

# Journal of Law & Commerce

Vol. 40, No. 1 (2021) • ISSN: 2164-7984 (online)  
DOI 10.5195/jlc.2021.229 • <http://jlc.law.pitt.edu>

## ARTICLES

TAX TREATY INTERPRETATION IN THE U.S. AND THE VIENNA  
CONVENTION ON THE LAW OF TREATIES—IS THERE ROOM FOR  
COMPROMISE?

*Dalton Luiz Dallazem*



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program, and is cosponsored by the University of Pittsburgh Press.

# ARTICLES

## TAX TREATY INTERPRETATION IN THE U.S. AND THE VIENNA CONVENTION ON THE LAW OF TREATIES—IS THERE ROOM FOR COMPROMISE?

*Dalton Luiz Dallazem\**

### ABSTRACT

*The Vienna Convention on the Law of Treaties (“VCLT”) contemplates the interpretation of treaties in its Articles 31, 32 and 33, giving the framework to be followed by one who is engaged in this difficult endeavor. Tax treaties are, first and foremost, treaties. Therefore, the VCLT is the leading guide for their interpretation. The United States has sixty-eight income tax treaties in force. If one logs on any website provider of case-law services and types “tax treaty,” more than six hundred cases will pop up. After analyzing the key issues related to the VCLT and tax treaty interpretation in the United States, this Article focuses on the study of some tax treaty cases to examine whether or not the courts applied the VCLT framework when delivering their opinions, even if it was applied instinctively, but theorizing a deep approach to the interpretation of tax treaties is not its intent. Regardless of the inference of Savigny and other jurists that “interpretation is an art” and “cannot be learned and governed by any specific rules,” in accordance with the preponderant point of view, customary international law has developed rules on interpretation of treaties, which are accurately contemplated in the VCLT. Still, the American*

---

\* Doctor of Juridical Science (S.J.D.) in International Taxation, University of Florida, U.S. Doctor of Juridical Science (S.J.D.) in Tax Law, UFPR, Brazil.

*judiciary does not exactly follow its rules. Nonetheless, the U.S. court decisions that have already applied the interpretation rules of the VCLT—the vast majority of them out of the arena of tax treaties—are “especially valuable” as substantiation of international law since they are rendered by courts of a nation not a party to the Convention, and their importance is further reinforced because the United States, as the most active treaty-maker in the world, decidedly influences the law applicable to treaties.*

## Table of Contents

Introduction.....	4
I. Articles 31 and 32 of the Vienna Convention on the Law of Treaties.....	6
II. The OECD Model Commentaries and the VCLT.....	12
III. Is There a Threshold for Tolerable Textual Ambiguity? .....	16
IV. Articles 31 and 32 of the VCLT as Customary International Law in the United States .....	18
V. The Historical U.S. Approach to Tax Treaty Interpretation.....	23
VI. Is the VCLT Interpretive Framework Harmonious With the United States' Constitution? .....	25
VII. Senate Conditions: Reservations, Understandings, and Declarations (RUDS) .....	29
VIII. Tax Treaty Overrides—Is It a Problem?.....	31
IX. Case Study.....	34
A. Maximov v. United States.....	34
B. Great-West Life Assur. Co. v. United States .....	37
C. O'Connor v. United States .....	39
1. Claims Court Opinion.....	41
2. Court of Appeals Opinion .....	43
3. Supreme Court Opinion.....	45
D. United States v. Stuart.....	47
E. Xerox Corporation v. United States .....	50
1. The Language of the Treaty Itself .....	53
2. The Technical Explanation.....	54
3. The Revenue Procedure 80-18 .....	56
4. Competent Authority Agreement .....	57
Conclusion .....	59

“[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.”

Justice Horace Gray, delivering the opinion of the Supreme Court in  
*The Paquete Habana*.<sup>1</sup>

## INTRODUCTION

Many years ago, Lord McNair affirmed one of the most cited quotes about interpretation: “[t]here is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation.”<sup>2</sup>

In the summer of 2004, Avi-Yonah made a point that it would be a good idea for international tax lawyers to study the Vienna Convention on the Law of Treaties (“VCLT”).<sup>3</sup> He mentioned the case *Xerox Corporation v. United States*, one of the cases analyzed by this Article, to imply a different result under the interpretive principles enshrined in Articles 31 and 32 of the Convention.<sup>4</sup>

The United States has sixty-eight income tax treaties in force.<sup>5</sup> If one undertakes a research on any website provider of case-law services and types “tax treaty interpretation,” more than six hundred cases will appear. However, there is only one case citing expressly the interpretive principles of the VCLT,<sup>6</sup> which is understandable since the VCLT has not yet received

---

<sup>1</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900).

<sup>2</sup> SIR ARNOLD MCNAIR, *THE LAW OF TREATIES* 364 (Oxford Clarendon Press 1961).

<sup>3</sup> Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

<sup>4</sup> Reuven S. Avi-Yonah, *International Tax as International Law*, 57 *TAX L. REV.* 483, 491–93 (2004). For those interested about a comprehensive study undertaken in the Brazilian context of the VCLT and tax treaty interpretation, see Luís Flavio Neto, *DIREITO TRIBUTÁRIO INTERNACIONAL. “CONTEXTOS” PARA INTERPRETAÇÃO E APLICAÇÃO DE ACORDOS DE BITRIBUTAÇÃO* (Quartier Latin 2018).

<sup>5</sup> UNITED STATES INCOME TAX TREATIES—A TO Z, <https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z> (last visited May 7, 2018). This Article focuses on income tax treaties, but its conclusions can be applied to estate and gift tax treaties.

<sup>6</sup> *Coplin v. United States*, 6 Cl. Ct. 115 (Cl. Ct. 1984), *rev'd*, 761 F.2d 688 (Fed. Cir. 1985), *aff'd sub nom. O'Connor v. United States*, 479 U.S. 27 (1986).

U.S. Senate advice and consent to ratification.<sup>7</sup> The Supreme Court has only cited to it twice in an incidental fashion, but the cases were not about tax treaties.<sup>8</sup>

The decisions adjudicated by the U.S. courts do not portray a uniform approach to the interpretation of tax treaties. A considerable number of them highlight differently the interaction among the treaty text, the purpose of the treaty, the goal of the negotiators, the Senate opinion and what is the appropriate reasoning to the analysis of all these factors.<sup>9</sup>

After analyzing the key issues related to the VCLT and tax treaty interpretation in the United States, this Article focuses on the study of some cases to examine whether or not the courts applied it when delivering their opinions, even if it has happened instinctively.

It also speculates what results would have been achieved had the VCLT been applied when the courts did not recourse to it. Theorizing a deep approach to the interpretation of tax treaties, however, is not its intent. Instead, its purpose is to demonstrate the feasibility and importance of the VCLT for the subject, summoning the courts to apply its interpretive principles.

Regardless of the inference of Savigny and other jurists that “interpretation is an art” and “cannot be learned and governed by any specific rules,” in accordance with the preponderant point of view, customary international law has developed rules on interpretation of treaties, which are accurately contemplated in the Vienna Convention.<sup>10</sup> Still, the American judiciary does not exactly follow its rules.<sup>11</sup>

Nonetheless, the U.S. court decisions that have already applied the interpretation rules of the VCLT, the majority of them out of the arena of tax treaties, are “especially valuable” as substantiation of international law since they are rendered by courts of a nation not a party to the Convention, and their importance is further reinforced because the United States, as the most

---

<sup>7</sup> OFFICE OF TREATY AFFAIRS: TREATIES PENDING IN THE SENATE (2019). See U.S. CONST. art. II, § 2 (“[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur.”).

<sup>8</sup> Rebecca M. Kysar, *Interpreting Tax Treaties*, IOWA L. REV. 1387, 1402 (2016).

<sup>9</sup> Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 743 (1998).

<sup>10</sup> Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT’L L. 281, 327–28 (1988).

<sup>11</sup> Kysar, *supra* note 8, at 1408.

active treaty-maker in the world, decidedly influences the law applicable to treaties.<sup>12</sup>

In fact, the Article demonstrates that the application of the VCLT by the courts adjudicating tax treaties, particularly the Supreme Court, is already happening as a non-written compromise. It also provides arguments for a compromise in that direction.

Notwithstanding, it is not the purpose to denote the adoption of the VCLT interpretation canons as the “sanctity of dogmas.” The idea is to demonstrate their importance and value, since acknowledged as customary international law.

#### I. ARTICLES 31 AND 32 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

“The treaty on treaties,”<sup>13</sup> “[t]he Bible of the international lawyer,”<sup>14</sup> the “[t]reaty designed to govern all other treaties,”<sup>15</sup> “a giant step for mankind toward a world in which the rule of law will be not a dream but a reality,”<sup>16</sup> or the “major achievement in the development and codification of international law,”<sup>17</sup> the VCLT “[h]as the potential to be the international instrument most often relied upon by national courts.”<sup>18</sup>

The rules on interpretation enclosed in the VCLT suggest an attempt to indicate the elements to be taken into account in that process, and to evaluate their relative weight in it, rather than to describe, let alone impose, the process of interpretation itself.<sup>19</sup> The principles laying down the so-called general rule of interpretation,

---

<sup>12</sup> Frankowska, *supra* note 10, at 384–85 (1988); see David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 972–73 (1994) (“[j]udges in the United States are increasingly realizing that the approach taken by the Vienna Convention on the Law of Treaties may lead to interpretative outcomes very different from those suggested by some of the litigants.”).

<sup>13</sup> Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT’L L. 495 (1970).

<sup>14</sup> Avi-Yonah, *supra* note 4, at 483.

<sup>15</sup> Frankowska, *supra* note 10, at 285 (1988).

<sup>16</sup> Kearney & Dalton, *supra* note 13, at 561.

<sup>17</sup> S. REP. NO. 106-71, at 44 (2001).

<sup>18</sup> Frankowska, *supra* note 10, at 286.

<sup>19</sup> I.M. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 117 (Manchester Univ. Press 2d ed. 1984).

[a]re mostly drawn from international judicial and arbitral practice, as it had developed since the late nineteenth century, and they were adopted by the ILC as a pragmatic compromise avoiding to follow one particular doctrine or theory of treaty interpretation. Also, since it considered the interpretation of documents to be to some extent an art, not an exact science, the Commission also disavowed the idea of proposing an elaborate code or canon of interpretation, but deliberately confined itself to some fundamental rules recourse to which is, moreover, discretionary rather than obligatory.<sup>20</sup>

Regarded as being amid the most successful provisions of the VCLT, it is said that Articles 31 and 32 attain a characteristic and fortunate balance between sobriety, flexibility, and normative guidelines. They are also regarded as indicative of customary international law.<sup>21</sup> *Verbatim at literatim*, the Articles 31 and 32 of the VCLT read as follows:

#### Article 31

##### General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

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

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion 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.

---

<sup>20</sup> VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 522 (Oliver Dorr & Kirsten Schmalenbach eds., Springer Publishing 2012).

<sup>21</sup> ROBERT KOLB, THE LAW OF TREATIES: AN INTRODUCTION 128 (Edward Elgar 2006).



## Article 32

## Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 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.<sup>22</sup>

Article 31 is unquestionably a central foundation of the Vienna Convention, and it has been so recurrently cited that only a condensed study of its various aspects is possible.<sup>23</sup> This general rule establishes the key role for the text of the treaty and looks to the text of other documents only to the extent they form an “agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty” or an “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.” Furthermore, the general rule is favorably disposed to look at “subsequent agreement between the parties regarding the interpretation of the treaty” and “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” The general rule is inclined to rely on “[a] special meaning [of] a term if it is established that the parties so intended.”<sup>24</sup>

It is clear the choice made by the VCLT in favor of the objective method of interpretation concentrated on the text. Intention has not been embraced by Article 31(1), notwithstanding it can be implicitly contemplated under the object and purpose test.<sup>25</sup> “[T]he relevant question is not so much what a treaty was intended to say, but rather what it actually says.”<sup>26</sup>

---

<sup>22</sup> VCLT, *supra* note 3.

<sup>23</sup> THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 805 (Olivier Corten & Pierre Klein eds., Oxford Univ. Press 2011).

<sup>24</sup> Michael S. Kirsch, *The Limits of Administrative Guidance in the Interpretation of Tax Treaties*, 89 TEX. L. REV. 1063, 1078–79 (2009).

<sup>25</sup> KOLB, *supra* note 21, at 132.

<sup>26</sup> FRANCISCUS A. ENGELN, INTERPRETATION OF TAX TREATIES UNDER INTERNATIONAL LAW: A STUDY OF ARTICLES 31, 32 AND 33 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES AND THEIR APPLICATION TO TAX TREATIES 427 (International Bureau of Fiscal Documentation 2004).

What is of primary importance, states Vogel, is the text of the treaty; in other words, “[t]he ‘ordinary meaning’ of the ‘terms,’ and the wording not of the *individual* provision, but that of the entire agreement in *context*. The older view that primarily looked for the subjective intent of the parties to the treaty is thereby rejected.”<sup>27</sup>

In line with Vogel, Lang utters that the interpretation of the “terms” written in a tax treaty taking the “context” into consideration stems from the general rule expressed in the VCLT.<sup>28</sup>

In conjunction with the text, which includes its preambles and annexes, the context also encompasses the contemporaneous agreements and instruments enumerated by the Article 31(2)(a) and (b) of the VCLT, such as protocols, memoranda of understanding, exchanges of notes, etc.<sup>29</sup>

According to Article 31(3)(a) of the VCLT, subsequent agreements entered into by the parties regarding the interpretation of the treaty or the application of its provisions must also be considered together with the context. Amendments to the treaty are not agreements in the meaning of Article 31(3)(a), despite equally binding on the parties.<sup>30</sup>

Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation shall also be taken into account together with the context.<sup>31</sup>

The relevant rules of international law applicable in the relations between the parties shall, likewise, be considered in the process of interpretation.<sup>32</sup> This rule manifests the principle that any treaty, as a result a tax treaty, cannot be understood in isolation from the other rules of international law applicable in the relations between the parties.<sup>33</sup>

The *ordinary meaning* is the meaning that flows genuinely from an unprejudiced and impartial reading of the text of the treaty taking into account its object and purpose in conjunction with a fair, honest and

---

<sup>27</sup> KLAUS VOGEL & ALEXANDER RUST, IN REIMER & RUST (EDS.), KLAUS VOGEL ON DOUBLE TAXATION CONVENTIONS 4th ed. (2015), Introduction at 82.

<sup>28</sup> MICHAEL LANG, INTRODUCTION TO THE LAW OF DOUBLE TAXATION CONVENTIONS 56–57 (Linde 2013).

<sup>29</sup> ENGELEN, *supra* note 26, at 429.

<sup>30</sup> *Id.* at 431.

<sup>31</sup> VCLT, *supra* note 3, art. 31(3)(b).

<sup>32</sup> *Id.* art. 31(3)(c).

