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‘ESSENTIALLY NO DIFFERENT’ BUT NOT THE SAME? AN ANALYSIS OF THE RULES APPLICABLE TO THE INTERPRETATION OF DOUBLE TAXATION AGREEMENTS

by

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supervised by Charles de Matos Ala

Submitted in partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

Date: **14 June 2023**

DECLARATION

I, Daniel Alan Hart, declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through Turnitin and have attached the report to my submission.

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ABSTRACT

This research report aims to determine whether the rules of interpretation generally applied by South African courts in construing documents are the same as the international rules applicable to the interpretation of double taxation agreements (DTAs). The report will compare the prevailing international law rules regarding the interpretation of treaties with the rules of statutory interpretation applied by South African courts. The goal is to assess whether South African courts should rely on domestic or international law principles when interpreting DTAs, and to this end the report will critically analyse the approach taken in two specific cases, *Krok v The Commissioner for the South African Revenue Services* 2015 (6) SA 317 (SCA) and *ITC 1925* 82 SATC 144.

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I INTRODUCTION

In the case of *Krok v The Commissioner for the South African Revenue Services* [1], Maya JA in a unanimous judgment for the Supreme Court of Appeal, and in the context of interpreting the provisions of a double taxation agreement (DTA) concluded between the Government of Australia and the Republic of South Africa, held that:

> Regarding the approach to be adopted in construing the relevant provisions, consideration must be had to the rules applicable to the interpretation of treaties which are binding on South Africa and all States as rules of customary international law. These rules, which are essentially no different from those generally applied by our courts in construing statutes and agreements, are set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969.[2]

In the above paragraph, Maya JA makes five distinct propositions. The first proposition is that there are rules which are applicable to the interpretation of treaties. Second, that these rules are customary international law. Third, that these rules are binding on all states. Fourth, that these rules are, in essence, 'no different to the rules generally applied by South African courts in construing statutes and agreements'.[3] And finally, that these rules are set out in art 31 and art 32 of the Vienna Convention on the Law of Treaties, 1969 (the VCLT).

The fourth proposition in the paragraph above, namely that the rules set out in art 31 and art 32 of the VCLT are 'no different to the rules generally applied by South African courts in construing statutes and agreements' merits further consideration. This is because four years after the decision in *Krok*, the paragraph quoted above was expressly referred to in the case of *ITC 1925*[4]. In *ITC 1925*, the Tax Court was faced with interpreting a most favoured nation clause in a DTA concluded between the Government of South Africa and the Kingdom of the Netherlands. The court, per Hack AJ, specifically referencing the principles enunciated in paragraph 27 in *Krok* (and presumably the fourth proposition contained therein), held that, 'the principles applicable to the interpretation of international tax treaties in South African law and International Law are the same as those applied by our courts in construing statutes and agreements'.[5]

The main research question this report aims to answer is: are the rules of interpretation generally applied by South African courts in construing documents the same as the international rules applicable to the interpretation of DTAs? In order to answer it one must first

[1] 2015 (6) SA 317 (SCA).
[2] Ibid para 27.
[3] Ibid.
[4] 82 SATC 144.
[5] Ibid para 33.

understand the prevailing rules of customary international law regarding the interpretation of treaties. Therefore, one will need to interrogate propositions one, two, three and five as well. Equally important to the inquiry is to understand the rules generally applied by South African courts in construing documents. It is also useful to consider the specific nature of DTAs The following subsidiary research questions therefore arise:

1. Are there international rules applicable to the interpretation of treaties?
2. Are these rules customary law in nature?
3. Are these rules binding on all states?
4. What are these rules as set out in art 31 and art 32 of the VCLT?
5. What are the rules of generally applied by South African courts in construing documents?
6. What is the nature of a DTA?
7. What is the appropriate approach to interpret a DTA?

While the focus of this report is limited to the specific questions set out above, it does not intend to provide a comprehensive commentary on the correct methodology of interpretation under South African law generally. Moreover, in respect of the rules generally applied by South African courts in construing documents, this report will limit the discussion to the interpretation of statutes.

The main research question is relevant because South Africa has signed approximately one hundred and four bilateral DTAs as of 17 May 2022.[6] The courts in South Africa have been tasked with interpreting DTAs in the past and will inevitably be required to interpret the provisions of DTAs in the future. It is therefore imperative that a correct (or at least a consistent) interpretative approach is followed.

This report consists of five parts. In Part II, this report contains a discussion of international law generally. It also contains a discussion about the VCLT and article 31 and 32 thereof. In Part III, this report will consider the traditional approach to the interpretation of domestic statutes as well as the contemporary approach to the interpretation of documents as espoused by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.[7] Part IV will attempt a comparison and analysis between the interpretative approaches set out in Parts II and III respectively. This Part will consider the areas of overlap as well as some

[6] The Commissioner of the South African Revenue Services, '*Summary of all Agreements for the Avoidance of Double Taxation*' available at https://www.sars.gov.za/lapd-inta-dta-2013-01-status-overview-of-all-dtas-and-protocols/, accessed on 30 October 2022.
[7] 2012 (4) SA 593 (SCA).

differences between the relevant provisions relating to interpretation of the VCLT and the principles set out in *Endumeni* and later refined in the case of *South African Revenue Service v United Manganese of Kalahari (Pty) Ltd*.[8] Part V of this report will set out a brief overview of the nature of a DTA. Thereafter it will set out an analysis of the approach to the interpretation of DTAs in both *Krok* and *ITC 1925*.

II CUSTOMARY INTERNATIONAL LAW REGARDING THE INTERPRETATION OF TREATIES

(a) International law

The first two propositions set out in paragraph 27 of *Krok* relate to the existence of customary international rules of treaty interpretation. Before considering these rules in more detail, it is useful to first consider the concept of international law generally, and the role of treaties and customary international law as sources of international law specifically.

