

Interpretation of International Tax Treaties

Judge Manuel Hallivis Pelayo

Vienna Convention on the Law of Treaties

VCLT codifies International Law rules: Applies to treaties entered into from January 27, 1980

García Novoa: “A treaty about treaties”

International Law Commission (ILC): “...confined itself to isolate and codify the general principles which appear to constitute general rules for the interpretation of treaties”

Tax treaties **are international agreements**, thus Arts. 31 to 33 VCLT are *in principle* applicable in order to determine their interpretation

Avery Jones: The General rule contains **3 principles**:

- 1.- Interpretation in good faith
- 2. The parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them
- 3. The third principle is one both of common sense and good faith: the ordinary meaning of a term is not to be determined in the abstract, but in the context of the treaty and in the light of its object and purpose

Art. 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 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**.

1. In good faith

- 1. 1. “A treaty shall be interpreted **in good faith...**”
 - **Good faith.**- (Black) “Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry...An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law...”
 - A principle “...which ought to govern all international relations” (Engelen)
 - “The very foundation of international law”
 - “the basis of all international legal order”
 - two approaches:
 - **Subjective.** *Criterion when negotiating a treaty*
 - *Honest spirit of loyalty and rightfulness that should prevail in every State when negotiating a treaty*
 - **Objective.** *Criterion when applying a treaty.*
 - *In all legal matters arising from the application of a treaty*

– ***Art. 26. Pacta sunt servanda***

“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

– ***Main Principle of International Law***

» If it did not exist, international relationships would not be possible

» **Complement: art. 27:**

• “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”

• Acquiescence

• Estoppel

• Protection of legal expectations

2. Ordinary meaning

- 1. Textual approach (objective):
 - “.. in accordance with the **ordinary meaning** to be given to the terms of the treaty ...”
 - The article... is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties...once it is established...that the starting point of interpretation is the meaning of the text” **John F. Avery Jones**,
 - We have to start with the text and then “go on”
 - Pastor Ridruejo**: Text is the authentic expression of the will of the parties involved in a treaty
 - Moyano**: International Law Commission:
 - Russia.- Text is the main source of intention of the parties involved because that intention is concreted in words
 - Other civil law countries.- It is the best way to know what is the intention of the States. It is far less random and more accurate and fair to discover the intention of the parties involved in the treaty.

3. Context

- “.. in their context ...”

- » “Context” means “the parts of something written or spoken that immediately precede and follow a word or passage and clarify its meaning. 2. the circumstances relevant to something under consideration.”

- » **Vogel**: “we have to see what else is in the context”

- Article 31(2) establishes The **context** for the purpose of the interpretation of a treaty **shall comprise, in addition to the text**, including its preamble and annexes:

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

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

4.- Subsequent agreement or practice:

– 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.
 - » **Mutual Agreement Procedures (MAPS)**
 - **They constitute objective evidence of mutual understanding among parties**

5.- Special Meaning

- 31, 4: A **special meaning** shall be given to a term **if** it is established that the **parties so intended**.

GOOD DEFINITIONS SECTION

6.- 31,1: “And in the light of its object and purpose.”

If there are two alternatives choose that which prevents double taxation

- » Avoid double taxation and prevent evasion
- » Exchange of information
- » Simplify Tax Systems
- » Legal Certainty

32.- Supplementary means of interpretation and 33.- Interpretation of treaties authenticated in two or more languages

Art. 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.

- Art. 33.** “1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
- 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
- 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
- 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard for the object and purpose of the treaty, shall be adopted.”

Mexican Tax Court Methodology

- 1.- ¿Is that income taxed under Mexican law?
- 2.- ¿Is there a DTT?
 - ¿Does it apply in this case?
 - ¿Is that taxpayer a foreign resident?
- 3.- Application of DTT:
 - Apply the VCLT in the order of arts. 31 and 32:
 - Ordinary meaning, (unless there is a special meaning)
 - If not enough, look at the context
 - Check if result is according to the treaty's object and purpose (if two alternatives, take the one which avoids double taxation)
 - If necessary use MAPS (if they are accepted by Courts)
 - In case of an undefined term (for that sole purpose): **use of Article 3(2) of the tax treat**
 - Domestic Tax Law meaning first, and, if necessary, go to any other applicable domestic law
 - If it is necessary use of the Commentaries of MCOECD, jurisprudence and doctrine in that order
 - Only** use supplementary means of interpretation in order to confirm the result when it is manifestly absurd or unreasonable
- 4.- Satisfy application procedures of internal law
 - (i.e. Art. 5 Mexican Income Tax Law)
 - ¿Has the taxpayer made its choice to be withheld or to file a refund request?