<sup>33</sup> ENGELEN, *supra* note 26, at 436.

reasonable attention of the other conclusive evidence of the common intention of the parties considered in paragraphs 2 and 3 of Article 31. The presumption is that there is a *particular context* from where the terms of a treaty would be apprehended. Article 31(4) of the VCLT establishes the removal of that presumption if the parties intended to reach a *special meaning* for a given term of the treaty. If the party invoking that *special meaning* succeeds in proving it, there is no room for applying the supplementary means of interpretation expressed in Article 32 VCLT.<sup>34</sup>

The elements set forth in Article 31 of the VCLT are authentic and legally binding, unless they place a meaning ambiguous or obscure or lead to a result which is manifestly absurd or unreasonable. Consequently, Article 32 of the VCLT does not establish substitute means of interpretation. Its work is to aid or supplement an interpretation consonant with the general rule encompassed by Article 31. The sub-paragraph (a) of Article 32 VCLT is applicable only if the ambiguity or obscurity cannot be elucidated by an interpretation centered in good faith, namely, honestly, fairly and reasonably employing all the elements enunciated in Article 31 VCLT, and, as a result, only if such interpretation leaves a material hesitation as to the intended meaning.<sup>35</sup>

If the meaning built-in from Article 31 guidance is clear, it may only be aborted if, in the particular context, it would lead to an objectively and manifestly absurd or unreasonable result. The sub-paragraph (b) of Article 32 VCLT embraces an exception to the general rule of interpretation, hence its application should be rigorously restricted to circumstances where the application of Article 31, in the particular context, leads to a so absurd or unreasonable result that it is clear from the very beginning that this result is not what the parties reasonably had in mind. Such situations are exceptional and to the greatest extent identify with drafting errors or defective texts.<sup>36</sup>

What are the “supplementary means of interpretation” authorized by Article 32? Supplementary means include, but are not limited to, the preparatory work of the treaty and the circumstances of its conclusion.

The preparatory work is normally “understood to include written material, such as successive drafts of the treaty, conference records,

---

<sup>34</sup> *Id.* at 419.

<sup>35</sup> *Id.* at 420.

<sup>36</sup> *Id.* at 420–21.

explanatory statements by an expert consultant at a codification conference, uncontested interpretative statements by the chairman of a drafting committee and ILC Commentaries,” whose value depends on quite a few factors, particularly “authenticity, completeness and availability.”<sup>37</sup>

It is clear that they are all materials built during the construction of the treaty, with the involvement of representatives from both countries or all the countries in the case of a multilateral instrument.

Other “supplementary” approaches of treaty interpretation are based on domestic legal orders’ principles on statutory construction (e.g., *ejusdem generis*, *expression unius est exclusio alterius*, *lex posterior derogat legi priori*, *lex specialis derogat legi generali*, to name a few).<sup>38</sup> However, the employment of those principles could not lead to a derogation of the treaty text in favor of a statutory provision, except if it is the case of a country where the treaty override is possible.<sup>39</sup>

When the meaning resulting from the application of Article 31 of the VCLT is clear and, in the particular context, also leads to a reasonable result, the supplementary means specified in Article 32 may only have room for application where they validate this meaning.<sup>40</sup>

By placing emphasis on evidence of understanding between the parties, the VCLT reveals a solid appeal to interpret treaties harmonically with the “shared understanding of the parties.” In accomplishing this outcome, it assigns restrictions on the role of supplementary materials.<sup>41</sup>

Notwithstanding, in a practical view, Article 32 gives courts significant latitude to look beyond the treaty text, since it authorizes reference to supplementary materials both when a court finds the treaty text to be ambiguous and when it finds the text to be unambiguous.<sup>42</sup>

---

<sup>37</sup> ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 246 (Cambridge Univ. Press 2d ed. 2007).

<sup>38</sup> JAN KLABBERS, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW* 38–39 (Kluwer Law International 1996).

<sup>39</sup> *See infra* section VIII.

<sup>40</sup> ENGELEN, *supra* note 26, at 421.

<sup>41</sup> KIRSCH, *supra* note 24, at 1079.

<sup>42</sup> *Id.* (“Indeed, the International Court of Justice, when interpreting treaties under the Vienna Convention, frequently looks beyond the text of the document to these supplementary materials.”).

The expression “[i]n order to confirm the meaning resulting from the application of Article 31” consents this reference to supplementary means for purpose of meaning confirmation.

But the truth is that Article 32 does not offer great precision about how much ambiguity or obscurity must persist after investigating Article 31 in order to trigger Article 32. Even reasonable doubt may justify the resort to Article 32. Therefore, from a realistic perspective of the adjudicatory process, “as long as litigants bring *travaux* to court’s attention—as they always do—courts cannot prevent Article 31 analysis from becoming prematurely ‘contaminated’ by these supplementary materials.”<sup>43</sup>

## II. THE OECD MODEL COMMENTARIES AND THE VCLT

Here and there, American courts have been relying upon the Organisation for Economic Co-operation and Development (“OECD”) Commentaries<sup>44</sup> when building their opinions.<sup>45</sup> Where could the Commentaries suit within the interpretive frame devised by the VCLT? Well, there is significant uncertainty concerning the legal status of the Commentaries. In fact, scholars have been quite divided on the question.<sup>46</sup>

Nonetheless, Engelen provides a reliable approach to tackle the topic.<sup>47</sup> After an in-depth analysis of the relevant books and papers, the recommendations of the OECD Council to Member countries when concluding or revising tax treaties, and the international law status of the

---

<sup>43</sup> Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT’L L. 431, 440 (2004).

<sup>44</sup> Organisation for Economic Co-operation and Development, *Model Tax Convention on Income and Capital 2017*, OECD (Nov. 21, 2017), <http://www.oecd.org/ctp/model-tax-convention-on-income-and-on-capital-full-version-9a5b369e-en.htm>.

<sup>45</sup> See generally *Kimball v. Comm’r*, 6 T.C. 535 (T.C. 1946); *United States v. A.L. Burbank & Co.*, 525 F.2d 9 (2d Cir. 1975); *Taisei Fire and Marine Ins. Co. v. Comm’r*, 104 T.C. 535 (T.C. 1995); *North West Life Assurance Co. of Canada v. Comm’r*, 107 T.C. 363 (T.C. 1996); *Podd v. Comm’r*, 76 T.C.M. (CCH) 906 (T.C. 1998); *Nat’l Westminster Bank, PLC v. United States*, 44 Fed. Cl. 120 (Fed. Cl. 1999); *Nat’l Westminster Bank, PLC v. United States*, 58 Fed. Cl. 491 (Fed. Cl. 2003); *Nat’l Westminster Bank, PLC v. United States*, 69 Fed. Cl. 128 (Fed. Cl. 2005); *Nat’l Westminster Bank, PLC v. United States*, 512 F.3d 1347 (Fed. Cir. 2008); *Escobedo v. United States*, 2013 WL 6058485 at \*1 (S.D. Cal. 2013); *Topsnik v. Comm’r*, 143 T.C. 240 (T.C. 2014); *McManus v. United States*, 130 Fed. Cl. 613 (Fed. Cl. 2017).

<sup>46</sup> ENGELEN, *supra* note 26, at 439.

<sup>47</sup> *Id.* at 458–73.

Commentaries, his inferences consider to what extent the principles of acquiescence, estoppel and protection of legitimate expectations are pertinent “[w]hen interpreting and applying the provisions of tax treaties that are identical or substantially similar to those of the OECD Model Tax Convention.”<sup>48</sup>

Particularly, Engelen examines whether such legally non-binding instruments can be a source of legal obligation in the light of those principles.<sup>49</sup> Here is what he concluded:

- (i) Treaties between OECD Member countries.

If both parties to a tax treaty are OECD members, provided that the conditions below are met, the meaning established in the Commentaries must apply, otherwise it would be not an interpretation in “good faith.” The conditions are:

- a) Both parties should have voted favorably to the recommendations pertaining to the Model made by the OECD Council pursuant to Article 5(b) of the OECD Convention.<sup>50</sup>
- b) There is neither reservations on the provisions of the Model nor observations on the interpretations of those provisions as elaborated in the Commentaries thereon.
- c) The treaty follows the arrangement and the main provisions of the Model.
- d) There are no signals from both parties in the course of negotiation that the provisions would be understood differently than as stipulated in the Commentaries on the matching provisions of the model.<sup>51</sup>

Present all the circumstances above, the assumption must be that the parties have accepted the interpretation denoted out in the Commentaries, resulting in a tacit agreement on the grounds of Article 31(2)(a) of the VCLT, in the first place as they stand at the time of the treaty’s termination. The

---

<sup>48</sup> *Id.* at 463.

<sup>49</sup> VCLT, *supra* note 3.

<sup>50</sup> Organisation for Economic Co-operation and Development, *Convention on the Organisation for Economic Co-operation and Development*, OECD (Dec. 14, 1960), <https://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm> (“In order to achieve its aims, the Organisation may: (a) take decisions which, except as otherwise provided, shall be binding on all the Members; (b) make recommendations to Members; and (c) enter into agreements with Members, non-member States and international organisations.” (quoting Article 5 of the OECD Convention)).

<sup>51</sup> ENGELEN, *supra* note 26, at 465–69.

same remains true for later versions of the Commentaries, which in this case fits into Article 31(3)(a) of the VCLT, unless later changes or additions are a direct effect of amendments to the OECD Model Tax Conventions itself. Should that be the case, such later changes or additions could be a supplementary means of interpretations on the word of Article 32 of the VCLT.<sup>52</sup>

- (ii) Treaties between OECD Member countries and non-member States.<sup>53</sup>

Here it is necessary a split-up between associated States<sup>54</sup> and third States.<sup>55</sup>

Considering that for treaty interpretation purposes the standpoint of associated States is not much different from that of OECD Member countries, the conclusions above expressed in (i) also apply between OECD Member countries and associated States, as long as:

- a) There is neither reservations on the provisions of the Model nor observations on the interpretations of those provisions as elaborated in the Commentaries thereon.
- b) The treaty follows the arrangement and the main provisions of the Model. And:
- c) There are no signals from both parties in the course of negotiation that the provisions would be understood differently than as stipulated in the Commentaries on the matching provisions of the model.

---

<sup>52</sup> DAVID A. WARD ET AL., THE INTERPRETATION OF INCOME TAX TREATIES WITH PARTICULAR REFERENCE TO THE COMMENTARIES ON THE OECD MODEL 80 (International Fiscal Association, 2005) (discussing study conducted by group of prominent international tax scholars to analyze relevance of ambulatory updates to OECD Commentaries as guidance on earlier treaties). “In our view, later commentaries that represent a fair interpretation of the [OECD] Model and that clearly arise from the words of the Model [e.g., amplification of existing commentary by the addition of new examples or arguments to what is already there] and that do not conflict with commentaries current at the time the tax treaty was negotiated can be given weight as persuasive interpretations by the [OECD committee responsible for the Model] of the meaning of the particular Article of the Model but they cannot be considered to have been adopted by the treaty negotiators for purposes of the particular tax treaty. The new commentary would not fall within Article 31 [the general rule] of the *Vienna Convention* and therefore would only represent a helpful paraphrase or explanation of what could be said to be the meaning of the particular Article. Of course, if the interpretation is clear and unambiguous, the words in the particular tax treaty do not require references to the commentaries to be interpreted.” *Id.*

<sup>53</sup> ENGELEN, *supra* note 26, at 469–72.

<sup>54</sup> Non-member States that have established their consideration on the OECD Model Tax Convention and its Commentaries.

<sup>55</sup> Non-member States that have not established it.

In the case of tax treaties between OECD Member countries and third States, the Commentaries are at most a supplementary means of interpretation (Article 32 of the VCLT).

(iii) Treaties between non-member States.<sup>56</sup>

When interpreting a tax treaty between associated States identical to those of the OECD Model, one should apply the same principles pertinent to treaties between OECD Member countries and associated States. Being the case of a tax treaty between third States, is difficult to assume that the parties have agreed with the interpretation according to those of the Commentaries.

It is interesting to register, as did Kirsch, that “in very limited circumstances, U.S. tax treaty documents explicitly address the effect of ambulatory OECD Commentary guidance.”<sup>57</sup> He cites the memorandum of understanding (MOU) accompanying the U.S.-Austria tax treaty, which states that the tax treaty is based on the OECD Model Treaty and that the treaty’s provisions are “generally . . . expected to have the same meaning as expressed in the OECD Commentary.”<sup>58</sup> The MOU goes further and declares that “[t]he [OECD] Commentary—as it may be revised from time to time—constitutes a means of interpretation in the sense of the Vienna Convention on the Law of Treaties of May 23, 1969.”<sup>59</sup> Considering that the U.S.-Austria MOU itself, which was agreed to by both parties in connection with the conclusion of the treaty, is equivalent to “context” within the meaning of Vienna Convention Article 31(2), “[i]ts explicit reference to subsequently developed OECD Commentary should make that ambulatory Commentary relevant in interpreting the U.S.-Austria treaty, at least to the extent that the United States or Austria did not enter a reservation or observation with respect to a new OECD Commentary.”<sup>60</sup>

---

<sup>56</sup> ENGELEN, *supra* note 26, at 472.

<sup>57</sup> Kirsch, *supra* note 24, at 1081.

<sup>58</sup> *Id.* at 1081 (quoting Memorandum of Understanding Accompanying the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Austria, May 31, 1996, S. Treaty Doc. No. 104-31 (1996)).

<sup>59</sup> Kirsch, *supra* note 24, at 1081 (quoting Memorandum of Understanding Accompanying the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Austria, May 31, 1996, S. Treaty Doc. No. 104-31 (1996)).

<sup>60</sup> *Id.*



### III. IS THERE A THRESHOLD FOR TOLERABLE TEXTUAL AMBIGUITY?

Article 32 of the VCLT says that supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, can be employed 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 leaves the meaning ambiguous or obscure.

Therefore, we could say that if Article 31 leaves the meaning precise and clear enough—in one word, unambiguous—recourse to Article 32 is legitimate only to confirm that meaning, and the courts may be prevented from changing the clear meaning if subsequently they find a different one from the preparatory work records.

However, the job is not that easy. In the practical world of treaty interpretation, “ambiguous meanings” are much more recurrent than “clear or unambiguous meanings.”

Thus, the question is, would it be possible to establish a threshold for triggering Article 32? Or is the presence of a “reasonable unambiguous meaning” could be sufficient for preventing the potential trigger?

Bederman faced the subject in 1994, stating, “Vagueness will always be with us,” he says, and “the trick is to deal with it.”<sup>61</sup> First, an interpreter has to begin with the treaty’s text and embrace the VCLT’s threshold of ambiguity, breaking from the text only when its words present a result “manifestly absurd or unreasonable.”<sup>62</sup> This threshold should be adopted as a high level of tolerance for ambiguity. Then, the VCLT test should be employed to the applicable provisions of the treaty, avoiding the “[r]ecurring pathology in American judicial decisions to create ambiguity via structural readings of conventions in which the subject clause is made nonsensical by parallel readings with irrelevant provisions.”<sup>63</sup>

Second, if the break from the text is permitted, the interpreter should prefer the negotiation history and evidence of subsequent practice over the legislative history of the advice and consent process or unilateral

---

<sup>61</sup> Bederman, *supra* note 12, at 1030.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1030–31.

interpretations by the executive branch. In fact, these two later resources should be “[h]andled with extreme care.”<sup>64</sup>

Finally, if textual and extratextual sources do not succeed, the exegete should interpret the treaty as reasonably as possible to circumvent later charges of breaching the agreement. “If the first two rules of treaty interpretation miscarry, and a court must choose between a meaning advanced by a foreign nation and one by the executive branch, the construction of the treaty partner is to be preferred.”<sup>65</sup>

Despite its undeniable value, Bederman’s guide does not answer one question. Article 32 allows the recourse to supplementary means of interpretation to confirm the meaning resulting from the application of Article 31, whose paragraph four states that “a special meaning shall be given to a term if it is established that the parties so intended.”<sup>66</sup> What if the parties establish a “special meaning” in the preparatory work which conflicts with the meaning resulting from the application of Article 31 and the interpreter comes across this maze when trying to confirm the meaning that is neither absurd nor unreasonable?

