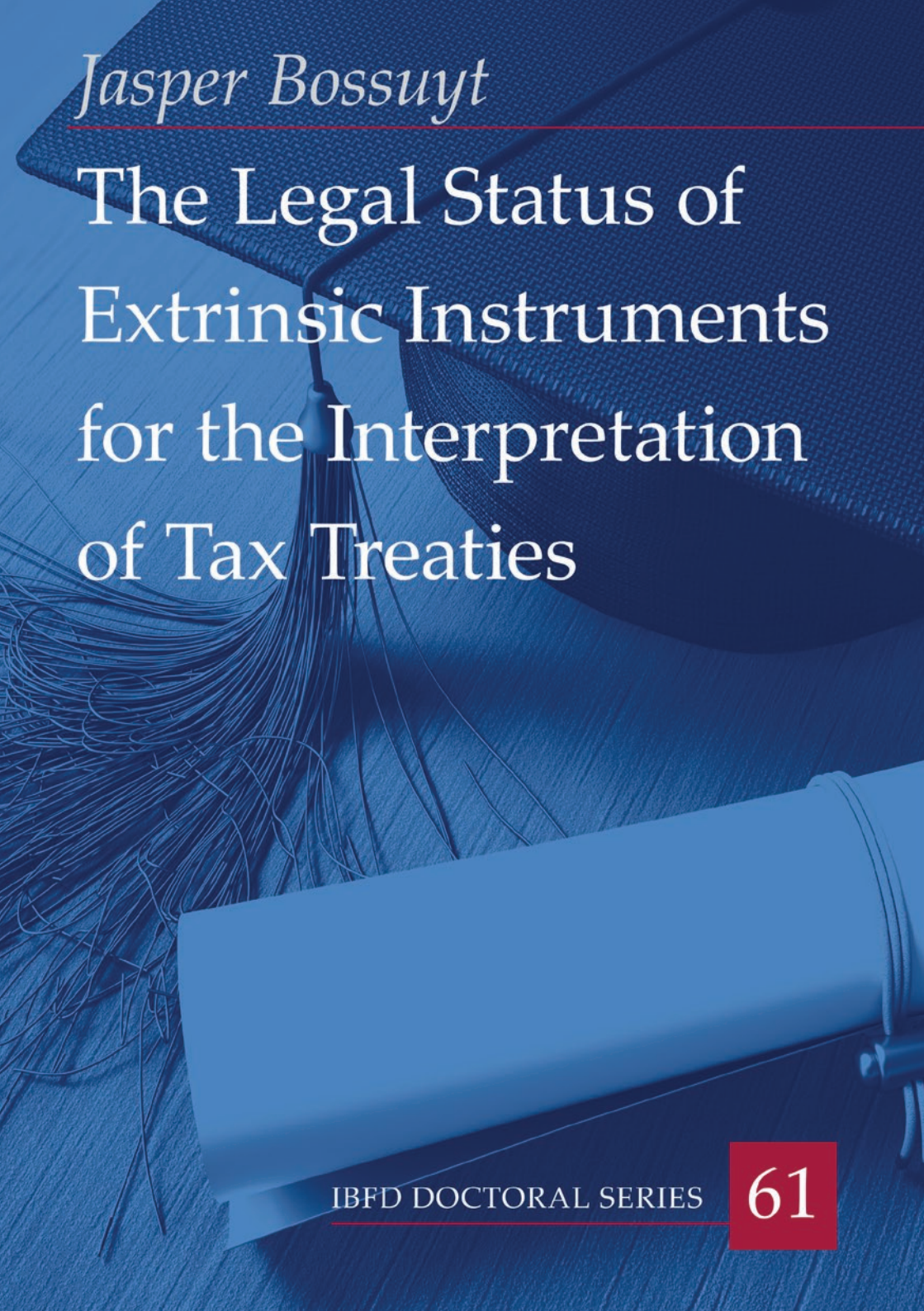
Jasper Bossuyt

The Legal Status of Extrinsic Instruments for the Interpretation of Tax Treaties



IBFD DOCTORAL SERIES 61

The Legal Status of Extrinsic Instruments for the Interpretation of Tax Treaties

Why this book?

National tax authorities can express their views in a variety of ways on how tax treaties should be interpreted. As a result, there are unilateral, bilateral and multilateral interpretive instruments that are not – or not necessarily – incorporated into an actual tax treaty, but are "extrinsic" to it. Moreover, national courts and tax authorities, as well as taxpayers and tax scholars, strongly rely on the OECD Commentaries and Transfer Pricing Guidelines when interpreting tax treaties. Their legal status has been considered one of the major unresolved issues in international tax law. This book thoroughly analyses the legal status of extrinsic instruments under public international law in a critical, integrated and original manner, with the OECD Commentaries and Transfer Pricing Guidelines as central elements. Starting with a detailed historical evolution of model conventions and commentaries, the book empirically studies the OECD Commentaries and their interrelationship with other extrinsic instruments, relying on treaty practices in Belgium, the Netherlands and the United States. It then critically investigates the various methods and concepts offered by public international law to assess their impact on the interpretation of tax treaties. This book offers interpreters refreshing, original and stimulating insights for determining the legal status and role of extrinsic instruments for tax treaty interpretation purposes.

Honourable mention for the 2020 Mitchell B. Carroll Prize (IFA) and 2021 EATLP Doctoral Tax Thesis Award (European Association of Tax Law Professors and European Commission).

Title:	The Legal Status of Extrinsic Instruments for the Interpretation of Tax Treaties
Author(s):	Jasper Bossuyt
Date of publication:	January 2022
ISBN:	978-90-8722-738-8 (print/online), 978-90-8722-740-1 (ePub), 978-90-8722-739-5 (PDF)
Type of publication:	Book
Number of pages:	1,576
Terms:	Shipping fees apply. Shipping information is available on our website
Price (print/online):	EUR 175 / USD 210 (VAT excl.)
Price (eBook: ePub or PDF):	EUR 140 / USD 168 (VAT excl.)

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www.ibfd.org

ISBN 978-90-8722-738-8 (print)
ISBN 978-90-8722-740-1 (eBook, ePub); 978-90-8722-739-5 (eBook, PDF)
ISSN 1570-7164 (print); 2589-9619 (electronic)
NUR 826

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Foreword

As a law student at KU Leuven, conducting research and writing a doctoral dissertation was not something I envisaged myself doing immediately after graduating from law school. The idea to postpone a career in law practice and take up the challenge – it really is a challenge – to pursue a doctoral degree indeed only emerged while writing my master thesis during the second semester of my final year. Writing this doctoral dissertation required a lot of hard work and dedication, and I could not have done it without the support of many people whom I would like to thank, starting with my supervisor, Prof. Luc De Broe. Prof. De Broe provided me with the opportunity to become an assistant at the law faculty and guided me towards a research topic that I eventually would become quite passionate about. There are different types of PhD supervisors, and I can honestly say that Prof. De Broe was, for me personally, the ideal supervisor. He always entrusted me with a lot of freedom and flexibility to conduct my research in an independent manner, and his door was always open if I had questions regarding my research or really any other topic I felt the urge to address. I am particularly grateful for his support and confidence when I decided to pursue further studies at the Université Libre de Bruxelles and Harvard Law School, which are two decisions that strongly impacted my personal and professional life.

