

CHAPTER 1

INTRODUCTION

1.1 Scope and purpose of this study

Many of the issues related to the application of tax treaties arise from a lack of a clear understanding of the rules and principles governing their interpretation. It is, therefore, not surprising that the question of interpretation is much debated by scholars. In many studies of substantive tax treaty law, the subject of interpretation is indeed considered in more or less detail as well. It must be emphasised, however, that this study does not purport to give a detailed overview of all that has ever been said on this subject. Nor does it purport to give a detailed overview of the many decisions of domestic courts relevant to this subject, both in the Netherlands and elsewhere.

This study considers the interpretation of tax treaties primarily from the standpoint of public international law. The principal purpose of this study is to analyse and discuss the rules and principles of international law relevant to the interpretation of treaties in general, and their application to tax treaties in particular. The rules of international law enshrined in Articles 31, 32 and 33 of the Vienna Convention are therefore central to this study. Not only are detailed studies of these rules in relation to tax treaties scarce, but it also seems that tax lawyers and practitioners sometimes fail to appreciate the intricacies of these rules, and this is the main reason for undertaking this study. Moreover, a clear understanding of some of the fundamental principles of international law underlying the said Articles 31, 32 and 33 is necessary to resolve some of today's major issues of tax treaty interpretation.

The primary focus of this study is thus on the rules of international law governing the interpretation of treaties. Where appropriate, reference is made to the jurisprudence of the ICJ and to the law and procedure of other international courts and tribunals. The emphasis placed on the relevant rules and principles of international law is intended to offer a new perspective for dealing with some of the interpretation issues in international taxation.

Tax treaties are not only a source of legal obligation for the contracting States from the standpoint of public international law, but, more importantly perhaps, can also be invoked by the tax-payers of those States. Therefore, this study furthermore considers to what extent the relevant rules and principles of international law are binding on domestic courts and taxpayers. Since the question of the effect of international law in a State's national legal order cannot be answered *in abstracto*, but depends on its relevant rules of constitutional law, which vary from country to country, this study only addresses the issue from the perspective of the Netherlands. In addition, the importance of international law for the purpose of the interpretation of tax treaties is illustrated by a number of

leading cases decided by the *Hoge Raad*. The legal position in other countries is, however, left to be determined by those who are familiar with the laws and practices prevailing in those countries.

1.2 Structure

This study is divided into four parts. Part I is primarily intended as an introduction to this study and will also discuss in broad outline the traditional sources of international law as formulated in Article 38 of the Statute of the ICJ. First, the constitutive elements of customary international law are examined, followed by a discussion of the various manifestations of treaties under international law. The dynamics of the relation between treaties and customary international law will also come up for discussion, and some attention will be given to the general principles of law as a source of international law, as well as the hierarchy – if any – between the different sources. For those who are familiar with public international law, this introduction to its sources will presumably bring nothing new. However, for those who are less informed about this subject, it should provide a better understanding of some of the rules and principles of international law that will be discussed further on in this study.

Part II is the heart of this study and examines the content and meaning of the rules of interpretation as laid down in Articles 31, 32 and 33 of the Vienna Convention. For this purpose, extensive reference is made to the preparatory work of the ILC on the subject, as well as the comments of governments on the draft articles prepared by the ILC. In addition, reference is made to the comments and observations of delegations in the Sixth Committee of the General Assembly of the United Nations and the Committee of the Whole of the United Nations Conference on the Law of Treaties, held in Vienna in 1968 and 1969. Naturally, this study will also take the positions of delegations in the plenary sessions of the Conference into account. The relevant jurisprudence of the ICJ and that of its predecessor, the PCIJ, will be analysed and discussed as well, just as the case law of other international courts and tribunals. The system of interpretation that reveals itself from this study will be summarised at the end of Part II.

Part III will examine the relevance of Articles 31, 32 and 33 of the Vienna Convention for the purpose of the interpretation and application of tax treaties. First, some of the elements of interpretation that may be present in the context of a tax treaty are examined according to the relative weight ascribed to them in Articles 31, 32 and 33 of the Vienna Convention. Special consideration will be given to the international law status of the Commentaries on the OECD Model Tax Convention, as well as to the legal status of mutual agreements arrived at between the competent authorities within the legal framework of a treaty provision corresponding to Article 25(3) of the OECD Model Tax Convention. Second, the relation between tax treaties and domestic law, as established by Article 3(2) of the OECD Model Tax Convention, will be examined in the light of the general rule of interpretation laid down in Article 31 of the Vienna Convention.

Finally, Part III will consider the internal effect of international law under Dutch constitutional law, with a view to examine whether domestic courts and taxpayers are legally bound to interpret and apply the provisions of a tax treaty in accordance with the relevant rules of international law.

Part IV will present the final conclusions to be drawn from this study on the rules of international law enshrined in Articles 31, 32 and 33 of the Vienna Convention in general, and their application to tax treaties in particular.