

The interpretation of double taxation agreements: a comparative evaluation of recent South African case law

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1 Introduction

Vogel and Rust describe the act of interpretation as unfolding a text, to bring it to be understood.¹ The South African courts have recently had a number of opportunities to interpret double taxation agreements entered into by South Africa. For example, in May 2015 the tax court in Johannesburg delivered judgment in a case dealing with the double taxation agreement between South Africa and the United States of America.² In August 2015, the supreme court of appeal considered the double taxation agreement between South Africa and Australia.³ Besides the relevant findings on the merits of the cases, both these judgments contain a number of interesting points regarding the interpretation of double taxation agreements. It is these points regarding interpretation that this contribution aims to examine.

In order to examine these points, the necessary background in relation to each case will be discussed. Thereafter, the relevant court's approach or finding in relation to a number of aspects regarding the interpretation of double taxation agreements will be analysed. The analysis will refer to other important cases on these aspects, as well as the views of academic authors. Moreover, the position in other states, such as the United Kingdom and Canada will be referred to in respect of each aspect.⁴

2 Background

In order to discuss certain aspects of the judgments, some of the basic facts and provisions with which the cases were concerned must be considered.

2.1 *AB LLC and BD Holdings LLC v The Commissioner of the South African Revenue Service*

The taxpayer was incorporated in the United States of America. From February 2007 until May 2008 the taxpayer provided certain consultancy services to a South African resident client. The taxpayer provided these services by sending a number of its employees to South Africa. The issue in this case was whether the taxpayer

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¹ Vogel and Rust "Introduction" in Reimer and Rust (eds) *Klaus Vogel on Double Taxation Conventions* (2015) 35.

² *AB LLC and BD Holdings LLC v The Commissioner of the South African Revenue Service* (13276) 2015 ZATC 2 (15 May 2015).

³ *Krok v Commissioner, South African Revenue Service* 2015 6 SA 317 (SCA).

⁴ These two states were chosen as comparative jurisdictions because the courts themselves, in their respective judgments, referred to cases from these states. Furthermore, there is a strong tradition in South African case law of looking to English cases for guidance in formulating South African tax principles.

carried on its business in South Africa through a permanent establishment situated in South Africa. If so, the profits attributable to the permanent establishment could be taxed in South Africa in terms of the relevant provisions of the double taxation agreement.⁵

The double taxation agreement contains a definition of a permanent establishment, the relevant parts of which read as follows:

- “1. For the purposes of this Convention, the term ‘permanent establishment’ means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
2. The term “permanent establishment” includes especially:
- (a) a place of management;
 - (b) a branch;
 - (c) an office;
 - (d) a factory;
 - (e) a workshop;
 - (f) a mine, an oil or gas well, a quarry or other place of extraction of natural resources;
 - (g) a warehouse, in relation to a person providing storage facilities for others;
 - (h) a store or premises used as a sales outlet;
 - (i) a ship, drilling rig, installation or other structure used for the exploration or exploitation of natural resources, but only if it lasts more than twelve months;
 - (j) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities lasts more than twelve months; and
 - (k) the furnishing of services, including consultancy services, within a Contracting State by an enterprise through employees or other personnel engaged by the enterprise for such purposes, but only if activities of that nature continue (for the same or a connected project) within that State for a period or periods aggregating more than 183 days in any twelve-month period commencing or ending in the taxable year concerned.”⁶

The commissioner for the South African Revenue Service argued that, on the facts before the court, the taxpayer carried on business in South Africa through a permanent establishment because the requirements of sub-article 5(2)(k) were met. It argued that if the requirements of this sub-article were met, it was unnecessary to show that the requirements of article 5(1) were also satisfied. Since it was undisputed that the taxpayer provided services in South Africa for the requisite time period, the requirements of article 5(2)(k) were met and, therefore, it was established that the taxpayer carried on its business through a permanent establishment in South Africa. In terms of this argument, whether the requirements of article 5(1) were also met is irrelevant, since article 5(2)(k) effectively deems a permanent establishment to exist. In the alternative, it argued that the requirements of article 5(1) were met on the facts of the case.

The taxpayer argued that if it is shown that the requirements of article 5(2)(k) were met, it still had to be found that the requirements of article 5(1) were also met. In other words, a permanent establishment could exist only if the requirements of article 5(1) were also met. For its argument, the taxpayer relied on the commentary in relation to the OECD Model Tax Convention’s articles 5(2)(a) to (f). In terms of the applicable commentary, articles 5(2)(a) to (f) contain a list of examples which may, *prima facie*, constitute a permanent establishment, but makes it clear that these examples will be regarded as permanent establishments only if the requirements of

⁵ the *AB LCC* case (n 2) par 11, which refers to a 7(1) of the Convention between the Republic of South Africa and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains – *GG 18553 (15-12-1997)*.

⁶ a 5(1) and (2) of the convention (n 5).

article 5(1) are met.⁷ The taxpayer sought to extend this part of the commentary to cover the interpretation of article 5(2)(k) of the relevant treaty.

The parties furthermore differed on the way that the 183 days mentioned in article 5(2)(k) should be calculated.⁸

2.2 The *Krok* case

Briefly, the facts of the case were that the Australian tax office requested the South African Revenue Service to assist it with the collection of income tax purportedly due to it by Krok. At the request of its Australian counterpart, the South African Revenue Service applied for a preservation order in respect of Krok's assets situated in South Africa. The relevant double taxation agreement did not initially contain a provision on mutual assistance in the collection of taxes. However, in 2008 the double taxation agreement was amended by a protocol, which inserted a provision into the double taxation agreement allowing South Africa and Australia to assist each other in the collection of taxes and securing preservation orders for purposes of recovering taxes. Krok argued that, on a proper interpretation of the relevant articles of the double taxation agreement and protocol, South Africa would be entitled to obtain a preservation order only if the taxes claimed by the Australian tax office arose on or after the date on which the protocol came into effect. One of the bases for Krok's argument was the general rule of interpretation that, in the absence of express provisions to the contrary, statutes should be construed as affecting future matters only. Thus, the argument went, the relevant provision inserted by the protocol could be applied only in respect of taxes on amounts relating to the period after the protocol came into effect.⁹

