RECENT DEVELOPMENTS IN THE INTERPRETATION AND APPLICATION OF DOUBLE TAXATION CONVENTIONS

I have chosen as my topic for today's lecture a discussion of recent developments in the interpretation and application of double taxation conventions (which I shall generally refer to as "tax treaties" or as "DTC's").

There are a number of reasons why I have chosen this topic.

First, out of sheer laziness. I am presently in the process of updating a book about DTC's so I have been looking at this issue during the last couple of months.

Secondly, because I think this is an increasingly important topic for anyone involved in taxation in practice. As international trade and investment grows, fewer and fewer tax issues involve only the tax law of one country, while more tax issues involve cross-border questions. Increasingly, double taxation conventions are relevant to these cross-border questions.

At the same time, countries are concluding more tax treaties. The United Kingdom, for example, now has over 100 comprehensive double taxation conventions in force - we have a tax treaty with very nearly every one of our major trading and investment partners. Portugal has not quite reached the position of the United Kingdom, but nevertheless has a significant number of tax treaties. A database that I consulted showed that at the end of last year Portugal had seventeen comprehensive income tax treaties in force, with a number of treaties waiting to go into force. I suspect that a number of those treaties have, in fact, already entered into force.

Because of the increase in importance of tax treaties and the increasing number of treaties, we are all finding ourselves having to interpret the meaning of tax treaties more often. It is for that reason that I have chosen this topic for today's lecture.

What I would like to do in this lecture is to look at a number of aspects of tax treaty interpretation. In particular, I would like to look at the general approach to tax treaty interpretation and some of the aids to treaty interpretation. As aids to treaty interpretation I shall be looking at the Commentary on the OECD Model treaty, the role of mutual agreements between Revenue authorities, foreign language texts, decisions of foreign courts and the role of expert evidence.

Before I look at these topics, however, I would like to tell you about an English court case that never was. A little over a year ago I was involved in a dispute between a client and the Inland Revenue over the interpretation of a tax treaty. Unfortunately, the issue was settled by agreement and will never come to a court hearing. That is a great pity because the issue would have been a fascinating one (and the fees that I would have earned would possibly have paid for my children's education). Sadly, the Inland Revenue and the clients did not take the matter to court so I have to find some other way of paying for their education.

The issue concerned the double taxation convention between the United Kingdom and Luxembourg, and the Dividend Article in particular. That Article provides for a repayment of tax if the recipient of dividends from a UK company is the "beneficial owner" of the dividends. In our case, we had the situation of a Luxembourg company which was in liquidation. The question was whether a company in liquidation is the beneficial owner of dividends received by it.

The particular problem arises because there is a rule of English law that a company in liquidation ceases to be, for domestic law purposes, the beneficial owner of its assets[i]. Once the company enters into liquidation, the assets belong beneficially to the creditors (or shareholders) of the company not the company itself.

The Inland Revenue argued that this domestic rule also applied to the interpretation of the tax treaty. Since the Luxembourg company was in liquidation, it could not be the beneficial owner and could not take the benefit of the Dividend Article.

We disagreed, and we proposed to argue that the correct interpretation of the treaty meant that we were entitled to benefit.

In support of our argument, we had already amassed a great deal of supporting material. We would be seeking to rely upon the Commentary prepared by the OECD. We would also be seeking to rely upon a report relating to tax treaties prepared by the OECD Committee on Fiscal Affairs. One of the major issues in the case would be the application of Article 3(2) of the treaty, which was based upon the OECD Model. We also were planning to rely upon certain cases decided by foreign, non-UK courts, particularly a decision of the Dutch Supreme Court. Finally, we were planning to rely upon various articles written by learned academics.

The articles written by academics were particularly important. One of the most helpful articles was written by Professor John Avery Jones, in which he supported our view. This was particularly important because John Avery Jones sits as a tax judge and it seemed likely that he would be the judge who would hear our case. It is always helpful when you are arguing a case before a judge if you can cite to him articles where he has supported your viewpoint. This may be one of the reasons why the Inland Revenue were so willing to settle the case.

