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By Helen Schroeder

Abstract

There is a growing trend in the United States for the adoption of the VCLT in analyzing international tax treaties.[1] This trend is positive and should be continued. By looking at how the VCLT could have been applied to the tax treaty interpretation in dispute in Xerox Corp. v. U.S., I assert both that it should be seen as a legitimate source of international tax law and that it should continue to be used moving into the future.[2]

[1] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].
[2] *See Id.*; Xerox Corp. v. United States, 14 Cl. Ct. 455 (Cl. Ct. 1988); Xerox Corp. v. United States, 41 F.3d 647 (Fed. Cir. 1994).

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INTRODUCTION

It is a cliché at this point to say that "nothing can be said to be certain, except death and taxes."[3] Yet, Benjamin Franklin's 1789 quote remains true to this day. Unfortunately, with the certainty of taxation is coupled the certainty that those wealthy and powerful enough to try will attempt to evade such taxation.

That evasion might occur through offshore bank accounts, as was revealed to the world during the release of the Panama Papers in 2016.[4] A John Doe's act of leaking of millions of confidential documents from Panama law firm Mossack Fonseca showed how clients of the firm "were able to launder money, dodge sanctions[,] and avoid tax."[5] In the aftermath, authorities around the world "launched hundreds of tax probes and criminal investigations" and world leaders resigned.[6] In the United States, Congress passed the Corporate Transparency Act, mandating that companies in the United States "report their true owners to the Treasury Department[]…."[7] The Corporate Transparency Act has been described as the "biggest revision of American anti-money laundering controls since the post-9/11 Patriot Act…."[8] In short, the release of the Panama Papers shook the world and highlighted the relevance of international tax law and its enforcement.

An additional step should be taken by U.S. courts to further scrutinize potential tax evasion: incorporate the Vienna Convention on the Law of Treaties (VCLT) in the interpretation of international tax treaties. [9]

Where international tax law and the principles of international treaty interpretation collide, there arises potentials for corporations to be taxed large amounts on profits or to figuratively get away with murder by dodging such taxes. The VCLT is a tool that courts can, and should, look to in interpreting international tax treaties in a consistent and effective manner.[10] Such a tool is

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[3] 10 JARED SPARKS, THE WORKS OF BENJAMIN FRANKLIN 410 (Whittemore, Niles & Hall 1856).
[4] The New York Times, *What Are the Panama Papers?*, N.Y. TIMES (Apr. 4, 2016), https://www.nytimes.com/2016/04/05/world/panama-papers-explainer.html; *Panama Papers Q&A: What is the scandal about?*, BBC (Apr. 6, 2016), https://www.bbc.com/news/world-35954224.
[5] *Panama Papers Q&A: What is the Scandal About?*, *supra* note 4.
[6] Will Fitzgibbon and Michael Hudson, *Five Years Later, Panama Papers Still Having a big Impact*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 3, 2021), https://www.icij.org/investigations/panama-papers/five-years-later-panama-papers-still-having-a-big-impact/ (specifying that "[g]overnment officials in three countries have resigned, including a prime minister and an energy and industry minister."); *see also* Will Fitzgibbon and Emilia Diaz-Struck, *Panama Papers Have Had Historic Global Effects – and the Impacts Keep Coming*, CTR. FOR PUB. INTEGRITY (Dec. 1, 2016), https://publicintegrity.org/accountability/panama-papers-have-had-historic-global-effects-and-the-impacts-keep-coming/ (noting that "one-third of all nations – at least 79 so far – have announced 150 inquiries, audits[,] or investigations by [authorities]…. Thousands of taxpayers and companies are under investigation").
[7] Asraa Mustufa, *Advocates Celebrate Major US Anti-Money Laundering Victory*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Dec. 11, 2020), https://www.icij.org/investigations/paradise-papers/advocates-celebrate-major-us-anti-money-laundering-victory/.
[8] Fitzgibbon & Hudson, *supra* note 6.
[9] VCLT, *supra* note 1.
[10] VCLT, *supra* note 1.

especially useful as due to the nature of international tax litigation the relevant international tax treaties are typically examined years after their original drafting.

I argue that the VCLT should be looked to in determining the outcomes of international tax treaties, along with and perhaps before other resources such as the OECD Model and affidavits from treaty drafters.[11] I will accomplish this argument by examining the course and ultimate outcome of the 1988 and 1994 *Xerox Corporation* cases, in which a dispute over the United States-United Kingdom Income Tax Convention of 1975 led to an unfair and unjust result as an American-based company avoiding paying a significant tax liability.[12]

Section I of this paper is the Introduction, explaining the importance of international taxation and the realities of widespread international tax evasion. Section II of this paper will provide a high-level background of the relevant elements, terms, and facts at issue in both *Xerox* cases.[13] This context will be an aid to international law scholars unfamiliar with tax law, tax law scholars unfamiliar with international law, and students perhaps unfamiliar with either. Section III will analyze what tools were used in the *Xerox* cases and argue why the VCLT should have been incorporated into that toolbox.[14] Section IV will highlight why the VCLT should be looked to as a legitimate source in interpreting international tax law and discuss potential avenues for its application moving forward.[15] Finally, Section V will re-emphasize the previous points and serve as the Conclusion.

I. BACKGROUND LEGAL SOURCES

In this Section I will describe three particularly relevant sources for the interpretation of tax treaties, from the most useful to the least useful. The first is the Vienna Convention on the Law of Treaties, specifically Articles 31 and 32.[16] The second is the OECD Model tax treaty.[17] Last is affidavits written by the individuals who drafted the actual tax treaty itself.

Signed in Vienna in 1969, and entered into force in 1980, the Vienna Convention on the Law of Treaties (VCLT) is known as the "treaty on treaties" and is looked to as a foundational text on the interpretation of treaties, among other things.[18] While treaties are between small groups of

[11] VCLT, *supra* note 1; OECD (2019), *Model Tax Convention on Income and on Capital 2019 (Full Version)*, Paris, https://doi.org/10.1787/g2g972ee-en [hereinafter OECD Model and Commentary].
[12] Xerox Corp. v. U.S., 14 Cl. Ct. 455 (Cl. Ct. 1988); Xerox Corp. v. U.S., 41 F.3d 647 (Fed. Cir. 1994); 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 the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, U.K.-U.S., Dec. 31, 1975, 31 U.S.T. 5668, https://www.irs.gov/pub/irs-trty/uk.pdf [hereinafter 1975 U.S.-U.K. Income Tax Treaty].
[13] Xerox Corp. v. U.S., 14 Cl. Ct. 455 (Cl. Ct. 1988); Xerox Corp. v. U.S., 41 F.3d 647 (Fed. Cir. 1994).
[14] Xerox Corp. v. U.S., 14 Cl. Ct. 455 (Cl. Ct. 1988); Xerox Corp. v. U.S., 41 F.3d 647 (Fed. Cir. 1994); VCLT, *supra* note 1.
[15] VCLT, *supra* note 1.
[16] VCLT, *supra* note 1, at arts. 31-32.
[17] OECD Model and Commentary, *supra* note 11.
[18] VCLT, *supra* note 1; *50th Anniversary: Vienna Convention on the Law of Treaties*, OXFORD PUB. INT'L L., https://opil.ouplaw.com/page/766 (last visited Dec. 2, 2022); 50 Years Vienna Convention on the Law of Treaties, U. OF VIENNA (Nov. 18, 2019), https://juridicum.univie.ac.at/news-events/news-

individual States—or bilateral between only two States, as in the case with international tax treaties—the "interpretation of international treaties is governed by public international law, and more specifically by customary international law, as embodied in the [VCLT]."[19] The customary international law embodied in the VCLT more specifically includes guidance on: concluding and effecting treaties (Part II); observing, applying, and interpreting treaties (Part III, and the focus of this paper); amending and modifying treaties (Part IV); and invalidating, terminating, and suspending treaties (Part V).[20]