International law can be defined as a 'system of rules and principles generally accepted as legally binding in relations between states and other international actors'.[9] It is generally recognised by courts and academics alike that the sources of international law are identified in art 38(1) of the Statute of the International Court of Justice.[10] Article 38(1) identifies four sources of international law: 'international conventions (treaties) whether general or particular'; 'international custom, as evidence of a general practice accepted as law (customary international law)'; 'the general principles of law recognised by civilised nations'; and 'judicial decisions and the teaching of the most highly qualified publicists as a subsidiary means for the determination of the rules of law'.[11] While there are no rules relating to the hierarchy between these four identified sources,[12] the two most important sources of international law are treaties and customary international law.[13] Both of these sources will be discussed briefly below.

A treaty is a formal written agreement between states (or international organisations) that is governed by international law.[14] Treaties can be bilateral (between two states) or multilateral (between multiple states) and establish binding rights and obligations for the

[8] 2020 (4) SA 428 (SCA).
[9] John Dugard, Max Du Plessis, Tiyanjana Maluwa et al *Dugard's International Law A South African Perspective* 5 ed (2018) at 1.
[10] Ibid at 28. See too H Thirlway *The Sources of International Law* in Malcom D Evans (ed) *International Law* 3 ed (2010) at 96.
[11] 1945 Statute of the International Court of Justice.
[12] Dugard, op cit note 9.
[13] *North Sea Continental Shelf (Federal Republic of Germany v Kingdom of Denmark; Federal Republic of Germany v Kingdom of the Netherlands)*, [1969] ICJ Rep 3 3.
[14] Dugard op cit note 9.

parties that have entered into the treaty.[15] The source of these rights and obligations is the written instrument being the treaty itself. Importantly, a treaty cannot bind states which are not party to it.[16]

Customary international law on the other hand refers to unwritten rules and practices (or international custom) of international actors (usually states).[17] Unlike treaties, where states must expressly consent to be bound by the provisions contained therein, consent to be bound by customary international law is inferred from the conduct of states.[18] The *North Sea Continental Shelf*[19] case is authority for the 'two-element theory' of customary international law.[20] The theory states that there are two requirements for a rule to constitute customary international law.[21] The first is *usus*; that the rule must be a settled practice.[22] This requirement demands that the rule in question be a practice observed by states which practice should be both general and widespread.[23] In other words, it would not be sufficient for one, two or a few states to observe the rule.[24] The second requirement is that of *opinio urus*.[25] This Latin phrase is a shortened version of another; *opinio juris sive necessitatis*, which means an opinion of law or necessity.[26] Because a settled practice cannot on its own create a customary rule, *opinio urus* as an additional element requires that there must be a sense of obligation on behalf of the state in question to be bound by the settled practice which must be accepted as law.[27]

(b) The Vienna Convention of the Law of Treaties, 1969

The VCLT is a multilateral treaty to which one hundred and sixteen states are party.[28] At the date of writing this report, South Africa is not a party to the treaty. Adopted and open to signature on 23 May 1969, the VCLT was entered into force on 27 January 1980 and has been referred to by Dugard as the 'definitive statement on the law of treaties by both signatories and

[15] Ibid.
[16] See in this regard, article 34 of the VCLT and *Minister of Justice and Constitutional Development v South African Litigation Centre* 2016 (3) SA 317 (SCA) para 78.
[17] Dugard Op cit note 9 at 30.
[18] Ibid.
[19] Supra note 13.
[20] Thirlway op cit note 10.
[21] Dugard op cit note 9 at 28.
[22] Ibid at 31.
[23] Ibid.
[24] Ibid.
[25] Ibid at 36.
[26] Jonathan Law & Elizabeth A. Martin *Oxford Dictionary of Law* 7 ed (2009) at 385.
[27] Dugard op cit note 9 at 36.
[28] *The United Nations Treaty Collection Status of Treaties* available at *https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en* accessed on 23 October 2022.

non-signatories' and sets out comprehensive rules relating to how treaties should be defined, drafted, amended and interpreted.[29]

Today it is generally accepted that the provisions contained in art 31 and art 32 of the VCLT relating to treaty interpretation are customary international law.[30] The International Court of Justice has applied the rules contained in these provisions as codified custom to the treaties the court is called to interpret.[31] This view is widely shared by other international courts such as the International Tribunal for the Law of the Sea,[32] the European Court of Human Rights,[33] the European Court of Justice[34] and certain dispute resolution bodies of the World Trade Organisation,[35] as well as certain arbitral institutions[36] and national courts.[37] It is submitted that Maya JA emphasises the status of art 31 and art 32 as customary international law because South Africa is not a signatory to the VCLT, and therefore would not be bound by its provisions, unless it could be established that any of those provisions constituted customary international law. It should be noted that the judgment in *Krok* is not the only instance of a positive affirmation of the binding nature of the VCLT on South Africa as a subject of international law. The Constitutional Court in the case of *Law Society of South Africa and Others v President of the Republic of South Africa and Others*,[38] confirmed that the 'major provisions of the Vienna Convention like the articles on interpretation doctrines and the good faith doctrine amount to a codification of customary international law and are therefore binding on South Africa.'[39]

(c) Articles 31 and 32 of the VCLT

When drawing up the articles which eventually became the Vienna Convention's rules on treaty interpretation, the International Law Commission 'confined itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the

[29] Dugard, op cit note 9 at 608.
[30] Oliver Dörr & Kirsten Schmalenbach *Vienna Convention on the Law of Treaties A Commentary* 2 ed 2018 at 561.
[31] Ibid.
[32] *ITLOS (Seabed Disputes Chamber) Responsibilities and of States Sponsoring Persons and Entities with Respect to Activities in the Area*, 1 February 2011, para 57.
[33] *Hassan v United Kingdom (GC) App No 29750/09*, ECHR 2014-VI, para 100.
[34] *Axel Walz C-63/09* [2010] ECR I-4239 para 23.
[35] *US–Clove Cigarettes* WT/DS406/AB/R, para 258 (2012).
[36] *The Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v Netherlands*) (2005) 27 RIAA 35, para 45.
[37] *CHMRC v M Fowler* (2017) 79 SATC 355 (UKUT) para 18 – 23; *Qenos Pty Ltd v Ship 'APL Sydney'* [2009] 187 FCR 282, para 11 (Finkelstein J); *Court of Appeal Lena-Jane Punter v Secretary for Justice* [2004] 2 NZLR 28, para 61 (Glazebrook J).
[38] 2019 (3) SA 30 (CC).
[39] Ibid para 38.

interpretation of treaties.'[40] When one considers the elements set out in art 31 and art 32, this attempt and confinement to general rules and principles becomes apparent. We will discuss these elements briefly below.