I am not certain how surprising it may seem to persons versed in the Portuguese legal system that we were gathering so much supplementary material in that case. It is certainly very unusual in the context of the English legal system to bring forward so many secondary sources as an aid to interpretation. The English courts generally apply a literal approach to the interpretation of statues, and are not willing to accept much extrinsic material as an aid to interpretation. English courts, for example, seldom refer to decisions in foreign courts. There is an old rule that they will only refer to the views of academic writers if the academic writer is dead. It is only very recently that the courts have decided that they can look at the debates in Parliament when interpreting legislation that was being discussed there.

Sadly, the case will never come to trial. We still remain uncertain as to what is the true meaning of the expression "beneficial owner".

The General Approach to the Interpretation of Double Taxation Conventions

My comments about the approach of the English courts to statutory interpretation lead me to say something about the general approach that courts take to the interpretation of tax treaties. In common law countries, that approach is very different from the approach that we would take to the interpretation of tax statutes themselves.

As I have explained, we take a literal approach to the interpretation of tax statutes. With regard to tax treaties, however, the approach is a broad, liberal approach consistent with the purpose of the tax treaty. It is often said that in interpreting a tax treaty one should seek the intention of the Contracting States when they entered into the tax treaty. That is a comment I will come back to later today.

Let me mention here the first of a number of court decisions that I am going to refer to in this lecture. This was a decision of the Supreme Court of Canada in a case called R. v. Crown Forest Industries Limited[ii]. The case concerned a company which had been incorporated in the Bahamas but which was carrying on a shipping business from the United States. The company was exempt from tax in the Bahamas; it was also exempt from tax in the United States because there are special provisions exempting shipping companies in the US.

The company received from Canada rental payments for the leasing out of barges. The company argued that those rental payments should be subject to a lower rate of tax in Canada because of the treaty between Canada and the United States.

In order to take advantage of the treaty, the company had to show that it was a resident of the United States.

The Supreme Court of Canada held that the company was not a resident of the United States. Though its business was administered there and it was carrying on business in the US, it was not a resident because it was not subject to tax there. I might say, briefly, that I personally don't agree with that decision.

What I particularly wanted to note was the comment of the judge in the Supreme Court of Canada on the approach to interpreting tax treaties. He said as follows:

> "In interpreting a treaty, the paramount goal is to find the meaning of the words in question. This process involves looking at the language used and the intentions of the parties. Both upon the plain language … and through an interpretation of the goals and purposes of the double taxation convention, I reach the same destination …"

Thus he stressed the element of looking at the goals and purposes of the treaty, as well as looking at the language used.

A similar statement is found in the decision of United States Tax Court in the important case of North West Life Assurance Company of Canada v. The Commissioner of Internal Revenue[iii]. That case concerned the issue of the computation of the tax liability of a Canadian insurance company which had a branch in the US. Under US domestic law, the profits of an insurance company which arise in the United States are attributed on a formula basis. The question at issue here was whether the provisions of the US/Canada tax treaty could override that formula basis.

I want to quote very briefly what the majority of the US Tax Court said about the interpretation of tax treaties. They said as follows:

> "The goal of convention interpretation is to give the specific words of a convention a meaning consistent with the genuine shared expectations of the contracting parties … courts liberally construe treaties to give effect to their purpose …"

My final quotation here comes from another Canadian case, this time a decision of the Tax Court of Canada in RMM Canadian Enterprises Inc v. R.[iv].

That case concerned the relationship between tax treaties and domestic anti-avoidance legislation: which is, I should say, one of the most difficult issues in international tax law.

In looking at the approach to the interpretation of tax treaties, the trial judge said as follows:

> "That [tax treaties] should be construed liberally and in a manner that will best achieve their purpose is obvious. In determining the intention of the parties recourse may be had to a vast array of extrinsic materials, including the OECD Model convention and the Commentary on it as well as the travaux préparatoires …"

What is important about each of these quotations given above is that the courts reaffirmed a special approach to the interpretation of tax treaties. Unlike the normal approach to the interpretation of tax legislation, tax treaties have to be given a liberal interpretation, consistent with the purpose of the treaty. The object is to seek the intention of the States when they entered into the treaty.

