of the other Contracting State (an implicit reference to the principle of reciprocity on which the Convention is based).' This cannot be read as implying that the reciprocity principle has a role only in tax treaties and not to treaty law in general. In this regard, Sean Watts explains that '[t]he principle of reciprocity has long been recognized as an important secondary rule under the law of treaties. Reciprocity places conditions on the binding force, interpretation, and operation of treaties. As a general matter, rules of treaty interpretation have evolved from custom into a formal "treaty on treaties." Detailed, codified rules, often tailored to specific types of treaties and obligations, now guide states' interpretation and implementation of their treaty obligations', and Watts further adds that 'states have developed and even codified highly refined secondary rules for treaty interpretation and application. These rules account for both obligational and observational components of reciprocity in treaty practice'. *See* Sean Watts, *Reciprocity and the Law of War*, 50(2) Harv. Intl. L.J.365–434, at 371 and 378 (2009),http://www.harvardilj.org/wp-content/uploads/2010/09/HILJ_50-2_Watts.pdf (27 January 2016). Also *see* Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 (1) Cornell Intl. L.J. 92–123 (2003). In this sense, the term 'context' in both the VCLT and Art. 3(2) of the OECDMC, are implicitly governed by the reciprocity principle, being possible to take recourse to the ordinary meaning under the lenses of the other contracting party.

provisions normally appearing in double taxation Conventions'. By 1980 when the VCLT came into force, Article 3(2) was widely used because it was useful for dealing with interpretation issues. From that point to the present, when concluding tax treaties, parties still include Article 3(2) regardless of the codification of international law in the VCLT. Article 3(2) has turned into a reminder of the way countries dealt with a twentieth-century problem, a problem that is not a problem in the current times.

6 Conclusion

When dealing with the rules of interpretation contained in the VCLT, Article 31 is a single rule with different elements, where the context is one of the most useful and important ones. Moreover, we dealt with the concept of context as contained in Article 31(2), finding that the intention of the ILC was to leave an open definition, but in any case a definition. Therefore, the context can be comprised of only bilateral text-based material and unilateral instruments agreed by the other parties and formally related to the treaty. Also, it was concluded that Article 31(3) is not context, but it is equally important.

The scope of Article 3(2) is limited, i.e. it only applies when applying the treaty and it only deals with terms undefined under the treaty, leaving aside other interpretation issues. Due to this, all tax treaty interpretation issues not regarding undefined terms will be solved with the VCLT. Given that the context has a vital role in this article and it is not defined in the treaty, we looked for its ordinary meaning, which led us to consider that the concept of context within Article 3(2) and VCLT is the same. However, there is no consensus on what context is, and there are different views based on reasonable arguments. For this reason, and looking to avoid any issue, it would be of great help that parties when concluding a treaty agree expressly on the meaning of context, having in this way certainty on what it comprises.

Furthermore, when dealing with the rule of interpretation of Article 3(2), another aspect of critical importance is the limitation on the sources available to look for a meaning of an undefined term. In this way, Article 3(2) provides that only those meanings contained in the law for the purpose of the taxes covered by the treaty can be used. Nevertheless, this limitation only refers to the taxes covered by the treaty and nothing is said on the law for the purposes of the persons covered by the treaty, which can be important in those States following a schedular system of taxation.

We proposed to harmonize both scopes of tax treaties and Article 3(2), which will result in having a hierarchical order of importance of the domestic law applicable. The proposed approach can be briefly explained with concentric circles, where the smallest one would comprise the law regarding the taxes and person covered by the treaty, the middle one would comprise only the law relating to the taxes to which the Convention applies and the biggest one will comprise any other law for the purposes to the taxes covered. Keeping this in mind, when looking for a domestic meaning, one will start from the smallest circle towards the biggest.

Regarding the interaction between Article 3(2) and the VCLT, we concluded that depending the interpretation issue we have in front we will use one or the other and we summarized the alternatives in four scenarios.

Due to the way Article 3(2) and the VCLT interact and the way each rule operates, we concluded that both rules work in a similar way, allowing us to consider that Article 3(2) is not essential to the contemporary tax treaty practice and could be excluded when a tax treaty is being concluded. Bolstered by the fact that Article 3(2) was first used as a response to the lack of consensus on how to deal with treaty interpretation in the 40s, and that it ended up as a tradition that passed from treaty to treaty, turning into a reminder of the way States dealt with a twentieth-century problem, a problem that is not a problem in the current times. Based on this, we considered that Article 3 (2) is not essential to the contemporary tax treaty practice and thus could be excluded when a tax treaty is being concluded.