3 *The role of the commentary*

3.1 The two relevant cases

In the *AB LCC* case the court observed that even where states adopted the exact wording of a model treaty, they would usually interpret the same terms or articles differently. Thus, model treaties are published with commentary to minimise different interpretations.¹⁰ The court further stated that in a situation where a double taxation agreement used the same article as that of the OECD Model Tax Convention, it would not be uncommon to rely on the commentary.¹¹ The import of the commentary was emphasised by the court when it opined that “[t]he explanations provided in the Commentary are of immense value in understanding or interpreting any article contained in the treaty”.¹²

Regarding the parties' arguments, the court noted that the commentary to articles 5(2)(a)-(f) had been accepted in many courts where the treaties had adopted the

⁷ Commentary on the OECD Model Tax Convention a 5(2) par 12. Each article in the OECD Model Tax Convention is accompanied by a detailed commentary to interpret or illustrate the article. This contribution is based on the OECD Model Tax Convention and Commentary of 15-07-2014. It should be noted that the OECD Model Tax Convention does not contain the additional articles, like article 5(2)(k), that the relevant treaty contained.

⁸ the *AB LCC* case (n 2) par 45-47.

⁹ The other basis for Krok's argument was the “revenue rule”, a point easily dismissed by the court. See the *Krok* case (n 3) par 29-30.

¹⁰ the *AB LCC* case (n 2) par 15.

¹¹ the *AB LCC* case (n 2) par 14.

¹² the *AB LCC* case (n 2) par 22.

same wording as the OECD Model Tax Convention. The court then argued that the interpretation provided in the commentary “takes no account of the phrase ‘includes especially’”.¹³ After an analysis of the meaning of that phrase, the court ruled that the phrase serves to extend or enlarge the meaning of a thing or a concept and that, consequently, article 5(2)(k) forms an “integral part” of article 5(1). Accordingly, the court found that if an activity falls within the provisions of article 5(2)(k) a permanent establishment exists and the requirements of article 5(1) need not be met.¹⁴ The court acknowledged that its interpretation was contrary to what was suggested in the commentary but distinguished the treaty in front of it from the OECD Model Tax Convention to which the commentary relates. It concluded that the interpretation set forth in the commentary in respect of articles 5(2)(a)-(f) could not be adopted for article 5(2)(k) (which does not appear in the OECD Model Tax Convention), because of the differences between articles 5(2)(a)-(f) and 5(2)(k). Consequently, the court found that the commentary was “of no assistance” in relation to article 5(2)(k).¹⁵

Concerning the calculation of the 183 days referred to in article 5(2)(k), the court adopted the interpretation set out in the commentary.

In the *Krok* case, Krok argued that the commentary supported his interpretation of the relevant provisions. However, the court, relying on the United Kingdom case of *Ben Nevis*,¹⁶ found that

“the commentary makes clear that it is open to the parties to apply the provision on assistance in the collection of taxes to revenue claims arising before the Convention enters into force and that the question is whether the parties intended that the Protocol should have that effect. All indications are that this is what was intended here.”¹⁷

Hence, Krok’s argument was rejected.

3.2 Comments regarding the role of the commentary

In the *AB LCC* case the court acknowledged the “immense value” of the commentary in interpreting double taxation treaties and noted that many other courts have relied on the interpretation set forth in the commentary. Yet, the court criticised the commentary by stating that it did not take the words “includes especially” into account. In relation to the 183-day rule, the court accepted the interpretation set out in the commentary without question.

The court was therefore inconsistent in its treatment of the commentary and never described the basis on which it was entitled (or obliged) to refer to the commentary. It may even be suggested that, because the court was not clear on whether it was bound to apply the commentary or whether it was simply entitled to apply it if it was appropriate to do so, the court treated it inconsistently. The questions that the court should have asked were (a) whether South African courts are obliged to refer to and follow the commentary and (b) if they are not, whether they are entitled to do so and on what basis? The court in the *Krok* case did not provide an answer to these questions. It merely noted the commentary, but disagreed with the way in which the taxpayer interpreted it.

¹³ the *AB LCC* case (n 2) par 18.

¹⁴ the *AB LCC* case (n 2) par 29-30.

¹⁵ the *AB LCC* case (n 2) par 31.

¹⁶ *Ben Nevis (Holdings) Ltd v Commissioners for Her Majesty’s Revenue and Customs* 2013 EWCA Civ 578.

¹⁷ the *Krok* case (n 3) par 38.

One point that authors, internationally, seem to agree on is that the commentary is not binding.¹⁸ Even the OECD does not regard the commentary as binding since it suggests that the commentary is “of great assistance in the application and interpretation of the conventions ...”, but not that the commentary is binding, as conventions signed by countries are.¹⁹ A South African court, interpreting a double taxation agreement to which South Africa is a party, is therefore not bound to interpret that double taxation agreement in accordance with the interpretation in the commentary. The questions that remain are therefore whether a South African court is entitled to rely on the commentary and the basis for such reliance.

Many authors are of the view that the constitution provides a basis for the use of the commentary.²⁰ Two sections of the constitution are of relevance here. The first is section 232, which provides that customary international law is law in South Africa unless it is inconsistent with the constitution or an act of parliament.²¹ The second is section 233, which obliges a court when interpreting any legislation to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. A number of authors argue that the commentary forms part of South Africa’s customary international law and that South African courts are therefore obliged to follow it.²² Another opinion seems to be that the commentary constitutes international law and that the South African courts are bound to interpret double taxation agreements in a manner that is consistent with the commentary.²³ However, Ward and his co-authors have argued convincingly that the commentary is neither international law, nor customary international law.²⁴ Hence, the two sections of the constitution mentioned above do not oblige a South African court to apply the commentary, or even to consider it. Furthermore, if a South African court does refer to the commentary, these sections of the constitution cannot be cited as justification for such a reference.

¹⁸ Ward, De Broe, Killius, Le Gall *et al* *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries of the OECD Model* (2005) 38-53; Avery Jones “Treaty interpretation” in Vann (ed) *Global Tax Treaty Commentaries* (2015) par 5.2.1.2; Vogel “The influence of the OECD commentaries on treaty interpretation” 2000 *Bulletin for International Taxation* 612-614. Only Engelen “Some observations on the legal status of the commentaries on the OECD Model” 2006 *Bulletin for International Taxation* 105 seems to be of the view that states are bound by the commentary.