If there is time, at the end of this lecture I will express some doubts whether that really is the correct approach to the interpretation of tax treaties.

The Vienna Convention on the Law of Treaties

The last quotation from the RMM Canadian Enterprises case refers to "a vast array of extrinsic materials". It is to these extrinsic materials that I now want to turn my attention.

The first matter I should mention - which I suppose is not a type of extrinsic material as such - are the provisions of the Vienna Convention on the Law of Treaties dealing with the interpretation of treaties. The Vienna Convention, of course, codifies a whole series of rules of public international law concerning treaties. These rules apply not just to tax treaties but to all forms of treaties.

Articles 31 to 33 of the Vienna Convention set out the rules for interpreting treaties.

I am not certain if Portugal is a party to the Vienna Convention. In any case, it doesn't matter. A number of authorities have pointed out that the rules in Articles 31 to 33 are a codification of customary international law. Customary international law, of course, binds all countries. Thus Portugal is equally bound by these rules of interpretation whether it is a party to the Vienna Convention or not.

I am not going to go through Articles 31 to 33 here. I leave it to you to look at the text[v]. All I want to point out here is that there are an increasing number of court cases from around the world where the courts have made reference to the rules in the

Vienna Convention in relation to tax treaties. These rules should, it would seem, be the starting point for any approach to the interpretation of a provision in a tax treaty.

Let me give you one example. In the Crown Forest case, referred to above, the Supreme Court of Canada referred to Articles 31 and 32 of the Vienna Convention as providing a justification for the reference to various extrinsic material.

The OECD Commentary

I am certain that you will all know the background here.

Since the late 1950s the OECD - based in Paris - has had a committee working on tax treaties. They have produced a model tax treaty which is used as the basis for negotiation between pairs of countries. Virtually every tax treaty since the early 1960s has been based on a version of the OECD Model. It has come to the stage now that the United Kingdom, when it concludes a treaty with another country, tends to conclude a text which is virtually identical to the OECD Model and merely puts the departures from the Model into a separate Protocol.

Alongside the Model treaty itself, since the 1960s the OECD has published a Commentary on the meaning and application of the text of the Convention. Obviously, what the OECD thinks the Model Convention means ought to be very important in the interpretation of specific treaties.

There has been an increasing number of cases in recent years where the courts have referred to the Commentary as an aid to interpretation.

That is all very well, but it leaves a number of rather difficult questions.

The first question, which I shall just raise very briefly, is how you fit the OECD Commentary within the terms of the Vienna Convention. The Vienna Convention refers to various extrinsic material that can be looked to for the interpretation of treaties. The OECD Commentary does not fit very happily in to any of those categories. The categories include any instrument made "in connection with the conclusion of the" DTC. The Commentary does not fit very well into that category. Secondly, the Vienna Convention refers to any subsequent practice on the interpretation of tax treaties. Again, it does not fit very well into that category. Finally, the Vienna Convention refers to the travaux préparatoires. That is just about possible, but it rather stretches the meaning of that expression.

The application of the Vienna Convention is also relevant to one of the other big questions surrounding the reference to the OECD Commentary. The question is: should you refer to the version of the Commentary which was in force at the time that the treaty was negotiated, or the current version of the Commentary? This is important because the Commentary has been changed from time to time. In the last six years in particular, the OECD has published the Commentary in a loose-leaf form and makes amendments to it roughly once every two years.

To take an example. Suppose that there is a tax treaty which was concluded by Portugal in 1980. Portugal is a member of the OECD, so you ought to have regard to the OECD Model and Commentary. However, when you come to interpret the 1980 treaty should you look at the 1977 version of the Commentary, or the 1992 version of the Commentary (when it was republished) or the very latest version which contains the amendments which were published in November of 1997.

The view of the OECD Committee on Fiscal Affairs is very clear: you should always look at the latest version, even if amendments have been made since the time the treaty was concluded. Though this is the view of the OECD Committee, it is by no means clear that the same view is shared by courts or tax lawyers around the world. Let me give you two recent examples of this.

Firstly, a decision of the Danish Supreme Court on the 18th December 1992 concerning Texaco Denmark. That case was concerned with the question how you should calculate the profits of a permanent establishment in Denmark. In particular, it concerned the very difficult question of whether in computing those profits you could deduct “interest” on loans made internally within the same company.