Returning to VCLT Part III and its focus on treaty interpretation, VCLT Article 31 states that treaties should be interpreted "in good faith," and that context should be taken into account.[21] Such context includes the text of the treaty, as well as agreements and instruments between all treaty parties related to the treaty.[22] However, "[w]ith reference to tax treaties … unilateral explanations by one party that have not been expressly confirmed by the other party cannot be included."[23] VCLT Article 32 builds on these interpretation principles by stating that "supplementary means of interpretation" such as the preparing of the treaty or the circumstances it was drafted under should be used only when interpretation under VCLT Article 31 leaves the treaty's meaning ambiguous or produces an unreasonable result.[24] This is a guided narrowing of when supplementary materials should be used for interpretation, as well as how much weight should be given to them.[25]

The second relevant legal source used currently in the interpretation of international tax treaties is the OECD Model.[26] An abbreviation of the Organisation for Economic Co-operation and Development, the OECD Model Convention is typically the foundation for drafting international tax treaties.[27] It operates as a type of "open blueprint" for fostering tax treaty negotiations.[28] The accompanying OECD Commentaries "reflects the current views on existing

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detailansicht/news/50-years-vienna-convention-on-the-law-of-treaties/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=c429b920a208a21200d829194f27c907.

[19] Victor Uckmar, *Double Taxation Conventions*, *in* INTERNATIONAL TAX LAW 149, 156–57 (Andrea Amatucci ed., 2006).

[20] VCLT, *supra* note 1.

[21] VCLT, *supra* note 1, at pt. 3; VCLT, *supra* note 1, at art. 31.

[22] VCLT, *supra* note 1, at art. 31.

[23] Uckmar, *supra* note 19, at 157.

[24] VCLT, *supra* note 1, at art. 32; VCLT, *supra* note 1, at art. 31.

[25] While VCLT Article 32 does not give a black letter rule on exactly how much weight or emphasis to give to a supplementary item, it does state that supplemental items should only be looked to "in order to confirm the meaning" of an Article 31 plain language reading. *See* VCLT, *supra* note 1, at art. 32.

[26] OECD Model and Commentary, *supra* note 11.

[27] OECD Model and Commentary, *supra* note 11; ROY ROHATGI, BASIC INTERNATIONAL TAXATION 24 (2002) (commenting that while the OECD Model *or* the United Nations Model are used as the basis for treaty negotiation, "the UN and US Models [both] essentially follow the form and text of the OECD [Model].").

[28] Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, in FOUNDATIONS OF INTERNATIONAL INCOME TAXATION 384, 391 (Michael J. Graetz ed., 2003).

provisions and their application to specific situations," creating a standard that aids "in the uniform interpretation and application of the treaties based on [the OECD Model]."[29]

While the Commentaries certainly have their usefulness, "the exact relation between the Commentaries and the actual treaties … is a matter on which there is no fully developed international consensus."[30] There is significant debate concerning when and how the OECD Model and Commentaries ought to be applied under the VCLT, as well as the OECD Model's own implied stance on where it ought to be applied.[31] This debate and some of the scholarship that addresses it will be discussed at the end of Section IV.

Last then, are affidavits, which fall under the umbrella of supplementary means of interpretation under VCLT Article 32.[32] In a situation examining and interpreting an international tax treaty, it is almost certain that any relevant affidavit would have been written after the fact. The timeliness of any affidavits aside, it would likely be difficult to secure from any one individual an affidavit that does not favor one party to an international tax treaty. The nuances of this tension in the context of *Xerox* will be discussed in Section III.[33]

A. Notable Elements of the 1975 U.S.-U.K. Income Tax Treaty

The debate over how the 1975 U.S.-U.K. Income Tax Treaty ought to have been interpreted was really only concerned with one element of the treaty: Article 23, "Elimination of Double Taxation."[34] Even more specifically, the interpretation controversy surrounded Article 23(1) and Article 23(1)(c), which dealt with when a United States-based company could receive a U.S. tax credit for payment of a U.K. tax called the Advance Corporation Tax.[35] The Advance Corporation Tax will be explained in greater detail in the following subsection.

Article 23(1)(c) establishes that tax "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

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[29] OECD Model and Commentary, *supra* note 11; ROHATGI, *supra* note 27, at 24.
[30] *See* Hugh J. Ault, *The Role of the OECD Commentaries in the Interpretation of Tax Treaties*, *in* ESSAYS ON INTERNATIONAL TAXATION 61, 61 (Herbert H. Alpert & Kees van Raad eds., 1993) (commenting that "[t]he [OECD] Model Convention is important not only for the text of the treaty Articles but also for the extensive explanatory Commentary which follows each Article.").
[31] OECD Model and Commentary, *supra* note 11; VCLT, *supra* note 1.
[32] VCLT, *supra* note 1, at art. 32.
[33] Xerox Corp. v. U.S., 14 Cl. Ct. 455 (Cl. Ct. 1988); Xerox Corp. v. U.S., 41 F.3d 647 (Fed. Cir. 1994).
[34] I will note here the apparent discrepancy in applying the VCLT (which was enacted in 1980 and not retroactively applied) to a treaty entered into in 1975. However, the VCLT was opened for signing in 1969, so its ideas on interpretation were already present, if not binding, at the time of the 1975 U.S.-U.K. Income Tax Treaty. Additionally, both the United States and United Kingdom had signed the VCLT in 1970 (with the United Kingdom ratifying it in 1971), so both States were aware of its interpretive principles. Even if the VCLT did not apply in force, it was in 1975 still a reflection of customary international law. *See* Esmé Shirlow and Kiran Nasir Gore, *Celebrating 50 Years of the VCLT: An Introduction*, KLUWER ARB. BLOG (Dec. 2, 2019), http://arbitrationblog.kluwerarbitration.com/2019/12/02/celebrating-50-years-of-the-vclt-an-introduction/; 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12, at art. 23.
[35] 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12, at art. 23.

the dividend shall be treated as an income tax ….”[36] This small section of the broader treaty is critical to understanding the *Xerox* case saga, as the core question was “whether the surrender by [a Xerox subsidiary] of a portion of its section 85 offset 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.”[37] The reference to a section 85 offset refers to an option available to U.K. resident corporations wherein they could offset the Advance Corporation Tax payment against their own corporate liability and carry any remaining Advance Corporation Tax payment offset forward into a future taxable year.[38]

B. A Summation of *Xerox*

In this section I will provide a high-level summary of the *Xerox Corporation* cases and the different conclusions that the Claims Court and the Federal Circuit came to.[39]

First, it is necessary to explain one of the important taxation elements in play in *Xerox*, the United Kingdom’s Advance Corporation Tax (ACT), noted above.[40] While the ACT has since been abolished and replaced, a general understanding of what it used to be and how it used to operate is crucial to understanding and analyzing the *Xerox* cases.[41]

Under this tax scheme, when a corporation “made a qualifying distribution … it paid ACT to HM Revenue & Customs [the U.K. department responsible for taxation, comparable to the IRS in the U.S.]. … ACT was effectively a pre-payment of the company’s corporation tax liability.”[42] This structure required companies to withhold tax on dividends before making their distribution to shareholders.[43] However, the key detail here was that U.K. companies could offset the withheld ACT amount against the overall company tax liability, subject to certain limits and carrying any excess forward into a future taxable year.[44]

It may be important to note that ACT was not refundable and must have been paid regardless of if a company had any U.K. corporate tax liability or not, so it “is not similar to U.S. corporate estimated tax payments.”[45] However, U.K. residents were given an associated “shareholder credit” upon receipt of an ACT-taxed qualifying distribution, while non-U.K. resident shareholders received no such credit.[46] It was to eliminate this tax discrimination against