Article 31 of the VCLT, which is headed, 'General rule of interpretation', requires every treaty to be interpreted in 'good faith'. We can consider this requirement of good faith to be the first rule of art 31. In the commentaries to the VCLT,[41] it is stated that this rule flows 'directly from the concept of *pacta sunt servanda'*, the Latin maxim which means that agreements must be kept.[42] Indeed, this is not the only article in the VCLT in which the notion of good faith is evoked; art 26 of the VCLT, which is headed, 'Pacta sunt servanda' states that, '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.'.[43] Dörr and Schmalenbach are of the view that this requirement of good faith serves to 'qualify the dogmatism that can result from purely verbal or, for that purpose, excessively teleological analysis'.[44] This suggests that good faith in the context of art 31(1) requires an element of reasonableness to be included in the interpretation process.[45] Indeed, in the context of the case of *Nicaragua v USA*,[46] the ICJ held that the requirement of good faith required the parties to withdraw or terminate a treaty within a reasonable time when the treaty contained no 'provision regarding the duration of their validity'.[47]

The second rule set out in art 31(1) requires an interpreter to give ordinary meaning to the terms of the treaty. The ordinary meaning of the text must be the starting point for any interpretative exercise but will be determinative only if this meaning is confirmed by investigating the context and object and purpose of the treaty, and on examining all other relevant matters.[48] This is to be expected given that the text itself is what falls to be interpreted. However, this ordinary meaning will only be determinative if it is confirmed by a broader investigation of the context, object, and purpose of the treaty, and any other relevant factors.

However, the process of interpretation as set out in the VCLT is not a purely grammatical exercise.[49] This is because words obtain their meaning from the context in which

[40] Richard Gardiner Treaty Interpretation 2 ed 2015 at 57.
[41] The International Law Commission 'Commentaries' available at .http://www.un.org/law/ilc/index.htm accessed on 16 February 2023.
[42] Jonathan Law & Elizabeth A. Martin op cit note 26.
[43] Art 26 of the Vienna Convention on the Law of Treaties, 1969.
[44] Dörr and Schmalenbach op cit note 30 at 59.
[45] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* [1984] ICJ Reports 420, para 63.
[46] Ibid.
[47] Ibid.
[48] Gardiner, op cit note 40 at 185.
[49] Dörr and Schmalenbach op cit note 30 at 582.

they are used.[50] Thus, art 31(1) requires that the terms of the treaty are to be 'interpreted in their context'. But what is context here and when must an interpreter refer to it? We can be guided by art 31(2) which states that context shall comprise of the text (including its preamble and annexes) as well as any agreements or instruments made by the parties to the treaty in connection with its conclusion.[51] For example, the title of the treaty has also been used to inform the context of its provisions.[52] In other cases context has been held to include, the punctuation and syntax,[53] the structure of the sentence,[54] the use of the same term elsewhere in the treaty,[55] and the preamble to the treaty.[56] Article 31(2) serves to include certain additional extrinsic (i.e. not the treaty itself) documents to form elements of the 'context'. It is submitted that the documents set out in art 31(2) represent a closed list, and as such the context cannot be expanded to include every possible consideration. The requirement of context makes the 'systematic structure' of the treaty as important as the ordinary meaning of the words when interpreting any provision of a treaty.[57] Article 31(2), sets out what might constitute context and should be compared to art 32 which sets out supplementary means to interpretation. Both articles permit reference to external materials, but the difference is that those which are listed in art 32 may only be used to 'confirm' or 'determine' the meaning arrived at by virtue of art 31(1). A discussion on art 32 follows in more detail below.

The last requirement of art 31(1) is that the text must be interpreted, 'in the light of its object and purpose'. Accordingly, regard must also be had to the object and purpose of the treaty. This introduces the 'teleological or functional element' into the interpretation exercise.[58] In other words, consideration must be had to the aim or intention of the treaty to interpret the specific provisions thereof. This requirement can be differentiated from context in that context refers to the surrounding conditions that help to explain the meaning of a treaty (such as the text itself as well as certain prescribed agreements or instruments made by the parties to the treaty in connection with its conclusion), while the object and purpose refers to the aim or intention behind the treaty.[59] In order to determine the object and purpose, certain treaties

[50] Ibid.
[51] Art 31(2) of the Vienna Convention on the Law of Treaties, 1969.
[52] *Oil Platforms (Preliminary Objection)* [1996] ICJ Rep 803, para 4.
[53] *ICJ Aegean Sea Continental Shelf* [1978] ICJ Rep 3, para 53.
[54] *ICJ Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)* [1992] ICJ Rep 351, para 373.
[55] Ibid para 374.
[56] *ICJ Asylum Case* [1950] ICJ Rep 266, 282;
[57] Dörr and Schmalenbach op cit note 30 at 582.
[58] Ibid at 586.
[59] Ibid.

specifically include a statement or provision setting out their purpose.[60] One can have regard to the title of the treaty,[61] and/or its preamble.[62] Other treaties of the same kind can also be considered when establishing the purpose or intention of the treaty in question.[63]

Article 32 deals with the use of so called 'supplementary means of interpretation'. Essentially, art 32 sets out what information and material besides the text of a treaty can be used to assist in the interpretation of the treaty. Supplementary means have included, preparatory works of a treaty, circumstances surrounding the treaty's conclusion and other supplementary means.[64] What is important to note for present purposes is how supplementary means of interpretation can only be used in limited circumstances; to '*confirm* the meaning resulting from the application of art 31 or to *determine* the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable'. [65]

In summary, the interpretative framework prescribed by art 31 and art 32 of the VCLT provides a set of guidelines to be followed when interpreting a treaty. The key elements of this framework have been discussed and include: (i) good faith; (ii) attributing the ordinary meaning to the text; (iii) taking into account the context of the treaty; and (iv) interpreting provisions in light of their object and purpose.