The tax treaty which was involved was the 1948 treaty between the United States and Denmark. Though it was a 1948 treaty, the Danish Supreme Court referred to the OECD Commentary, which was first published in 1966. The particular point in the Commentary had not changed since 1966, so the Court did not have to decide whether to look at the later or earlier version of the Commentary.

A different situation arose, however, in the US Tax Court in a case called Taisei Fire and Marine Insurance v. Commissioner of Internal Revenue[vi]. In that case a number of Japanese insurance companies sold insurance in the US through an agent. The question was whether that agent constituted a permanent establishment. This point had been discussed in the OECD Commentary, but there had been a highly relevant change to the Commentary between the original publication in 1966 and the revised version in 1977. The particular tax treaty concerned here was the US-Japanese treaty of 1971 - concluded slap-bang between two versions of the OECD Commentary.

Which version should the judge use? Was it the 1966 version before the amendment, or the 1977 version with the amendment?

The judge in question, a Senior Judge of the US Tax Court, said that he had reservations about using the 1977 Commentary when he was interpreting a 1971 treaty: if he was seeking the meaning of the Convention as agreed by the parties when they entered into the Convention, he should not look at the 1977 amendment.

However, he got himself out of his dilemma by noting that the change to the Commentary was consistent with the earlier understanding of the meaning of the treaty. The change was merely a confirmation of the earlier views.

My own view on this particular question is that both the earlier Commentaries and later Commentaries can be helpful as a guide to the interpretation of tax treaties. We are still waiting, however, a definitive decision of a superior court on the question of prior or subsequent versions of the Commentary.

Mutual Agreements

Turning from the OECD Commentary, one type of extrinsic material consists of mutual agreements between the competent authorities in the two countries concerned.

As you will know, the OECD Model treaty - and tax treaties based upon it - have a procedure for resolving disputes over the interpretation of the treaty. The competent authorities of the two states - typically the Ministry of Finance in the two states - can reach an agreement as to the interpretation of the treaty and resolve the dispute that way.

The question which then arises is whether a court can or must have regard to the mutual agreement when it interprets the treaty.

Almost universally courts have held that they are not bound by the terms of a mutual agreement between the competent authorities. We have a number of examples of this recently.

The first example is a Canadian case, Cudd Pressure Control Inc v. R.[vii]. That case again concerned the question of calculating the profit of a permanent establishment. In that case, a US corporation had a permanent establishment in Canada. In computing the profit which was taxable in Canada, the Canadian branch sought to deduct a "rent" which it had to pay to the head office in America for the use of certain equipment. I should point out that the Canadian branch was taking a little bit of a liberty in trying to deduct the rent: they tried to deduct a rent of $2½m., when it was shown that if they had bought the equipment themselves, it would have only have cost them just over $900,000.

One particular issue concerned the existence of a mutual agreement between the US and Canadian competent authorities on the calculation of the profits of permanent establishments like this. Did the judge have to give effect to the mutual agreement?

The judge in the Canadian Court noted that there was no decision of the courts in Canada to the effect that he was bound to follow a mutual agreement. He looked at the Vienna Convention which said that such an agreement could be taken into account. In the final analysis, he reached his own decision without having regard to the agreement, though the result he reached was exactly the same as that agreed upon between the two Revenue authorities.

A clear rejection of a mutual agreement comes from a decision of a Belgian court, the Court of Appeal of Gent, in their decision of the 20th June 1996. The Belgian and the Dutch tax authorities had concluded a mutual agreement about the taxation of directors of private companies. The question was whether that agreement was binding on the Belgian court.

The Court of Appeal looked at the terms of the original treaty and decided that the terms were perfectly clear. The mutual agreement was in contradiction to the clear meaning of the treaty. The Court then took a very bold view and said that there was no power for Revenue authorities to reach an agreement which contradicted the clear wording of the treaty. In effect, the Revenue authorities were seeking to amend the treaty through the agreement. The Court of Appeal said that the Revenue authorities had no power to do so.