¹⁹ OECD *Introduction to OECD Model Tax Convention on Income and on Capital* (2014) par 29.

²⁰ See the authors listed at n 22 ff.

²¹ Constitution of the Republic of South Africa, 1996.

²² Olivier and Honiball *International Tax: A South African Perspective* (2011) 312; Oguttu “Resolving double taxation: the concept ‘place of effective management’ analysed from a South African perspective” 2008 *CILSA* 80-104; West states that “the OECD Commentary may be an interpretational tool in terms of customary international law and have a persuasive effect where clarity is sought for a particular term used i.e. may assist in the interpretation of the context” (West *The Taxation of International (Non-resident) Sportspersons in South Africa* (2009 thesis Unisa) 32). It is unclear what is meant by an “interpretational tool”, but it should be noted that if the commentary is customary international law (even only as an “interpretational tool”), South Africa is bound to it in terms of s 232 of the constitution and it is difficult to see how it can then be limited to “persuasive effect” only.

²³ Van der Merwe “The phrase ‘place of effective management’ effectively explained?” 2006 *SA Merc LJ* 121-136.

²⁴ Ward *et al* (n 18) 38-53; Ward “The role of the commentaries on the OECD model in the tax treaty interpretation process” 2006 *Bulletin for International Taxation* 97-99-100. See also Erasmus-Koen and Douma “Legal status of the OECD commentaries – in search of the holy grail of international tax law” 2007 *Bulletin for International Taxation* 339; Pijl “The OECD commentary as a source of international law and the role of the judiciary” 2006 *European Taxation* 216 and Avery Jones (n 18) par 5.2.4 all of whom agree with Ward *et al*.

If it is assumed that South African courts are bound to apply articles 31 and 32 of the Vienna Convention on the Law of Treaties²⁵ (a point discussed below),²⁶ could these sections provide an explanation for the court's reliance on the commentary? The difficulty in relying on the relevant provisions of the Vienna convention is that the commentary does not fit comfortably within any of the categories provided for in these articles of the Vienna convention.²⁷ Moreover, well-known academic authors have differing views regarding the category within which the commentary should be placed.²⁸ Some authors regard courts' reluctance to place the commentary within one of the categories in the Vienna convention as wise, since it allows flexibility.²⁹ Other authors have suggested that it is not necessary for the commentary to fall within one of the categories set out in the Vienna convention for courts to be able to use it in the interpretation of double taxation agreements. According to this argument, the Vienna convention does not constitute a codification of all the guidelines and principles involved in the interpretation of treaties, a position that is supported by the commentary on the Vienna convention.³⁰ Other interpretative materials, such as the commentary, may therefore be used in the interpretive process.³¹ As an example, the decision of the Canadian supreme court in the *Crown Forest Industries* case³² is cited. In that case, the court held that the commentary that existed at the time when a specific treaty was concluded formed part of the "legal context" of that treaty. Therefore, it plays a significant role in the interpretation of the treaty. It is explained that "legal context" "describes the body of substantive law that may be looked at to infer legislative intent. It includes, amongst other things, the relevant case law, statutes, common law and international law."³³ In terms of the *Crown Forest Industries* case, the commentary forms part of the "legal context" and is therefore very important in the process of interpreting a treaty.

Despite this uncertainty regarding the use of the commentary in terms of the Vienna convention, courts internationally have frequently relied on the commentary,³⁴ but they have been reticent regarding the basis on which they rely on the commentary.³⁵ For example, in the United Kingdom, the court has stated that that it is common ground that the court is entitled to consider the commentary.³⁶ Also, in South Africa, where the courts have referred to or relied on the commentary, they have not

²⁵ Vienna Convention on the Law of Treaties (adopted 23-05-1969 entered into force 27-01-1980) 1155 UNTS 331.

²⁶ See par 4 below.

²⁷ Baker *Double Taxation Conventions: A Manual on the OECD Model Tax Convention on Income and on Capital* (2002) par E-12; Kobetsky *International Taxation of Permanent Establishments: Principles and Policy* (2011) 164. See also Avery Jones (n 18) par 5.2.1.1 – 5.2.1.2, who makes the point that the fact that the commentary is not binding does not mean that it cannot fall within a 31 of the Vienna convention.

²⁸ See Ward *et al* (n 18) 18-27 for a synopsis of the views of different authors. See also Baker (n 27) par E-12; Avery Jones (n 18) par 5.2.2 and 5.2.5.

²⁹ Erasmus-Koen and Douma (n 24) 349.

³⁰ Ward (n 24) 98. See also Avery Jones (n 18) par 5.2.2.3.

³¹ Avery Jones (n 18) par 5.2.2.3.

³² *Crown Forest Industries Ltd v The Queen* 1995 2 SCR 802.

³³ Ward (n 24) 99.

³⁴ Baker (n 27) par E-10.

³⁵ Baker (n 27) par E-12; Erasmus-Koen and Douma (n 24) 349.

³⁶ *Sun Life Assurance Co of Canada v Pearson* 1986 STC 335 CA. See also the *Ben Nevis* case (n 16).

set out the basis on which they have done so.³⁷ Thus, the judgment in the *AB LCC* case, which also remained silent on the basis upon which it was entitled to rely on or reject the interpretation in the commentary, did not constitute an exception to the rule. But, it is still regretted that the judgment in the *AB LCC* case did not discuss the basis upon which the commentary was referred to. It should, at the very least, have made the point explicitly that the commentary is not binding upon it and that the constitution forms no basis for reliance on the commentary. It would have been very useful if the court had stated on which of the above possibilities it was entitled to rely on the commentary. Perhaps then it could have justified why it chose to rely on the commentary in respect of one matter, but criticised the commentary in respect of another.