The answer is not easy. The Supreme Court has stated that “the clear import of treaty language controls unless ‘application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent of expectations of its signatories.’”<sup>67</sup>

Similarly, the Tax Court has asserted that “when the language is reasonably clear, . . . , the party proffering a contrary interpretation must persuade the court that its construction comports with the view of both parties.”<sup>68</sup>

Article 31(4) apparently endorses those conclusions, but if we assume such seal of approval is correct, we easily tear down the threshold for triggering Article 32. If the parties intend to establish a meaning to be applicable objectively by the future interpreters of the treaty according Article 31(4) of the VCLT, they must include this meaning in the “context,”

---

<sup>64</sup> *Id.* at 1031–33.

<sup>65</sup> *Id.* at 1033.

<sup>66</sup> VCLT, *supra* note 3, at 31(4).

<sup>67</sup> *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982). See *infra* Section IX, paragraph A and C, about Justice Scalia and his concern regarding the way the Court referred to *Maximov v. United States* about *Sumitomo*.

<sup>68</sup> *North West Life Assurance Co. of Canada v. Comm’r.*, 107 T.C. 363 (T.C. 1996).

not merely in the preparatory works. “Context” is being adopted here in the exact limits enacted by Article 31 itself.

#### IV. ARTICLES 31 AND 32 OF THE VCLT AS CUSTOMARY INTERNATIONAL LAW IN THE UNITED STATES

At the time of the Founding, customary international law was referred to as the “law of nations.”<sup>69</sup> Back in those days, the term in its comprehensive sense covered not only what we today identify as customary international law, but also the “law merchant,” maritime law, and the law of conflict of laws.<sup>70</sup>

The Statute of the International Court of Justice defines customary international law as “general practice accepted as law.”<sup>71</sup> According to the *Restatement (Third) of Foreign Relations Law*, “Customary international law results from general and consistent practice of states followed by them out of a sense of legal obligation.”<sup>72</sup>

Appropriate sources of international law were recognized by the U.S. Supreme Court in *Smith*: customary international law “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.”<sup>73</sup>

In line with a ubiquitous *opinion juris* of the international community, the VCLT portrays a treaty which to a large extension is a restatement of customary law, independently binding States whether they are parties to the Convention or not. Even before the VCLT entered into force, States and the International Court of Justice had already invoked its provisions.<sup>74</sup>

The drafters of the VCLT were aware that the Convention is not purely declaratory of international law. Its preamble states: “Believing that the

---

<sup>69</sup> CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 391 (Wolters Kluwer Law & Business 5th ed. 2014).

<sup>70</sup> *Id.*

<sup>71</sup> Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993.

<sup>72</sup> RESTATEMENT (THIRD) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (AM. LAW INST. 1987).

<sup>73</sup> *United States v. Smith*, 18 U.S. 153, 160–61 (1820).

<sup>74</sup> Frankowska, *supra* note 10, at 286.

*codification* and *progressive development* of the law of treaties achieved in the present Convention. . . .”<sup>75</sup> Indeed, an appreciable period must elapse before a practice may amalgamate into custom,<sup>76</sup> but is undeniable that Articles 31 and 32 delivered a “comparatively skeletal guide to basic principles that were already well entrenched in customary international law.”<sup>77</sup>

The VCLT was signed by the United States but not yet ratified. If one visits the U.S. Department of State website and search for the VCLT, the first information found is transcribed below:

Is the United States a party to the Vienna Convention on the Law of Treaties?

No. The United States signed the treaty on April 24, 1970. The U.S. Senate has not given its advice and consent to the treaty. The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.<sup>78</sup>

In the first two decades after the signing of the VCLT, fourteen cases in the United States invoked the provisions of the VCLT, seven of which concerned with interpretation of treaties; all seven of those decisions were rendered by federal courts and concerned with interpretation invoked Article 31, the “general rule of interpretation.”<sup>79</sup> The courts avoided the intricate problem of identifying customary international law, using the Vienna Convention as a convenient anchorage. Nonetheless, for the courts of the United States—and of any State not party to a treaty—the burden of

---

<sup>75</sup> VCLT, *supra* note 3.

<sup>76</sup> Frankowska, *supra* note 10, at 286 n.27.

<sup>77</sup> Criddle, *supra* note 43, at 446.

<sup>78</sup> See U.S. DEPT. OF STATE, FREQUENTLY ASKED QUESTIONS, <https://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Apr. 8, 2022); U.S. DEPT. OF STATE, FREQUENTLY ASKED QUESTIONS, <https://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Apr. 8, 2022). The specific provisions are articles 2, 18, 20, 25, 26, 31, 32, 33, 35, 36, 46, 56, 60, and 63. See also Frankowska, *supra* note 10, at n.81.

<sup>79</sup> Frankowska, *supra* note 10, at 307–08. Frankowska list the cases concerned with interpretation in footnote 125: *Barr v. U.S. Dep’t of Justice*, 819 F.2d 25 (2d Cir. 1987); *Acrilicos v. Regan*, 617 F. Supp. 1082 (Ct. Int’l Trade 1985); *Westar Marine Services. v. Heerma Marine Contractors*, 621 F. Supp. 1135 (D.C. Cal. 1985); *Coplin v. United States*, 6 Cl. Ct. 115 (1984), *rev’d*, 761 F.2d 688 (Fed. Cir. 1985), *aff’d sub nom. O’Connor v. United State*, 479 U.S. 27 (1986); *Denby v. Seaboard World Airlines*, 575 F. Supp. 1134 (E.D.N.Y. 1983), *rev’d*, 737 F.2d 172 (2d Cir. 1984); *Day v. Trans World Airlines*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), *reh’g denied*, 429 U.S. 1124 (1977); *Husserl v. Swiss Air Transport*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff’d per curiam*, 485 F.2d 1240 (2d Cir. 1973).

determining the content of customary international law is not affected by the existence of a purportedly systemic treaty.<sup>80</sup>

After those first decades, we can also observe federal and state courts resorting to the VCLT interpretative rules, but now they have accomplished the task of distinguishing standards of customary international law.<sup>81</sup> As Criddle identified, “many lower federal and state courts apply the Convention’s treaty-interpretation provisions routinely as customary international law.”<sup>82</sup>

---

<sup>80</sup> Frankowska, *supra* note 10, at 387–88 (1988). Frankowska acknowledges that “the disintegration of the international community into political blocs espousing fundamentally different ideologies, accompanied by a deterioration of commonly shared values, has compounded the difficulties inherent in the process of determining rules of customary international law.” *Id.* at 381.

<sup>81</sup> Kysar, *supra* note 8, at 1402. Kysar cites on footnote 79 the following decisions as examples: *Gonzalez v. Gutierrez*, 311 F.3d 942, 949 n.15 (9th Cir. 2002) (“While the United States is not a signatory to the Vienna Convention, it is the policy of the United States to apply articles 31 and 32 as customary international law.”); *Aquamar S.A. v. Del Monte Fresh Produce N.A.*, 179 F.3d 1279, 1296 n.40 (11th Cir. 1999); *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 638 n.9 (5th Cir. 1994); *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001) (explaining that the court applies customary international law principles elucidated in the Vienna Convention on the Law of Treaties when interpreting treaties even though the United States is not a signatory); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1361–62 (2d Cir. 1991), *rev’d sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (“Rather than having evolved from a judicial common law, . . . principles of treaty construction are themselves codified[] in Article 31 of the Vienna Convention on the Law of Treaties.”); *Risinger v. SOC LLC*, No. 2:12-CV-00063-MMD-PAL, 2014 WL 804802, at \*2 (D. Nev. Feb. 27, 2014) (“Although the United States has not ratified the Vienna Convention on the Law of Treaties, our Court relies on it as an authoritative guide to the customary international law of treaties, insofar as it reflects actual state practices.” (quoting *Mora v. New York*, 524 F.3d 183, 196 n.19 (2d Cir. 2008))); *Busby v. State*, 40 P.3d 807, 814–15 (Alaska Ct. App. 2002) (applying the interpretive principles of the Vienna Convention).

<sup>82</sup> Criddle, *supra* note 43, at 434, 447 n.72. As reported by Criddle, every American court that employed the VCLT’s legal authority before 2004 (publishing date of his paper) has concluded that its provisions proclaim binding customary norms. He mentions the ensuing decisions on footnote 72: *Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423 (2d Cir. 2001) (“[W]e apply the rules of customary international law enunciated in the Vienna Convention on the Law of Treaties.”); *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 n.5 (2d Cir. 2000) (“We . . . treat the Vienna Convention as an authoritative guide to the customary international law of treaties.”); *Croll v. Croll*, 229 F.3d 133, 145 (2d Cir. 2000) (citing the Vienna Convention’s directive that treaty text “must be interpreted ‘in accordance with the ordinary meaning to be given to the terms . . .’”); *Aquamar, S.A. v. Del Monte Fresh Produce N.A.*, 179 F.3d 1279, 1296 n.40 (11th Cir. 1999) (“Although the United States is not a party to the Vienna Convention, it regards the substantive provisions of the Vienna Convention as codifying the international law of treaties.”) (quoting *Kreimerman v. Casa Veerkamp S.A. de C.V.*, 22 F.3d 634, 638 n.9 (5th Cir. 1994)); *Kreimerman v. Casa Veerkamp*, 22 F.3d 634, 638 (5th Cir. 1994) (“Although the United States is not a party to the Vienna Convention, it regards the substantive provisions of the Vienna Convention as codifying the international law of treaties.”); *Haitian Centers Council v. Sale*, 969 F.2d 1350 (2d Cir. 1992) (“[P]rinciples of treaty construction are themselves codified, in Article 31 of the Vienna Convention on the Law of Treaties.”); *R. Griggs Group Ltd. v. Filanto Spa*, 920 F. Supp. 1100, 1105 n.7 (D. Nev.

Indeed, the debate about the status of customary international law in U.S. courts has been vigorous over the past two decades.<sup>83</sup> Nonetheless, there is no doubt that Articles 31 and 32 of the VCLT are considered by the United States to be customary international law.<sup>84</sup>

In this perspective, the 2017 Annual Meeting of the American Law Institute Council<sup>85</sup> approved the language of the Section 106, Chapter 2,<sup>86</sup> of the *Restatement of the Law Fourth, The Foreign Relations Law of the United States Treaties*:<sup>87</sup>

§ 106. Interpretation of Treaties

(1) A treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose.

(2) The context for the purpose of interpreting a treaty comprises, in addition to the text (including its preamble and annexes), (a) any other agreement that was made between all the parties in connection with the conclusion of the treaty, and

---

1996) (“The United States is not a signatory to the Vienna Convention; however, it has been a policy of the United States that Articles 31 and 32 are declaratory of customary international law, and will be so applied in the United States.”); *Logan v. Dupuis*, 990 F. Supp. 26, 29 n.6 (D.D.C. 1997) (“Although the United States is not a party to the Vienna Convention, it regards the substantive provisions of the Vienna Convention (and specifically, Article 31) as codifying the customary international law of treaties.”); *Busby v. State*, 40 P.3d 807 (Alaska App. 2002) (“[B]oth federal and state courts have acknowledged and employed the principles of interpretation codified in the Vienna Convention. We will too.”); *State v. Martinez-Rodriguez*, 33 P.3d 267, 273 n.3 (N.M. 2001).

<sup>83</sup> Gary Born, *Customary International Law in United States Courts*, 92 WASH. L. REV. 1641, 1641 (2017).

<sup>84</sup> See Counter-Memorial of the United States of America (Case Concerning Avena and Other Mexican Nationals) 1 I.C.J. Pleadings, 67–68 n.142 (Nov. 3, 2003) (describing Article 31 as “an article reflecting customary international law” and stating that Article 32 “likewise reflects customary international law”); see also Brief for the United States as Amicus Curiae Supporting Petitioner, at 936, *Abbott v. Abbott*, 560 U.S. 1, 9 and n.6 (2010) (citing *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001)). Article 33 does not hold the same perspective in the U.S. judicial environment. Not that it cannot be considered as customary international law, but it was not expressly stated as strongly as it was regarding to Articles 31 and 32.

<sup>85</sup> *Annual Meeting 2017*, AMERICAN LAW INSTITUTE, <https://www.ali.org/annual-meeting-2017/> (last visited June 14, 2022).

<sup>86</sup> Whose title is: Status of Treaties in United States Law.

<sup>87</sup> Jennifer Moringo, *U.S. Foreign Relations Law, Treaties Approved*, AMERICAN LAW INSTITUTE, <https://www.thealiadviser.org/us-foreign-relations-law/treaties-approved/> (last visited June 14, 2022) [hereinafter *U.S. Foreign Relations Law*]; see also American Law Institute, <https://www.ali.org/projects/show/foreign-relations-law-united-states/> (last visited May 1, 2018).

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

(3) There shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding interpretation of the treaty or the application of the parties regarding its interpretation, and (c) any relevant rules of international law applicable between the parties.

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

(5) Recourse may be had to supplementary means of interpretation, including the treaty's negotiation history and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of subsections (1) through (4), or to determine the meaning when that application (a) leaves the meaning ambiguous or obscure or (b) leads to a result that is manifestly absurd or unreasonable.

(6) Courts of the United States have final authority to interpret a treaty for purposes of applying it as law in the United States. In doing so, they ordinarily give great weight to an interpretation by the executive branch.<sup>88</sup>

As Harvard Law School describes the Restatements of the Law, “the ALI’s aim is to distill the ‘black letter law’ from cases, to indicate trends in common law, and, occasionally, to recommend what a rule of law should be.”<sup>89</sup> In essence, they restate existing common law into a series of principles or rules.<sup>90</sup> The introductory Reporters’ Memorandum to the Section 106 language stated:

The prior Restatement did not recognize the Vienna Convention Articles 31 and 32 as fully reflecting customary international law regarding the rules for treaty interpretation and identified some potential divergence between the U.S. approach to interpretation of treaties and that of the Vienna Convention. However, subsequent developments in international law and state practice in applying the Vienna Convention principles, and in the U.S. domestic approach to interpretation of treaties, have both solidified international acceptance of the Vienna Convention standard and narrowed any perceived divergence in approach.<sup>91</sup>

---

<sup>88</sup> RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE U.S. TD No. 2 § 106 (AM. LAW INST. 2017).

<sup>89</sup> Harvard Law School Library, <https://guides.library.harvard.edu/c.php?g=309942&p=2070280> (last visited Aug. 14, 2018).

<sup>90</sup> *Id.*

<sup>91</sup> See *U.S. Foreign Relations Law*, *supra* note 87; see also American Law Institute, *supra* note 87. “This Section updates and elaborates upon the issues addressed in § 325 and parts of § 326 of

Section 106 clearly incorporates the principles of Articles 31 and 32 of the VCLT, and notwithstanding the deference to the executive expressed in the paragraph 6, it ought not to be understood as an authorization for the adoption of a unilateral interpretation.