I would also like to express my gratitude to Prof. Frans Vanistendael, Prof. Jan Wouters, Prof. Ekkehart Reimer and Prof. Hugh Ault for the energy and time spent while reading this dissertation as members of my doctoral exam jury. A special word of thanks goes out to Prof. Hugh Ault, who first authored an article on my research topic. As a young researcher exploring the extensive literature on this research topic, it struck me how many authors expressed their gratitude to Prof. Ault for sharing his thoughts on a working paper, an article or a book. I thus gladly took the opportunity to approach him at the end of the first tax seminar at Harvard Law in the summer of 2014, where we were coincidentally seated next to each other. Thank you, Prof. Ault, for your enthusiastic and positive response to my initial research agenda, your insightful comments on the first draft, as well as your positive words, which encouraged me to continue and persevere.

I had the pleasure and privilege of working with great people during my time at the law faculty. As a proud member of the Institute of Tax Law, I cherish the joyful and enriching moments and interactions I had with Ingrid, Thomas, Filip, Joris, Anouk, Prof. Axel Haelterman, Prof. Axel Cordewener, Prof. Kenneth Vyncke, Prof. Niels Bammens and the many part-time members of our Institute. Many thanks also go to Frederic, Wannes, Nick, Inge,

Stijn, Joke, Leen, Thomas, Pim, Els, Richard, Friso, Jasper, Eveline, Tine, Johanna and many others for sharing laughs and joy, but also frustrations and irritations, all of which are and were both inevitable and instrumental to reaching our goals. Thank you, Prof. Vananroye, Prof. Caroline Van Schoubroeck, Prof. Matthias Storme and Prof. Wouter Devroe for energizing the Economic Law Department and creating a pleasant and intellectually stimulating environment for young researchers. Finally, I very much enjoyed and benefited from the close proximity of emeriti professors at the law faculty. I reminisce in particular about the amusing stories told by the late Prof. Luc Ballon, who gave me the opportunity to publish my first article in DAOR. The lunches with Prof. Herman Cousy and Frederic were, without question, highlights of my time at "De Valk".

As a member of the ABAP Delegation, the POC and the faculty council, it was an honour to represent my colleagues and contribute to shaping some of the policies within the law faculty. Although time-consuming, I considered it a privilege to co-organize the annual International and European Tax Moot Court with Prof. Pasquale Pistone, João and Ricardo.

I would like to also thank those colleagues and partners at the Brussels office of Linklaters LLP who showed genuine interest in the progress of my dissertation throughout the years and supported me in the final phase, allowing me to finalize the dissertation during my time at the firm.

I am especially grateful for the people I befriended during my time in Kortrijk, Leuven, Brussels, Durham and Cambridge. These friendships allowed me to occasionally set aside my dissertation, although my friends will rightfully say that I should have done so more often. I intend to make up for that in the future.

Finally, this dissertation would have never come about without the unconditional love and support of my parents and brother, who are the most important people in my life. No effort was ever too much for them. My parents laid down the foundation allowing me to pursue anything I ever wanted to pursue. In doing so, they never pushed me into a particular role, but always advised me to simply do my best. My brother's down-to-earthness, which I greatly admire, enabled me to put my dissertation in perspective. His unconditional support also (all too) often took the form of multiple rides from and to an office, whether in Leuven or Brussels, with yet another cargo load of books. I consider this dissertation to be as much theirs as it is my own.

Jasper Bossuyt
Brussels, 20 February 2021

Chapter 1

General Introduction

1.1. Preliminary observations

This research project encompasses a thorough analysis of the legal status of extrinsic instruments for the interpretation of tax treaties. The project was initiated in 2013 following two main observations.

1. The first observation was that tax authorities, tax administrations and competent authorities, all members of a country's executive branch, have various means at their disposal to express their views on the interpretation of tax treaties.[1] As a result, a wide array of instruments exist that are not (necessarily) incorporated into tax treaties, but are "extrinsic" to them.[2] There is no international tax scholarship that researches, in a structured and fundamental manner, the legal status of these extrinsic instruments for tax treaty interpretation purposes. The extrinsic instruments are categorized, for the purposes of this book, on the basis of the number of parties that are involved in their drafting.

From a *multilateral* angle, several international organizations are involved in the drafting of model conventions, which may serve as models for actual tax treaties. The model convention that is widely considered to be the most relevant or dominant in this regard is the OECD Model Tax Convention on Income and on Capital (OECD Model). This model was developed within the framework of the OECD and has served as the basis for more than 3,000 tax treaties currently in force worldwide.[3] It is accompanied by an exten-

1. In most countries, a distinction exists between the tax authorities (e.g. the Ministry or Treasury) and the tax administration (e.g. Her Majesty's Revenue and Customs in the United Kingdom and the Internal Revenue Service in the United States). The former designates the administrative agency responsible for a country's international tax policy, whilst the latter refers to the agency that monitors the collection of taxes. The term "competent authorities" designates the members of the executive branch that are entitled to represent a contracting state in the framework of the mutual agreement procedure *ex* art. 25 of the OECD Model Tax Convention on Income and on Capital (OECD Model).
2. *See*, for example, Y. Brauner, *The True Nature of Tax Treaties*, 74 Bull. Intl. Taxn. 1, p. 29 (2020), Journal Articles & Opinion Pieces IBFD: "Such concepts are extended via a myriad of instruments, including domestic laws and regulations, constitutional provisions, administrative agreements between governments, OECD reports, G7 and G20 statements, etc."
3. B.J. Arnold, *The Interpretation of Tax Treaties: Myth and Reality*, 64 Bull. Intl. Taxn. 1, p. 13 (2010), Journal Articles & Opinion Pieces IBFD.

sive commentary (the Commentaries on the OECD Model). The OECD Model and its Commentaries are adopted by the OECD's Committee on Fiscal Affairs (CFA), which is comprised of high government officials of the OECD member countries.[4] The OECD also conducts research with regard to other tax treaty issues and regularly produces reports in this regard that convey the OECD's views on the interpretation of the provisions of the OECD Model. An important example is that of the OECD Transfer Pricing Guidelines,[5] by which the OECD provides guidance on the application of the so-called "arm's length principle", which is generally considered to be laid out in article 9(1) of the OECD Model.