Vogel and Rust describe common interpretation as the interpretation of a double taxation agreement in a way that is most likely to be accepted in both contracting states.³⁸ Both in the United Kingdom and in Canada, the principle of common interpretation is followed, even if it is not stated explicitly by the courts.³⁹ In the *AB LCC* case, the court, arguably, regarded the commentary as a means of achieving a common interpretation by stating that the commentary seeks to minimise the different interpretations that may be placed on the same words by the different states. Vogel also regards the commentary as a source from which a common interpretation may be sought.⁴⁰ The *AB LCC* case further acknowledges that the interpretation provided in the commentary in relation to articles 5(2)(a)-(f) has been accepted in many courts, a clear indication that the commentary does, in fact, contain a common interpretation in this case. However, the court in the *AB LCC* case then criticises the interpretation set out in the commentary, by stating that the commentary does not take into account the phrase “includes especially”. It therefore seems as if the court paid lip service to the idea of common interpretation in relation to the phrase, but in the end decided to interpret the words “includes especially” in its own unique way. It is submitted that there was no need for the court to depart from the common meaning as set out in the commentary in order to reach the outcome that it did. In fact, later in its judgment, the court held that

“what is recommended by the OECD for [articles 5(2)(a)-(f)] has no bearing on the issue of the relationship between articles 5(1) and 5(2)(k). Article 5(2)(k) is specific and very different from articles 5(2)(a)-5(2)(f) ... As far as article 5(2)(k) is directly concerned the OECD Commentary is of no assistance.”⁴¹

³⁷ See eg *Secretary for Inland Revenue v Downing* 1975 4 SA 518 (A), ITC 1503 1990 53 SATC 342 (T); *Commissioner for the South African Revenue Service v Tradehold Ltd* 2012 3 All SA 15 (SCA). See also The Davis Tax Committee *Interim Report Addressing Base Erosion and Profit Shifting in South Africa* (2014) 36.

³⁸ Vogel and Rust (n 1) 41-42. Their justification for a common interpretation is that a 31(1) of the Vienna convention requires a double taxation agreement to be interpreted in the light of its objects and purpose. The purpose of a double taxation agreement is to allocate tax claims equally between the two relevant contracting states, and this purpose can be achieved only if the double taxation agreement is interpreted consistently by the courts in both states. Edwardes-Ker *Tax Treaty Interpretation* (1994 thesis Queen Mary and Westfield College University of London) par 5.02 refers to the requirement of good faith in art 31(1) to substantiate why a common interpretation must be followed.

³⁹ Vogel and Rust (n 1) 42-43.

⁴⁰ Vogel and Rust (n 1) 45.

⁴¹ the *AB LCC* case (n 2) par 31.

4 *The role of the Vienna convention*

Articles 31 to 33 of the Vienna convention contain rules regarding the interpretation of international agreements. These rules are widely regarded as a codification of customary international law.⁴² Both the United Kingdom and Canada have ratified the Vienna convention,⁴³ and the courts in both states have acknowledged that these rules are to be applied when interpreting these states' double taxation agreements.⁴⁴

South Africa has not ratified the Vienna convention. Yet, many authors are of the view that South Africa is, generally speaking, bound to its provisions, since they are a codification of customary international law.⁴⁵ The constitution provides that customary international law is law in South Africa unless it is inconsistent with the constitution or an act of parliament.⁴⁶ However, in *Harksen v President of the Republic of South Africa*⁴⁷ the constitutional court stated that the extent to which the Vienna convention reflects customary international law is by no means settled. Yet, in *Glenister v President of the Republic of South Africa* the majority of the court relied on art 31(3)(b) of the Vienna convention, stating that "the subsequent practice of states in applying a treaty can be used to indicate how the states have interpreted the treaty and thus give content to treaty obligations".⁴⁸ The constitutional court's reliance on the Vienna convention indicates that at least the articles dealing with interpretation in the Vienna convention form part of South African law. However, the supreme court of appeal in the *Krok* case has now put the matter beyond doubt. It stated that articles 31 and 32 of the Vienna convention⁴⁹ are binding on South Africa

⁴² Baker (n 27) par E-03; Vogel and Rust (n 1) 38.

⁴³ https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=en#EndDec (08-12-2015).

⁴⁴ In respect of Canada see Kandeve "Tax treaty interpretation: determining domestic meaning under article 3(2) of the OECD Model" 2007 *Canadian Tax Journal* 31 36. In respect of the United Kingdom see the *Ben Nevis* case (n 16).

⁴⁵ Dugard *International Law: A South African Perspective* (2011) 414; Olivier and Honiball (n 22) 308. See also n 32.

⁴⁶ s 232 of the constitution.

⁴⁷ 2000 2 SA 825 (CC).

⁴⁸ 2011 3 SA 347 (CC) par 187 and n 43. The minority also quoted with approval from the Vienna convention in par 91 of the minority judgment.

⁴⁹ A 31 and 32 of the Vienna convention read as follows:

"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."

32 – *Supplementary means of interpretation*

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

(a) leaves the meaning ambiguous or obscure; or

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

as rules of customary international law.⁵⁰ South African courts will therefore be bound to apply the rules of the Vienna convention when interpreting double taxation agreements.

However, in the *AB LCC* case, no mention was made of the Vienna convention. When the court discusses its approach to the interpretation of double taxation agreements, it refers only to *Commissioner for the South African Revenue Service v Tradehold Ltd*.⁵¹ According to this approach, “interpretation ‘must give effect to the purpose of the treaty in a manner that is congruent with the words used’”.⁵² In the *AB LCC* case the court’s approach is not incompatible with article 31(1) of the Vienna convention, especially in relation to the use of the ordinary meaning of the words and the object and purpose of the treaty.⁵³ Nonetheless, article 31(1) of the Vienna convention also refers to the context within which the terms are used. Articles 31(2) and (3) then define what materials are to be regarded as part of the context. What is unclear from the judgment in the *AB LCC* case is whether its approach would have allowed it to refer to the materials set out in articles 31(2) and 31(3). A clear reference to the Vienna convention would therefore have been preferable.

5 Domestic interpretation rules

In the *Krok* case the court stated that the rules of articles 31(2) and 31(3) of the Vienna convention were effectively the same as those generally applied by South African courts in construing statutes and agreements.⁵⁴ Without attempting a comparison between the interpretation rules applying to domestic legislation and those applying to international treaties, it is worth noting that there is some academic support for the view that there is not much of a difference between the two.⁵⁵ However, the majority of authors are of the view that treaties, more specifically double taxation agreements, should be interpreted in accordance with public international law and not in terms of domestic rules, since double taxation agreements are international agreements entered into between two state parties.⁵⁶ The fact that double taxation agreements are also incorporated into domestic legislation does not mean that domestic rules apply to them. They are still governed by the rules of public international law.⁵⁷ It is conceded that many of the public international law rules regarding the interpretation of double taxation agreements are similar to those governing the interpretation of domestic legislation, but there are factors that will result in them being different.⁵⁸

Courts in a number of other states have accepted that double taxation agreements should be interpreted in accordance with the rules of public international law and not in the same way as domestic legislation.⁵⁹ For example, in Canada the courts have accepted that rules governing the interpretation of treaties are different to those governing the interpretation of domestic law. A more liberal approach is, therefore,

⁵⁰ the *Krok* case (n 3) par 27.