Indeed, the Reporters' notes explanation resort to *Sumitomo*, and in this case the Supreme Court made clear that the meaning was agreed by the parties, since both Governments (Japan and the United States) expressly supported the interpretation as declared by the Court.<sup>92</sup> "When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinary strong contrary evidence, defer to that interpretation."<sup>93</sup>

After all, if Articles 31 and 32 of the VCLT were not rules reflecting customary international law, the courts would be prevented from employing them because of the non-retroactivity command formulated on its Article 4:

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.<sup>94</sup>

## V. THE HISTORICAL U.S. APPROACH TO TAX TREATY INTERPRETATION

Criddle argues that the methodological dissonance of U.S. courts having not fully assimilated the VCLT's customary canons displays a basic tension between two competing visions of their appropriate role in treaty litigation: (1) an internationalist approach acclimatized to international custom and committed to the promotion of an organized international system, and (2) a

---

RESTATEMENT THIRD, THE FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. LAW INST. 1987). The prior Restatement noted that the Vienna Convention interpretation provisions reflected "generally accepted principles," which the United States "has also appeared willing to accept . . . despite differences of nuance and emphasis," but it did not yet acknowledge the Vienna Convention as reflecting customary international law standards for the interpretation of treaties." RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE U.S. TD No. 2 § 106, Reporters' Notes (AM. LAW INST. 2017).

<sup>92</sup> See *U.S. Foreign Relations Law*, *supra* note 87. See also American Law Institute, *supra* note 87. See *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176 (1982).

<sup>93</sup> *Sumitomo*, 457 U.S. at 185 (1982).

<sup>94</sup> VCLT, *supra* note 3, art. 4.



nationalist approach that depicts interpretive principles analogically from national law and adjusts to shifting foreign-policy preferences.<sup>95</sup>

United States Courts have long accepted that international law not only delimits the treaty power's extension but also affords the foundations by which courts must interpret treaties.<sup>96</sup>

Before the 1920s, the conception that domestic courts should adopt a particular nationalist approach rather than apply customary international treaty canons would have appeared manifestly nonsensical. The nationalist approach seemingly became established in U.S. treaty interpretation only in the early-to mid-twentieth century, apparently replicating new movements in political and legal theory.<sup>97</sup>

The first decades of the twentieth century observed an attenuation of the United States' internationalist approach as new theoretical developments questioned customary international canons' pragmatic foundations, efficacy, moral and political legitimacy. This challenge was answered by American legal experts in a few distinct ways.<sup>98</sup>

First, legal academics and diplomats joined in several international conferences that attempted to crystallize and codify customary treaty standards in multilateral conventions. These conferences fashioned significant draft treaties such as the 1929 Havana Convention and the 1935 Harvard Draft Convention, and over time this systematization effort placed the underpinning for the International Law Commission's more successful labors after the Second World War.<sup>99</sup>

Second, "general principles of law" were indiscriminately adopted by U.S. courts to fill the jurisprudential vacuum in international treaty law, deviating U.S. treaty practice from its internationalist anchorages.<sup>100</sup>

Third, U.S. courts replied to the global crisis in international treaty law by rendering amplified reverence to the political branches' interests and experience.<sup>101</sup>

---

<sup>95</sup> Criddle, *supra* note 43, at 437 (2004).

<sup>96</sup> *Id.* at 465.

<sup>97</sup> *Id.* at 467, 468.

<sup>98</sup> *Id.* at 471.

<sup>99</sup> *Id.*

<sup>100</sup> Criddle, *supra* note 43, at 471, 472.

<sup>101</sup> *Id.* at 472.

As demonstrated by Criddle, the nationalist approach in U.S. treaty interpretation is neither a primary appraisal nor an inexorable consequence of the United States' "dualist" legal system.<sup>102</sup> For virtually a century and a half after the founding, U.S. courts applied a predominantly monist treaty jurisprudence, invoking and employing international treaty canons as U.S. law.<sup>103</sup>

Furthermore, there is scarce indication that judges of the period—the first decades of the twentieth century—intended to abandon the internationalist approach. "To the maximum extent possible, courts continued to rely upon international consensus as a guide." Due to the crisis of international treaty law, American courts merely had no choice but to frame new common law principles to aid them in disposing of the treaty cases brought to adjudication.<sup>104</sup>

#### VI. IS THE VCLT INTERPRETIVE FRAMEWORK HARMONIOUS WITH THE UNITED STATES' CONSTITUTION?

The Constitution of the United States deals with the treaty power in four provisions, Article I, Section 10;<sup>105</sup> Article II, Section 2;<sup>106</sup> Article III, Section 2;<sup>107</sup> and Article VI, Clause 2.<sup>108</sup>

An investigation is necessary to evaluate if the VCLT interpretive standards infringe the Constitution, a circumstance which would preclude courts from its application. In the first place, it was the United States that entered into the Convention, thus there is no transgression to Article I, Section 10.

---

<sup>102</sup> *See id.*

<sup>103</sup> *Id.* at 473.

<sup>104</sup> *Id.*

<sup>105</sup> U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation.").

<sup>106</sup> U.S. CONST. art. II, § 2, cl. 2 (The President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur.").

<sup>107</sup> U.S. CONST. art. III, § 2, cl. 1 ("The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their Authority.").

<sup>108</sup> U.S. CONST. art. VI, cl. 2. "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

The “advice and consent”—Article II, Section 2—deserves a special attention, since the VCLT was not yet “advised and consented” by the Senate, and consequently not ratified. “Advice and consent” is an ambiguous phrase which presidents and senators have debated since the nation’s founding.<sup>109</sup>

The VCLT was signed by the United States on May 23, 1969 and presented to the Senate on November 7, 1971.<sup>110</sup> The Senate Foreign Relations Committee reported a resolution of advice and consent to ratification, subject to an understanding and an interpretation, on September 7, 1972.<sup>111</sup> However, the Department of State and the Senate Foreign Relations Committee could not agree on satisfactory stipulations and the convention rests pendent on the Foreign Relations Committee calendar.<sup>112</sup>

Despite the lack of advice and consent, among the constitutional concerns expressed by the Senate one will not find any reference to Articles 31 or 32 of the VCLT.<sup>113</sup> Therefore, applying Articles 31 and 32 of the VCLT is not a Constitutional transgression to its Article II, Section 2 by the U.S. courts. Having been widely accepted by the United States courts as expressions of customary international law, at least Articles 31 and 32, such interpretive standards, additionally, do not conflict with any federal statute, since any federal statute establishes that the interpreter must search for the intention of the parties without looking first for the text of the treaty.

The next Article of the Constitution to be considered is Article III, Section 2, the judicial power.<sup>114</sup> When it comes to treaties, as with federal legislation, all three branches of government play important constitutional roles in their formation and internalization. The judicial power encompasses “all [c]ases, in [l]aw and [e]quity, arising under . . . [t]reaties,” just as it encompasses cases arising under the Constitution and “the laws of the United States,” and courts retain the same supreme interpretive authority on the

---

<sup>109</sup> *About Treaties: Historical Overview*, SENATE.GOV, <https://www.senate.gov/artandhistory/history/common/briefing/treaties.htm> (last visited Apr. 8, 2022).

<sup>110</sup> VCLT, *supra* note 3.

<sup>111</sup> *Id.*

<sup>112</sup> S. REP. NO. 106-71, at 20 (2001).

<sup>113</sup> *See id.* *See also* Frankowska, *supra* note 10, at 389 (“Though the Senate has withheld its advice and consent to ratification, its reasons hardly lie with the treaty’s merits.”).

<sup>114</sup> *See* U.S. CONST. art. III, § 2.

subject of U.S. treaties that they retain in cases concerning federal constitutional and statutory law.<sup>115</sup>

The supremacy clause—Article VI, Clause 2—proclaims treaties to be the “supreme law of the land,” which binds all states within the union.<sup>116</sup> Naturally the VCLT is not yet the law of the land since it was not ratified. Nonetheless, as I have been arguing in this Article, its canons of interpretation—Articles 31 and 32—can be applied as customary international law.<sup>117</sup>

As we can see, applying the VCLT, besides not weakening the political branches’ control over the United States’ treaty obligations, favors judges to apply a set of principles that the political branches already accept.<sup>118</sup>

Fundamentally, if there was some constitutional transgression or any transgression at all, the ALI would not publish the Section 106 of the Restatement of the Law Fourth.<sup>119</sup> Beyond that, the Constitution itself does not proclaim binding general interpretive rules.<sup>120</sup>

One question is relevant at this point. If the rules of interpretation are customary international law and do not violate the Constitution, are they binding on the U.S. courts?

Well, the answer is not easy, but according to Clark and Bellia, neither the modern position nor the revisionist view fully accounts for the role that traditional customary international law has played in the U.S. constitutional system.<sup>121</sup>

The modern position, as adopted by the *Restatement (Third) of Foreign Relations* relying upon *Sabbatino*,<sup>122</sup> is that “the international law on the interpretation of international agreements is binding on the United States, and

---

<sup>115</sup> Criddle, *supra* note 43, at 479–80 (2004) (citing U.S. CONST. art. III, 2, cl. 1).

<sup>116</sup> U.S. CONST. art. VI, § 2.

<sup>117</sup> See *infra* Section VIII (explaining the Supremacy Clause might trigger the issue of “treaty override.”).

<sup>118</sup> Criddle, *supra* note 43, at 488.

<sup>119</sup> See Frankowska, *supra* note 10, at 389 (“The courts’ application of provisions of the Vienna Convention may not be particularly objectionable.”).

<sup>120</sup> Kenneth S. Gallant, *American Treaties, International Law: Treaty Interpretation after the Biden Condition*, 21 ARIZ. ST. L.J. 1067, 1091 (1989).

<sup>121</sup> Bradford R. Clark & Anthony J. Bellia Jr., *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 743 (2012). Clark and Bellia make the argument that Supreme Court precedent addressing the traditional rights of foreign nations may be explained under Articles I and II of the Constitution, not as exercises of Article III judicial power to apply federal common law.

<sup>122</sup> See *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398 (1964).

is part of the law of the United States.”<sup>123</sup> The revisionist view, on the other hand, contends that customary international law “should not be a source of law for courts in the United States unless the appropriate sovereign—the federal political branches or the appropriate state entity—makes it so.”<sup>124</sup>

Advocates of the modern and revisionist positions have endeavored to exploit historical materials and judicial precedents to devise a uniform rule directing how federal courts should treat all rules of customary international law, be they established sovereignty-respecting rules or later-emerging sovereignty-limiting rules. “The modern position would treat all customary international law—including modern sovereignty-limiting rules—as self-executing federal common law applicable in state and federal courts. In some cases, however, this approach would undermine rather than further the Constitution’s allocation of powers.”<sup>125</sup> In opposition, the revisionist view would subject all undigested principles of customary international law to conflicting state law, which would generate a multitude of practical difficulties and would repudiate a great deal of historical practice.<sup>126</sup>

Clark and Bellia conclude arguing that customary international law can properly be applied by U.S. Courts to help materialize the Constitution’s allocation of foreign affairs powers.<sup>127</sup> “From this perspective, judicial application of traditional law of nations principles is a function of the assignment of Article I and Article II powers to the political branches, rather than an exercise of Article III power to make federal common law.”<sup>128</sup>

---

<sup>123</sup> M. CHERIF BASSIOUNI, INTERNAL EXTRADITION: UNITED STATES LAW AND PRACTICE 155 (Oxford Univ. Press 6th ed. 2014) (“Insofar as this section reflects customary law, or if the United States adheres to the Vienna Convention, courts in the United States are required to apply those rules of interpretation even if the United States jurisprudence of interpretation might have led to a different result.”); accord RESTATEMENT (THIRD) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1), (3), reporter’s notes 1, 3 (1987).

<sup>124</sup> Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2260 (1998).

<sup>125</sup> Born, *supra* note 83.

<sup>126</sup> *Id.* at 744.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 838.

## VII. SENATE CONDITIONS: RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS (RUDS)

Collectively known as “RUDs,” the United States has used a variety of labels for conditions with treaties that it had ratified, including “reservation,” “amendment,” “condition,” “understanding,” “declaration,” and “proviso.”<sup>129</sup> Those conditions usually come out in the Senate’s resolution of advice and consent, although it is not rare for the executive branch to propose them for the Senate to take into consideration.<sup>130</sup>

The VCLT only deals with reservations, Article 2(1)(d),<sup>131</sup> and amendments, Article 39.<sup>132</sup> “Reservations” and their express acceptances or objections must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.<sup>133</sup> They are not, thus, unilateral procedures. Correspondingly amendments also require an agreement between the parties.

National materials are clearly censured by the VCLT for interpretive purposes, which includes executive branch representations as to the meaning of a provision and contemporaneous record of presidential-senatorial “common understandings” of treaty interpretation during the proceeding of advice and consent.<sup>134</sup>

In 2001, the Committee on Foreign Relations of the Senate prepared a study about the Senate’s role on treaties and other agreements, which provides the following definitions:

(4) *Conditional approval.*—The conditions traditionally have been grouped into categories described in the following way.

—Amendments to a treaty change the text of the treaty and require the consent of the other party or parties.

---

<sup>129</sup> CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 35 (Oxford Univ. Press 2015).

<sup>130</sup> *Id.*

<sup>131</sup> VCLT, *supra* note 3, art. 2(1)(d) (“For the purposes of the present Convention: (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.”).

<sup>132</sup> *Id.* art. 39 (“A treaty may be amended by agreement between the parties.”).

<sup>133</sup> *Id.*

<sup>134</sup> Bederman, *supra* note 12, at 973.

—Reservations change U.S. obligations without necessarily changing the text, and they require the acceptance of the other party.

—Understandings are interpretive statements that clarify or elaborate provisions but do not alter them.

—Declarations are statements expressing the Senate’s position or opinion on matters relating to issues raised by the treaty rather than to specific provisions.

—Provisos relate to issues of U.S. law or procedure and are not intended to be included in the instruments of ratification to be deposited or exchanged with other countries.<sup>135</sup>

In any event, whatever name a condition is given by the Senate, if it alters an international obligation under the treaty, the President is expected to transmit it to the other party,<sup>136</sup> and in most cases it does, concluding the “protocol of exchange.”<sup>137</sup>

However, on occasion, the United States simply attaches reservations, declarations, and understandings without obtaining treaty partner’s express or implied consent.<sup>138</sup> Under such circumstances, should a court apply the VCLT—Article 31—ignoring those unilateral instruments or should a court honor them?

In *Xerox Corp. v. United States*, the Government sustained that copies of the Technical Explanation of the tax treaty signed between the United States and the United Kingdom “would have been sent to the U.K. negotiators.”<sup>139</sup> Nonetheless, according to the Court of Appeals, “no evidence of such ‘sending’ was provided, and it must be assumed that the Treasury’s files contained no such support.”<sup>140</sup> On this extremely one-sided record, it would violate any reasonable canon of construction to infer mutual assent by the signatories to the position taken by the Treasury.”<sup>141</sup>

Also, in *National Westminster Bank, PLC v. U.S.*, the Government contended that statements made by the Treasury Department and in the

---

<sup>135</sup> S. REP. NO. 106-71, at 7, 11 (2001).

<sup>136</sup> *Id.*

<sup>137</sup> MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 133 (1990).

<sup>138</sup> Criddle, *supra* note 43, at 476.

<sup>139</sup> *Xerox Corp. v. United States*, 41 F.3d 647, 656 (Fed. Cir. 1994), *rev’g* 14 Cl. Ct. (1988).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* Even though our criticism to such decision, see *infra*, Section IX, paragraph E, it is undeniable that the court recognizes the importance of “express acceptance” by the other State when there is some condition imposed by one reserving State.