On a *bilateral* level, the tax authorities will, in principle, negotiate and conclude tax treaties on behalf of their national governments. These agreements are expected to bind their country at the international level. As a result, they will have the opportunity to express their common views on the interpretation of a treaty either in the treaty itself, in a contemporaneous agreement (such as a memorandum of understanding) or by way of an exchange of letters or diplomatic notes.[6]

Furthermore, the treaties that national tax authorities negotiate and conclude generally contain a specific provision by which the competent authorities of the contracting states may engage in the so-called "mutual agreement procedure" *ex* article 25 of the OECD Model and conclude a competent authority agreement with a view to resolving interpretive uncertainties or issues of double taxation not provided for in the treaty.

Finally, there are various ways for a country's executive branch to *unilaterally* convey its views on the interpretation of tax treaties. The tax authorities

4. *See*, e.g. E.C.C.M. Kemmeren, *De rol van het OESO-Commentaar bij de uitleg van belastingverdragen en het Europese recht: trias politica onder toenemende druk*, in *Principieel belastingrecht – Vriendenbundel Richard Happé* p. 97 (H. Gribnau ed., Wolf Legal Publishers 2011); and L. De Broe & J. Luts, *BEPS Action 6: Tax Treaty Abuse*, 43 Intertax 2, p. 133 (2015). For a critical analysis in this respect, *see* L. Brosens & J. Bossuyt, *Legitimacy in International Tax Law-Making: Can the OECD Remain the Guardian of Open Tax Norms?*, 12 World Tax J. 2, pp. 1-64 (2020), Journal Articles & Opinion Pieces IBFD.

5. Current version: *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (10 July 2017), Primary Sources IBFD.

6. *See also* J. Hattingh, *Legal Considerations Arising from the Use of Memoranda of Understanding in Bilateral Tax Treaty Relations*, in *Current Tax Treaty Issues – 50th Anniversary of the International Tax Group* pp. 359-438 (G. Maisto ed., IBFD 2020), Books IBFD.

may, for example, decide to publish a tax treaty policy in which they explicitly address their views on tax treaty provisions. Moreover, it is generally the case that a legislature does not intervene in the process of negotiating and concluding tax treaties. However, that does not mean that a legislature does not play any role at all. Depending on the specific constitutional rules of each jurisdiction, the legislative branch must approve the treaty before it can be fully applicable in domestic law.[7] Hence, the executive branch will need to inform the people's representatives of the policies that underpin a tax treaty and the legal consequences that they envisage in this regard. As a result, they will have the opportunity to express their views on the interpretation of the tax treaty provisions, which will allow the legislative branch to be duly informed prior to giving its approval.

The tax administration traditionally also imparts its views on the interpretation and application of domestic tax law in order to provide taxpayers with more certainty as to how it will apply domestic tax measures. Nothing prevents the tax administration from taking on this exact same role with regard to the interpretation of tax treaties. Hence, the views expressed in administrative documents such as circular letters (Belgium) or revenue rulings (United States) are of a unilateral nature because only one party produces them.

2. A second observation relates to different actors in the interpretive process, i.e. domestic courts, taxpayers and tax authorities, heavily relying on the OECD Commentaries for the interpretation of tax treaties modelled after the OECD Model. The Commentaries on the OECD Model are, arguably, the most important extrinsic instrument with regard to the interpretation of tax treaties based on the OECD Model.[8] This poses the question as to what the legal status is of the OECD Commentaries for the interpretation of tax treaties based on the OECD Model. This question has puzzled scholars for decades, and it is considered "one of the major unresolved issues in

7. *See*, for example, Y. Masui, *Parliamentary Involvement in the Conclusion of Tax Treaties in Japan*, in *Tax Treaties After the BEPS Project – A Tribute to Jacques Sasseville* pp. 191-204 (B.J. Arnold ed., Canadian Tax Foundation 2018); and D.P. Sengupta, *Tax Treaty Making in India: How Legitimate Is the Process?*, in *Tax Treaties After the BEPS Project – A Tribute to Jacques Sasseville* pp. 268-285 (B.J. Arnold ed., Canadian Tax Foundation 2018).

8. P. Pistone, *General Report*, in *The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties* p. 7 (M. Lang et al. eds., CUP 2012).

modern international tax law".[9] There is still no agreement on the issue,[10] which has been referred to as "the Holy Grail of international taxation",[11] and it has been doubted as to whether consensus can ever be reached.[12] As Brauner recently wrote: "Can international courts base their decisions on OECD 'standards'? What is the legal source for such reliance? These issues are simply ignored in most cases due to the power that the OECD and its dominating members impose over the international tax regime."[13] He further states that "international tax practice presents a challenge, since many courts have accepted the Commentaries on the OECD Model and other OECD materials without much analysis and justification of the reasons for such adoption (while others similarly rejected arguments based on same materials with little analysis)".[14]

Courts around the world have indeed adopted divergent views (sometimes within a single jurisdiction).[15] Some courts may just refer to the Commentaries without any further explanation as to its legal basis,[16] whilst other courts

9. S. Douma & F. Engelen, *General Introduction*, in *The Legal Status of the OECD Commentaries* pp. 2-3 (S. Douma & F. Engelen eds., IBFD 2008), Books IBFD. *See* Y. Brauner, *The True Nature of Tax Treaties*, 74 Bull. Intl. Taxn. 1, p. 34 (2020), Journal Articles & Opinion Pieces IBFD: "[I]t is not clear whether one should or could rely on it, especially if technical interpretation of the tax treaty itself could lead one to a different result."

10. E.g. K. van Raad, *International coordination of tax treaty interpretation and application*, in *International and Comparative Taxation: Essays in Honour of Klaus Vogel* p. 219 (P. Kirchhof et al. eds., Kluwer Law International 2002); S. Austry et al., *The proposed OECD multilateral instrument tax treaties*, BTR, pp. 456-457, footnote 5 (2016); I. Grinberg, *The New International Tax Diplomacy*, 104 The Georgetown Law Journal 5, p. 1183 (2016); K. Cejie, *The Commentaries on the OECD Model as a Mechanism for Interpretation with Reference to the Swedish Perspective*, 71 Bull. Intl. Taxn. 12, pp. 666 and 673 (2017), Journal Articles & Opinion Pieces IBFD; and C. Pleil & S. Schwibinger, *Confronting Conflicts of Qualification in Tax Treaty Law: The Principle of Common Interpretation and the New Approach Revisited*, 10 World Tax J. 3, sec. 3.3.1.1. (2018), Journal Articles & Opinion Pieces IBFD.

11. S. Douma & F. Engelen, *General Introduction*, in *The Legal Status of the OECD Commentaries* p. 5 (S. Douma & F. Engelen eds., IBFD 2008), Books IBFD.

12. K. Cejie, *The Commentaries on the OECD Model as a Mechanism for Interpretation with Reference to the Swedish Perspective*, 71 Bull. Intl. Taxn. 12, p. 666 (2017), Journal Articles & Opinion Pieces IBFD.

13. Y. Brauner, *The True Nature of Tax Treaties*, 74 Bull. Intl. Taxn. 1, p. 32 (2020), Journal Articles & Opinion Pieces IBFD.