⁵¹ the *Tradehold* case (n 37).

⁵² the *AB LCC* case (n 2) par 24.

⁵³ the *AB LCC* case (n 2) par 5. See also par 5 below.

⁵⁴ the *Krok* case (n 3) par 27.

⁵⁵ Arnold “The interpretation of tax treaties: myth and reality” 2010 *Bulletin for International Taxation* 1.

⁵⁶ Baker (n 27) par E.03; Avery Jones (n 18) par 1; Vogel and Rust (n 1) 36.

⁵⁷ Avery Jones (n 18) par 1; Harris and Oliver *International Commercial Tax* (2010) 30.

⁵⁸ See Avery Jones (n 18) par 2.1 and 2.2 for a list of these factors.

⁵⁹ See Baker (n 27) par E.04 for a discussion of the approaches adopted in a number of states.

applied in the interpretation of Canada's double taxation agreements.⁶⁰ In the United Kingdom, the approach followed by the courts may be summarised as follows: the courts have acknowledged that a literal approach to the interpretation of double taxation agreements is not appropriate as it may be inconsistent with the purposes of the treaty. If a provision is ambiguous, a purposive construction may be followed to resolve the ambiguity. It should be taken into account that the provisions were not drafted by English draftsmen and are not to be interpreted only by English judges. It should be interpreted on broad principles that are generally accepted and not in accordance with technical rules of English law or precedent. One of these broad principles is the rule embodied in article 31(1) of the Vienna convention requiring good faith in the interpretation of the treaty, in accordance with the ordinary meaning of the terms in their context and in the light of its object and purpose. If this approach is followed, but the meaning of the provision is unclear, ambiguous or leads to an absurd result, supplementary means of interpretation may be consulted. These aids to the interpretation of the treaty, as well as foreign precedents (which may have persuasive value) and academic writings, are not a substitute for the study of the terms of the treaty and their use is discretionary, not mandatory.⁶¹

In South Africa, the supreme court of appeal has not been consistent regarding this point. In *Secretary for Inland Revenue v Downing* the court preferred to interpret certain words in their "natural meaning". It also stated that the article in the applicable double taxation agreement should be read as a whole in order to interpret it.⁶² The court's approach corresponds with the approach set forth in article 31(1) of the Vienna convention, with the "natural meaning" used in the *Downing* case corresponding to "ordinary meaning" used in the Vienna convention. Similarly, reading the relevant article as a whole (as indicated in the *Downing* case) suggests that the court interpreted the terms in their context, as required by the Vienna convention. Therefore, the court in effect adopted an interpretation

⁶⁰ *MNR v Saunders* 1954 DTC 524 526; the *Crown Forest Industries* case (n 32); *Kandev* (n 44) 35; *Watson and Baum* "Beneficial ownership as a treaty anti-avoidance tool?" 2012 *Canadian Tax Journal* 149 153; *Olivier and Honiball* (n 22) 311.

⁶¹ *IRC v Commerzbank AG* 1990 STC 285 297-298; *Memec plc v IRC* 1998 STC 754 766; *Commissioners for Her Majesty's Revenue and Customs v Smallwood* 2010 EWCA Civ 778 par 26. In the *Ben Nevis* case (n 16) par 17, the court held that these principles set out above are largely derived from a 31 and 32 of the Vienna convention and that there is no conflict between the two. The court furthermore stated that the formulation of these principles in the court cases was in the nature of a summary and that a 31 and 32 of the Vienna convention dealt with certain matters which were not included in this formulation.

⁶² the *Downing* case (n 37) 528. The court also referred to the intention of the parties in interpreting certain words in the relevant double taxation agreement. The Vienna convention requires that the ordinary meaning of the words in their context be ascertained in the light of the object and purpose of the double taxation agreement. In other words, it is the objectively ascertained object and purposes of the double taxation agreement as a whole that is to be taken into account (see *Avery Jones* (n 18) par 3.4.10). Therefore, when the court in the *Downing* case took the intention of the parties into account, it did not determine the object and purpose of the relevant double taxation agreement. However, *Ward et al* (n 18) 31-32 state that the commentaries to the Vienna convention emphasise the important role of the parties' intention in the interpretation process in international law. They stress that it is not the subjective intention of the parties, but rather their objective intention, derived from the wording of the treaty and the application of the Vienna convention, which is relevant. *Vogel and Rust* (n 1) 39 are of the view that the intention of the parties is relevant only to the extent that it has been expressed in the wording of the agreement. It is submitted that when the court in the *Downing* case used the parties' intention to determine the meaning of the relevant words of the double taxation agreement, its method of interpretation was still in accordance with the Vienna convention.

in accordance with the rules of international law in the interpretation of double taxation agreements.⁶³

Next came *AM Moola Group Ltd v Commissioner for the South African Revenue Service*.⁶⁴ The supreme court of appeal had to interpret a provision in a trade treaty between South Africa and Malawi for the reduction of certain customs duties. The court found that the meaning to be attached to a term used in the treaty was the meaning ascribed to it in the relevant provision of the Customs and Excise Act (and regulations thereto) of which the treaty formed part and not the ordinary meaning of the term. The court further held that because the treaty formed part of the Customs and Excise Act and that, hence, the meaning of a term used in this act was ascribed to the treaty, the interpretation of the treaty provisions must change when the act is changed. Thus, the court treated the relevant treaty the same as it would domestic legislation.⁶⁵

In the *Tradehold* case, the court noted that the applicable treaty was based on the OECD Model Tax Convention. It then stated that in the interpretation of treaties, “an exact correlation between the wording in the double taxation agreement and that used in the domestic taxing statute” cannot be expected.⁶⁶ According to the court, double taxation agreements “use wording of a wide nature, intended to encompass the various taxes generally found in the OECD member countries”.⁶⁷ Furthermore, the court indicated that double taxation agreements must be interpreted “in a manner which gives effect to the purpose of the treaty and which is congruent with the words employed in the treaty”.⁶⁸ Although this judgement does not mention the Vienna convention, it seems to follow the approach of article 31(1) of the Vienna convention, by relying on the wording of the treaty, as well as its objects and purposes.