Senate Report surrounding the ratification of the treaty supported its position.<sup>142</sup> *Per contra*, the Court of Claims decided that neither of the unilateral statements suggested “[t]hat at the time of Treaty ratification the U.S. contemplated that it would be adjusting the books and records of the branch to change the nature of actual transactions between the branch and the head office.”<sup>143</sup> In addition, “even if the court were to read these statements more broadly, the unilateral views of the U.S. are not controlling.”<sup>144</sup>

In this context, it is noteworthy to cite Justice Scalia’s concurring opinion in *United States v. Stuart*, stating that extratextual materials to be consulted “[m]ust be materials that reflect the mutual agreement (for example, the negotiation history) rather than a unilateral understanding.”<sup>145</sup>

In spite of those opinions, the fact is that, when interpreting tax treaties, the United States courts have been looking to unilateral instruments more than they should if the VCLT canons were properly applied.<sup>146</sup>

#### VIII. TAX TREATY OVERRIDES—IS IT A PROBLEM?

Article 26 of the VCLT proclaims the principle of *pacta sunt servanda*: “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>147</sup> Subsequently, Article 27 of the Convention deals with internal law and observance of treaties: “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>148</sup>

As reported by the OECD, “[t]he term ‘treaty override’ refers to a situation where the domestic legislation of a State overrules provisions of

---

<sup>142</sup> Nat’l Westminster Bank, P.L.C. v. United States, 58 Fed. Cl. 491, 499 (2003).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *United States v. Stuart*, 489 U.S. 353, 373–74 (1989) (Scalia, J., concurring) (“Using preratification Senate materials, it may be said, is rather like determining the meaning of a bilateral contract between two corporations on the basis of what the board of directors of one of them thought it meant when authorizing the chief executive officer to conclude it.”).

<sup>146</sup> See Kirsch, *supra* note 24, at 1063.

<sup>147</sup> VCLT, *supra* note 3, art. 26.

<sup>148</sup> *Id.* art. 27.



either a single treaty or all treaties hitherto having had effect in that State.”<sup>149</sup> Tax treaty override “[s]tems from a conflict between laws: domestic legislation is in conflict with one or more provisions of a previous international treaty.”<sup>150</sup>

Pursuant to the Supremacy Clause of the U.S. Constitution, in the United States treaties can be modified unilaterally by subsequent domestic legislation, and vice versa.<sup>151</sup>

Avi-Yonah makes the argument that “[o]n its face, the Supremacy Clause says nothing about the relationship between treaties and federal laws, and it is not at all clear whether it should ever have been interpreted as the basis for treaty overrides.”<sup>152</sup>

The Supreme Court has adopted what is called the “last-in-time” or “later-in-time” rule to those perspectives: in case of a conflict between a self-executing treaty and a federal statute, U.S. courts are to apply whichever is last in time.<sup>153</sup> Most of the times, the Court has applied this rule in the context of giving effect to a statute that is inconsistent with an earlier treaty.<sup>154</sup>

The later in time rule was codified by the Congress, for revenue purposes, through the amendment of Section 7852(d) of the Internal Revenue Code in 1988.<sup>155</sup>

---

<sup>149</sup> OECD Model Tax Convention on Income and on Capital, July 15, 2014, R(8)-2, <http://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm> (last visited Apr. 27, 2018).

<sup>150</sup> CARLA DE PIETRO, *TAX TREATY OVERRIDE* 217 (Wolters Kluwer 2014).

<sup>151</sup> U.S. CONST. art. VI, cl. 2 (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”); U.S. CONST. art. II, § 2, cl. 2 (“He [the President] shall have the power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur. . . .”).

<sup>152</sup> Reuven S. Avi-Yonah, *Treaty Overrides: A Qualified Defense of U.S. Practice*, in *TAX TREATIES AND DOMESTIC LAW* 69 (Guglielmo Maisto ed., 2006).

<sup>153</sup> BRADLEY, *supra* note 129, at 53.

<sup>154</sup> *Id.* The Supreme Court has formulated the treaty override doctrine on the following main constitutional pillars: international treaties and domestic law have the same rank within the national hierarchy, no priority is given to one or another by the U.S. Constitution; the adoption and ratification procedure of a treaty does not involve the House of Representatives; and a treaty is approved by the Senate and ratified by the President (CARLA DE PIETRO, *TAX TREATY OVERRIDE* 20 (Wolters Kluwer, 2014)).

<sup>155</sup> Anthony C. Infanti, *United States*, in 2 *TAX TREATIES AND DOMESTIC LAW* 355, 369 (Guglielmo Maisto ed., 2006) (quoting of Sec. 7852(d)) (“For purposes of determining the relationship between a provision of a treaty and any law of the United States affecting revenue, neither the treaty nor the law shall have preferential status by reason of its being a treaty or law.”).

The United States' responsibility under international law for complying with a treaty is not relieved by the last-in-time rule. Consequently, if a court decides to override a treaty, the United States' international obligations could be considered in breach. Having in mind the potential foreign relations consequences of such doing, courts frequently presume that Congress does not intend to override treaties. This canon of construction comes from *Charming Betsy*, “[p]ursuant to which U.S. courts will attempt to construe statutes, where possible, so that they do not conflict with international law (either treaty-based or customary).”<sup>156</sup>

Well, that being said, we need to address the theoretical circumstance of Congress overriding Articles 31 and 32 of the VCLT,<sup>157</sup> even considering Article I, Section I, clause 10 of the Constitution,<sup>158</sup> since “[w]ith the exception of nonderogable *jus cogens* norms, Congress may override customary international law [ . . . ].”<sup>159</sup> Indeed, lower courts have ascertained that Congress can violate customary international law.<sup>160</sup>

Although the overriding is in theory possible, it is not likely that Congress would engage in such a venture after taking so many years to reach the ratification, if the VCLT is eventually ratified. Moreover, it is worth to remember that among the constitutional concerns expressed by the Senate on the report to the President one will not find any contrary advice to the Articles 31 and 32 of the VCLT.<sup>161</sup>

It is true that the United States overrides treaties, but the substantial congressional enactments that have overridden treaty obligations are on the

---

<sup>156</sup> BRADLEY, *supra* note 129, at 54; *see* *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”); *see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).

<sup>157</sup> *See generally, e.g.*, Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002) (arguing that Congress can formulate rules of interpretation in many circumstances).

<sup>158</sup> U.S. CONST. art. I, § 8, cl. 10 (authorizing Congress to “define and punish . . . offen[s]es against the Law of Nations”).

<sup>159</sup> Criddle, *supra* note 43, at 488.

<sup>160</sup> BRADLEY & GOLDSMITH, *supra* note 69, at 407. Bradley and Goldsmith cite as examples *United States v. Yousef*, 327 F.3d 56, 93 (2d Cir. 2003), *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991), and *Garcia-Mir v. Meese*, 788 F.2d 1446, 1454–55 (11th Cir. 1986).

<sup>161</sup> *See* CONGRESSIONAL RESEARCH SERVICE LIBRARY OF CONGRESS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 45–48 (Comm. Print. 2001).

field of tax treaties,<sup>162</sup> and it has been criticized for this practice,<sup>163</sup> also bearing the political cost arising from it.<sup>164</sup>

However, within the particular subject of tax treaties, “[g]iven that the override addresses abuse, meaning, instances where the treaties are used in unintended manners, the political costs seem to have been bearable.”<sup>165</sup>

In this context, Avi-Yonah makes the argument that the practice of treaty override in the United States can generally be supported as harmonious with the essential purpose of tax treaties, which is, according to the OECD, the prevention of both double taxation and double non-taxation.<sup>166</sup>

Indeed, as addressed by Brauner, “[t]reaty abuse generally has been considered a domestic law issue.”<sup>167</sup>

Therefore, despite having overridden treaties in some occasions, that is neither a habitual nor an unjustified practice of the United States.

Finally, the VCLT is a very important multilateral treaty and there is no evidence of a multilateral treaty override in the United States.

## IX. CASE STUDY

### A. Maximov v. United States<sup>168</sup>

This case is about whether an American trust, whose beneficiaries were British residents, was exempt from federal income tax on capital gains realized in the United States under the Tax Treaty with the United Kingdom in force at the time, whose Article XIV provided that “a resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States tax on gains from the sale or exchange of capital assets.”<sup>169</sup>

---

<sup>162</sup> See generally David Sachs, *Is the 19th Century Doctrine of Treaty Override Good Law for Modern Day Tax Treaties?*, 47 TAX LAW. 867 (1994).

<sup>163</sup> See generally, e.g., Anthony C. Infanti, *Curtailing Tax Treaty Overrides: A Call to Action*, 62 U. PITT. L. REV. 677 (2001).

<sup>164</sup> Omri Marian, *Unilateral Responses to Tax Treaty Abuse: A Functional Approach*, 41 BROOK. J. INT'L L. 1157, 1179 (2016).

<sup>165</sup> *Id.* at 1179 n.82.

<sup>166</sup> Avi-Yonah, *supra* note 152, at 78.

<sup>167</sup> Yariv Brauner, *What the BEPS*, 16 FLA. TAX REV. 55, 92 (2014).

<sup>168</sup> See *Maximov v. United States*, 373 U.S. 49 (1963).

<sup>169</sup> *Id.*

Andre Maximov, the petitioner and trustee, sought a refund for the income tax paid on the gains, but clearly he was not a “resident of the United Kingdom,” since the trust was established in the United States, governed by the laws of one of its States and administered by an American trustee, Mr. Maximov himself.<sup>170</sup> However, he argued the disregard of the trust as a separate taxable entity invoking the purposes and objectives of the treaty, which denoted measuring the application of the exemptive provision by the economic impact of the tax.<sup>171</sup> Since the real burden of the tax fell upon the beneficiaries, who were United Kingdom residents, the exemption should be acknowledged, and the refund granted.<sup>172</sup>

It is interesting to mention that before reaching the Supreme Court, the Court of Appeals (Second Circuit) had said that “to give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties, it is necessary to examine not only the language, but the entire context of agreement.”<sup>173</sup> That passage denotes the importance given to the “entire context.”

The Supreme Court started interpreting the language of the Convention to find the definition of “resident of the United Kingdom,” which was defined as “any person (other than a citizen of the United States or a United States corporation) who is resident in the United Kingdom for the purposes of United Kingdom tax and not resident in the United States for the purposes of United States tax.”<sup>174</sup> As the word “person” was not defined in the treaty and it referred non-defined terms to the domestic tax law of the country applying it, under United States law the term “person” included a trust.<sup>175</sup> Therefore, the Court concluded that the trust was a separate “person” and a distinct tax entity, apart from its beneficiaries.<sup>176</sup> It was not, as a result, a resident of the United Kingdom.<sup>177</sup>

Justice Goldberg, delivering the opinion of the Court, voiced that

---

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 52.

<sup>172</sup> *Id.*

<sup>173</sup> *Maximov v. United States*, 299 F.2d 565, 568 (1962).

<sup>174</sup> *Maximov*, 373 U.S. at 53.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 53.

[i]t is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign, when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.<sup>178</sup>

Apparently, if the *obvious* meaning resulting from the text were in contradiction with the intent or expectations of its signatories, the Supreme Court would have decided differently, which would be in accordance with the VCLT only if those intent and expectations could fit into its Article 31(2) or (3).

Citing *Maximov* and emphasizing the adverb *particularly* in the quotation, Justice Scalia, in his *Stuart* concurring opinion, uttered that it would be inappropriate to sanction a deviation from clear text *even if there were* indications of contrary intent.<sup>179</sup> He also pointed out that in *Sumitomo*, the Court referred to *Maximov* to state that “[t]he clear import of treaty language controls unless ‘application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.’”<sup>180</sup> Nonetheless, he continued, “[o]ur *Sumitomo* dictum separated the last clause of this quotation from its context to support precisely the opposite of what it said.<sup>181</sup> Regrettably, that passage from *Sumitomo* is already being quoted by lower courts as ‘[t]he general rule in interpreting treaties.’”<sup>182</sup>

The use of the adverb *regrettably* by Justice Scalia<sup>183</sup> denotes his concern in strengthening the importance of the text and the context of the treaty, as the VCLT does.

---

<sup>178</sup> *Id.* at 54.

<sup>179</sup> *United States v. Stuart*, 489 U.S. 353, 372 (1989) (Scalia, J., concurring), *remanded to* 872 F.2d 929 (9th Cir. 1989).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* (“[I]t is particularly inappropriate for a court to sanction a deviation from the clear . . . .” (citing Justice Goldberg’s opinion in *Maximov*, 373 U.S. at 54)).

<sup>183</sup> *Id.*

### B. Great-West Life Assur. Co. v. United States

Canadian borrowers paid interest to Great-West Life (GWL) in 1967, 1968 and 1969.<sup>184</sup> GWL is a life insurance company organized under the laws of Canada and licensed to do business in the United States.<sup>185</sup> GWL determined that the interest was “effectively connected” with its U.S. life insurance business, then reported and paid the relevant income tax.<sup>186</sup>

Subsequently, GWL filed for a refund arguing that Article XII, as amended, of the Double Tax Convention between the United States and Canada exempted the interest from all U.S. tax.<sup>187</sup> Such Article XII, as amended and in force at the time of the facts reads as follows:

1. Dividends and interest paid by a corporation organized under the laws of Canada to a recipient, other than a citizen or resident of the United States of America or a corporation organized under the laws of the United States of America, shall be exempt from all income taxes imposed by the United States of America.
2. Dividends and interest paid by a corporation organized under the laws of the United States of America whose business is not managed and controlled in Canada to a recipient, other than a resident of Canada or a corporation whose business is managed and controlled in Canada, shall be exempt from all taxes imposed by Canada.

The parties have agreed that each of the textual requirements of Article XII have been met: the amounts at issue received by GWL are “interest”; each item of interest was paid by “a corporation organized under the laws of Canada”; and the recipient of interest (GWL) is neither “a citizen or resident of the United States of America” nor “a corporation organized under the laws of the United States.”<sup>188</sup> Bearing in mind Article 31 VCLT plain language, the conclusion ought to be in favor of GWL.

However, the court decided to investigate the intent of the contracting parties. The approach employed was not the one indicated by the VCLT, though. The court began its reasoning with the importance of the sourcing

---

<sup>184</sup> Great-West Life Assurance Co. v. United States, 678 F.2d 180 (Ct. Cl. 1982).

<sup>185</sup> *Id.* at 181.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 182.

rules for nonresident aliens and foreign corporations.<sup>189</sup> At the time of the facts, interest paid by a foreign corporation would be United States sourced if 50 or more percent of the payor's gross income were "effectively connected with the conduct of a United States business."<sup>190</sup>

Then the court turned to the Senate Committee on Foreign Relations Report and to the transmittal letter from the Acting Secretary of State to conclude that Article XII of the treaty "[e]ffected only a waiver of United States taxes imposed solely through the deemed sourcing provisions on those not present in the United States."<sup>191</sup>

In other words, as GWL was present in the United States by virtue of its United States life insurance operations, the treaty should not apply, and it was not entitled to the refund.

The documents employed by the court are unilateral, and are not included in the "supplementary means of interpretation," since Article 32 of the VCLT, as said above, when referring to the "preparatory work of the treaty" and to the "circumstances of its conclusion," made clear the bilateral feature of those expedients. Moreover, having recourse to Article 32 would be acceptable, as repeatedly reiterated in this Article, to confirm the meaning resulting from the application of Article 31 or when its application leaves the meaning ambiguous, obscure or leads to a result which is manifestly absurd or unreasonable. None of these requirements are present here. Even worse, considering the facts, its relatively easy to conclude in favor of GWL due to the plain language of Article XII of the treaty.

The court decided that the treaty would be applicable on those circumstances wherein the recipient of the interest was not present in the United States. Well, but what are the situations of effectively connected income wherein there is no presence, in some way, in the United States?