> “Attendu que si les Etats Contractents sont effectivement autorisés à résoudre les difficultés ou dissiper les doutes, ils ne peuvent pour autant sortir du champ d’application d’un article déterminé et modifier ainsi la Convention …”

The Gent Court’s decision is in line with the decisions of a number of other countries, including the UK, that mutual agreements may be binding on the tax authorities themselves, but they do not bind courts to reach the same result.

Foreign language texts

The point I am interested in here arises where the particular tax treaty in question exists in several different language versions. For example, the Portuguese-Belgian treaty of July 1969 was concluded in French, Dutch and Portuguese, all three texts being equally authentic. The Portugal-Bulgaria treaty of June 1995 was concluded in Portuguese, Bulgarian and English, and the treaty states that “in the case of divergence of interpretation or application, the English text shall prevail”. The tax treaty with France of January 1972 was concluded in French and in Portuguese, both texts being equally authentic. Finally, the Italy-Portuguese treaty of May 1980 was executed in Italian, Portuguese and French: the French version takes precedence in the event of disputes.

The position of treaties concluded in more than one language is covered by Article 33 of the Vienna Convention. If a treaty is authenticated in more than one language text, then Article 33 provides that they are equally authoritative and the meaning of terms is presumed to be the same in each authentic text. The court or tax authority must, therefore, look at all of the language texts to reach a meaning that is common between the terms.

There have been some examples of this in recent case law.

There was an example of this from Canada in the case of Qing Gang Li v. R.[viii]. The case concerned a Chinese student who arrived in Canada to study but subsequently married a Canadian girl and remained in the country. The question was whether the student's scholarship was exempt from tax under the Student Article of the treaty. That turned on the question of whether he was visiting Canada solely for the purposes of education.

The Federal Court of Appeal in Canada looked at the French and English texts of the Canada-China treaty. It was clear from the French text - which used the words "qui séjourne" - that the presence in Canada had to be temporary. On that basis, it held that the English text had to have the similar meaning and that the student was not temporarily in Canada.

I suspect that there will be an increasing number of problems arising over dual language treaty texts. One of the most difficult problems, in practice, is getting hold of the foreign language text. Even harder is finding somebody who can tell you what the Bulgarian text of a treaty means. I was very impressed recently to see some correspondence from a firm of solicitors in London looking at the UK-Sweden treaty and quoting the Swedish version of the text and showing that the Swedish version had a somewhat different meaning from the English version.

<u>Decisions of foreign courts</u>

This is an issue very close to my heart. I believe very strongly that, when courts are called upon to interpret a tax treaty, should look at any helpful decisions from foreign courts. We should abandon our normal xenophobia when it comes to foreign court cases.

I am delighted to say that many judges are beginning to agree with me and are citing foreign cases. This is particularly true in Canada, for example, where US cases are cited, and in the US where Canadian and English cases tend to be cited.

There was an interesting decision on this point in a recent Australian case, <u>Lamesa Holdings BV v. FCT</u> [ix].

The case concerned the application of the Business Profits Article of the Australia-Netherlands treaty to capital gains on the disposal of a string of companies which owned mining rights in Australia. The case is of very little general interest outside of Australia.

However, at the first trial the judge said that he could look at Dutch cases, but only cases interpreting the Australia-Netherlands treaty (if there were any).

The case went on appeal to the Federal Court of Australia. The Federal Court upheld the decision of the trial judge. They were prepared, however, to take a broader view on the question of foreign cases. An Australian court can look at decisions of courts in the other State party to the treaty even if those courts were interpreting treaties with countries other than Australia.

What this means, I suppose, is that if a question now arose on the Australia-Netherlands treaty, the Australian court could look at decisions of the Dutch courts on, for example, the Netherlands-Germany or Netherlands-Portugal treaty. What they might not be able to look at are decisions of courts from countries other than the Netherlands.

Expert Evidence

One of the interesting points about the Lamesa case in Australia was that the court received the evidence of a Dutch specialist in international tax law, Professor Maarten Ellis, whom some of you may know. He gave evidence as to how the Dutch courts had interpreted similar provisions in Dutch treaties.

This leads me on to a discussion of the whole question of calling expert evidence in cases involving the interpretation of tax treaties.