14. Id., at p. 34.

15. *See* P. Pistone, *General Report*, in *The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties* pp. 5-6 (M. Lang et al. eds., CUP 2012); the case law cited in M. Edwardes-Ker, *Tax treaty interpretation* paras. 26.11-26.12 (1994); and P. Arginelli, *Multilingual Tax Treaties: Interpretation, Semantic Analysis and Legal Theory* pp. 503-507, footnotes 1508-1509 (IBFD 2015), Books IBFD.

16. *See*, e.g. Tax Court of Canada, 8 April 2005, *Allchin v. R*, 7 ITLR 851; Court of Appeal (Civil Division), 2 March 2006, *Indofood International Finance Ltd v. JPMorgan Chase*

employ a variety of expressions to describe the role of the Commentaries in their decision-making processes. For example, the Commentaries have been considered "relevant",[17] "auxiliary",[18] "admissible",[19] "authoritative",[20]

Bank NA, London Branch, 8 ITLR 675; Tax Court of Canada, 28 September 2007, *Garcia v. Canada*, 10 ITLR 183; Income Tax Appellate Tribunal (Mumbai), 13 August 2008, *Deputy Director of Income Tax (International Taxation) v. Balaji Shipping (UK) Ltd / Assistant Director of Income Tax (International Taxation) v. Balaji Shipping (UK) Ltd*, 11 ITLR 120 et seq.; Income Tax Appellate Tribunal (Delhi), 29 August 2008, *Fugro Engineers BV v. Assistant Commissioner of Income Tax / Assistant Commissioner of Income Tax v. Fugro Engineers BV*, 11 ITLR 434; Income Tax Appellate Tribunal (Pune), 21 January 2009, *DaimlerChrysler India Private Ltd v. Deputy Commissioner of Income Tax*, 11 ITLR 811; Authority for Advance Rulings (Income Tax) (New Delhi), 11 September 2009, *Pintsch Bamag v. Director of Income Tax (International Taxation)*, 12 ITLR 265; Conseil d'Etat, 31 March 2010, *Société Zimmer Ltd v. Ministre de l'Economie, des Finances et de l'Industrie*, 12 ITLR 778-779; Oslo District Court, 16 December 2009, *Dell Products (NUF) v. Tax East*, 12 ITLR 829; Income Tax Appellate Tribunal (Mumbai), 22 March 2010, *J Ray McDermott Eastern Hemisphere Ltd v. Joint Commissioner of Income Tax*, 12 ITLR 927; Federal Court of Appeal, 10 June 2010, *Lingle v. Her Majesty the Queen*, 12 ITLR 999; Spanish Supreme Court, 25 March 2010, *Oracle Ibérica SRL v. General State Administration*, 13 ITLR 188; Tax Court of Canada, 14 January 2011, *Saipem UK Ltd v. Her Majesty The Queen*, 13 ITLR 469; Income Tax Appellate Tribunal (Mumbai), 16 July 2010, *Linklaters LLP v. Income Tax Officer – International Taxation Ward 1(1) (2)*, 13 ITLR, 322 et seq.; Bundesfinanzhof (Germany), 8 September 2010, 13 ITLR 646; Bundesfinanzhof (Germany), 9 February 2011, 13 ITLR 867; Supreme Court (Spain), 13 April 2011, *Televisión de Cataluña SA v. General State Administration*, 14 ITLR 569 et seq.; Italian Supreme Court of Cassation, 9 March 2012, *Boston Scientific International BV v. Italian Revenue Agency*, 14 ITLR 1073 and 1077; High Court of Judicature (Bombay), 6 August 2012, *Director of Income Tax v. Balaji Shipping UK Ltd*, 15 ITLR 150; First-tier Tribunal, 10 August 2012, *Weiser v. Revenue and Customs Commissioners*, 15 ITLR 168; First-tier Tribunal, 22 August 2012, *Yates v. Revenue and Customs Commissioners*, 15 ITLR 234; Income Tax Appellate Tribunal (Kolkata), 12 April 2013, *Income Tax Officer v. Right Florists Pvt Ltd*, 15 ITLR 797; High Court of Delhi, 5 February 2014, *Director of Income Tax v. e-Funds IT Solution and related appeals*, 16 ITLR 702; and Supreme Court (Spain), 18 June 2014, *Borax Europe Ltd v. General State Administration*, 17 ITLR 497 et seq. Also recently confirmed in C. Pleil & S. Schwibinger, *Confronting Conflicts of Qualification in Tax Treaty Law: The Principle of Common Interpretation and the New Approach Revisited*, 10 World Tax J. 3, sec. 3.3.1.1. (2018), Journal Articles & Opinion Pieces IBFD.

17. E.g. Tax Court of Canada, 22 July 2005, *Yoon v. R*, 8 ITLR 144; Noregshøgsterett, 24 April 2008, *Sølvik v. Staten v/Skatt Øst*, 11 ITLR 30; Tax Court of Canada, 22 April 2008, *Prévost Car Inc v. R*, 10 ITLR 765; Tax Court of Canada, 9 September 2009, *Lingle v. R*, 12 ITLR 65 (upheld by Federal Court of Appeal, 10 June 2010, *Lingle v. Her Majesty the Queen*, 12 ITLR 996); and Income Tax Appellate Tribunal (Mumbai), 29 September 2008, *Assistant Director of Income Tax (International Taxation) v. Delta Airlines Inc*, 12 ITLR 349.

18. Supreme Administrative Court (Helsinki, Finland), 20 March 2002, *Re A Oyj Abp*, 4 ITLR 106.

19. E.g. Chancery Division, 20 July 2012, R*evenue and Customs Commissioners and another v. Ben Nevis (Holdings) Ltd and others*, 15 ITLR 113.

20. E.g. House of Lords, 23 May 2007, *NEC Semi-Conductors Ltd and other test claimants v. Inland Revenue Commissioners*, 9 ITLR 1001.

"significant",[21] "of great assistance",[22] "of great importance",[23] "an important source",[24] "of immense value",[25] "persuasive",[26] "valid guidance"[27] and "the historical background of the treaty".[28] Conversely, other courts have flat-out rejected the use of the Commentaries.[29]

The lack of general agreement on the legal status of the OECD Commentaries for the interpretation of tax treaties results in a divergent and inconsistent practice with respect to judicial and administrative decisions, legal advice, as well as research endeavours in the field of international taxation.

1.2. Fundamental problem and relevance of the research project

3. The observations mentioned in section 1.1. demonstrate the fundamental problem that will be tackled in this book, i.e. the legal uncertainty that pervades the use of extrinsic instruments throughout the tax treaty interpretation process. This issue is relevant for different actors in the international tax community for a variety of reasons.