Vogel criticizes this opinion expressing that it is not acceptable "[a]n interpretation which, though corresponding to the intent of the parties, is in no way supported by the wording of the treaty. This is true even in cases where the interpretation of the treaty according to its wording may lead to a non-logical result."<sup>192</sup>

---

<sup>189</sup> *Id.* at 183–84.

<sup>190</sup> I.R.C. § 861(a)(1)(B) (2018).

<sup>191</sup> *Great-West Life Assurance Co.*, 678 F.2d at 188.

<sup>192</sup> VOGEL & RUST, *supra* note 27, at 83.

The American Law Institute also strongly criticizes this approach of the court stating that it is “squarely inconsistent with the rules of the Vienna Convention.”<sup>193</sup> Moreover, “[i]n deciding whether to give effect to the literal language of a treaty, a court should take into account the reasonableness of taxpayers’ reliance on that language.”<sup>194</sup>

### C. O’Connor v. United States

Taxpayers employed by the Panama Canal Commission filed suits for refund of federal income taxes.<sup>195</sup> The Claims Court entered judgment in favor of taxpayers,<sup>196</sup> and Government appealed. The Court of Appeals reversed, and certiorari was granted.<sup>197</sup> The Supreme Court, Justice Scalia, held that under Panama Canal Treaty, salaries paid to taxpayers by Panama Canal Commission were not exempt from United States taxation.<sup>198</sup>

Taxpayers, all United States citizens, during the respective relevant tax years were employees of the Panama Canal Commission (the “Commission”), an agency of the United States government.<sup>199</sup> The wages they received from the Commission were included in computing their federal income tax for the years 1979, 1980, and 1981.<sup>200</sup> Based on their understanding of an international agreement, the taxpayers filed claims for refund for the amount of tax paid with respect to income received from the Commission.<sup>201</sup> The Internal Revenue Service denied each of their claims and suits followed.<sup>202</sup>

On September 7, 1977, after years of negotiation, the United States and the Republic of Panama signed the Panama Canal Treaty.<sup>203</sup> The Senate

---

<sup>193</sup> AM. L. INST., FEDERAL INCOME TAX PROJECT: INTERNATIONAL ASPECTS OF THE UNITED STATES INCOME TAXATION II: PROPOSALS ON UNITED STATES INCOME TAX TREATIES 46 (1992) [hereinafter PROPOSALS ON UNITED STATES INCOME TAX TREATIES].

<sup>194</sup> *Id.*

<sup>195</sup> *See* O’Connor v. United States, 479 U.S. 27 (1986).

<sup>196</sup> Coplin v. United States, 6 Cl. Ct. 115, 115 (Ct. Cl. 1984), *rev’d*, 761 F.2d 688 (Fed. Cir. 1985), *aff’d sub nom.* O’Connor v. United State, 479 U.S. 27 (1986).

<sup>197</sup> *Coplin*, 761 F.2d at 688.

<sup>198</sup> *See* O’Connor, 479 U.S. at 28.

<sup>199</sup> *Id.* at 28.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *See* O’Connor, 479 U.S. at 28 (1986).



approved the treaty and it entered into force on October 1, 1979, restoring to Panama territorial sovereignty over the Canal Zone.<sup>204</sup> Panama granted to the United States the right to manage, operate, and maintain the canal until the year 2000. During this period, the canal was to be operated by the Commission.<sup>205</sup>

Because the Canal Zone would no longer be subject to United States territorial sovereignty, it was necessary to define the rights and legal status of the Commission and its employees vis-a-vis each country. These matters were to be governed by the Panama Canal Treaty (Implementation Agreement), whose Article XV deals with taxation of the Commission and its United States citizen employees:

ARTICLE XV

Taxation

1. By virtue of this Agreement, the Commission, its contractors and subcontractors are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property.
2. United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.
3. United States citizen employees and dependents shall be exempt from taxes, fees or other charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the Commission.
4. The Coordinating Committee may establish such regulations as may be appropriate for the implementation of this Article.<sup>206</sup>

The dispute centers on the correct interpretation of the first sentence in paragraph two.<sup>207</sup> The taxpayers claimed that, according to a literal interpretation, income earned by all United States citizens from the Commission was exempt from United States income taxation. The

---

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Panama Canal Treaty: Implementation of Article III, art. XV Pan.-U.S., Sept. 7, 1977, T.I.A.S. No. 10031.

<sup>207</sup> *O'Connor*, 479 U.S. at 31–32.

government contended that the provision was intended to bar only Panama, and not the United States, from taxing Commission employees.<sup>208</sup>

### *I. Claims Court Opinion*

In the Claims Court the government argued that the treaty language should not be construed literally because to do so would violate the intention of the signatories. The court recognized that it should not give literal effect to treaty language if it was persuaded that such language did not reflect the intention of the parties.<sup>209</sup> Despite government arguments that the literal language did not reflect the intention of the United States, the court construed the language literally because the government presented “*no evidence whatsoever* as to the interpretation given this language by Panama.”<sup>210</sup>

Articles 31 and 32 of the VCLT are cited by the Claims Court in two passages:

“Interpretation of [a treaty] must, of course, begin with the language of the Treaty itself.” *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180, 102 S. Ct. 2374, 2377, 72 L. Ed. 2d 765 (1982). Indeed, “[t]he clear import of treaty language controls unless ‘application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.’” *Id.* (quoting *Maximov v. United States*, 373 U.S. 49, 54, 83 S. Ct. 1054, 1057, 10 L. Ed. 2d 184 (1963)). In construing treaties, words “are to be taken in their ordinary meaning . . . and not in any artificial or special sense impressed upon them by local law.” *Geofroy v. Riggs*, 133 U.S. at 271, 10 S. Ct. at 298; *accord Santovincenzo*, 284 U.S. at 40, 52 S. Ct. at 84; *see* Vienna Convention art. 31, 63 Am. J. Int’l L. 885.<sup>211</sup>

A court ought not, of course, give literal effect to treaty language if it is persuaded that such language does not reflect the intention of the high contracting parties. *See, e.g., Sumitomo Shoji*, 457 U.S. at 180, 102 S. Ct. at 2377; *Great-West Life Assurance Co. v. United States*, 678 F.2d 180, 230 Ct. Cl. 477, 481 (1982); Vienna Convention art. 32, 63 Am. J. Int’l L. 885. On the other hand, the court may not simply rewrite the contract to achieve an end it deems desirable.<sup>212</sup>

---

<sup>208</sup> *Id.* at 32.

<sup>209</sup> *See* *Coplin v. United States*, 6 Cl. Ct. 115, 127 (Cl. Ct. 1984), *rev’d*, 761 F.2d 688 (Fed. Cir. 1985), *aff’d sub nom.* *O’Connor v. United States*, 479 U.S. 27 (1986).

<sup>210</sup> *Coplin*, 6 Cl. Ct. at 128, 145–47, 159 (emphasis in original).

<sup>211</sup> *Id.* at 126.

<sup>212</sup> *Id.* at 127–28.

The court referred to the *language of the treaty* and Article 31 of the VCLT, but instead of building its arguments in favor of the *object and purpose* of the agreement, repeatedly evoked the *interests and intentions* of both parties.<sup>213</sup> On those grounds, decided that “[a] fair reading of the language in question leads to the conclusion that it unambiguously exempts U.S. citizens who are Commission employees from taxation by Panama as well as the United States.”<sup>214</sup>

Well, if the text of the treaty is *unambiguous*, bringing into play Article 32 of the VCLT is dispensable, except for endorsing the interpretation based on the text. But the court was not in fact applying the VCLT accurately, despite having cited it. Its course of action, scrutinizing the *intention of the parties*, favors the nationalist approach argued by the Government. “[P]lain meaning of the treaty controls unless it is inconsistent ‘with the intent . . . of its signatories,’” stated the court.<sup>215</sup>

If the court were applying the VCLT, resorting to Article 32 would prevent it from modifying the *unambiguous language* in case that the *preparatory work* led to a different conclusion. Even acknowledging that the record exhibited by the Government carried considerable obstacles to a measurement of what the parties intended when they agreed to Article XV of the Implementation Agreement, the court delved into the negotiating history to manifest that the materials left many questions unanswered and concluded for sustaining the *unambiguous language* of the treaty.<sup>216</sup>

With all due respect, even though the Claims Court expressly cited the Article 31 of the VCLT, it seems that the “context” of the Implementation Agreement does not authorize its conclusion to grant the refund.

In effect, Paragraph 1 of Article XV explicitly grants the exemption “in the Republic of Panama,” therefore Paragraph 2 must follow this guidance. Additionally, the second sentence of Paragraph 2 says, “[s]imilarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.”<sup>217</sup> Well, if the second sentence states that the U.S. citizens employees are exempt from income earned outside the Republic of Panama, it seems that the first sentence (bone

---

<sup>213</sup> *Coplin*, 6 Cl. Ct. at 126.

<sup>214</sup> *Id.* at 127.

<sup>215</sup> *Id.* at 128.

<sup>216</sup> *Id.* at 128–35.

<sup>217</sup> Panama Canal Treaty: Implementation of Article III, *supra* note 206, at art. XV.

of contention) is affording the exemption “inside” Panama only, not in the United States territory.

Obviously, the courts have the authority to build their decisions in consonance with the rules of the system. However, since the customary international law status of Articles 31 and 32 of the VCLT, more attention should be paid to the *object and purpose* of the treaty, instead of the *intention of the parties*. Certainly, the conclusion would be different if the Court followed the VCLT standards of interpretation.

## 2. Court of Appeals Opinion

When the case reached the Court of Appeals, the Court of Appeals was informed by the U.S. government that “[o]n February 25, 1985, the United States received a diplomatic note from the Panamanian Foreign Minister in which he confirmed that the Panamanian Foreign Ministry shared the United States’ view that the Implementing Agreement was not intended to affect United States taxation of Commission employees.”<sup>218</sup> Letters from the Panamanian team that negotiated the Implementation Agreement were enclosed by the Foreign Minister, where they confirmed that Paragraph 2 of Article XV was “discussed, negotiated and drafted exclusively with respect to the tax exemption that the Republic of Panama would grant to United States-citizen employees of the Commission and their dependents.”<sup>219</sup>

Furthermore, according to the negotiators, the “provisions resulted from negotiations that did not deal with the United States authority to tax the individuals mentioned therein.”<sup>220</sup> The Court of Appeals also registered that “[I]n an appendix to the brief the government included the cable from the United States embassy in Panama transmitting the diplomatic note and the accompanying letters to the State Department.”<sup>221</sup>

The Court of Appeals admitted the new evidence grounded on Supreme Court case law establishing exception to the general rule when interpreting the meaning of treaties, whose plain words were:

---

<sup>218</sup> *Coplin*, 761 F.2d 688, 691 (Fed. Cir. 1984), *aff’d sub nom.* O’Connor v. United States, 479 U.S. 27 (1986).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *See id.*

The court's "role is limited to giving effect to the intent of the Treaty parties." *Sumitomo*, 457 U.S. at 185, 102 S. Ct. [sic] at 2380; accord *Great-Western Life Assurance Co. v. United States*, 678 F.2d 180, 183, 230 Ct. Cl. [sic] 477 (1982) (treaties must be construed to enforce intent of contracting parties). Because we deny the motions to strike, the record now reveals the intent of each government. Since both treaty parties agree that paragraph 2 was not intended to create an exemption from United States domestic taxation, the trial court's decision cannot be upheld. It is the government, not the taxpayers, which is entitled to judgment as a matter of law. Therefore, we reverse the decision of the Claims Court and direct that summary judgment be granted in favor of the appellant.<sup>222</sup>

The Claims Court had concluded on the *unambiguity* of the treaty language (Article XV of the Implementation Agreement), and the Court of Appeals said nothing to express the contrary.<sup>223</sup> Therefore, the latter is not confirming the meaning resulting from the context, but changing it as adjudicated in favor of the intention of the parties, since the Claims Court verdict was reversed.

As said before, pursuant to Article 32 of the VCLT, recourse to supplementary means of interpretation may be used in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when such interpretation leaves it ambiguous or obscure.

If the Court said the text—Article XV, paragraph 2—was unambiguous in favor of the taxpayers, then resorting to Article 32 was dispensable. On the other hand, if the text is indeed ambiguous, then Article 32 applies.

Although the Court of Appeals did not apply the VCLT interpretive frame, it is interesting to cite the opinion of Circuit Judge NIES—not the one delivering the opinion of the court, by the way—concerning to the evidence brought into play by the Government at the last minute, "with respect to the late filed concurrence by the Panamanian government with the interpretation by the U.S. State Department, that evidence was not necessary to the above decisions and is not necessary here. It merely confirms the most reasonable interpretation of the Article."<sup>224</sup>

After concluding that "[A]rticle XV had no relevance to taxation by the United States of its own citizens,"<sup>225</sup> Judge NIES implicitly applied Articles

---

<sup>222</sup> *Coplin*, 761 F.2d at 691–92.

<sup>223</sup> *See id.* at 688–92.

<sup>224</sup> *Id.* at 692.

<sup>225</sup> *Id.*

31 and 32 of the VCLT. In other words, it seems his conclusion is that the *unambiguous language*, actually, led to the interpretation in favor of the Government,<sup>226</sup> and in that case recourse to supplementary means to confirm the meaning after applying Article 31 is precisely the wording of Article 32.

### 3. Supreme Court Opinion

The Supreme Court held in favor of the Government building its arguments from the context and in the light of the object and purpose of the Agreement, according, then, Article 31(1) of the VCLT (despite having not cited it):

If the first sentence of § 2 were interpreted to refer to United States as well as Panamanian taxes, then the second sentence and § 3 would also do so, with the implausible consequence that United States citizen employees would be exempt not only from United States income taxes on their earnings from the Commission but also from such taxes on income from sources outside Panama and from all United States gift and inheritance taxes.<sup>227</sup>

Advancing his analysis, Justice Scalia asserted:

More persuasive than the textual evidence, and in our view overwhelmingly convincing, is the contextual case for limiting Article XV to Panamanian taxes. Unless one posits the ellipsis of failing to repeat, in each section, § 1's limitation to taxes "in the Republic of Panama," the Article takes on a meaning that is utterly implausible and has no foundation in the negotiations leading to the Agreement. For if the first sentence of § 2 refers to United States as well as Panamanian taxes, then the second sentence of § 2, and the totality of § 3, must do so as well—with the consequence that United States citizen employees and their dependents would be exempt not only from United States income tax on their earnings from the Commission, but also from United States income tax on all income from sources outside Panama (*e.g.*, United States bank accounts), and from all United States gift and inheritance taxes.<sup>228</sup>

Moreover, scrutinized out of context, the treaty interpretation as purported by the taxpayers would produce "[t]ax immunity of unprecedented

---

<sup>226</sup> As I expressed *supra* IX(C)(A) when I gave my interpretation of Article XV of the Implementation Agreement.

<sup>227</sup> *O'Connor v. United States*, 479 U.S. 27 (1986).

<sup>228</sup> *Id.* at 31.

scope,”<sup>229</sup> an absurd, or at least undesirable, result.<sup>230</sup> In this perspective, “a quick break from the text became necessary,”<sup>231</sup> which, is in accordance with Article 32 of the VCLT.

Strengthening Justice Scalia’s arguments, we can say that the object and purpose of the treaty is not to grant a domestic immunity resulting in double non taxation. Hence, Article 31(1) of the VCLT could support this potential reasoning, therefore the taxpayers’ interpretation was not built in good faith.