When the supreme court of appeal in the *Krok* case stated that the rules of articles 31(2) and (3) of the Vienna convention were essentially the same as domestic interpretation rules, did it not in effect say that double taxation agreements are to be interpreted in accordance with domestic interpretation rules? If all the court meant to say was that double taxation agreements must be interpreted in accordance with articles 31(2) and (3) of the Vienna convention and that some of South Africa’s domestic interpretation rules correspond to these provisions, the statement cannot be objected to. However, if the court meant that domestic interpretation rules should be applied to double taxation agreements, as was done by the same court in the *AM Moola* case in relation to a trade treaty, the court’s sentiment cannot be supported. It is submitted that South African courts should interpret double taxation agreements in accordance with international law, as was done in the *Downing* and *Tradehold* cases.

In the *AB LCC* case, the court referred to the passage in the *Tradehold* case cited above, which stated that effect must be given to the purpose of the double taxation agreement in a manner that is consistent with the words employed. The court also referred to the dictionary meaning of the relevant word and how it was used in several

⁶³ The Davis Tax Committee (n 37) 36.

⁶⁴ *AM Moola Group Ltd v Commissioner for the South African Revenue Service* 2003 65 SATC 414.

⁶⁵ the *AM Moola* case (n 64) par 27.

⁶⁶ the *AM Moola* case (n 64) par 18.

⁶⁷ the *Tradehold* case (n 37) par 18. The court also noted that double taxation agreements intended to include taxes which may come into existence in future, in addition to existing taxes. This, coupled with the complex nature of taxation in the OECD member states, led the court to state (also in par 18) that the “the wording in the double taxation agreement cannot be expected to match precisely that used in the domestic taxing statute”.

⁶⁸ the *Tradehold* case (n 37) par 21.

court decisions (both South African and international cases). The court furthermore referred to the intention of the parties and refused to adopt the taxpayer's argument, *inter alia*, because it would defeat the object of the double taxation agreement.⁶⁹ It may thus be inferred that the court in the *AB LCC* case tried to interpret the relevant treaty in accordance with the ordinary meaning of the words in the light of the object of the treaty, an approach that corresponds with the Vienna convention. It is a pity that the judgment itself does not refer to the Vienna convention.

6 *The use of unilateral materials*

In the *AB LCC* case, the court referred to the Technical Explanation of the double taxation agreement, stating that the interpretation offered in the Technical Explanation coincided with the one arrived at earlier in the judgment. The court described the Technical Explanation as offering an insight into the understanding of the signatories to the double taxation agreement.

The court does not provide any basis on which it is entitled to refer to the Technical Explanation. It may be asked whether the Vienna convention provides such a basis. In order to answer this point, it must be ascertained what the Technical Explanation is. It has been described as follows:

“In recent years the Treasury has also provided to the Senate a ‘Technical Explanation’ of each treaty to be considered for ratification. The Technical Explanation is published as ‘an official guide to the Convention ... reflect[ing] the policies behind particular Convention provisions, as well as understandings reached with respect to the interpretation and application of the Convention.’ While the Technical Explanations have been said to be prepared on the basis of the US treaty negotiator’s notes, *they generally remain only unilateral authority*. They are seldom submitted before publication to negotiators of the treaty partner, and only one instance has been reported of the treaty partner having expressed agreement.”⁷⁰

Can it be argued that the Technical Explanation forms part of the context (as defined in article 31(2) of the Vienna convention) and that it may therefore be used in terms of article 31(1)? Avery Jones is of the view that unilateral material is never part of the context (unless the other party has accepted it).⁷¹ Such an interpretation must be correct, as articles 31(2)(a) and (b) as well as articles 31(3)(a) and (b) all require agreement between the parties to the treaty.⁷² Avery Jones mentions the possibility of using unilateral material as supplementary means of interpretation in terms of article 32 of the Vienna convention, but warns that if the other state does not agree with it, it is of no value as an aid to interpretation.⁷³ Most other authors also agree with the view that the Technical Explanation cannot be used in the interpretation of double taxation agreements.⁷⁴ It may be concluded that the Vienna convention does

⁶⁹ The court also stated that the “judgment of the Canadian Federal Court of Appeal, in my view, does not conform with the rules of interpretation applicable in our jurisdiction” (see the *AB LCC* case (n 2) par 36). It is beyond the scope of this contribution to investigate the rules of interpretation used by the Canadian federal court and to review whether the court in the *AB LCC* case was correct in making this statement.

⁷⁰ Footnotes omitted – own emphasis. Katz “United States” in *Cahiers de Droit Fiscal International: The Interpretation of Double Taxation Conventions* (1993) 615 616.

⁷¹ Avery Jones (n 18) par 3.4.5.2.

⁷² A 31(3)(c) of the Vienna convention, which refers to the rules of international law, is not applicable.

⁷³ Avery Jones (n 18) par 3.5.1.4.

⁷⁴ See, eg Vogel and Rust (n 1) 40 and 51; Harris and Oliver (n 57) 32 and 36.

not provide a basis for the reference to the Technical Explanation by the court in the *AB LCC* case.

However, Baker suggests that the Technical Explanation may be used with a view to establishing a common interpretation,⁷⁵ but cautions that such unilateral statements, which are prepared by revenue authorities of one state and not agreed to by the other state, should not be regarded as binding.⁷⁶ Elsewhere, the courts have used the Technical Explanation for the purpose of establishing a common intention. For example, in New Zealand, the Technical Explanation has been considered with a view to establishing the official opinion of the other party to the treaty regarding the meaning of a term.⁷⁷ In Canada, the Technical Explanations are often referred to, because the Canadian ministry of finance have endorsed them.⁷⁸ Yet the Canadian courts still do not consider the Technical Explanations as binding.⁷⁹ For example, in *Allchin v Her Majesty the Queen* the federal court of appeal noted that “[w]hile technical explanations attached to treaties are not binding on the Court, they may be accepted as valid guidance”.⁸⁰