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[36] 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12, at art. 23.
[37] Xerox Corp. v. U.S., 14 Cl. Ct. 455, 461 (Cl. Ct. 1988); Xerox Corp. v. U.S., 41 F.3d 647 (Fed. Cir. 1994).
[38] *See* Xerox Corp. v. U.S., 14 Cl. Ct. 457, 461 (Cl. Ct. 1988).
[39] Xerox Corp. v. U.S., 14 Cl. Ct. 455 (Cl. Ct. 1988); Xerox Corp. v. U.S., 41 F.3d 647 (Fed. Cir. 1994).
[40] *Id.*
[41] *Id.*
[42] *Advance Corporation Tax (ACT)*, THOMAS REUTERS PRAC. L., https://uk.practicallaw.thomsonreuters.com/2-107-6371 (last visited Dec. 2, 2022).
[43] *Id.*
[44] HM Revenue & Customs, Company Taxation Manual, CTM201205-ACT: Set-Off Against CT on Profits: Introduction, GOV. UK (Apr. 16, 2016), https://www.gov.uk/hmrc-internal-manuals/company-taxation-manual/ctm20105 (last visited Dec. 2, 2022).
[45] Xerox Corp. v. U.S., 14 Cl. Ct. 455, 458 (Cl. Ct. 1988).
[46] *Id.* at 459.

U.S. shareholders of U.K. companies that the U.S.-U.K. Income Tax Treaty of 1975 was negotiated and signed.[47]

For better or for worse, the unique specifics of tax law are not constant. Provisions like the U.K.'s ACT will constantly come, go, and be modified due to the nature of tax law. Though the ACT itself is no longer relevant, this continual change serves to underscore why the VCLT should be looked to as an interpretation constant.[48]

In the shadow of the ACT, Xerox brought a suit to the Claims Court seeking to recover federal income taxes that it claimed it had paid in excess for the 1974 taxable year.[49] As the "parent corporation of an affiliated group of corporations," Xerox filed all of its subsidiary companies' taxes collectively and also brought this suit collectively.[50] The Claims Court was asked to address the issue of "whether the surrender by [a U.K.-based Xerox subsidiary] of a portion of its ACT (the portion … was not in dispute) to U.K. subsidiaries should have any effect on the availability of an [U.S.-U.K. Income Tax Treaty of 1975] Article 23(1)(c) U.S. foreign tax credit to its parent, Xerox…."[51] Put more simply, Xerox sought a tax credit in the United States for ACT paid by a Xerox subsidiary in the U.K.

The Claims Court, in its decision, looked first to the language of the 1975 U.S.-U.K. Income Tax Treaty in analyzing the issue. In its reading, the court found that the language of Article 23(1)(c) could not be interpreted in isolation from that of the broader Article 23(1).[52] The broader language of Article 23(1) was that where a U.S. corporation owned 10% or more of the voting stock of a U.K. corporation it receives dividends from, "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."[53] Thus, the amount of ACT surrendered by the Xerox subsidiary to the U.K. government was not "a tax paid 'by the United Kingdom Corporation' that distributed the dividends" and so there was no intention that such surrendered ACT funds be covered by a U.S. tax credit. Following this analysis, the Claims Court ruled that Xerox was not entitled to the indirect foreign tax credit under the 1975 U.S.-U.K. Income Tax Treaty.[54]

The litigation over that tax treaty's interpretation did not stop there. In 1994, the Federal Circuit weighed in on the case, reversing the holding of the Claims Court and allowing Xerox and

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[47] 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12; Xerox Corp. v. U.S., 14 Cl. Ct. 455, 459 (Cl. Ct. 1988).
[48] VCLT, *supra* note 1.
[49] *See* Xerox Corp. v. U.S., 14 Cl. Ct. 455, 455–56 (Cl. Ct. 1988).
[50] *Id.*
[51] Dalton Luiz Dallazem, *What Rules, if not Customary International Law—Articles 31–32 of the VCLT—Are the U.S. Courts Relying upon While Applying and Interpreting Tax Treaty Provisions?*, 211 ADVANCES IN SOC. SCI., EDUC. AND HUMAN. RSCH. 122, 124 (2018), http://rais.education/wp-content/uploads/2018/11/25902739.pdf (providing an excellent summation of the *Xerox* cases).
[52] 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12, at art. 23; Dallazem, *supra* note 51, at 124.
[53] 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12, at art. 23.
[54] Dallazem, *supra* note 51, at 124; Xerox Corp. v. U.S., 14 Cl. Ct. 455, 469–70 (Cl. Ct. 1988) (noting here that the stakes on the interpretation of this treaty was a federal income tax refund of $1,826,222 to Xerox and its subsidiaries); 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12.

its subsidiaries to receive a federal income tax refund of approximately $1.8 million.[55] The Federal Circuit made the reversal on the grounds that Xerox was entitled to the indirect foreign tax for ACT paid in the U.K., regardless of if that tax was offset against mainstream corporation tax or was otherwise used or surrendered by the Xerox affiliate.[56]

In reversing the lower court, the Federal Circuit looked to the language of the 1975 U.S.-U.K. Income Tax Treaty itself and analyzed its plain language.[57] However, it also looked beyond the text of the treaty. Admittedly, the court acknowledged that "[u]nless the treaty terms are unclear … it should rarely be necessary to rely on extrinsic evidence in order to construe a treaty, for it is rarely possible to reconstruct all of the considerations and compromises that led … to the final document."[58] But immediately after commenting so, the Federal Circuit contradicted itself in saying that "extrinsic material is often helpful in understanding the treaty and its purposes, thus providing an enlightened framework for reviewing its terms."[59] This opened a channel for the Federal Circuit to review extrinsic evidence and to give it the same weight as what was written in the treaty itself.[60]

Affidavits for both sides of the case—in this situation meaning the treaty negotiators from the United States and United Kingdom who had drafted the treaty—were requested and looked to in aiding the court's analysis of the treaty and its purpose.[61] However, the individual negotiators were writing affidavits in 1994 for a treaty effected in 1975: they were testifying as to the intent of the treaty nearly 20 years after the fact! The Federal Circuit gave the affidavits and negotiation history of the treaty substantial weight in reversing the decision of the Claims Court.[62] Xerox was able to receive their sought-after $1.8 million federal income tax refund, an outcome for which the "general consensus is that the corporation 'got away with murder.'"[63]

II. *XEROX* AND THE TOOLS COURTS LOOKED TO

How would looking to the VCLT have helped the Federal Circuit come to a fairer conclusion?[64] That answer is simplified by contrasting the approaches of the Federal Circuit and the Claims Court, as well as what sources they turned towards. The resulting insight illuminates the type of gap that the VCLT[65] Emphasizing what VCLT Articles 31 and 32 have to say

[55] *See* Xerox Corp. v. U.S., 41 F.3d 647 (Fed. Cir. 1994); The total amount of the sought refund was $1,826,222 for the 1974 taxable year, worth approximately $10.5 million in 2022. *See CPI Inflation Calculator*, U.S. BUREAU OF LABOR STATISTICS, https://www.bls.gov/data/inflation_calculator.htm (inflation calculated using the CPI Inflation Calculator).
[56] Xerox Corp., 41 F.3d at 660.
[57] 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12; Xerox Corp. v. U.S., 41 F.3d 647, 651–52 (Fed. Cir. 1994).
[58] Xerox Corp., 41 F.3d at 652.
[59] *Id.*
[60] Noting here that this is exactly the type of outcome that VCLT Article 32 aims to avoid, something that will be discussed in-depth in Section III.
[61] Xerox Corp. v. U.S., 41 F.3d 647, 654 (Fed. Cir. 1994).
[62] *Id.* at 653–54.
[63] Reuven S. Avi-Yonah, *International Tax as International Law*, 57 TAX L. REV. 483, 493 (2004).
[64] VCLT, *supra* note 1.
[65] VCLT, *supra* note 1.