(d) The approaches to interpretation as contemplated by articles 31 and 32 of the VCLT

Broadly, there are three approaches to interpret treaties: by looking at the actual words used in the treaties themselves (the textual approach), by considering the purpose of the treaty (the teleological approach), or by trying to understand what the parties to the treaty intended (the 'intention of the parties' approach).[66] The textual approach focuses on the literal meaning of the words and is preferred by formalists and positivists.[67] The teleological approach looks at the object and purpose of the treaty and chooses the interpretation that best serves that goal.[68] The intention of the parties approach tries to figure out what the people who made the treaty

[60] Ibid.
[61] *ICJ Delimitation of the Continental Shelf between Nicaragua and Colombia (Preliminary Objections)* [2016] ICJ Rep 100, para 39.
[62] *ICJ Asylum Case* [1950] ICJ Rep 266, 282.
[63] *ICJ Oil Platforms (Preliminary Objection)* [1996] ICJ Rep 803, para 27.
[64] Dörr and Schmalenbach op cit note 30 at 621.
[65] Peter Harris *International Commercial Tax* 2 ed 2020 at 40.
[66] Dugard op cit note 9 at 622.
[67] Ibid.
[68] Ibid.

meant, either by looking at the text of the treaty or by looking at preparatory works (*travaux préparatoires*) or historical documents about the treaty.[69]

Today, the VCLT recognizes all three of the approaches described above.[70] Article 31 of the VCLT says that a treaty should be understood based on the usual meaning of its words in context, as well as its overall purpose (textual and teleological).[71] As for the 'intention of the parties' approach, art 32 allows recourse to 'supplementary means of interpretation, including the preparatory works of the treaty and the circumstances of its conclusion' while art 31(3) allows the interpreter to consider 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' and 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[72]

Dugard is of the view that there is no 'hierarchy of rules in interpretation'.[73] He justifies this position by referring to a statement of the international law commission in 2018 when it said, '[t]he interpretation of a treaty consists of a single operation, which places appropriate emphasis on the various means of interpretation indicated respectively in Articles 31 and 32'.[74]

III RULES RELATING TO THE INTERPRETATION OF STATUTES IN SOUTH AFRICA

(a) The traditional approach

The South African judiciary's approach to the interpretation of statutes has historically vacillated between 'narrow, formalist literalism and broad, free-thinking purposivism'.[75] One approach that has predominated was that of arriving at the intention of the legislature by having regard to the language used in the relevant statute.[76] This has been called the literalist-cum-intentionalist approach.[77] To understand this approach it is useful to begin with the so-called 'golden rule' of statutory interpretation. First enunciated by Innes CJ in *Venter v Rex*[78] over

[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Ibid at 623.
[74] Ibid.
[75] LM Du Plessis 'Statute Law and Interpretation' in W A Joubert (founding ed) *LAWSA* Volume 25(1) - Second Edition para 320.
[76] Milton Seligson 'Judicial Forays in Statutory Construction' (2021) 12(2) *Business Tax and Company Law Quarterly* at 9.
[77] Du Plessis op cit note 75 para 320.
[78] 1907 TS 910.

one hundred years ago, in essence the golden rule requires that the words of a statute must be given their:

> ordinary grammatical meaning unless to do so would lead to 'an absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account'[79].

The golden rule can be classified broadly as a literal approach due to its preference to the 'ordinary grammatical' or 'plain' meaning of the words but also as an intentionalist approach given the secondary stage of the interpretative process, namely the recourse to the intention of the legislature and context when required.[80] The approach can therefore be described as a two-staged approach (as opposed to a unitary one) which required, in the first instance, one to consider the 'ordinary grammatical' or 'plain' meaning of the words of the statute and thereafter (but only to the extent that this meaning leads to an absurdity or a one contrary to the intention of the legislature) the context.[81]

In time, judges would also come to place significant emphasis on the role of context in the exercise of interpretation. This shift in focus can, for the most part, be attributed to the dissenting judgment of Schreiner JA in *Jaga v Donges NO and Another; Bhana v Donges NO and Another*.[82] The learned judge held that words used must 'be interpreted in the light of their context, including the rest of the statute regarded, the matter of the statute, its apparent scope and purpose, and, within limits, its background matter'.[83] This dissenting judgment was applied in a number of cases until ultimately it was endorsed by the Constitutional Court in the case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*.[84] Here the Constitutional Court noted that, 'the emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous.'[85]

Another popular approach which stemmed from the dissenting judgment of Schreiner JA in *Jaga v Donges NO* was one based on purposivism.[86] Here the aim was to give effect to the policy, object or purpose of the legislation.[87] This approach has its origins in the exercise

[79] Ibid. at 915.
[80] Du Plessis op cit note 75 para 321.
[81] Ibid.
[82] 1950 (4) SA 653(A) at 662G–H, 664H.
[83] Ibid.
[84] 2004 (4) SA 490 (CC) para 89.
[85] Ibid para 90.
[86] Du Plessis op cit note 75 para 323.
[87] Ibid.

of seeking out the intention of the legislature.[88] Typically, however, recourse to the object or purpose of the statute was only deployed when the language of the statute was ambiguous or uncertain.[89]

For many years no single approach of statutory interpretation pre-dominated and a tug of war emerged in the jurisprudence between judges taking a literalist approach and those favouring a more contextualist approach.[90] This vacillation and uncertainty in approach has been described as being 'manifestly undesirable' and resulted in a 'pick-and-mix' approach from the judiciary[91] where, 'judges could find authority supporting whatever approach they wished to take in a case'.[92]

(b) The contemporary approach

The contemporary approach to the interpretation of documents in South African law was comprehensively set out in *Endumeni*. In this case, the SCA per Wallis JA unanimously endorsed a unitary (or single-staged) approach to the interpretation process.[93] While this case ostensibly marked a distinctive moment in the judicial approach to interpretation generally and statutory interpretation specifically, in that it constituted an express move away from the literalist-cum intentionalist approach of the judiciary to a unitary approach, *Endumeni* did not serve to change the law; it provided a restatement of the law as it was when the judgment was handed down in 2012.[94] The relevant extract which is now often cited in cases today is paragraph 18 of that judgment which follows below:

> Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.