4. First, it is relevant for the practice of interpreting tax treaties by taxpayers and their tax advisers, national tax administrations and domestic courts. Taxpayers conducting cross-border activities will normally rely on

21. E.g. Supreme Administrative Court (Helsinki, Finland), 12 December 2011, 14 ITLR 1011.
22. E.g. First Council of Taxpayers (Brazil), 19 October 2006, *Eagle Distribuidora de Bebidas SA v. Second Group of the Revenue Department in Brasilia*, 9 ITLR 675.
23. E.g. Supreme Court, 21 September 1991, BNB 1992/379; and Supreme Court 14 July 2017, 16/03578, BNB 2017/188.
24. E.g. Supreme Court of Norway, 8 June 2004, *PGS Exploration AS v. State of Norway*, 7 ITLR 76; Supreme Court of Norway, 2 December 2011, *Dell Products (NUF) v. Tax East*, 14 ITLR 389; and Borgarting Court of Appeal, 2 March 2011, *Dell Products (NUF) v. Tax East*, 13 ITLR 736.
25. E.g. Tax Court (Johannesburg), 15 May 2015, *South Africa - Company, name undisclosed v. South African Revenue Service (SARS)*, 17 ITLR 942.
26. E.g. Court of Appeal (Civil Division), 23 May 2013, *Ben Nevis (Holdings) Ltd and another v. Revenue and Customs Commissioners*, 15 ITLR 1015; Upper Tribunal, 4 February 2015, *Macklin v. Revenue and Customs Commissioners*, 17 ITLR 790; and Supreme Court, 20 May 2020, *Fowler v. The Commissioners for her Majesty's Revenue and Customs*, [2020] UKSC 22, para. 18.
27. E.g. Federal Court of Appeal, 27 May 2004, *Allchin v. R*, 6 ITLR 995.
28. E.g. Federal Court of Australia (Full Court), 29 April 2005, *McDermott Industries (Aust) Pty Ltd v. Commissioner of Taxation*, 7 ITLR 813.
29. E.g. Conseil d'Etat, 9 November 2015, *Ministre du Budget v. Landesarztekammer Hessen Versorgunsgwerk & Ministre du Budget v. Société Santander Pensiones*, 18 ITLR 579.

tax treaties and examine whether they might be subject to double taxation. Hence, they should be able to reasonably foresee the tax consequences that follow from the treaty's application. This is crucial, since the predictability and clarity of rules are fundamental building blocks of economic growth.[30]

The issue is also of relevance for national tax administrations. In determining their position on the interpretation of a tax treaty, they could unilaterally or bilaterally produce extrinsic instruments that contain their views, or they could rely on extrinsic instruments produced by, for example, the OECD in the OECD Commentaries. In any event, they should be able to reasonably assess the likelihood that courts will uphold their positions. Furthermore, the tax administration can also have recourse to extrinsic instruments to alter its view on a particular issue. In that case, the tax administration should consider it important to understand whether and to what extent a policy change will yield any legal effects in tax treaty practice and whether there are any options to further enhance this.

Finally, domestic courts will ultimately adjudicate conflicts between taxpayers and national tax administrations relating to the interpretation of tax treaty provisions. It is evident that they should be able to reasonably ascertain whether and to what extent they can or must adhere to the views enshrined in the different types of extrinsic instruments.

5. The legal uncertainty relating to the legal status of extrinsic instruments is also relevant from a policy perspective. As set out above, the OECD produces the OECD Model, which serves as a model for actual tax treaties and is accompanied by the OECD Commentaries. There should be little doubt that the OECD, as a global policy-making organization, aims to implement its policies on as wide a scale as possible. However, the legal uncertainty pertaining to the legal status of the Commentaries could negatively impact the outreach of the OECD's policies. A better understanding in this regard will thus aid the OECD in improving the implementation of its policies set out in the Commentaries and in determining the likelihood that its endeavours in this regard will be successful.

In addition to the OECD, the legal uncertainty in relation to the legal status of extrinsic instruments also constitutes a policy concern for national tax authorities. As said, the tax authorities generally negotiate and conclude tax treaties. In doing so, they can be expected to have a particular policy view

30. OECD, *Action Plan on Base Erosion and Profit Shifting* p. 10 (OECD 2013), available at http://dx.doi.org/10.1787/9789264202719-en (accessed 4 May 2021).

that they wish to adopt. Those policies can be of an economic and/or financial nature and largely depend on the legal consequences of the various treaty provisions. Hence, it is important for the tax authorities that their envisaged tax consequences comply with the practical application of the treaty. For example, if the respective policy were to be based on the OECD's views that are incorporated into the Commentaries, the tax authorities would be expected to find it important that the Commentaries indeed be applied in practice, not only by tax administrations, but also by taxpayers and, ultimately, courts. Legal uncertainty in this regard may lead to discrepancies between the tax authorities' expectations and the final results and could also inhibit the tax authorities from finding alternative routes to overcome said discrepancies.

The legal uncertainty in relation to the various extrinsic instruments, especially the OECD Commentaries, should also be a concern for a treaty country's legislative branch.[31] As said, the legislative branch is normally not involved in the process of negotiating tax treaties. However, in most countries, a legislature will be required, under domestic law, to intervene and approve the treaty in order for it to have full effect in the domestic legal order. Hence, this democratic approval process requires the legislature to be duly informed of the policies that underpin the treaty and the legal consequences that they may have. It is submitted, in this regard, that a meaningful discussion (if any) between the executive and the legislative branches can only take place if there is sufficient certainty as to the legal status of interpretive extrinsic instruments. Indeed, without any explicit position on the OECD Commentaries and considering the uncertainty in respect thereof, a legislature cannot fully assess the tax treaty implications.[32] Moreover, even if there were to be a discussion on the treaty's legal effects and the status of the Commentaries,[33] the uncertainty surrounding the legal status of the latter inhibits the legislative branch from properly challenging the executive

31. In a similar sense, *see* E.C.C.M. Kemmeren, *De rol van het OESO-Commentaar bij de uitleg van belastingverdragen en het Europese recht: trias politica onder toenemende druk*, in *Principieel belastingrecht – Vriendenbundel Richard Happé* pp. 95-108 (H. Gribnau ed., Wolf Legal Publishers 2011).

32. *See also Income Tax Treaties: Hearing before the Subcommittee Oversight of the Committee on Ways and Means House*, 96th Cong., 2nd Session, 29 April 1980, p. 143 (statement Langer, annex C): "There are many areas in which the 1977 U.S. model income tax treaty closely follows the 1977 OECD model. What concerns me is the extent to which the OECD commentaries are binding on the U.S. Treasury, the Internal Revenue Service, and our courts in the interpretation of U.S. tax treaty provisions that closely follow those is the OECD model. […] I urge the Treasury and the Congress to review this situation."

33. A parliamentary discussion on individual tax treaties and their consequences is, for example, rare in Belgium. There has not been much scholarship on this issue aside from a recent contribution by A. Christians, *While Parliament Sleeps: Tax Treaty Practice in Canada*, 10 J. Parl. & Pol. L., pp. 15-42 (2016).

branch in this regard. Finally, even in the case of consensus on the status of the Commentaries between the executive and legislative branches, it is submitted that the latter's approval of the treaty is based on uncertain grounds as a result of the uncertain status of the Commentaries.