throughout, I will analyze the tools used and not used by both of the courts from weakest to strongest: affidavits, a technical explanation and a revenue procedure, an authority agreement, and the tax treaty's plain language.[66]

A. Affidavits

Article 32 of the VCLT addresses the use of supplementary materials in treaty interpretation.[67] The text of Article 32 makes explicit reference only to "the preparatory work of the treaty" and "the circumstances of its conclusion," but other external resources, such as ex facto affidavits, fall under the umbrella of supplementary materials as well.[68] Additionally, Article 32 emphasizes that such materials should be used in the way the article title contemplates: as supplements.[69]

There is no hardline rule against looking beyond the four corners of the treaty itself—not in international law, nor tax law, nor broader United States law. However, "[w]hat *is* restricted by the Vienna rules … is to actually base a finding on such material at the outset of the process of interpretation…."[70] This restriction is recommended "in order to prevent the agreement of the parties from being replaced by the content of unconsummated exchanges of proposals and arguments that preceded the finalization of the treaty."[71] While this comment specifically mentions unconsummated documents that preceded the agreement, the same principle applies to unconsummated documents that succeed the agreement. Both kinds of supplementary materials have the potential to replace the actual treaty itself when reviewed without appropriate guidance regarding limitations or weight. This danger is especially apparent when it comes to turning to affidavits for interpretive guidance.

Sources that are "unilateral explanations by one party" not "expressly confirmed by the other party cannot be included" fall under VCLT Article 31(2)'s contextual umbrella, and affidavits are one type of such unilateral documents.[72] Additionally, VCLT Article 32 focuses primarily on preparatory and conclusory work related to a treaty, and an affidavit is an after-the-fact assertion directly tethered to neither.[73] Neither VCLT Article provides an appropriate avenue for how to incorporate and weigh supplementary materials such as affidavits, the silence implying that looking at such unilateral explanations is potentially dangerous.[74] Affidavits may not have

[66] VCLT, *supra* note 1, at arts. 31-32.
[67] VCLT, *supra* note 1, at art. 32.
[68] VCLT, *supra* note 1, at art. 32; *See* Uckmar, *supra* note 19, at 158; ROHATGI, *supra* note 27, at 23; PETER HARRIS & DAVID OLIVER, INTERNATIONAL COMMERCIAL TAX 39–42 (2nd ed. 2020); LEOPOLDO PARADA, DOUBLE NON-TAXATION AND THE USE OF HYBRID ENTITIES: AN ALTERNATIVE APPROACH IN THE NEW ERA OF BEPS 59 (2018).
[69] VCLT, *supra* note 1, at art. 32.
[70] Oliver Dörr and Kirsten Schmalenbach, *Article 32. Supplementary Means of Interpretation*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 571, 580 (2012) (emphasis added).
[71] *Id.*
[72] Uckmar, *supra* note 19, at 157; VCLT, *supra* note 1, at art. 31.
[73] VCLT, *supra* note 1, at art. 32; *See* PARADA, *supra* note 68, at 55.
[74] VCLT, *supra* note 1, at arts. 31-32.

been mentioned under VCLT Articles 31 or 32 as it is all too possible for such an explanatory, ex-post document to be given more weight than the treaty itself.[75]

In the Federal Circuit's review of *Xerox*, that is exactly what the affidavits did.[76] Instead of using such supplementary materials "to confirm a meaning otherwise arrived at under Article 31,"[77] affidavits were the *second* thing the Federal Circuit mentioned looking to in its opinion, after first discussing the purpose of the treaty. Neither of these first two tools was the text of the treaty itself, putting the Federal Circuit in jeopardy of replacing the agreement of the parties with the content of the unconsummated affidavits. While the purpose statement in the treaty is part of the treaty and its context, falling under VCLT Article 31, such a section should not replace the actual details agreed to in the main body of the treaty.[78]

It also must be emphasized that by a degree of almost 20 years, the affidavits "were not even contemporaneous with the [1975 U.S.-U.K. Income Tax T]reaty but executed years later when the affiants were in private practice and had no stake in protecting the fisc."[79] They were supplemental materials not even from the same time period as the treaty itself.

Why then did the Federal Circuit turn to the affidavits so quickly and place so much weight on them? The answer may be for the sake of simplicity. As described previously, the *Xerox Corp.* cases dealt with a complex international tax treaty and over a million dollars in potential tax liability.[80] Instead of pouring over the language of the treaty without external references, it may have been more straightforward to rely on the opinions of those who wrote it.

Especial weight was placed on the affidavit of Robert J. Patrick, Jr., who had been a principal negotiator for the United States on the 1975 U.S.-U.K. Income Tax Treaty and was at the time of the treaty the International Tax Counsel for the Treasury.[81] He wrote in his affidavit that "[t]o the best of my knowledge, this interpretation of the Treaty [referring to the interpretation of the Claims Court] has never previously been set forth by the United States, the United Kingdom, or anyone else."[82] The testimony of someone present at and significantly involved in the negotiations of the relevant treaty was clearly persuasive.

The Federal Circuit then defended its decision to rely on such statements, stating that "[t]hese statements are consistent with the clear text of the treaty and its purpose of avoiding double taxation of dividends."[83] But that defense belies the hazard of incorporating supplemental materials into interpretation: it is significantly different if the text of the treaty is examined and ambiguity is

[75] VCLT, *supra* note 1, at arts. 31-32.
[76] Xerox Corp. v. U.S., 41 F.3d 647 (Fed. Cir. 1994).
[77] HARRIS & OLIVER, *supra* note 68, at 40.
[78] VCLT, *supra* note 1, at art. 31.
[79] Avi-Yonah, *supra* note 63, at 493 (note that "fisc" refers to the public treasury of Rome and is a reference to the public treasury of the United States).
[80] Xerox Corp. v. U.S., 14 Cl. Ct. 455 (Cl. Ct. 1988); Xerox Corp. v. U.S., 41 F.3d 647 (Fed. Cir. 1994).
[81] 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12.
[82] Xerox Corp. v. U.S., 41 F.3d 647, 654 (Fed. Cir. 1994).
[83] *Id.*

clarified through supplemental materials, compared to if supplemental materials are looked to before determining if the text of the treaty has any potential ambiguity.

These two approaches are dangerously dissimilar, and the latter runs the risk of replacing the actual agreement of the parties with an unconsummated secondary source. VCLT Article 32 is brief but firm in outlining that "supplementary means of interpretation" should *only* be used to confirm VCLT Article 31 interpretation, or when interpretation under VCLT Article 31 "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable."[84] These strict guidelines are in place to prevent the manifestly unreasonable result of using a treaty to confirm the meaning of a supplementary resource. Without knowing it or citing it, the Claims Court was correct to stay within the boundaries of context set by VCLT Articles 31 and 32.[85]

B. Technical Explanation & Revenue Procedure 80-18

The Claims Court also gave appropriate weight to two additional supplemental materials that provided context: a Technical Explanation and Revenue Procedure 80-18. The Technical Explanation was prepared by the U.S. Treasury Department "in connection with the submission of the [tax treaty] to the Senate for hearings on ratification in 1977."[86] While both of these documents were still unilateral views from the United States' side, they were unilateral views presented in conclusion with the Senate's approval of the tax treaty. So, unlike the affidavits, they were at least from the same time period as the tax treaty itself and agreed to by multiple parties from one State.