[88] *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990 (1) SA 925 (A) at 943.
[89] *Goldberg v PJ Joubert Ltd* 1960 1 All SA 526 (T).
[90] Malcom Wallis 'Interpretation Before and After Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA)' *PER* 22 2019 at 6.
[91] Ibid 7.
[92] Ibid.
[93] Supra note 7 para 18.
[94] Wallis op cit 90 at 8.

> The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

One should immediately note the reference to 'documents' throughout the paragraph of the text above. This is because Wallis JA attempts to set out a 'single, coherent approach to interpretation'[95] of all documents interpreted in terms of South African law; not only statutes and contracts, but others too, including wills and patents.[96] While the creation, nature and effect of documents may differ, all documents are written instruments which need to be interpreted. It would seem to follow that a common (or unitary) approach to interpretation to all of these documents should be adopted.

What should also be immediately apparent from the above extract, at least insofar as it relates to the interpretation of statutes, is the relegation of the two-staged approach in interpretation. The reader will recall that in terms of the golden rule discussed earlier, the emphasis in the interpretative process was placed squarely on determining the 'ordinary grammatical' or 'plain' meaning of the text in the relevant legislation, and then, only to the extent that this meaning leads to an absurdity or a one contrary to the intention of the legislature, would the interpreter be permitted to resort to context. What the passage above makes clear, is that the starting point of interpretation remains with the text itself, but that the language used in the light of the ordinary rules of grammar and syntax, the context, the purpose of the provision and the material known to those responsible for its production can all be considered when interpreting the relevant statuary provision.

One will also note the process of the interpretation is 'objective and not subjective'.[97] In the case of *Novartis v Maphil*,[98] the Appellant tried to argue for an interpretation that took the 'objective' (or dictionary) meaning of the words used in a contract and not the context.[99]

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[95] Dennis M Davis 'Interpretation Of Statutes: Is It Possible To Divine A Coherent Approach?' *South African Judicial Education Journal Volume* 3, Issue 1, 2020 at 1.
[96] Supra note 7 para 18.
[97] Ibid.
[98] 2016 (1) SA 518 (SCA).
[99] Ibid para 27.

This argument was rejected by the SCA which held, relying on the dictum of the case of *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*,[100] that the approach is not purely objective and that the words must be interpreted in the light of all relevant and admissible context, including the circumstances in which the document came into being.[101] Indeed, this sentiment is echoed by Wallis JA in an academic article penned in 2019, where he stated that the reference to objectivity is meant to require one to interpret the language used in the document, and not to '[try] to go behind it to any unwritten and unexpressed intention that the legislature or the parties may have had in formulating the document.'[102] Again, the reference to objectivity is to be welcomed, as we have seen in the past with respect to the interpretation of statutes, regard was commonly had to the 'intention of the legislature' which would sometimes have the result of divergence from the written text itself.

The *Endumeni* approach requires that when more than one meaning is possible, each possibility must be weighed bearing certain considerations in mind (i.e. the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose and the material known to those responsible for its production).[103] In the case of *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others*,[104] the Constitutional Court adopted the approach proposed by the *Endumeni* by engaging with the meaning of the term 'withdrawal' for purposes of interpreting a settlement agreement. The court interpreted the meaning of the term 'withdrawal' after having regard to the context in which the term appeared in the settlement agreement and specifically the appeal proceedings which preceded the drafting of the settlement agreement.[105] As was demonstrated in this case, the *Endumeni* approach has the added benefit of forcing the judicial officer to record their rationale when dealing with exercises of interpretation, rather than simply referring to some nebulous construct such as the intention of the parties or the legislature. It is submitted that possibly for this reason alone, this approach should be welcomed.

It was also in the case of *Airports Company South Africa* that the approach in *Endumeni* was expressly endorsed by the Constitutional Court. In this case the Constitutional Court held that 'there is no dispute about the principles of interpretation. The correct approach to the interpretation of documents was summarised by the Supreme Court of Appeal in Endumeni

[100] 2014 (2) SA 494 (SCA).
[101] Ibid.
[102] Wallis op cit note 90 at 15.
[103] Supra note 7 para 18.
[104] 2019 (5) SA 1 (CC)
[105] Ibid para 44 – 47.

Municipality [in paragraph 18]'.[106] This explicit endorsement from the highest court in the land makes it abundantly clear that the *Endumeni* approach is the definitive approach in relation to the interpretation of documents in South Africa.[107]

But the approach in *Endumeni* has not always received unconditional acceptance. In the case of *Commissioner for the South African Revenue Services v Daikin Air Conditioning South Africa (Pty) Limited,* [108] (*Daiken*) Majiedt JA and Davis AJA handed down a dissenting judgment which questioned the reliance on a contextual approach to the interpretation of statutes as proposed in *Endumeni*. The learned judges held that there should be a distinction drawn when interpreting the provisions of a contract as opposed to the provisions of a statute.[109] The distinction is necessary because the legislative process which culminates in an enactment is quite different from the process which results in a conclusion of a contract, and thus different considerations should apply.[110] In *Daikin* the two dissenting judges took particular issue with the majority's reliance on commercial sensibility in coming to their interpretation.[111] Indeed, the minority argued, context is fact specific and can be applied in the interpretation of contracts but not of statutes.[112]

Subsequently, Wallis JA penned the judgment of *United Manganese* where he addressed the dissenting judgment in *Daikin* by saying that 'context is as important in construing statutes as it is in construing contracts or other documents and the contrary suggestion is incorrect'.[113] Therefore, contrary to the dissenting judgment in *Daikin,* it is clear that the context can and should be considered in the interpretation of statutes. Context applied to the interpretation of statutes includes the obligation to interpret legislation in accordance with the spirit purport and object of the Bill of Rights as required by s 39(2) of the Constitution of the Republic of South Africa, 1996, (the Constitution), the entire enactment itself, any applicable reports (if the legislation flows from a commission of enquiry, or the establishment of a specialised drafting committee), the legislative history and the general factual background to the statute.[114]

On the same day as the SCA handed down its decision in *United Manganese*, the SCA handed down a judgment in *Telkom SA SOC Limited v Commissioner for the South African*

[106] Ibid.
[107] 2019 (5) SA 1 (CC) para 29.
[108] 2018 80 SATC 33.
[109] Ibid para 31.
[110] Ibid.
[111] Ibid.
[112] Ibid.
[113] Supra note 8 para 17.
[114] Ibid.