6. The absence of a theoretical framework surrounding the various multilateral, bilateral and unilateral extrinsic instruments, in combination with the uncertain status of the OECD Commentaries, also concerns researchers in the field of tax treaties. Indeed, authors conducting research on specific tax treaty provisions generally rely on the views enshrined in the Commentaries to determine their interpretation and estimate their implications in practice and in terms of policy. Hence, their research findings will partly have an uncertain legal basis. Moreover, other researchers, but also taxpayers and courts, will rely on those research findings with a view to establishing their own positions on the interpretation of the treaty. As a result, further research and even case law could be based on uncertain and doubtful grounds. Finally, scholars should also be aware of potential flaws in their own research when relying on other authors' research findings that are based on a particular view of the OECD Commentaries that might differ from their own views in this regard.[34] It is, therefore, submitted that scholars engaged in research on tax treaties should, from a methodological standpoint, be required to take an explicit position on the legal value of the OECD Commentaries and other extrinsic instruments.

7. This book studies the legal status of extrinsic instruments in international law for the interpretation of tax treaties. The relevance of the analysis undertaken in this book is not necessarily confined to the specific extrinsic instruments that will be addressed, nor is it restricted to the contemporary bilateral tax treaty network. First of all, this book examines the legal background and specific characteristics of various extrinsic instruments. It is submitted that this analysis will mutatis mutandis apply to current and future extrinsic instruments that have the same legal background and/or the same characteristics. Moreover, a study of the relevance of extrinsic

34. For example, Skaar has authored a widely consulted thesis on permanent establishments; *see* A.A. Skaar, *Permanent Establishment: Erosion of a Tax Treaty* Principle p. 610 (Kluwer Law and Taxation 1991). In his methodological part, however, Skaar argues, at p. 48, that the OECD Commentary should qualify as "context" in the sense of article 31 of the *Vienna Convention on the Law of Treaties* (23 May 1969), Treaties & Models IBFD. This implies, as will be set out further in this book, that any interpreter must take the Commentary into account when attempting to ascertain the treaty meaning. It appears from the literature review that the international tax community generally does not endorse Skaar's position in this regard. Nevertheless, his work is often relied upon in practice and in current research on permanent establishments.

instruments logically requires a detailed assessment of the general provisions on treaty interpretation and how they apply in particular to tax treaties that are based on the OECD Model, thereby taking into account the unique features of the latter and the various extrinsic instruments that can be produced in this regard. It is submitted that this analysis may constitute the foundation for the interpretation of future tax treaties, irrespective of their bilateral or multilateral nature.

A sound example relates to the introduction of the OECD's Multilateral Instrument (MLI).[35] The signing of the MLI is one of the outcomes of the OECD/G20 BEPS Project and will modify existing bilateral tax treaties, subject to certain conditions. The MLI is also accompanied by an Explanatory Statement that serves as an interpretive instrument for the provisions enshrined in the MLI. Additionally, the MLI contains a provision that is almost identical to a specific interpretive provision incorporated into tax treaties based on the OECD Model, i.e. article 3(2) of the OECD Model.[36] Notwithstanding the fact that this book does not include an analysis of the interpretation of the MLI (*infra* No. 15), the findings of this research project should further enhance the proper understanding of the MLI's provisions, the use of the Explanatory Statement and other BEPS-related materials, as well as the interplay of the MLI's provisions with pre-existing and future bilateral tax treaties.[37]

1.3. Research question

8. The aforementioned problems are covered in the following central research question:

What is the legal status of extrinsic instruments under international law for the interpretation of tax treaties?

35. *OECD Multilateral Instrument to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (24 Nov. 2016), Treaties & Models IBFD [hereinafter MLI]. On 7 June 2017, 68 states signed the MLI. As of 15 January 2021, 95 states have already signed the MLI (*see* http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (accessed 4 May 2021)).

36. *See*, for example, G. Manzi, *The Autonomous Interpretation of the Multilateral Instrument with Particular Relevance to Article 2(2)*, 74 Bull. Intl. Taxn. 12, pp. 742-756 (2020), Journal Articles & Opinion Pieces IBFD.

37. *See*, for example, M. Lang et al. (eds.), *The OECD Multilateral Instrument for Tax Treaties – Analysis and Effects* p. 272 (Kluwer Law International 2018); and J. Hattingh, *The Relevance of BEPS Materials for Tax Treaty Interpretation*, 74 Bull. Intl. Taxn. 4/5, p. 192 et seq. (2020), Journal Articles & Opinion Pieces IBFD.

1.4. State of the art

9. There have not been many scholarly contributions discussing the legal status of the various multilateral, bilateral and unilateral extrinsic instruments for the interpretation of tax treaties.[38] The OECD Commentaries is probably the most important exception in this respect. Four distinct periods cover the scholarly debate. Prior to 1993, no scholar had devoted any special attention to a thorough study of this subject matter. Ault authored the first doctrinal article, published in 1993.[39] Over the following 10 years, many renowned international tax scholars engaged in the discussion, which focused almost exclusively on the potential ways to fit the OECD Commentaries into articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969) (VCLT), which contain the general rule on treaty interpretation. In 2004, the debate was revitalized by Engelen, who argued, in his doctorate, that the Commentaries are "binding" by virtue of the international principles of acquiescence and estoppel.[40] However, renowned international tax scholars, led by Ward, rapidly rejected this view and denied the legally "binding" character of the OECD Commentaries, instead arguing that principles of logic and good sense compel the use of the Commentaries for the interpretation of tax treaties.[41] Over the last couple of years, it has been seen what could be referred to in this regard as a "renaissance" of articles 31 and 32 of the VCLT and their potential influence with respect to the subject of this book.[42]

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38. For a recent exception, *see*, e.g. J. Hattingh, *Legal Considerations Arising from the Use of Memoranda of Understanding in Bilateral Tax Treaty Relations*, in *Current Tax Treaty Issues – 50th Anniversary of the International Tax Group* pp. 359-438 (G. Maisto ed., IBFD2020), Books IBFD.

39. H.J. Ault, *The Role of the OECD Commentaries in the Interpretation of Tax Treaties*, in *Essays on International Taxation in honor of Sidney I. Roberts* pp. 61-68 (H.H. Alpert & K. van Raad eds., Kluwer Law 1993). Nooteboom was a close second; *see* A. Nooteboom, *De invloed van de OECD-modelbelastingverdragen terzake van inkomen en vermogen van 1963 en 1977 op de rechterlijke oordelen in Nederland gepubliceerd in de BNB's in de jaren 1981-1993* p. 30 (Koninklijke Vermande 1994).