The Claims Court looked to the Technical Explanation to confirm its own reading of the treaty, as "the Senate's consideration of the Convention, beginning in July 1977, was based upon the interpretation set forth in the Technical Explanation."[87] The Claims Court mirrored the approach of the Senate in its treaty interpretation: letting the words of the statute guide and only looking to the Technical Explanation to clarify. In answering its own questions on the appropriate application of the tax treaty's Article 23, the Claims Court noted that there was no indication as to "any disagreement in the Senate during this time concerning the interpretation of Article 23 in the Technical Explanation" and that it was thus "logical to conclude that the Senate was in accord with Treasury's interpretation of [tax treaty] Article 23 as set forth in the Technical Explanation when it ratified the 1975 U.S.-U.K. Income Tax Treaty."[88] The Claims Court looked to what the Senate had in mind when ratifying the plain language of the treaty by using the tools the Senate itself had available.[89]

In the Federal Circuit's discussion of the Technical Explanation, the court mentions that "[a] treaty must be construed in accordance with the intent of both signatories."[90] This point then

[84] VCLT, *supra* note 1, at art. 32.
[85] VCLT, *supra* note 1, at arts. 31-32.
[86] Xerox Corp. v. U.S., 14 Cl. Ct. 455, 463 (Cl. Ct. 1988).
[87] *Id.*
[88] 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12, at art. 23; Xerox Corp. v. U.S., 14 Cl. Ct. 455, 463 (Cl. Ct. 1988).
[89] Xerox Corp. v. U.S., 14 Cl. Ct. 455, 463 (Cl. Ct. 1988).
[90] Xerox Corp. v. U.S., 41 F.3d 647, 656 (Fed. Cir. 1994).

leads to the Federal Circuit's rejection of the Technical Explanation as a tool for treaty interpretation, as "the Treasury's position [in the Technical Explanation] was not embraced by the Senate."[91] Yet whatever disagreement the Senate had with the Technical Explanation, it still decided to ratify the 1975 U.S.-U.K. Income Tax Treaty in its final form in July of 1979.[92] The Federal Circuit's stance on the Technical Explanation conflicts with that of the Claims Court, the latter of which wrote that there was no on-record notice that the Senate disagreed specifically with the Technical Explanation's interpretation of Article 23 of the tax treaty.[93]

The Federal Circuit's discussion is also interesting in that there is no mention of the U.K.'s opinion, or lack thereof, on the Technical Explanation. Under VCLT Articles 31 and 32, the U.K.'s position on such a contextual document would have been far more relevant than that of the Senate.[94] However, the reality in the *Xerox* cases was that the U.K. had not responded nor stated a position on either the affidavits nor the Technical Explanation, nor the associated Revenue Procedure.[95] None of those resources was then as important as the plain language of the tax treaty itself, but the Technical Explanation and Revenue Procedure did hold more relevance than the affidavits, as the former documents were professions of how the United States as a State understood the tax treaty to function.

Still, use of the VCLT could have clarified both the appropriate use and deference that ought to be afforded to the Technical Explanation, sparing the tension between the Claims Court and the Federal Circuit on this matter.[96] As the Technical Explanation was, to the United States Senate, "a supplementary means of interpretation, including … the circumstances of [the treaty's] conclusion," it was a fair—if weakly unilateral— source under VCLT Article 32, so long as it was used to confirm the treaty's meaning under Article 31.[97] The Claims Court used the Technical Explanation in this manner, using it to confirm the authority agreement and ultimately the plain language of the treaty.[98] The Federal Circuit attempted to use the Technical Explanation to confirm what the *affidavits* said about the treaty, and in doing so had to disregard the Technical Explanation and the words of the treaty to protect the text and meaning of the affidavits.[99]

The Technical Explanation was also used in conjunction with Revenue Procedure 80-18, an IRS publication "setting forth procedures for U.S. taxpayers to follow under the applicable provisions of Articles 10 and 23."[100] The Revenue Procedure emphasized what had already been stated in the Technical Explanation: that under U.S. foreign tax credit purposes and Article 23 of the 1975 U.S.-U.K. Income Tax Treaty, there was no tax credit for a parent company that offset

[91] *Id.*
[92] Xerox Corp. v. U.S., 14 Cl. Ct. 455, 463 (Cl. Ct. 1988).
[93] 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12, at art. 23; *See* Xerox Corp. v. U.S., 14 Cl. Ct. 455, 463 (Cl. Ct. 1988).
[94] VCLT, *supra* note 1, at arts. 31-32.
[95] *See* Xerox Corp. v. U.S., 14 Cl. Ct. 455 (Cl. Ct. 1988); Xerox Corp. v. U.S., 41 F.3d 647 (Fed. Cir. 1994).
[96] VCLT, *supra* note 1.
[97] VCLT, *supra* note 1, at arts. 31-32.
[98] Both the authority agreement and plain language of the treaty will be discussed in the next subsections.
[99] Xerox Corp. v. U.S., 41 F.3d 647, 654 (Fed. Cir. 1994).
[100] Xerox Corp. v. U.S., 14 Cl. Ct. 455, 464 (Cl. Ct. 1988) (noting that Revenue Procedure 80-18 was issued on the day that the 1975 U.S.-U.K. Income Tax Treaty went into effect.).

ACT payment against a subsidiary's mainstream tax.[101] Put more simply, what Xerox was attempting to do with its U.K. subsidiary and the ACT had already been expressly considered and disallowed by the IRS.

The Claims Court used this Revenue Ruling to "augment[] the treaty interpretation outlined in the Technical Explanation," which matched the United States' position on how tax treaty Article 23(1)(c) ought to be read.[102] Every supplemental tool reached for by the Claims Court led back to what had been penned by the negotiators in the actual 1975 U.S.-U.K. Income Tax Treaty.[103] In contrast, the Federal Circuit also rejected the supplemental information provided in Revenue Procedure 80-18 as its interpretation "strain[ed] the plain meaning of the treaty"[104] and "[a] Revenue Procedure can not change the terms and purpose of a treaty."[105] But yet again, if the Federal Circuit had looked to the plain text of the tax treaty under a VCLT Article 31 interpretation, the role of the Revenue Procedure would have been clarified.[106]

As outlined by the Claims Court, Revenue Procedure 80-18 did not strain the meaning of the tax treaty in any way. Rather, it confirmed the Technical Explanation, the Senate's understanding in ratifying the treaty, and the authority agreement submitted to by both States. The Federal Circuit may have rejected the Revenue Procedure because it strained the meaning of the *affidavits*. This is reflected in the Federal Circuit's understanding of the purpose of the tax treaty as well; that court emphasized the treaty's purpose as "avoiding double taxation."[107] However, a reading of the preamble of the tax treaty reveals that the treaty defines its own purpose as being a "convention … for the avoidance of double taxation *and* the prevention of fiscal evasion…."[108] While the purpose of a treaty bears significant weight under VCLT Article 31, the Federal Circuit prioritized one half of the treaty's mission statement to the detriment of the other half instead of treating the purpose as a whole. This led to an unjust result and an unsupported conclusion.[109]

But why are the Technical Explanation and Revenue Procedure 80-18 acceptable when they are "unconsummated" documents that run the risk of sullying the actual treaty like the affidavits discussed earlier? The best answer lies in a combination of three factors: these documents were contemporary to the treaty, these documents supported the "consummated" authority agreement, and perhaps most importantly, these documents were not used as a way to get around the plain language of the treaty.