Revenue Service[115] which also addressed the dissenting judgment of *Daikin.* Here the court emphasised that the interpretative approach in *Endumeni* was essentially a 'unitary exercise in methodology', in that the relevant text which fell to be interpreted had to be considered in light of the 'ordinary rules of grammar and syntax; the context in which the provision appeared; the apparent purpose to which it was directed and the material known to those responsible for its production'.[116] It stressed however that the exercise of interpretation was not a 'uniform' exercise.[117] In other words, that the background and production of the relevant document had to be considered from the outset and that this would differ depending on the nature of the document in question.

From the above line of cases, the current approach to statutory interpretation is the approach endorsed by *Endumeni* and subsequently refined by *United Manganese*. The approach to interpretation is a unitary one which with the inevitable point of departure being the language of the provision itself read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. Context when interpreting statutes includes the obligation to interpret legislation in accordance with the spirit purport and object of the Bill of Rights as prescribed by s 39(2) of the Constitution, the entire enactment itself, any applicable reports, the legislative history and the general factual background to the statute.

IV COMPARING THE VIENNA CONVENTION AND SOUTH AFRICAN APPROACHES TO INTERPRETATION

When one compares the approach contained in the provisions of art 31 and art 32 of the VCLT against the *Endumeni* approach, one is tempted to jump to the conclusion that the approaches are compatible. *Endumeni* attempts to set out a single unitary (but not uniform) approach to the interpretation of documents in South Africa and that approach is not limited to the interpretation of statutes or contracts only. By virtue of its status as a document, a treaty would fall to be interpreted in accordance with the approach set out in *Endumeni* too. The provisions of art 31 and art 32 are so broad in nature that one could be forgiven for assuming that they are essentially no different to the principles of interpretation set out in *Endumeni.*

It is useful to list some of the immediately identifiable similarities between the two approaches. Firstly, both approaches emphasize the importance of considering the language

[115] 2020 (4) SA 480 (SCA).
[116] Ibid para 14.
[117] Supra note 7 para 18.

used in the document and its context. Article 31(1) makes specific reference to the 'ordinary meaning to be given to the terms of the treaty in their context' as a starting point. The *Endumeni* approach similarly requires one to consider '[t]he language used in the light of the ordinary rules of grammar and syntax' and 'the context in which the provision appears'. In interpreting any text, it is essential to consider the ordinary meaning of the words used in the text, which is often the starting point for interpretation. The language used is also a crucial consideration, as it is the primary means by which the text conveys meaning. These textual considerations are integral to any interpretative exercise of text. Both approaches also refer to context, but the meaning of the term is different in each. Finally, both approaches require that the purpose of the provision or treaty be taken into consideration when interpreting it. The VCLT requires the interpreter of a treaty to interpret the terms of the treaty 'in light of its object and purpose'. Similarly, in the *Endumeni* approach, consideration must be had to the 'apparent purpose to which [the provision] is directed'.

As mentioned above, there are some differences in the approaches which merit further consideration. The first is the meaning and use of the term 'context'. In both approaches an interpreter can consider context to assist them in the exercise of interpretation. The term is used in a similar (but not identical) way in the VCLT and in *Endumeni*. However, as set out above, art 31 of the VCLT has specific limitations in relation to what can constitute context for the purpose of interpretation of a treaty. In this regard, and as discussed in Part II, the context can include the entire text of the treaty, the title of the treaty, the punctuation and syntax, the structure of the sentence, the use of the term elsewhere in the treaty and the preamble to the treaty.[118] In terms of art 31(2), context can also include 'any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty' and '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'.[119].

In contrast the ambit of what can constitute context in statutory interpretation as proposed in *Endumeni* and modified by *United Manganese* is significantly wider. We know from *United Manganese* that in the interpretation of domestic legislation, a court *must* have regard to context which includes the imperative to interpret legislation in terms of s 39(2) of the Constitution, in accordance with the spirit, purport and object of the Bill of Rights, any applicable reports as well as the general factual background to the statute. The VCLT approach

[118] Art 31(2) of the Vienna Convention on the Law of Treaties, 1969.
[119] Ibid.

is therefore significantly more restrictive than the *Endumeni* approach insofar as what can constitute context for the purposes of interpretation.

In addition, it is worth dealing briefly with art 31(3) and art 32. In terms of art 31(3) (which remains part of the general rule of interpretation as set out in the VCLT), any 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' and any 'subsequent practice in application of the treaty which establishes the agreement of the parties regarding its interpretation' as well as any 'relevant rules of international law applicable in the relations between the parties' can also be considered when undertaking the exercise of interpretation.[120] It should be noted that these are separate and distinct from 'context' as contemplated by the art 31(2). However, in terms of art 31(3), the elements of that article must be taken into account 'together with context'.[121] In other words, these subsequent agreements, practices and rules of international law rank equally with the context for purposes of informing the meaning of the provision.