40. F. Engelen, *Interpretation of Tax Treaties under International Law* p. 590 (IBFD 2004), Books IBFD.

41. D.A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* p. 114 (IBFD 2006), Books IBFD.

42. *See*, e.g. D.M. Broekhuijsen, *A Modern Understanding of Article 31(3)(c) of the Vienna Convention (1969): A New Haunt for the Commentaries to the OECD Model*, 67 Bull. Intl. Taxn. 9 (2013), Journal Articles & Opinion Pieces IBFD; M. Nieminen, *OECD Commentaries under the Vienna Rules* (Tampereen Yliopisto 2014); and U. Linderfalk & M. Hilling, *The Use of OECD Commentaries as Interpretative Aids – The Static/Ambulatory-Approaches Debate Considered from the Perspective of International Law*, 1 Nordic Tax Journal, pp. 34-59 (2015).

10. The literature review yields the following conclusions. First of all, contemporary scholarship adopts a formalistic approach by generally referring to the "OECD Commentary" (or OECD Commentaries) as a single, indivisible, stand-alone document. Second, a comprehensive and structured analysis of the content of the Commentaries is absent, especially a discussion of the relationship of the statements expressed in the Commentaries with the text of the OECD Model provisions. Third, authors heavily focus on the OECD Commentaries in isolation but neglect to consider other available extrinsic instruments and their interplay with the Commentaries. Fourth, the literature disproportionately examines how the Commentaries can be squeezed into articles 31 and 32 of the VCLT, and it tends to neglect the legal framework that establishes the Commentaries, as well as other concepts of international law. Fifth, despite the fact that research pertaining to international tax treaties can be situated at the intersection of tax law and international law, authors writing about tax treaties generally refer to authors that are specialists in taxation. Intra-disciplinary research in this regard is scarce and, in any event, limited.

1.5. Research hypothesis

11. Contemporary scholarship has proven unsatisfactory for developing a legally sound response to the above research question in section 1.3. In light of the aforementioned gaps in the literature (*see* section 1.4.), the hypothesis is that this research question can only duly be answered if certain elements are taken into consideration. First, one should not (only) adopt a formalistic approach by considering the OECD Commentaries a single and indivisible instrument. Instead, one should adhere to a content-based approach and analyse the content of the Commentaries, more specifically, the various statements therein and how they relate to the text of the OECD Model's provisions. Second, research should not focus on the OECD Commentaries in isolation, but rather in connection with other (multilateral, bilateral and unilateral) extrinsic instruments. Third, research should not be confined to articles 31 and 32 of the VCLT. Fourth, following the view of the International Law Commission (ILC) below, areas of law that are at the intersection of international law and another area of law should be studied taking into account general principles and practices of international law:

> What once appeared to be governed by "general international law" has become the field of operation for such specialist systems as "trade law", "human rights law", "environmental law", "law of the sea", "European law" and even such exotic and highly specialized knowledges as "investment law" or "international refugee law" etc. – each possessing their own principles and institutions.

> The problem, as lawyers have seen it, is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.[43]

12. As a consequence, an intra-disciplinary approach is necessary in order to answer the research question. Therefore, it is necessary to resort to concepts of international law and authors that are specialists in that area of law.[44] It is acknowledged that this might lead to conclusions that could be perceived as surprising by international tax scholars. As Linderfalk aptly puts it, "[e]ven if no one seems prepared to supply the basis for recommended understandings of the Vienna Convention, years of repetition have generated widespread acceptance of those same understandings, making criticism exceptionally difficult".[45]

1.6. Research objective

13. This book aims to develop a legally sound and coherent theoretical framework encompassing multilateral, bilateral and unilateral extrinsic instruments in order to enhance the level of legal certainty relating to the use of extrinsic instruments for the interpretation of tax treaties. This should enable taxpayers, tax administrations and national courts to reasonably ascertain the implications of tax treaties. Moreover, it should allow the OECD and national tax authorities to duly assess the implications of their interpretive documents and, hence, improve the quality of this process. Furthermore, it will also close a gap in tax academic research, not only with respect to the legal status of the OECD Commentaries as such, but equally in relation to the interpretation of individual tax treaty provisions that are patterned after the OECD Model. Finally, it should also enable a country's legislative branch to engage in meaningful discussions with the executive branch so that it can approve tax treaties on the basis of the most accurate information relating to their various legal implications.

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43. ILC, *Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law*, Report of the Study Group of the International Law Commission, A/CN.4/L.682, 13 April 2006, p. 11, para 8.
44. In the same sense, *see* R.S. Avi-Yonah, *International Tax as International Law*, 57 Tax Law Review, pp. 483-502 (2003/2004).
45. U. Linderfalk, *When the International Lawyers Get to Be Heard – The Story of Tax Treaty Interpretation as Told in Sweden*, 1 Nordic Tax Journal, p. 4 (2016).

1.7. Scope of the research

The scope of this research project is divided into four aspects.

14. First, it is necessary to identify the extrinsic instruments that will be considered in this book. Extrinsic instruments are, for the purposes of this book, defined as published instruments designed by members of a country's executive branch with a view to interpreting tax treaty provisions. In light of the content-based approach adhered to in this book, including a structural analysis of the various types of extrinsic instruments and the way they are interconnected from a textual perspective, account will only be taken of published materials. Hence, the research is confined to multilateral (the OECD Commentaries, Transfer Pricing Guidelines and OECD reports), bilateral (tax treaties, memoranda of understanding, exchange of letters/diplomatic notes and competent authority agreements *ex* article 25 of the OECD Model) and unilateral (national tax treaty policies, explanatory memoranda, technical explanations (US) and administrative documents such as circular letters and (revenue) rulings) instruments. As a result, materials such as domestic law,[46] case law, Senate documents (US) and scholarly contributions remain outside the scope of the research project, as do drafts of tax treaties, correspondence, internal meetings and notes of negotiations.

15. Second, this research project examines the legal status of extrinsic instruments for the interpretation of bilateral income tax treaties. Hence, it does not consider any other international agreements relating to taxation, such as tax information exchange agreements or the MLI, which is not a bilateral income tax treaty, but a multilateral instrument intended to modify existing bilateral tax treaties, subject to certain conditions.[47] The MLI will, nevertheless, be addressed insofar as it is necessary for answering the central research question.

16. Third, the research project studies the legal status of extrinsic instruments for the interpretation of treaties that are based on the OECD Model. The focus on tax treaties based on the OECD Model and, *a fortiori*, on the accompanying OECD Commentaries is justified, considering that most tax treaties worldwide are based on the OECD Model. Moreover, the OECD

46. With the analysis of art. 3(2) of the OECD Model as notable exception, given its great importance for tax treaty interpretation purposes.
47. For that purpose, *see*, e.g. S. Wakounig, *Interpretation of Terms Used in the Multilateral Instrument*, in *The OECD Multilateral Instrument for Tax Treaties – Analysis and Effects* pp. 21-41 (M. Lang et al. eds., Kluwer Law International 2018).

Model has also inspired international (e.g. the UN)[48] and national (e.g. the Belgian and US) model conventions.[49] This book will focus on the OECD Model and not on any other model conventions.