There are, I think, two types of evidence, one desirable and one undesirable.

First, there has been a tendency in some recent litigation, particularly in the United States, to call evidence from the individuals who negotiated the treaty. Typically they are Revenue officials; usually they have retired by the time they are called to give the evidence. I have encountered two US cases where former ministers of one of the countries concerned gave evidence as to what they thought they were meaning when they signed a particular treaty.

The United States courts have accepted this evidence. I, however, have major doubts about whether this is desirable and whether the evidence is valid. The negotiators do not, necessarily, represent the views held by their country when the treaty was entered into. Almost certainly, the views that they are now expressing reflect hindsight and are likely to justify the position which their government is now taking. I suspect that very soon we will have a decision of the US Supreme Court which holds that evidence of this nature is totally inadmissible.

The other type of expert evidence is one that I think is much more desirable. This is evidence from experts in international tax law about the interpretation of tax treaties.

I think I have said enough to indicate that the interpretation of tax treaties is a very difficult issue. It involves the assembling of a large amount of material: versions of the OECD Commentary, foreign language texts, decisions of courts from around the world, and other material that I have not mentioned. I think that it would be very helpful to courts if they were more willing to call international tax lawyers and academics to assist them by presenting this material before them.

We have had two examples of this recently. One of them was the Lamesa case where, as I mentioned, evidence was taken from Professor Maarten Ellis.

Another case comes from the exotic location of Fiji, in the decision in Commissioner of Inland Revenue v. Commonwealth Development Corporation. In that case, evidence was given by Professor John Avery Jones. The Court recognised that in effect what was happening was that John was telling them how they ought to decide the case. Strictly speaking, evidence should not be given as to the issue which the Court has itself to decide in its own law. On the other hand, the Court in Fiji greatly welcomed the assistance of one of the leading experts in international tax law.

Personally, I think that it is an extremely helpful development to have experts in international tax law called to give evidence, and I would be more than happy to travel back to Portugal at any point in time if I am called upon for this purpose.

Conclusions

What conclusions could one draw from this mass of material?

First, I think it is very easy to conclude that the interpretation of tax treaties is a complicated issue, involving the gathering together of a large amount of relevant material. Increasingly, that is going to become the province of specialists in international tax law.

Broader than that, I think I would tender a tentative conclusion about the approach of courts to the interpretation of tax treaties. The courts have tended - and I have given you quotations where courts have said this - to look for the intention of the two contracting States at the time that they entered into the treaty. I am beginning increasingly to feel that that is the wrong approach. Focusing on the two States concerned seems to my mind to ignore the general international interest in the correct interpretation of tax treaties. The decisions of courts in one country on the interpretation of a treaty are relevant not just to that country but to all other countries that have concluded treaties using similar wording. With the increasing dominance of the OECD Model, most decisions of courts around the world are on the wording of treaties which are identical with virtually all of the other treaties in the world.

In those circumstances, I do not think that the courts should be looking for the intention of the parties. Rather, they should be looking for a truly international fiscal meaning to the wording of the treaty. That is, a meaning which reflects not just the intentions of the two parties but is consistent with the position of all countries and the principles of international tax law as a whole. That is, they should be looking for a pan-national meaning to the treaty.

Double taxation conventions exist in an international environment. It is important that any meanings that are given to the treaties should be an international meaning, not dependent simply on the intentions of the particular country. It would be very interesting to see whether the courts move towards that approach in the coming years.

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[i] See Ayerst v. C & K Construction Ltd. [1975] STC 345
[ii] 95 DTC 5389
[iii] (1996) 107 TC 636
[iv] 97 DTC 302
[v] **Vienna Convention on the Law of Treaties, 1969:**
Article 31:

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

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

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

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

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

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

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

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

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

Article 32:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

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

Article 33:

"(1) When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

(2) A version of the treaty in a language other than one of those in which the text is authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

(3) The terms of the treaty are presumed to have the same meaning in each authentic text.

(4) Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

[vi] 104 TC 535

[vii] 95 DTC 559

[viii] 94 DTC 6059

[ix] 97 ATC 4229 and (1997) 1 OFLR 380