In terms of art 32 recourse to supplementary means of interpretation '*may*' be had to '*confirm*' the meaning resulting from the application of art 31 or otherwise '*determine*' the meaning resulting from the application of art 31 if the resulting meaning is ambiguous, obscure, or manifestly absurd or unreasonable.[122] We know from the language used in art 32 that supplementary means of interpretation include the 'preparatory work of the treaty as well as the circumstances of its conclusion'.[123] The use of the word 'include' in art 32, suggests that this is not a closed list. However, it should be noted that it has not yet been 'conclusively established' which additional supplementary means may be considered along with those specifically mentioned in the text.[124] One should notice however, that supplementary means (preparatory work and the circumstances of a treaty's conclusion) can be used to either confirm a resulting meaning or determine a meaning if the resulting meaning is ambiguous, obscure, or manifestly absurd or unreasonable. The resultant meaning suggests that one would have to apply the provisions of art 31 before recourse is had to supplementary means of interpretation. In the mechanism of art 32, one can begin to discern a slight preference for the literal meaning of the text of the treaty which is reminiscent to the two-staged approach which was common in the literalist-cum-intentionalist era of statutory interpretation in South Africa. Only if the resulting meaning is ambiguous, obscure, or manifestly absurd or unreasonable would the

[120] Art 31(1) of the Vienna Convention on the Law of Treaties, 1969.
[121] Art 31(3) of the Vienna Convention on the Law of Treaties, 1969.
[122] Art 32 of the Vienna Convention on the Law of Treaties, 1969.
[123] Ibid.
[124] Dörr and Schmalenbach op cit note 30 at 626.

interpreter be entitled to have regard for the supplementary means of interpretation. It should also be noted that the qualification to a 'manifest' quality of absurdity or reasonability, is also reminiscent of the 'glaring' absurdity as first enunciated by Innes CJ in *Venter v Rex*.[125]

In summary, while the approaches can be said to be similar, they are not identical. The main differences between the two approaches relate what can constitute 'context', as well as the mechanism in terms of which interpretation takes place; the *Endumeni* approach is unitary, while art 31(2) introduces a two-staged approach to interpretation similar to the golden-rule of statutory interpretation in South Africa as first espoused in *Venter v Rex*.

V THE APPROPRIATE APPROACH TO INTERPRETATION OF DOUBLE TAXATION AGREEMENTS

(a) The nature of DTAs

At this stage it is useful to consider the nature of a DTA before considering the appropriate approach to adopt when interpreting one. A DTA is an international treaty concluded between two (or more) contracting states.[126] The primary aim of a DTA is, as the name suggests, to avoid the occurrence of double taxation. This is generally achieved by limiting the taxing rights of each of the contracting states.[127] DTAs therefore provide states with a collaborative measure to reduce double taxation which supplement and enhance double taxation rules unilaterally imposed by such states.[128] In addition, these treaties also serve to prevent fiscal evasion and provide certain rights to information and collaboration between taxing authorities.[129]

Insofar as the process by which a DTA becomes part of South African law, regard must be had to s 108 of the Income Tax Act 58 of 1962 (ITA) read with section s 231 of the Constitution. In terms of s 108 of the ITA, as soon as a DTA is approved by both houses of Parliament as contemplated in s 231, a notice must be published in the Government Gazette, which would have effect that the provisions of the DTA are enacted in terms of the ITA.

As a treaty, a DTA is not legislation created by parliament, but rather a governmental contract negotiated and concluded by the executive arm of the government for a very specific purpose. It is created through a bilateral or multilateral negotiation. And this process of

[125] Supra note 78.
[126] Wally Horak 'The Legal Nature and Scope of Application of Double Taxation Agreements' in *Silke on International Tax* para 12.1.
[127] Lynette Olivier & Michael Honiball *International Tax A South African Perspective* 5 ed (2011) 276.
[128] Ibid.
[129] Ibid.

negotiation is different from the process whereby ordinary legislation is enacted in the parliamentary process.[130]

(b) The role of the Constitution in the interpretation of legislation and DTAs

Given the nature of DTAs outlined above, what approach does the Constitution require to be followed when interpreting a DTA? The starting point is to acknowledge that international agreements concluded between international actors are usually governed by international law.[131] Accordingly, as international agreements, DTAs should be regulated by international law. However, as discussed earlier in this Part, DTAs become enacted in terms of s 108 of the ITA, thereby gaining the status of enacted domestic legislation.

As discussed in Part II, articles 31 and 32 of the VCLT are accepted to be customary international law. Section 232 of the Constitution states that, 'customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.[132] In addition, s 233 of the Constitution compels every court in South Africa when interpreting 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.' It is submitted that the reference to international law in s 233 includes customary international law; this much is implied by the fact that the primary sources of international law are treaties and customary international law. In addition, the headings of chapter 14 (s 231 to 233 of the Constitution) are headed, 'International Law'. Moreover, s 231 deals with treaties, s 232 deals with customary international law, and s 233 deals with the application of international law.

It follows that by virtue of s 233 of the Constitution, when interpreting any legislation, a South African court is obligated to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[133] This obligation is mandatory. Because art 31 and art 32 of the VCLT constitute customary international law, when interpreting a DTA that has been enacted into South African domestic law by virtue of s 108 of the ITA, a court must interpret such DTA having regard for the rules of interpretation set out in art 31 and art 32 of the VCLT.[134]

[130] Ibid.
[131] Ibid at 297.
[132] Section 232 of the Constitution.
[133] Section 233 of the Constitution.
[134] Supra note 1 para 27. See also *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC).

(c) An analysis of the interpretation of double taxation agreements in Krok and ITC 1925

Given the approach of interpretation which is required in terms of the relevant provisions of the Constitution discussed above, it is useful to consider two instances in which South African courts have been tasked within interpreting DTAs since the decision in Endumeni. As indicated in Part I, this report will consider the decisions in the case of *Krok* and *ITC 1925.*

The court in *Krok* was tasked with determining whether a preservation order granted in terms of s 185 and s 163 of the Tax Administration Act 28 of 2011 read with article 25A of a protocol (the Protocol) amending an existing DTA concluded between the government of the Republic of South Africa and the Government of Australia should be set aside.