United States courts have acknowledged that treaties "are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the

[101] 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12, at art. 23; Xerox Corp. v. U.S., 14 Cl. Ct. 455, 464 (Cl. Ct. 1988).
[102] *Id.*
[103] 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12.
[104] Xerox Corp. v. U.S., 41 F.3d 647, 656 (Fed. Cir. 1994).
[105] *Id.* at 657.
[106] VCLT, *supra* note 1, at art. 31.
[107] Xerox Corp., 41 F.3d at 656.
[108] 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12, at pmbl. (emphasis added).
[109] VCLT, *supra* note 1, at art. 31.

history of the treaty, the negotiations, and the practical construction adopted by the parties."[110] The VCLT provisions place a boundary on how liberally courts should be looking beyond the written word, as a safeguard against construing a treaty so liberally as to forget the power of the plain language itself.[111] Treaties are unique international documents, in that "the interpretation of treaties can legitimately depend on the identity of the interpreter."[112] Yet, while treaties "need not be read identically in all circumstances," tax law is a field where consistency and predictability are essential elements.[113] This means that placing boundaries on how liberally a treaty can be read is crucial to ensuring consistency.

i. Authority Agreement

Despite the authorities available to Xerox and the United States as early on as 1980, United Kingdom corporations in the late 1980s continued to have doubts about how the United States would interpret Article 23(1) of the 1975 U.S.-U.K. Income Tax Treaty ("Elimination of Double Taxation").[114] To answer these at-large questions, the United States and United Kingdom began negotiations under Article 25 of the tax treaty ("Mutual Agreement Procedure") and came to an agreement near the end of 1986.[115]

That authority agreement recited a number of accepted facts between the two States, including that the tax treaty's "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 … only for the appropriate amount of tax paid to the United Kingdom."[116] This agreement was, again, a supplemental material looked to by both the Claims Court and the Federal Circuit, falling within the scope of VCLT Article 32 applicability.[117]

But unlike the Federal Circuit's supplemental material of choice, the authority agreement was from 1986, a lesser 11 years of difference contrasted with the affidavits of 19 years later. The Claims Court's use of the authority agreement had also been agreed to by both parties and was not a unilateral assertion. The correspondents and signatories to the authority agreement were employees of the IRS and Policy Division of Inland Revenue at the time, meaning that both had a significant "stake in protecting the fisc" of their respective State.[118] As the authority agreement

[110] Air France v. Saks, 470 U.S. 392, 396 (1985) (quoting Choctaw Nation of Indians v. United States, 318 U.S. 423, 431–32 (1943)).
[111] VCLT, *supra* note 1, at arts. 31-32.
[112] Alex Glashausser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25, 27 (2005) (the author goes on to comment that because treaty interpretation can weigh so heavily on identity, neither the United States Supreme Court nor the International Court of Justice "has reason to defer to the other," but both should still "be open to the other's views as potentially persuasive.").
[113] *Id.* at 27–35.
[114] Referring to the Technical Explanation (created in 1977) and Revenue Procedure 80-18 (created in 1980), discussed in the previous subsection; *See also* 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12, at art. 23.
[115] 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12, at art. 24; Xerox Corp. v. U.S., 14 Cl. Ct. 455, 464–65 (Cl. Ct. 1988).
[116] Xerox Corp., 14 Cl. Ct. 455, 465 (Cl. Ct. 1988).
[117] VCLT, *supra* note 1, at art. 32.
[118] *See* Avi-Yonah, *supra* note 63, at 493 (referencing the language of Prof. Avi-Yonah).

was agreed to by both States, it had the authority of the treaty under the understanding that a treaty is a living document that can change over time with the consent of the States bound to it.[119]

The Claims Court used this agreement to support the interpretation that "the Article 23(1)(c) U.S. foreign tax credit is linked to the payment of ACT rather than the preceding dividend distribution by the U.K. corporation."[120] This usage is appropriate under VCLT Article 32, as the authority agreement was being used only insofar as the treaty interpretation under VCLT Article 31 was left ambiguous.[121] This was a fair decision, as even the contemporaries of the 1975 U.S.-U.K. Income Tax Treaty felt that the meaning of the treaty was ambiguous in this way!

The Federal Circuit did also use the authority agreement in coming to its own conclusion.[122] However, the Federal Circuit found that the agreement offered "no substantive change from the Treaty provisions" and did not "treat the important aspects of the [U.S.] Treasury's litigation position, such as that the Article 23 credit is only provisional…."[123] Looking at the text of the tax treaty Article 23, it is apparent that the provisional nature of the tax credit was already apparent in the treaty text and did not need to be changed in the authority agreement. The first line of the tax treaty's Article 23 reads: "In accordance with the *provisions* and subject to the limitations of the law of the United States … the United States shall allow … a credit against the United States tax the appropriate amount of tax paid to the United Kingdom[.]"[124] There was no need for the agreement to confirm or supplement what was already there.

By incorporating the authority agreement in a clarifying role, not as a source superior to the treaty language, the Claims Court also worked to accomplish one duty of international tax treaty interpretation: "respect[ing] the national obligations of the State under an international agreement."[125]

ii. Plain Language

The emphasis that VCLT Article 31 puts on the actual words of the treaty is hard to overstate.[126] Before turning to supplemental materials, treaties are to 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."[127] Every distinction between these two courts comes down to the fact that the Claims Court focused on examining the language of the tax treaty first, and when it looked to secondary sources it gave them less weight than it gave to the treaty's plain text.

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[119] *See, e.g.*, LAW OF THE SEA – UNCLOS AS A LIVING TREATY (Jill Barrett & Richard Barnes eds., 2016) (this collection of articles explores the ways that the UN Convention on the Laws of the Sea (UNCLOS) exists as an expression of changing international law and how treaties generally are very much alive).
[120] Xerox Corp. v. U.S., 14 Cl. Ct. 455, 466 (Cl. Ct. 1988).
[121] VCLT, *supra* note 1, at arts. 31-32.
[122] Xerox Corp. v. United States, 41 F.3d 647, 658 (Fed. Cir. 1994).
[123] Xerox Corp., 14 Cl. Ct. at 466.
[124] 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12, at art. 23.
[125] ROHATGI, *supra* note 27, at 20.
[126] VCLT, *supra* note 1, at art. 31.
[127] VCLT, *supra* note 1, at art. 31.

In writing the Vienna Convention on the Law of Treaties, "[t]he drafters … intended to adopt a plain meaning approach because they thought this methodology reflected customary practice and would give nations less flexibility to pursue unilateralist interpretations."[128] It is limiting to not be able to look much beyond what a treaty has to say about itself, but that limitation exists to protect States from taking advantage of interpretations unfairly biased in their favor. The Federal Circuit's use of the affidavits runs counter to the VCLT drafters' desire to prevent—or perhaps at least reduce the likelihood of—States interpreting treaties in their favor in their own courts.[129]

The Claims Court did not explicitly focus on avoiding the pursuance of a unilateral interpretation, but its focus on the tax treaty's text as a lodestar kept it from veering into a result that unfairly favored the U.S. and the U.S.-based company Xerox.[130] The Claims Court followed one scholar's guidance that "a court must interpret the treaty in accordance with Article 31, independent of Article 32, and then use Article 32 to check that meaning."[131] The Federal Circuit did the opposite, looking to supplementary materials first and then using the treaty to check the meaning of the additional material.[132]

Had the Federal Circuit followed the principles outlined in the VCLT, it likely would have come to a similar decision as the Claims Court. It likely would have held, again like the Claims Court, that the interpretation set forth by the United States "fully accords" with the supplemental materials and that the arguments set forth by Xerox conflicted with those supplemental materials.[133] The supplemental materials—the Technical Explanation, the Revenue Ruling, and the authority agreement—were not seen by either court as primary sources in interpreting the tax treaty. Yet, one of the biggest differences between these two courts is whether they looked at such supplements in the context of what the tax treaty said or what others argued the tax treaty said.