Would a South African court be able to refer to the Technical Explanation in order to establish a common interpretation? There is no public record (or at least not one which the present author could find) indicating that any South African organ of state has endorsed or agreed to the Technical Explanation. Hence, the South African position must be distinguished from the position in Canada and, since the Technical Explanations are not binding even in Canada and only provide guidance in Canada, one can deduce that they must have even less weight in South Africa (if any). It is submitted that in order to use the Technical Explanation as a basis to develop a common interpretation, a South African court would first have to establish the status of the Technical Explanation in the United States of America. In other words, whose view does the Technical Explanation reflect and is it binding in the United States? According to Becerra, Technical Explanations are “neither binding on the courts nor on the taxpayers of either contracting state. Thus the statement by the Treasury that they are official guides can only be true for Treasury’s own use and for Treasury’s purposes only.”⁸¹ Therefore, since the Technical Explanation is not binding on the courts in the United States and merely reflects the treasury’s view, it may be argued that the Technical Explanation cannot be regarded as an interpretation that would be most likely to be accepted in the United States. Therefore, it would be difficult to argue that the Technical Explanation could be used to establish a common interpretation.

In the *AB LCC* case, the court does not provide any justification for the use of the Technical Explanation and one cannot help criticising the judgment in this respect. The court should have stated on what basis it relied on the Technical Explanation, even if it were just to confirm a meaning already arrived at by the court. The Vienna convention does not provide such a basis. Although Baker suggests that the Technical Explanation could be used to establish a common interpretation, he concedes that this interpretation should be non-binding. As argued above, in South Africa less weight should be afforded to the Technical Explanation than in Canada,

⁷⁵ See par 7 below.

⁷⁶ Baker (n 27) par E.30.

⁷⁷ *CIR v JFP Energy Inc* (1990) 12 NZTC 7, 176.

⁷⁸ Baker (n 27) par E.31.

⁷⁹ *Kubicek Estate v R* 1997 DTC 5, 454 par 10.

⁸⁰ *Allchin v Her Majesty the Queen* 2004 FCA 206 par 16.

⁸¹ Becerra *Interpretation and Application of Tax Treaties in North America* (2013) 177.

(bearing in mind that even in Canada it is not binding). Given that the Technical Explanation merely reflects the United States' treasury's view and that it does not bind the courts, it is submitted that it should not be taken into account, or at best, be given very little weight, in establishing a common interpretation.

7 *Citing of foreign case law and authors*

Both cases make ample reference to foreign case law and the work of international authors in the field of international tax law. In terms of the Vienna convention, a court may refer to supplementary means of interpretation for the limited purposes of (a) confirming a meaning already determined in terms of article 31; or (b) determining a meaning if, after applying article 31, the meaning is ambiguous or obscure, or the result is manifestly absurd or unreasonable.⁸² Foreign court decisions and the opinions of academics are regarded as supplementary means of interpretation and may therefore be referred to for the limited purposes set out above.⁸³

The idea of finding a common interpretation was referred to earlier.⁸⁴ According to Vogel, the most important precondition to finding a common meaning is that courts must "take into consideration and evaluate the merits of relevant decisions made by comparable institutions in the other Contracting State and, if necessary, by those of third states".⁸⁵ There is authority in many countries around the world that foreign case law may be considered when interpreting double taxation agreements. For example, in the United Kingdom⁸⁶ and Canada⁸⁷ foreign case law may be taken into account. Also in South Africa, foreign case law⁸⁸ and the work of academic authors⁸⁹ are often relied on by courts when interpreting double taxation agreements. In South Africa, comparative interpretation⁹⁰ is one of the accepted methods of interpretation⁹¹ and courts are therefore completely justified in referring to the way in which the courts in other jurisdictions have interpreted double taxation agreements, in appropriate circumstances. Therefore, this method of domestic interpretation corresponds to article 32 of the Vienna convention (although the purpose for which foreign case law may be referred to is more limited in terms of article 32) and the courts in both the *Krok* and *AB LCC* case were correct in relying on these sources in order to interpret the relevant double taxation agreements. In the *AB LCC* case, the court, for example, referred to a Canadian case⁹² regarding the interpretation of article 5(1) of the OECD Model Tax Convention (which corresponded with article 5 of the double taxation agreement considered in the *AB LCC* case). The court used the reference to the Canadian case to confirm a meaning that it had already

⁸² (n 25) a 31(4).

⁸³ *Avery Jones* (n 18) par 3.5.1.4. However, *Baker* (n 27) par E.26 is of the view that foreign courts' decisions do not fit easily into any of the categories of the Vienna convention. Still, he points out that there are good jurisprudential reasons why foreign cases should be referred to and opines that courts should follow the relevant decisions of courts in other states, unless they are clearly wrong.

⁸⁴ See par 3.2 above.

⁸⁵ Vogel and Rust (n 1) 42.

⁸⁶ *IRC v Commerzbank AG* (n 61); *Memec Plc v IRC* (n 61).

⁸⁷ *eg TD Securities (USA) LLC v Her Majesty the Queen* 2010 TCC 186 par 87.

⁸⁸ *eg The Oceanic Trust Co Ltd NO v Commissioner for the South African Revenue Service* 74 SATC 127; the *Tradehold* case (n 37).

⁸⁹ *eg ITC 1735* 2002 64 SATC 455; *ITC 1544* 1992 54 SATC 456 (T); *Commissioner, South African Revenue Service v Van Kets* 2012 3 SA 399 (WCC).

⁹⁰ whereby provisions are interpreted in comparison with their counterparts in other jurisdictions.

⁹¹ *Du Plessis* "Statute law and interpretation" in 29(1) *LAWSA* par 326.

⁹² *The Queen v Dudney* WA 2000 DTC 6169.

ascribed to the concept of a “fixed place of business” and merely distinguished the facts in front of it from those in the Canadian case.⁹³ The court therefore used the Canadian case to confirm a meaning already arrived at, as required by article 32 of the Vienna convention. In the *Krok* case, the court observed that the findings of a United Kingdom court⁹⁴ regarding the nature and effect of the relevant article in the double taxation agreement were “instructive”.⁹⁵ It is submitted that in the *Krok* case, the court had already interpreted the relevant article in the double taxation agreement,⁹⁶ but relied on the United Kingdom case to confirm the interpretation that it had arrived at.