The Court also took into account together with the context, as the VCLT expresses in Article 31(3)(b), a practice in the application of the treaty which established the agreement of the parties regarding its interpretation:

It is undisputed that, pursuant to clear Executive Branch policy, the Panama Canal Commission consistently withheld United States income taxes from petitioners and others similarly situated, see Letter from John L. Haines, Jr., Deputy General Counsel, Panama Canal Commission, to David Slacter, United States Department of Justice, Dec. 20, 1982, pp. 2–3, 1 App. in Nos. 85–504, 85–505, 85–506, and 85–507 (CA Fed.), pp. 61–62, and that Panama, which had four of its own nationals on the Board of the Commission, did not object. The course of conduct of parties to an international agreement, like the course of conduct of parties to any contract, is evidence of its meaning.<sup>232</sup>

It is not clear if the Court would favor supplementary means of interpretation (Article 32 of the VCLT) in case it had found trusted records supporting the taxpayer’s position:

While the Claims Court may have been correct that the negotiating history does not favor the Government’s position sufficiently to overcome what that court regarded as a plain textual meaning in favor of the taxpayers, it certainly does not favor the taxpayers’ position sufficiently to affect our view of the text.<sup>233</sup>

In light of its leading tradition—nationalist approach—the answer is that yes, the opinion would probably favor the intention of the parties to the detriment of the text, whose meaning had already been built by the Court

---

<sup>229</sup> *Id.* at 32.

<sup>230</sup> Bederman, *supra* note 12, at 977.

<sup>231</sup> *See id.* at 977–78 (“Justice Scalia apparently felt uncomfortable in making the quick switch to extratextual means of construction.”). But, if the result from the text was unreasonable or absurd—a “tax immunity of unprecedented scope”—the interpreter can do it comfortably pursuant to Article 32 of the VCLT.

<sup>232</sup> *O’Connor*, 479 U.S. at 33.

<sup>233</sup> *Id.* at 35.

from the context, as demonstrated above. Yet again, as said in respect to the Claims Court judgment, if the meaning is clear, recourse to the Article 32 of the VCLT is not necessary, except to confirm it.

We can see in the Supreme Court opinion the interpretation canons enshrined in the VCLT. Before taking into account the practice in the application of the treaty (Article 31(3)(b)), it built the meaning starting with the text in its context and in the light of its object and purpose (Article 31(1)).<sup>234</sup>

#### D. United States v. Stuart

Stuart and Kapoor were Canadian citizens and residents, and they kept bank accounts with the Northwestern Commercial Bank in Bellingham, Washington.<sup>235</sup> In January 1984, the Canadian Department of National Revenue (Revenue Canada) asked the Internal Revenue Service (IRS) to provide their bank records respective to the years of 1980, 1981, and 1982.<sup>236</sup> The National Revenue substantiated its demands pursuant to Articles XIX and XXI of the 1942 Tax Treaty between the United States and Canada:

##### ARTICLE XIX

With a view to the prevention of fiscal evasion, each of the contracting States undertakes to furnish to the other contracting State, as provided in the succeeding Articles of this Convention, the information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws in so far as such information may be of use to the authorities of the other contracting State in the assessment of the taxes to which this Convention relates. The information to be furnished under the first paragraph of this Article, whether in the ordinary course or on request, may be exchanged directly between the competent authorities of the two contracting States.

##### ARTICLE XXI

1. If the Minister in the determination of the income tax liability of any person under any of the revenue laws of Canada deems it necessary to secure the cooperation of the Commissioner, the Commissioner may, upon request, furnish

---

<sup>234</sup> Bederman, *supra* note 12, at 974 (“[R]ecent decisions make clear that the move from text to intent is not to be taken lightly.”) (citing *O’Connor*, 479 U.S. 27 (1986)).

<sup>235</sup> *United States v. Stuart*, 489 U.S. 353, 353 (1989).

<sup>236</sup> *Id.*



the Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America.<sup>237</sup>

The “competent authority” under Article XIX—the IRS Director of Foreign Operations—concluded that the requests met the Convention text and served on Northwestern Commercial Bank administrative summonses for the demanded information. The Bank, at taxpayers’ request, refused to comply.

Grounded on 26 U.S.C § 7602(c),<sup>238</sup> taxpayers then petitioned the Federal District Court to repeal the summonses, contending that the IRS may not issue an order to further its investigation of a United States taxpayer when a Justice Department referral for possible criminal prosecution is in effect,<sup>239</sup> and because Revenue Canada’s investigation of taxpayers was a pending criminal investigation, United States law proscribed the use of a summons to obtain information for Canadian authorities regarding their American bank accounts.<sup>240</sup> Thus, the District Court ordered the bank to comply. The Court of Appeals reversed, holding that, under the treaty, first it is necessary to determine that Revenue Canada’s investigation has not reached a stage analogous to a Justice Department referral by the IRS and such a determination was not present in the case, and finally, the Supreme Court reversed and remanded.<sup>241</sup> Therefore, the controversy was whether the IRS had to be certain that any summons they issued on behalf of Canadian authorities was not in pursuance of a criminal prosecution.

---

<sup>237</sup> *Id.* (citing United States—Canada Income Tax Convention, Can.-U.S., Sept. 26, 1980, 1469 U.N.T.S. 189).

<sup>238</sup> “(c) NOTICE OF CONTACT OF THIRD PARTIES (1) GENERAL NOTICE An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made. (2) NOTICE OF SPECIFIC CONTACTS The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period by the Secretary with respect to the determination or collection of the tax liability of such taxpayer. Such record shall also be provided upon request of the taxpayer. (3) EXCEPTIONS This subsection shall not apply (A) to any contact which the taxpayer has authorized; (B) if the Secretary determines for good cause shown that such notice would jeopardize collection of any tax or such notice may involve reprisal against any person; or (C) with respect to any pending criminal investigation.” 26 U.S.C. § 7602(c) (2020).

<sup>239</sup> *Stuart*, 489 U.S. at 365.

<sup>240</sup> *Id.* at 357.

<sup>241</sup> *Id.* at 353.

The language of Article XIX prescribes the parties' obligation of furnishing relevant information that it is "in a position to obtain under its revenue laws."<sup>242</sup> Similarly, Article XXI consents the IRS Commissioner to provide information he "is entitled to obtain under the revenue laws of the United States of America."<sup>243</sup>

Again, taxpayers argued that the IRS would not be able, under American law, to proceed with an administrative summons to collect information.<sup>244</sup> Once a Justice Department referral was in effect, the IRS was not "in a position to obtain" such information once Canadian authorities have reached an analogous step in their investigation.<sup>245</sup>

The Supreme Court was not persuaded by the argument, American law, enunciated the Court, does not contain such a restriction.<sup>246</sup> Section 7602(c) is silent about foreign tax officials' decisions to scrutinize possible infringements of their countries' tax laws in contemplation of criminal legal process outside the United States.<sup>247</sup> Additionally, the elements of good faith portrayed by the Court does not embrace such a restriction, "Articles XIX and XXI of the 1942 Convention on their face therefore lend no support to respondent's position."<sup>248</sup>

As yet the Court applied the textual approach of the VCLT, in consonance with Article 31, nothing suggesting that it would be necessary going further. Notwithstanding, it did. The opinion inspected the Senate's ratification history to assert that the Committee on Foreign Relations report "[d]id not even mention the provisions for exchange of information."<sup>249</sup> There is no indication of incorporating domestic restrictions as an intention of the parties, neither in the Senate nor in the President's message to it.<sup>250</sup>

Apart from expendable, turning to unilateral instruments is not a recommended *modus operandi* for treaty interpretation, as this Article has been insisting to express. Article 32 of the VCLT does not enumerate them

---

<sup>242</sup> *Id.* at 354.

<sup>243</sup> *Id.*

<sup>244</sup> *Stuart*, 489 U.S. at 354.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 366.

<sup>248</sup> *Id.*

<sup>249</sup> *Stuart*, 489 U.S. at 366.

<sup>250</sup> *Id.* at 366–68.

among its sources of supplementary means of interpretation.<sup>251</sup> At this point, it is noteworthy to quote Justice Scalia's concurring opinion:

I concur only in the judgment of the Court because I believe that the text of Articles XIX and XXI of the Convention between the United States and Canada Respecting Double Taxation, Mar. 4, 1942, 56 Stat. 1405-1406, T.S. No. 983, is completely dispositive of respondent's claim under the agreement. The Court apparently agrees. . . . Given that the Treaty's language resolves the issue presented, there is no necessity of looking further to discover "the intent of the Treaty parties," . . . and special reason to avoid the particular materials that the Court unnecessarily consults.<sup>252</sup>

He continued emphasizing that the Court have already found it appropriate to give authoritative effect to extratextual materials only when a treaty provision is ambiguous.<sup>253</sup> Then, the opinion pointed out a strong criticism to the nature of the extratextual materials unnecessarily referred by the Court-preratifcation materials.<sup>254</sup> "[W]hatever extratextual materials are consulted must be materials that reflect the mutual agreement (for example, the negotiating history) rather than a unilateral understanding."<sup>255</sup> Therefore, Justice Scalia made his arguments precisely in favor of the interpretive frame of the VCLT, without citing it, though.

#### E. Xerox Corporation v. United States

Xerox brought action to recover federal income taxes paid for its taxable year ended December 31, 1974.<sup>256</sup> The U.S. Claims Court held that a United States corporate taxpayer was not entitled to foreign tax credit for portions of British subsidiary's (Rank Xerox, Limited—RXL) "advance corporation tax" (hereinafter "ACT") which subsidiary (RXL), in turn, had surrendered to its British subsidiaries, according to the British law.<sup>257</sup>

According to the facts, since the enactment by the United Kingdom of the so-called Finance Act of 1972 (hereinafter "FA 1972"), where a

---

<sup>251</sup> See VCLT, *supra* note 3, art. 32.

<sup>252</sup> *Stuart*, 489 U.S. at 371.

<sup>253</sup> See *id.*

<sup>254</sup> *Id.* at 371–74.

<sup>255</sup> *Stuart*, 489 U.S. at 371–74.

<sup>256</sup> *Xerox Corp. v. United States*, 14 Cl. Ct. 455 (1988), *rev'd*, 41 F.3d 647 (Fed. Cir. 1994).

<sup>257</sup> See *id.*

corporation resident in U.K. makes a “qualifying distribution,” an ACT is imposed on the corporation resident in the U.K. making such qualifying distribution (Section 84).<sup>258</sup> As stated by Sections 85 and 92 of the FA 1972, the distributing corporation may use the ACT payment in the following ways: (a) it may offset the ACT (subject to certain limits) against its own corporation tax liability, and any remaining balance may be carried back (two years) or carried forward (indefinite period); (b) it may surrender that right to one or more of its 51 percent or greater owned subsidiaries.<sup>259</sup>

Section 86 of the FA 1972 provides that a U.K. resident company receiving the distribution from another such company is entitled to a U.K. shareholder credit as a result of the receipt of the franked payment.<sup>260</sup> However, nonresident shareholders were excluded from this benefit.<sup>261</sup> On enactment of the FA 1972, the United States requested renegotiation of the existing tax treaty in force since 1946, to obtain the same allowance for U.S. shareholders receiving dividends from U.K. companies, thereby avoiding double taxation. The new treaty was signed on December 31, 1975 and came into force on April 25, 1980.<sup>262</sup>

The issue before the Court was whether the surrender by RXL of a portion of its ACT (the portion used to offset RXL mainstream corporation tax was not in dispute) to U.K. subsidiaries should have any effect on the availability of an Article 23(1)(c) U.S. foreign tax credit to its parent, Xerox.<sup>263</sup>

Treaty Article 23(1)(c) is retroactive to April 1, 1973:

Article 23—Elimination of Double Taxation

(1) In accordance with the provisions and subject to the limitations of the law of the United States (as it may be amended from time to time without changing the general principle hereof), the United States shall allow to a resident or national of the United States as a credit against the United States tax the appropriate amount of tax paid to the United Kingdom; and, in the case of a United States corporation owning at least 10 per cent of the voting stock of a corporation which is a resident

---

<sup>258</sup> Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-U.K., Dec. 31, 1975, <https://www.irs.gov/pub/irs-trty/uk.pdf> [hereinafter U.S.-U.K. Tax Treaty].

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Xerox Corp.*, 14 Cl. Ct. at 455.

of the United Kingdom from which it receives dividends in any taxable year, the United States shall allow credit for the appropriate amount of tax paid to the United Kingdom by that corporation with respect to the profits out of which such dividends are paid. Such appropriate amount shall be based upon the amount of tax paid to the United Kingdom, but the credit shall not exceed the limitations (for the purpose of limiting the credit to the United States tax on income from sources outside of the United States) provided by United States law for the taxable year. For the purposes of applying the United States credit in relation to tax paid to the United Kingdom:

(a) the taxes referred to in paragraphs (2)(b) and (3) of Article 2 (Taxes Covered) shall be considered to be income taxes;

(b) the amount of 5 or 15 per cent, as the case may be, withheld under paragraph (2)(a)(i) or (ii) of Article 10 (Dividends) from the tax credit paid by the United Kingdom shall be treated as an income tax imposed on the recipient of the dividend; and

(c) that amount of tax credit referred to in paragraph (2)(a)(i) of Article 10 (Dividends) which is not paid to the United States corporation but to which an individual resident in the United Kingdom would have been entitled had he received the dividend shall be treated as an income tax imposed on the United Kingdom corporation paying the dividend.<sup>264</sup>

In turn, Article 10(2)(a)(i) is retroactive only to April 6, 1975:

Article 10—Dividends

\* \* \*

(2) As long as an individual resident in the United Kingdom is entitled under United Kingdom law to a tax credit in respect of dividends paid by a corporation which is resident in the United Kingdom, paragraph (1) of this Article shall not apply. In these circumstances, dividends derived from a corporation which is a resident of a Contracting State by a resident of the other Contracting State may be taxed in the other Contracting State. However, such dividends may be taxed in the Contracting State of which the corporation paying the dividends is a resident, but if the beneficial owner is a resident of the other Contracting State, the tax so charged shall not exceed the tax provided in sub-paragraphs (a) and (b) below:

(a) In the case of dividends paid by a corporation which is a resident of the United Kingdom:

(i) to a United States corporation which either alone or together with one or more associated corporations controls, directly or indirectly, at least 10 per cent of the voting stock of the corporation which is a resident of the United Kingdom paying the dividend, the United States corporation shall be entitled to a payment from the

---

<sup>264</sup> U.S.-U.K. Tax Treaty, *supra* note 258, art. 28(2)(b)(i).

United Kingdom of a tax credit equal to one-half of the tax credit to which an individual resident in the United Kingdom would have been entitled had he received the dividend, subject to the deduction withheld from such payment and according to the laws of the United Kingdom of an amount not exceeding 5 per cent of the aggregate of the amount or value of the dividend and the amount of the tax credit paid to such corporation.<sup>265</sup>

Consequently, for the taxable year ended December 31, 1974, the year of the facts, when only Treaty Article 23(1)(c) was in force.<sup>266</sup> Therefore, the case centered on the ensuing grounds: (a) the language of the treaty itself; (b) the synchronous technical explanation; (c) the Revenue Procedure 80-18, and (d) a competent authority agreement.