This approach and focus on plain meaning are not so far removed from the typical approach of United States courts. If anything, the similarity between VCLT Article 31 and the Ordinary-Meaning Canon is what allowed the Claims Court to come to the correct interpretation of the 1975 U.S.-U.K. Income Tax Treaty without ever actually referring to the VCLT.[134] In fact, a "fundamental canon of [U.S.] statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."[135] Encouraging courts to focus on "ordinary meaning" as a "[g]eneral rule of interpretation" is not a novel suggestion at all in this way.[136]

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[128] Rebecca M. Kysar, *Interpreting Tax Treaties*, 101 IOWA L. REV. 1387, 1403 (2016).
[129] *See* Xerox Corp. v. United States, 41 F.3d 647 (Fed. Cir. 1994).
[130] *See* Xerox Corp. v. United States, 14 Cl. Ct. 455 (Cl. Ct. 1988).
[131] HARRIS & OLIVER, *supra* note 68, at 40.
[132] *See* Xerox Corp. v. United States, 41 F.3d 647 (Fed. Cir. 1994).
[133] VCLT, *supra* note 1; Xerox Corp. v. U.S., 14 Cl. Ct. 455, 464 (Cl. Ct. 1988).
[134] 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12; VCLT, *supra* note 1.
[135] Perrin v. U.S., 444 U.S. 37, 42 (1979) (setting out the ordinary-meaning canon of construction and then looking to the ordinary meaning of a particular word at the time the relevant statute was enacted by Congress).
[136] VCLT, *supra* note 1, at art. 31.

To answer the question posed by this paper in its title: How to get away with murder? Convince a court to turn a blind eye to tax treaty interpretation under the VCLT.[137] At least, that is how Xerox was able to do it.

III. VCLT APPLICATIONS MOVING FORWARD

Obviously, tension exists regarding applications of the VCLT from the American perspective.[138] It must be acknowledged that the United States, though a signatory to the VCLT in 1970, has still not ratified it.[139] But even without the act of ratification, as a signatory to the VCLT the United States is not supposed to take actions contrary to it.[140] Ratification status aside, "[i]t would be a good idea for international tax lawyers to study the VCLT. A lot of hard thinking went into that tax treaty, and it should not lightly be ignored."[141] Despite this pleading from international law practitioners, the VCLT is currently being ignored at worst, and under-utilized at best, in the realm of tax treaty interpretation.[142]

A survey of the Lexis tax case database in 2004 revealed that "among hundreds of treaty interpretation cases only one quite recent case in which a court discussed the potential application of the VCLT."[143] In that one case, *Kappus v. Commissioner*, a quick mention is given to VCLT Article 40(5) in discussing whether a nation can become a party to a treaty by ratifying a later provision.[144] As far as international treaty interpretations go, the case is admittedly not a decisive victory in support of using VCLT principles moving forward.[145] However, there has been more of a movement towards incorporating such interpretation provisions in recent years. The 2014 case *Bank of New York v. Yugoimport* examined a Succession Agreement using "the interpretive rules set forth in the Vienna Convention" under "New York's choice-of-law principles."[146] Though more recent than *Kappus*, this case is still quite narrow in its application of the VCLT, doing so only under a choice-of-law provision.

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[137] VCLT, *supra* note 1.
[138] VCLT, *supra* note 1.
[139] VCLT, *supra* note 1; *See* Avi-Yonah, *supra* note 63, at 492; UNITED NATIONS TREATY COLLECTION, *VCLT Status as at 02-12-2022*, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (last visited Dec. 2, 2022).
[140] VCLT, *supra* note 1; Avi-Yonah, *supra* note 63, at 492.
[141] Avi-Yonah, *supra* note 63, at 493.
[142] VCLT, *supra* note 1.
[143] Avi-Yonah, *supra* note 63, at 492; *see also* Kappus v. Commissioner, 337 F.3d 1053 (D.C. Cir. 2003) (the "one quite recent case" referred to in the quotation).
[144] VCLT, *supra* note 1, at art. 40; Kappus v. Commissioner, 337 F.3d 1053, 1059 (D.C. Cir. 2003).
[145] As the idea of using the VCLT to aid American tax courts in international tax treaty interpretation has not been embraced, the brief mention of VCLT principles in *Kappus* is a starting point to discussing VCLT adoption, not an example of what the ideal result under such an interpretive system would look like.
[146] Bank of New York v. Yugoimport, 745 F.3d 599, 610 (2nd Cir. 2014).

While at least there is more than one recent case in which application or potential application of the VCLT is discussed, the path forward remains unclear.[147] As demonstrated by this analysis of the *Xerox* cases, U.S. courts should not be hesitant to embrace VCLT Articles 31 and 32, as such provisions pave the way for tax results that are fair and in line with treaty text.[148] Again, doing such would not be a radical departure from typical U.S. case law, as there is already a tradition of using the Ordinary-Meaning Canon in interpreting U.S. statutes when they are being litigated.

Given that "[c]ourts in the [United States] are generally more willing than those of other states to look outside the instrument to determine its meaning," VCLT Articles 31 and 32 could provide guidelines for this practice.[149] If nothing else, such principles could help courts understand when it is appropriate to look to supplemental materials and how to weigh such materials against the plain language of the disputed treaty.

A. Why Use the VCLT Instead of the OECD?

In arguing why courts should adopt the use of the VCLT moving forward, it is necessary to discuss why it should be chosen over the OECD Model and Commentaries, mentioned briefly at the beginning of this paper.[150] While significant scholarly debate exists on this topic, the choice may not be as binary as it seems.[151]

Adopting the use of VCLT principles as an interpretive tool would not preclude the use of the OECD as another interpretive tool. If anything, the VCLT could guide courts in how to use the OECD Commentaries and ensure that such commentaries are only viewed secondary to the treaty text itself.[152] Like case law from international jurisdictions, the "OECD Commentary are reports are considered as supplementary means of interpretation" already and can be utilized "to provide additional non-binding support on treaty interpretations."[153] Additionally, the OECD Commentaries have typically already been looked to "as either an 'ordinary meaning' in the sense of Article 31 of the Vienna Convention, or a 'special meaning' in the sense of Article 31, paragraph 4, or as a supplementary means of interpretation in the sense of Article 32 of the Vienna Convention."[154] So some precedent for OECD Commentary application in accordance with VCLT principles already exists.[155]

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[147] VCLT, *supra* note 1; *See* Abrahamsen v. C.I.R., 142 T.C. 405 (T.C. 2014) (discussing the application of VCLT Article 34 to wage taxation imposed on member of diplomatic staff).
[148] Xerox Corp. v. U.S., 14 Cl. Ct. 455 (Cl. Ct. 1988); Xerox Corp. v. U.S., 41 F.3d 647 (Fed. Cir. 1994); VCLT, *supra* note 1, at arts. 31-32.
[149] MICHAEL EDWARDES-KER, TAX TREATY INTERPRETATION 46 (1994); VCLT, *supra* note 1, at arts. 31-32.
[150] VCLT, *supra* note 1; OECD Model and Commentary, *supra* note 11.
[151] *See* Uckmar, *supra* note 19, at 158–61; PARADA, *supra* note 68, at 60–69; HARRIS & OLIVER, *supra* note 68, at 39–60; ROHATGI, *supra* note 27, at 23; Ault, *supra* note 30, at 61–68.
[152] OECD Model and Commentary, *supra* note 11; VCLT, *supra* note 1.
[153] ROHATGI, *supra* note 27, at 23.
[154] OECD Model and Commentary, *supra* note 11; Uckmar, *supra* note 19, at 158.
[155] OECD Model and Commentary, *supra* note 11.