8 Conclusion

How have South African courts and more specifically the courts in the *Krok* case and the *AB LCC* case fared in interpreting the relevant double taxation agreements in front of them? The tax court treated the commentary inconsistently, criticising it in respect of one point and accepting it without question in respect of another, but failed to explain the difference in the treatment. The tax court did not state that (a) it was not obliged to follow the Commentary; (b) that the constitution does not provide a basis for its reliance on the Commentary; and (c) on what basis it was allowed to rely on the Commentary. Although many courts around the globe do not provide answers to point (c), it would have been very useful to receive the court’s views on the matter. The court in the *Krok* case did not provide any guidance on the point either, simply noting the Commentary, without comment (save to say that it did not agree with the taxpayer’s interpretation of it). It is hoped that South African courts will provide clarity on the matter in future.

Although the tax court seemed to support the idea of a common interpretation, it departed from the common interpretation of the phrase “including specifically”. It is submitted that this departure was unnecessary in the light of the way in which the court distinguished the treaty, from the OECD Model Tax Convention.

The court in the *Krok* case confirmed that articles 31 and 32 of the Vienna convention are rules of customary international law and therefore binding in South Africa. It is to be welcomed that the court has now settled this debate. It is not clear why the court in the *AB LCC* case did not refer to the Vienna convention, since it generally followed the approach set forth in it. The statement in the *Krok* case that the South African rules of interpretation are effectively the same as those in the Vienna convention is to be treated with circumspection. Although many of the domestic interpretation rules may be the same as the rules of the Vienna convention, it is submitted that when interpreting treaties, South African courts should interpret them in accordance with public international law rules. Although the supreme court of appeal has not been consistent in its application of the rules of public international law in the interpretation of treaties, it is encouraging that cases like *Tradehold*

⁹³ the *AB LCC* case (n 2) par 36. The court in the *AB LCC* case held that there were material differences between the relevant article in the *Dudney* case and a 5(1) and (2), read together, relevant in the *AB LCC* case. The court therefore thought it wrong to superimpose the interpretation of the Canadian court of appeal on the article that it was interpreting. The court also held that the judgment in the *Dudney* case provided doubtful instructive value, because of the difference in the particular articles. Moreover, the court was of the view that the “the judgment of the Canadian Federal Court of Appeal, in my view, does not conform with the rules of interpretation applicable in our jurisdiction”.

⁹⁴ the *Ben Nevis* case (n 16).

⁹⁵ par 38.

⁹⁶ par 33 to 36.

and the *AB LCC* case follow this approach to the interpretation of double taxation agreements.

It is submitted that in the *AB LCC* case, the court's reliance on the Technical Explanation without sufficient justification for its reliance, is problematic. It was argued above that the Vienna convention does not provide a basis for the reliance on the Technical Explanation. Arguably, the notion of a common interpretation could have been used to justify the reference to the Technical Explanation. However, as argued above, very little or no weight ought to be attached to the Technical Explanation in establishing such a common interpretation. The references to academic authors and foreign case law in both cases and by other South African courts are to be commended.

The way in which a court reaches its decision is often as important as the ultimate decision on the merits of a case. The way in which a court reached its decisions may, to a large extent, be influenced by the way in which it interprets materials in front of it. In analysing the interpretational approaches followed by the courts in the two recent, but also some of the older cases, it is evident that the South African courts have not yet developed a predictable and consistent approach to the interpretation of double taxation agreements. In this regard, it is submitted that the Vienna convention and other applicable rules of public international law should be the guiding light to courts in the future.

SAMEVATTING

DIE INTERPRETASIE VAN DUBBELBELASTINGOOREENKOMSTE: 'N REGSVERGELYKENDE BEOORDELING VAN ONLANGSE SUID-AFRIKAANSE REGSPRAAK

Die Suid-Afrikaanse hof het onlangs verskeie geleenthede gehad om dubbelbelastingooreenkomste, waartoe Suid-Afrika 'n party is, uit te lê. So het die belastinghof in Johannesburg, byvoorbeeld, in Mei 2015 uitspraak gelewer in 'n saak waarin die ooreenkoms tussen Suid-Afrika en die Verenigde State van Amerika ter sprake was. In Augustus 2015 het die hoogste hof van appèl die dubbelbelastingooreenkoms tussen Suid-Afrika en Australië onder die loep geneem. Buiten die bevindings op die meriete van die onderskeie sake, bevat hierdie sake ook 'n hele aantal interessante punte rakende die interpretasie van dubbelbelastingooreenkomste. Hierdie bydrae ondersoek spesifiek die uitleg van dubbelbelastingooreenkomste aan die hand van die punte wat in die sake te berde gekom het.

Nadat die feite van die twee sake ter agtergrond genoem is, word die rol van die OECD se kommentaar op die "OECD Model Tax Convention" in die uitleg van Suid-Afrika se dubbelbelastingooreenkomste eers aangespreek. Kritiek word uitgespreek teen die belastinghof se hantering van die betrokke kommentaar, onder andere omdat die hof oënskynlik nie konsekwent in die proses optree nie. Verder word die rol van die Weense konvensie op verdragsreg in die uitleg van dubbelbelastingooreenkomste oorweeg. Die mening word uitgespreek dat die *Krok*-saak die onsekerheid rakende die rol van hierdie verdrag in die uitlegproses uiteindelik uit die weg ruim. Die invloed van plaaslike reëls van uitleg op die uitleg van dubbelbelastingverdrae word ook ondersoek. Daar word aanbeveel dat die hof se stelling in die *Krok*-saak met omsigtigheid hanteer moet word en dat hof die reëls van internasionale reg behoort toe te pas in die uitleg van dubbelbelastingooreenkomste. Voorts word die gebruik van eensydige materiaal in die uitlegproses bespreek en die uitspraak van die belastinghof, wat op eensydige materiaal gesteun het, word gekritiseer.

Ten opsigte van elk van die punte wat aangespreek word, word die menings van akademiese skrywers, sowel as die posisie in Kanada en die Verenigde Koninkryk, ondersoek en met dié in Suid-Afrika vergelyk. Die slotsom waartoe gekom word, is dat die Suid-Afrikaanse hof nog nie 'n eenvormige en voorspelbare benadering tot die uitleg van dubbelbelastingooreenkomste volg nie. Daar word voorgestel dat die Weense konvensie en ander toepaslike reëls van internasionale reg die hof behoort te lei in die toekoms.