### *1. The Language of the Treaty Itself*

According to the Claims Court:

The “tax credit” referred to above is, as plaintiff asserts, the section 86 U.K. shareholder credit. However, a credit against U.K. tax liability is not what the foregoing articles confer upon a U.S. shareholder. Article 10(2)(a)(i) provides that a U.S. direct investor receive a “payment” from the U.K. “equal to one-half of the tax credit” a U.K. resident would receive. Moreover, Article 23(1) specifically provides that a U.S. direct investor be allowed a U.S. tax credit “for the appropriate amount of tax paid (emphasis added) to the United Kingdom” on account of the dividend distribution. The Article 23(1)(c) credit is qualified as a U.S. credit applied “in relation to tax paid to the United Kingdom.”<sup>267</sup>

Indeed, the Article 23(1)(c) cannot be interpreted without consideration to the Article 23(1), which says:

In the case of a United States corporation owning at least 10 per cent of the voting stock of a corporation which is a resident of the United Kingdom from which it receives dividends in any taxable year, the United States shall allow credit *for the appropriate amount of tax paid* to the United Kingdom *by that corporation* with respect to the profits out of which such dividends are paid.<sup>268</sup>

The portion of the ACT surrendered to a subsidiary is not a tax paid “by the United Kingdom Corporation” that distributed the dividends.<sup>269</sup> Consequently, it is correct to conclude that the U.S.-U.K. Tax Treaty

---

<sup>265</sup> *Id.* art. 28(2)(a)(ii).

<sup>266</sup> *Id.*

<sup>267</sup> *Xerox Corp. v. United States*, 14 Cl. Ct. 455, 462 (1988), *rev'd*, 41 F.3d 647 (Fed. Cir. 1994).

<sup>268</sup> VCLT, *supra* note 3, art. 23(1)(c) (emphasis added).

<sup>269</sup> *Xerox Corp.*, 14 Cl. Ct. at 462.

warrants the tax credit unless or until the ACT is set off against mainstream corporation tax in the United Kingdom.

After analyzing the text, the Claims Court was diligent in building the interpretation based on other elements—the technical explanation; the Revenue Procedure 80-18, and a competent authority agreement—but *only after interpreting the text of the treaty itself*. Therefore, without citing it, the Claims Court applied correctly Article 32 of the VCLT, resorting to supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31.

However, the Court of Appeals concluded that it was necessary to look at the intention of the parties and reversed.<sup>270</sup> It relied on affidavits of treaty negotiators not even synchronous with the treaty but executed years later when the affiants were in private practice and had no risk in safeguarding the Treasury. The affidavits could fit, at best, on Article 32 of the VCLT, therefore inferior sources of those employed by the Claims Court—Article 31.<sup>271</sup> Little or no weight should generally be given to evidence of individual treaty negotiators in the interpretation of a tax treaty.<sup>272</sup>

In conclusion, if the VCLT were observed by the Court of Appeals, much probably the Claims Court would be upheld, and no tax credit would be allowed.

## 2. The Technical Explanation

As stated by the Claims Court, “to better determine the intent of the treaty parties with respect to the applicability of the Article 23(1)(c) credit, it is appropriate to examine the official pronouncements of the United States (and the United Kingdom) in connection with the ratification and implementation of the Convention.”<sup>273</sup>

---

<sup>270</sup> *Id.*

<sup>271</sup> Avi-Yonah, *supra* note 4, at 493.

<sup>272</sup> PROPOSALS ON UNITED STATES INCOME TAX TREATIES, *supra* note 193, at 51. “[A] ‘battle of experts,’ in which a court or other tribunal attempt to sort through the testimony of negotiators (who, in the United States at least, may have long since turned to other occupations) seems a time-consuming and unreliable way to arrive at a sound interpretation.” *Id.* at 51–52. It is important to note that the Court of Appeals’ decision rendered in 1994 was—or should be—aware of the ALI project, published in 1992.

<sup>273</sup> *Xerox Corp.*, 14 Cl. Ct. at 462.

The Technical Explanation prepared by the U.S. Department of the Treasury provided an article by article interpretation of the treaty, stating the following with reference to ACT in the context of Article 23:

ACT which reduces mainstream [corporation] tax in any year or years shall be attributable to any accumulated profits of the year or years for which the mainstream tax is reduced. Where ACT is used to offset mainstream tax, the offset will be viewed as a refund of the ACT initially allowed as a credit and as a tax paid in respect of the year for which the ACT is applied as an offset. Consequently, a reduction in the foreign tax credit for the year from which the ACT is carried must be made in accordance with section 905(c) of the Code.<sup>274</sup>

Accordingly, “the Article 23(1)(c) U.S. foreign tax credit is linked to the payment of ACT and the year of its application as an offset against U.K. corporation tax liability.”<sup>275</sup>

There is no evidence on the record of any disagreement or reservations in the Senate. Furthermore, after copies of the Technical Explanation have been sent to the U.K., it ratified the treaty in the form made official by the U.S. Senate, without supplementary reservation or amendment.<sup>276</sup>

Nonetheless, the Court of Appeals perception was diverse. Quoting the Senate Executive Report that accompanied the Treaty when it was presented for ratification in 1978, it concluded that the Treasury’s standpoint was not embraced.<sup>277</sup>

In fact, the Senate did not delight in the Technical Explanation, as we can see from its words, but the Report did not reject it at all:

The ACT refunds, the withholding tax, and the unrefunded portion of the ACT are treated for U.S. foreign tax credit purposes in a manner which is generally favorable to U.S. shareholders. These rules raise difficult and complex issues. In recommending the ratification of the proposed treaty, the Committee does not intend that these rules necessarily serve as a model for future treaties. Further, in recommending the ratification of the treaty, the Committee does not intend to adopt or reject the amplifications of the foreign tax credit rules contained in the Treasury technical explanation. Consequently, Treasury would not be foreclosed by the ratification of the treaty from modifying those administrative interpretations in the future should it deem it advisable to do so. Of course, the rules contained in the treaty also do not limit any legislative action in this area;

---

<sup>274</sup> *Id.* at 463.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 464.

<sup>277</sup> *Xerox Corp. v. United States*, 41 F.3d 647, 656 (Fed. Cir. 1994).



the computation of the foreign tax credit for unrefunded ACT may be subject to any generally applicable changes in the U.S. foreign tax credit rules which may subsequently be enacted.<sup>278</sup>

With all due respect, the Court of Appeals did not understand why, absent the Treaty, the ACT was not creditable, and that preconception contaminated its picture. U.S. citizens and domestic corporations are allowed credit for income taxes imposed by foreign countries and possessions of United States.<sup>279</sup> For purposes of § 901 of the Internal Revenue Code, a tax is deemed paid or accrued only by “the person on whom foreign law imposes legal liability for such tax, even if another person (e.g., a withholding agent) remits such tax.”<sup>280</sup> Hence, the ACT was not creditable absent the Treaty because the U.K. imposed legal liability on the U.K subsidiary, not on U.S. shareholder. In other words, it was not a withholding tax.

### 3. *The Revenue Procedure 80-18*

On the exact day the U.S.-U.K. Tax Treaty took effect—April 25, 1980—the Internal Revenue Service issued Revenue Procedure (Rev. Proc.) 80-18, wherein Section 3.05 reads as shown below:

Paragraph (1)(c) of Article 23 provides, in addition, that the one-half of the ACT paid by a United Kingdom corporation that is not refunded to a U.S. direct investor [pursuant to Article 10] and that would be credited or refunded to a United Kingdom individual resident is treated as an income tax imposed on the distributing United Kingdom corporation (rather than the U.S. shareholder). Under United Kingdom law, a United Kingdom corporation that pays ACT may, however, transfer to a related United Kingdom corporation the right to apply ACT against mainstream tax liability. Thus, for example, a United Kingdom subsidiary of a United Kingdom corporation may benefit from the parent’s ACT payment by offsetting part or all of the ACT against its own liability for United Kingdom mainstream tax. *In such a case, for U.S. foreign tax credit purposes and pursuant to Article 23, the parent corporation has not paid or accrued the unrefunded ACT offset against the subsidiary’s mainstream tax and has contributed to the capital of the subsidiary an amount equal to the unrefunded ACT offset. The subsidiary is considered to have paid or accrued only mainstream tax paid or accrued in excess*

---

<sup>278</sup> *Id.* at 655.

<sup>279</sup> I.R.C. §§ 901(b)(1), 7701(d) (2018).

<sup>280</sup> Treas. Reg. § 1.901-2(f)(1) (2021).

*of the ACT offset, plus the amount of unrefunded ACT so offset. (Emphasis added.)*<sup>281</sup>

The Revenue Procedure, although better explained the Article 23(1)(c) of the Treaty, is a unilateral extratextual material, an indeed could not be used as a source for interpretation, according to the VCLT.

#### *4. Competent Authority Agreement*

In accordance with Article 25 of the U.S.-U.K. Tax Treaty—Mutual Agreement Procedure—the competent authorities of both countries entered into negotiations, and an agreement emerged in December 1986 in the form of an exchange of letters which reads:

December 18, 1986  
Mr. P.W. Fawcett  
Inland Revenue, Policy Division Room F-14, West Wing  
Somerset House London, WC2R 1LB England

Dear Mr. Fawcett:

*The following* memorializes the agreements reached at our meetings of July 11, and September 12, 1986, and *is intended to constitute, when accepted by you, a competent authority agreement under Article 25 of the Convention* between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income (the “Convention”).

1. *It is agreed that Article 23(1)(c) provides a mechanism by which a U.S. foreign tax credit may be obtained for that part of the U.K. tax credit referred to in Article 10(2)(a)(i) which is not paid to a U.S. corporation but to which an individual resident in the United Kingdom would have been entitled had he received the dividend.*

2. *It is agreed that Article 23(1)(c) was included in the Convention for the purpose of ensuring that in accordance with Article 23(1)(a) the Advance Corporation Tax (“ACT”) payment which generally underlies the U.K. tax credit referred to in paragraph 1 would be treated as an income tax paid to the United Kingdom by the U.K. corporation paying the dividend, because the United States questioned to what extent, in the absence of the Convention, payments of ACT would be treated as payments of a creditable corporate income tax for U.S. foreign tax credit purposes.*

---

<sup>281</sup> *Xerox Corp.*, 14 Cl. Ct. at 464.

3. *It is agreed that, pursuant to Article 23(1), the Article 23(1)(c) mechanism must be applied in accordance with the provisions and subject to the limitations of the law of the United States and that a credit is to be given under Article 23(1)(c) only for the appropriate amount of tax paid to the United Kingdom.*

4. *It is agreed that Article 23(1) of the Convention was not intended to provide two U.S. foreign tax credits for a single payment of ACT to the United Kingdom or U.S. foreign tax credits in excess of the amount of corporation tax (including both ACT and mainstream corporation tax) paid to the United Kingdom in respect of the profits out of which a dividend is paid.*

5. *It is agreed that under the language of Article 23(1) which provides that the Article 23(1)(c) credit must be allowed in accordance with the provisions and subject to the limitations of the law of the United States, the timing of the credit is to be determined as a matter of U.S. law.*

I would appreciate your reply as to whether you are in agreement with the propositions set forth in paragraphs (1) through (5) above. If you do assent to these propositions, we will consider such propositions to be a competent authority agreement under Article 25 of the Convention. *This agreement will supersede any and all prior agreements or correspondence between us regarding the matters addressed herein.*

Sincerely,

[/s/] P.E. Coates [U.S. Competent Authority].

23 December, 1986

Mr. P.E. Coates

Associate Commissioner (Operations) Internal Revenue Service Department of the Treasury Washington, DC 20224 USA

Dear Mr. Coates:

Thank you for your letter of 18 December 1986 recording the agreements reached at our meetings on 11 July and 12 September 1986.

I am writing to say that *I am in agreement with the propositions set out in paragraphs 1 to 5 of your letter, and your letter and this letter now constitute a competent authority agreement under Article 25 of the UK/US Double Taxation Convention, superseding previous correspondence between us on the matters covered in the letters.*

Yours sincerely,

[/s/] P.W. Fawcett [U.K. Competent Authority].<sup>282</sup>

---

<sup>282</sup> *Id.* at 465–66.

In a clear nationalist approach to the interpretation of the treaty, the Court of Appeals looked outside the text and the context, never using the materials mentioned in Article 31 or 32 of the VCLT.<sup>283</sup> As stated by Avi-Yonah, the general consensus is that *Xerox* “got away with murder.”<sup>284</sup>

#### CONCLUSION

Tax treaties are deficient in operative provisions of law, since they mostly work as jurisdictional blankets to the domestic rules of taxation, confining a state’s prerogative to tax a certain item of income.<sup>285</sup>

This feature enhances the weight of the textual approach adopted by the VCLT when applied to their interpretation. If one of its tasks is to limit the potential taxation that is granted by the domestic law, the VCLT interpretation standards can provide greater certainty to this purpose. On the other hand, as can be observed in *O’Connor v. United States*,<sup>286</sup> the textual approach prevented a double non taxation result.

The overall perspective was to demonstrate that the U.S. international tax law can benefit from incorporating customary international references of treaty interpretation into the domestic law. This Article demonstrates that there is no harm if courts resort to the VCLT when ruling about tax treaties. As shown, the Supreme Court has already applied it, although not expressly citing it. On the other hand, cases such as *Xerox v. United States* reveals the inconvenience of not applying the VCLT.

The application of the VCLT by the U.S. courts as an encompassment of customary international law in the field of interpretation of tax treaties helps to promote the development of international law within the international legal order.<sup>287</sup>

In 1984, Dalton asked, “has not the time come for the executive branch and the Senate to look again at the Vienna Convention on the Law of Treaties

---

<sup>283</sup> For a discussion about the contrast between the nationalist and the textual approach, see generally Criddle, *supra* note 43.

<sup>284</sup> Avi-Yonah, *supra* note 4, at 493.

<sup>285</sup> Kysar, *supra* note 8, at 1411.

<sup>286</sup> See *O’Connor v. United States*, 479 U.S. 27 (1986).

<sup>287</sup> Frankowska, *supra* note 10, at 383.

to assess whether overall U.S. interests would be served by our becoming a party to it?”<sup>288</sup>

In 1988 Frankowska summoned, “[t]he time has come for the Senate to give the Convention serious consideration.”<sup>289</sup> As the Reporters’ notes to the Section 106 approved language of the Restatement of the Law Fourth indicated:

[a]lthough U.S. courts have not always precisely tracked the principles set forth in the Vienna Convention, their approach to treaty interpretation has generally been consistent with those principles. Subsequent developments in international law and state practice in applying the Vienna Convention criteria, as well as in the U.S. domestic approach to interpretation of treaties, have both solidified international acceptance of the Vienna Convention standard and helped to reduce any perceived divergence in approach.<sup>290</sup>

Incorporating the customary interpretive standards into U.S. jurisprudence symbolizes a critical step toward the development of a coordinated international system for treaty adjudication. Obviously, the VCLT interpretive guidelines cannot ensure guarantee perfect transnational coordination in judicial treaty interpretation, “[b]ut at very least they provide a starting point for a more sophisticated, transnational treaty jurisprudence.”<sup>291</sup>

Since some opinions have already instinctively applied the canons of the VCLT, why not start applying them consistently?

---

<sup>288</sup> Robert E. Dalton, *The Vienna Convention on the Law of Treaties: Consequences for the United States*, 78 AM. SOC’Y INT’L PROC. 279 (1984).

<sup>289</sup> Frankowska, *supra* note 10, at 390.

<sup>290</sup> See *U.S. Foreign Relations Law*, *supra* note 87; American Law Institute, *supra* note 87.

<sup>291</sup> Criddle, *supra* note 43, at 436, 498.