One of the main arguments raised by the taxpayer in *Krok* was that that the court a quo erroneously overlooked an accepted 'general rule of interpretation that in the absence of express provisions to the contrary, statutes should be construed as affecting future matters only'.[135] This was done, according to the taxpayer, when the court a quo upheld the contention that article 25A of the Protocol applied retrospectively to all taxes since the inception of the DTA notwithstanding certain provisions contained in the Protocol.[136]

Paragraph 27 of the judgment, which was quoted in the Part I of this report, is relevant because it foreshadows the SCA's approach when considering which rules of interpretation should be adopted when interpreting the relevant provisions of the DTA. The SCA quotes the entirety of art 31 and art 32 in paragraph 27 immediately after the extract set out in Part I of this report. This suggests that the SCA in *Krok* was of the view that the approach which should be adopted to interpretation could be found in art 31 and art 32 of the VCLT.

Also relevant are the footnotes which appear in paragraph 27. As authority for the sentence which includes the first three propositions mentioned in Part I of this report, the court includes a reference to the UK decision of *Ben Nevis (Holdings) Limited & Metlika Trading Limited v The Commissioners for Her Majesty's Revenue and Customs*.[137]. In *Ben Nevis*¸ similar issues faced the court when interpreting a DTA concluded between South Africa and the United Kingdom, which was also amended by a protocol. In *Ben Nevis* the court found that the appropriate principles of interpretation to be adopted could be found in art 31 and art 32 of the VCLT and that these rules were rules of customary international law.[138] The SCA in *Krok*

[135] Supra note 1 para 22.
[136] Ibid para 23.
[137] [2013] EWCA.
[138] Ibid para 17.

held that the facts of the case were similar to those in *Ben Nevis*.[139] It is also relevant that the taxpayer sought to distinguish the two cases, but was ultimately unsuccessful, and the SCA found against him.

For the fourth proposition, the Court cites as authority paragraphs 18 and 19 of *Endumeni*. But it should be pointed out at that nowhere in its judgment did the SCA in *Endumeni* hold that the rules in art 31 and art 32 of the VCLT were 'essentially no different from those generally applied by our courts in construing statutes and agreements.' It furthermore should be noted that the court in *Krok* did not cite any other authority for the interpretation of documents in South Africa, nor did it embark on the approach as described in paragraph 18 of *Endumeni.*

From the above it would seem to follow that the SCA in *Krok*, notwithstanding that it made an express statement that the rules set out in art 31 and art 32 are 'essentially no different from those generally applied by [South African] courts in construing statutes and agreements', did not apply the rules generally applied by South African courts in construing statutes and agreements when interpreting the relevant provisions in the case before it. It is submitted therefore, that because proposition four was not strictly necessary for the SCA to come to its decision in Krok, that the statement was *obiter dictum*, and therefore not binding in accordance with the doctrine of *stare decisis*.[140]

In *ITC 1925*, the Tax Court was faced with interpreting a most favoured nation clause in a DTA concluded between the Government of South Africa and the Kingdom of the Netherlands. The court, per Hack AJ, specifically referencing paragraph 27 in *Krok* and the fourth proposition held that, 'the Parties are ad idem that the principles applicable to the interpretation of international tax treaties in South African law and International Law are the same as those applied by our courts in construing statutes and agreements'.[141] This remark was made somewhat toward the end of the judgment, as a basis for the court to make its decision in accordance with South African domestic law and to not consider certain decisions of the courts in the Netherlands which were relied upon by the appellant or to have regard to international law.[142] In interpreting the relevant provisions of the DTAs in question, the Tax Court preferred to use the rules of interpretation as espoused by South African courts when interpreting domestic legislation. In particular, Hack AJ refers to the decisions of the Supreme Court of

[139] Supra note 1 para 37.
[140] *Willoughby's Consol Co Ltd v Copthall Stores Ltd* 1918 AD 21.
[141] Supra note 4 para 33.
[142] Ibid.

Appeal in Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk as well as the case *Endumeni.*

For the reasons set out earlier in this Part, it is submitted that, regardless of whether the parties were *ad idem* as to approach to interpretation, a court is obliged to follow the correct approach when interpreting a DTA. In this regard, it is submitted that the court in *ITC 1925* erred in its approach. It seems likely that that this error may have arisen from the Tax Court treating the fourth proposition of paragraph 27 in *Endumeni* as a ratio decidendi and binding precedent.

Izelle du Plessis has suggested that the approach in *ITC 1925* is problematic and that it 'cannot be supported'.[143] In addition, the author holds the view that while the rules relating to interpretation as set out in the VCLT and those rules regarding the interpretation of domestic statutes are similar, they are not the same.[144]

VI CONCLUSION

In this report, the author sought to confirm whether the rules of interpretation generally applied by South African courts in construing documents the same as the international rules applicable to the interpretation of DTAs. This report has shown that the while these approaches are similar, they are not the same.

In Part II of this report the author sought to set out the prevailing customary international law regarding the interpretation of treaties. In Part II the author established that there are international rules applicable to the interpretation of treaties, that these rules are customary law in nature and are binding on all states, and that these rules are set out in art 31 and art 32 of the VCLT.

In Part III, the author examined the rules generally applied by South African courts in construing documents. These rules have developed over time, but the general approach has been comprehensively described *Endumeni.* The author set out the historical approach to the interpretation of legislation and considered it against the contemporary approach in South African jurisprudence for the interpretation of documents (including domestic legislation) as espoused by Wallis JA in *Endumeni*.

In Part IV the author compared the different interpretative approaches set out in Parts II and III respectively and considered the areas of overlap as well as some fundamental

[143] Izelle Du Plessis 'Double Taxation Treaty Interpretation: Lessons from a Case Down Under' PER / PELJ 2020(23) at 14.
[144] Ibid.

differences between the relevant provisions relating to interpretation of the VCLT and the principles set out in *Endumeni* and later refined in *United Manganese*. While the approaches can be said to be similar, they are not identical and there are differences between the two.

In Part V of this report, the author set out the nature of a DTA and submitted that the correct approach to interpreting any DTA would be in accordance with the customary international law regarding the interpretation of treaties, as set out in the VCLT and specifically art 31 and art 32 thereof. The author concluded with a discussion of the respective approaches adopted by the SCA *in Krok* and the Tax Court in *ITC 1925*.

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