However, in comparing the VCLT and OECD Commentaries it must be noted that "there is no international judicial authority to interpret tax treaties[,]" and the principles of the VCLT would have to govern in case of a conflict between the two.[156] The VCLT is a document for the interpretation of treaties, while "[t]he OECD Commentary and Reports are [only] considered as supplementary means of interpretation."[157]

B. VCLT Use Is Appropriate for Tax Treaties

It cannot be overemphasized that tax treaties are unique from typical treaties between States. While a "normal" bilateral treaty will bind two States to a set of agreements, a tax treaty is "primarily focused on the private actors who will be applying the treaty rules in the first instance to determine their tax liability."[158] With this framing, some might argue that the VCLT and its focus on plain language above everything else is not appropriate for tax treaty interpretation, as "[a]ll relevant material which is helpful in reaching a sensible interpretation should be considered, and the real issue is the weight to be given to the extra-contextual materials."[159]

But this fear is unfounded. The VCLT does not prohibit courts from looking to "all relevant material which is helpful in reaching a sensible interpretation."[160] The discussion of the Federal Circuit's use of supplementary materials is not meant to criticize that court for its act of using affidavits, but instead to be critical of the weight given to those affidavits. Similarly, the Claims Court did not violate the principles of the VCLT in looking to a variety of contemporary supplemental materials to confirm their reading of the 1975 U.S.-U.K. Income Tax Treaty.[161]

If anything, VCLT Articles 31 and 32 answer the real questions: whether to look to supplemental materials in the first place, and then what weight to give them.[162] VCLT Article 32 describes a narrow set of circumstances in which supplementary means of interpretation may be referenced: in confirming a plain language reading under VCLT Article 31, and when that reading results in an interpretation that is ambiguous or absurd.[163]

Courts interpreting tax treaties should still understand the unique nature of international tax law and its bind on private actors instead of States. Using the principles of VCLT, interpretation would not detract from that unique nature. Rather, the VCLT provides a degree of predictability to foreign and domestic taxpayers in that they understand when supplemental materials will be looked to and how those materials will be given less deference than the treaty language itself.[164] Perhaps much of the confusion leading up to and resulting in the *Xerox* litigation would have been

[156] VCLT, *supra* note 1; OECD Model and Commentary, *supra* note 11; ROHATGI, *supra* note 27, at 23.
[157] VCLT, *supra* note 1; ROHATGI, *supra* note 27, at 23.
[158] Ault, *supra* note 30, at 64.
[159] VCLT, *supra* note 1; Ault, *supra* note 30, at 64.
[160] VCLT, *supra* note 1; Ault, *supra* note 30, at 64.
[161] 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12.
[162] VCLT, *supra* note 1, at arts. 31-32.
[163] VCLT, *supra* note 1, at arts. 31-32.
[164] VCLT, *supra* note 1; AMERICAN LAW INSTITUTE, *infra* note 166.

resolved if company counsel was always aware that an affidavit would not be given more weight to speak about the meaning of a treaty than the treaty itself.[165]

Even the American Law Institute has spoken to the potential benefits of incorporating use of the VCLT in the realm of international tax treaty interpretation.[166] In a 1992 report on Federal Income Tax—occurring in the time period between the two *Xerox* cases—the ALI noted that while the tendency of the U.S. courts to openly look beyond the four corners of a treaty had its unique strengths, incorporating VCLT principles could help cover its weaknesses.[167] Though it did not specifically mention affidavits, the report addressed the use of unilateral materials. Even in 1992 it was apparent that "United States practice appears to place undue weight on unilateral interpretive materials, as opposed to materials that are the product of or otherwise reflect the *mutual* views of both parties to a bilateral convention."[168]

Whether by the VCLT, the OECD Model, or a combination of the two governed by the principles of the VCLT, a standard solution guiding when to look at outside sources and how much weight to give them would smell just as sweet.[169]

CONCLUSION

It is a reality that the complexities of international tax treaties are not going away any time soon, especially as "additional complexity is the price we have to pay for greater certainty and equity and more economically efficient tax rules."[170] The Vienna Convention on the Law of Treaties is a great tool to navigate that complexity if courts would only look to it and adopt it.[171]

The VCLT ought to have been used to interpret the 1975 U.S.-U.K. Income Tax Treaty in the *Xerox* litigation, as doing so would have led to a more understandable and fair result.[172] Without directly referencing the VCLT, the Claims Court came to a just decision in only using supplementary materials—the Technical Explanation, Revenue Ruling, and authority agreement—

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[165] Xerox Corp. v. U.S., 14 Cl. Ct. 455 (Cl. Ct. 1988); Xerox Corp. v. U.S., 41 F.3d 647 (Fed. Cir. 1994).
[166] VCLT, *supra* note 1.
[167] Xerox Corp. v. U.S., 14 Cl. Ct. 455 (Cl. Ct. 1988); *Xerox Corp. v. U.S.*, 41 F.3d 647 (Fed. Cir. 1994); AMERICAN LAW INSTITUTE, FEDERAL INCOME TAX PROJECT: INTERNATIONAL ASPECTS OF THE UNITED STATES INCOME TAXATION II: PROPOSALS ON UNITED STATES INCOME TAX TREATIES 27 (1992) ("Although the flexibility of U.S. interpretive practice relative to the more constrained approach of the Vienna Convention offers significant advantages, in at least one respect it would be desirable if U.S. interpretation practice conformed more closely to that of the Vienna Convention.").
[168] *Id.* (emphasis added).
[169] VCLT, *supra* note 1; OECD Model and Commentary, *supra* note 11; *see* WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2, l. 43-44 (alluding to the line "A rose by any other name would smell just as sweet.").
[170] Robert J. Peroni, J. Clifton Fleming, Jr. & Stephen E. Shay, *Reform and Simplification of the Foreign Tax Credit Rules*, *in* FOUNDATIONS OF INTERNATIONAL INCOME TAXATION 201, 201 (Michael J. Graetz ed., 2003).
[171] VCLT, *supra* note 1.
[172] VCLT, *supra* note 1; 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12; Xerox Corp. v. U.S., 14 Cl. Ct. 455 (Cl. Ct. 1988); Xerox Corp. v. U.S., 41 F.3d 647 (Fed. Cir. 1994).

to magnify what was already clear from a plain reading of the statute.[173] This approach is also in line with the well-understood Ordinary-Meaning Canon, which is commonly used by courts in statutory interpretation cases.

The Federal Circuit could have prevented Xerox from getting away with significant tax evasion by using the guiding framework of VCLT Articles 31 and 32 instead of relying haphazardly on a number of documents without any guiding principles.[174] The detriment that turning to affidavits written decades after the fact to interpret a tax treaty cannot be overstated.

While it is true that $1.8 million may not be a significant amount for a global corporation in the long or short run, that does not diminish the takeaway of the importance of consistent and predictable treaty interpretation. Tax treaties, obviously including the U.S.-U.K. Income Tax Treaty of 1975, "seek to address fiscal or tax evasion, a problem related with the asymmetries of information and the governance failure in collecting taxes…."[175] This goal is thwarted when courts look too far beyond the four corners of a treaty, especially if supplemental materials are looked to without guiding limits or principles. In a post-Panama Papers world, it seems more important than ever that courts have the ability to closely scrutinize any potential international tax evasion and avoidance. That ability would be strengthened by incorporating the principles of VCLT Articles 31 and 32[176] in the United States, promoting a tendency towards more predictable treaty interpretation.

By building on the small amount of pre-existing momentum and continuing to look and cite to the VCLT and its interpretive principles moving forward, courts can more easily interpret international tax treaties in a way that is appropriate, consistent, and able to create a better final result. It may even reduce the ability of corporations to get away with murder.[177]

[173] VCLT, *supra* note 1.
[174] VCLT, *supra* note 1, at art. 31-32.
[175] 1975 U.S.-U.K. Income Tax Treaty, *supra* note 12; PARADA, *supra* note 68, at 53; *see also* Uckmar, *supra* note 19, at 153 ("most tax treaties have another equally important operational objective: i.e. the prevention of fiscal evasion.").
[176] VCLT, *supra* note 1, at arts. 31-32.
[177] VCLT, *supra* note 1.