17. Fourth, this book aims to analyse the legal status of extrinsic instruments under public international law.[50] Tax treaties are sometimes considered to be of a "hybrid" nature, as they arise in multi-layered legal order. On the one hand, they are international agreements concluded by sovereign states with a view to allocate the taxing rights pertaining to various items of income. On the other hand, they also become part of domestic law and specifically impact the tax liability of individual taxpayers. Any potential conflicts will normally arise between taxpayers and the tax administration of a contracting state. Furthermore, one should not neglect the possible presence of a supranational framework. As a result, and depending on the jurisdictions involved, taxpayers might invoke domestic and supranational (e.g. the EU) tax rules or principles vis-à-vis national tax administrations (e.g. the principles of legality,[51], foreseeability and legitimate expectations,[52] the *Chevron* doctrine[53] and EU law principles)[54] with regard to the interpretation of tax

48. J. Sasseville, *Influence of the OECD Commentary on court decisions*, in *Courts and Tax Treaty Law* p. 194 (G. Maisto ed., IBFD 2007), Books IBFD; and M. Lennard, *The UN Model Tax Convention as Compared with the OECD Model Tax Convention – Current Points of Difference and Recent Developments*, 15 Asia-Pac. Tax Bull. 1 (2009), Journal Articles & Opinion Pieces IBFD.

49. *See* C. Devillet, *National Model Conventions Developed by OECD Member Countries*, in *Departures from the OECD Model and Commentaries* p. 130 (G. Maisto ed., IBFD 2014), Books IBFD: "[T]he national models of the OECD member countries generally have the same structure as the OECD Model and there is a strong identity (similarity) between the provisions of these models and the OECD Model. Member countries draw heavily on the work of the OECD in developing their model. [...] Some national models of OECD member countries, however, are closer to the OECD Model than others."

50. *See also* Y. Brauner, *The True Nature of Tax Treaties*, 74 Bull. Intl. Taxn. 1, p. 48 (2020), Journal Articles & Opinion Pieces IBFD: "[I]t opened a window to a public international law perspective that can immensely inform the international tax policy debate. Such a perspective casts doubt over the automatic use of soft law produced by a single international organization, which dominates treaty language and negotiation practices without ever establishing itself as the formal international tax standard setter."

51. B. Peeters, *De interpretatie van dubbelbelastingovereenkomsten* p. 182 et seq. (TFR 1993).

52. E.g. O. Marres, *Netherlands*, in *Courts and Tax Treaty Law* p. 320 (G. Maisto ed., IBFD 2007), Books IBFD; and C. West, *References to the OECD Commentaries in Tax Treaties: A Steady March from "Soft" Law to "Hard" Law*, 9 World Tax J. 1, p. 136 (2017), Journal Articles & Opinion Pieces IBFD.

53. *See*, e.g. M. Kirsch, *The Limits of Administrative Guidance in the Interpretation of Tax Treaties*, 87 Texax Law Review 6, p. 1095 et seq. (2009).

54. *See*, e.g. J. Wouters & M. Vidal, *An International Lawyer's Perspective on the ECJ's Case Law Concerning and the OECD Model Tax Convention and its Commentaries*, in *A vision of taxes within and outside European borders – Festschrift in honor of Prof. Dr. Frans*

treaty provisions.[55] This poses the question of the extent to which domestic or EU legal principles can be relevant in a tax treaty context.

18. This book initially intended to examine the legal value of extrinsic instruments, including the OECD Commentaries, in a pluralistic legal setting, as it is believed that these issues are indispensable for providing a comprehensive overview of their legal value in every possible situation. However, it does not tackle this additional question, but focuses solely on the legal status of extrinsic instruments for the interpretation of tax treaties under international law. The main reason for this is the view that an analysis of the legal status of extrinsic instruments pursuant to various domestic and supranational practices and principles necessarily requires preliminary consensus on their legal status under international law. Hence, the legal status of extrinsic instruments under international law is, in this regard, considered fundamental for any subsequent research on tax treaty interpretation in a multi-layered legal order. Despite the abundant amount of literature on the OECD Commentaries and considering the general absence of any work on the various other extrinsic instruments and their interrelationship, comprehensive and structured research that thoroughly analyses this fundamental question does not exist today.

1.8. Methodology and structure of the research project

19. The OECD Commentaries constitute the central element of this book. From a methodological standpoint, this can be justified by reference to the two aforementioned preliminary observations mentioned in section 1.1. As said, a broad array of extrinsic instruments exists for interpreting tax treaties, and a theoretical analysis in the literature in this regard is absent. Moreover, the OECD Commentaries are widely considered the most

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Vanistendael pp. 989-1006 (L. Hinnekens & P. Hinnekens eds., Kluwer Law International 2008); J. Wouters & M. Vidal, *The OECD Model Tax Convention Commentaries and the European Court of Justice: Law, Guidance, Inspiration?*, in *The Legal Status of the OECD Commentaries* pp. 195-216 (S. Douma & F. Engelen eds., IBFD 2008), Books IBFD; S. Douma, *The Principle of Legal Certainty: Enforcing International Norms under Community Law*, in *The Legal Status of the OECD Commentaries* pp. 217-250 (S. Douma & F. Engelen eds., IBFD 2008), Books IBFD; and E.C.C.M. Kemmeren, *De rol van het OESO-Commentaar bij de uitleg van belastingverdragen en het Europese recht: trias politica onder toenemende druk*, in *Principieel belastingrecht – Vriendenbundel Richard Happé* p. 104 (H. Gribnau ed., Wolf Legal Publishers 2011).

55. In the same sense, *see* E.A. Alkema, *The Commentaries on the OECD Model Tax Convention on Income and on Capital – Effective in Domestic Law or in Need of Alternatives?*, in *The Legal Status of the OECD Commentaries* pp. 163-194 (S. Douma & F. Engelen eds., IBFD 2008).

important extrinsic instrument. Pursuant to the research hypothesis set forth in section 1.5., its legal status should be assessed by taking account of its interplay with other extrinsic instruments. The literature review and preliminary research indicate that extrinsic instruments frequently refer to the Commentaries and that the Commentaries also refer to other legal instruments, such as the Transfer Pricing Guidelines and OECD reports. A study of the legal status of the OECD Commentaries should thus *ipso facto* entail a study of the legal status of other extrinsic instruments, such as the Transfer Pricing Guidelines.[56] Hence, this perspective, which is original in light of contemporary scholarship, justifies, from a methodological standpoint, the use of the OECD Commentaries as the central element of this book. Moreover, in order to avoid being repetitive, this methodological choice allows for an integrated analysis instead of juxtaposing the various extrinsic instruments.

20. In order to duly answer the central research question in section 1.3., this book is divided into two main parts.

21. Part 1 encompasses a descriptive overview of the historical evolution of model conventions and commentaries, together with an empirical study of the content of the Commentaries and their interplay with other extrinsic instruments.

22. Part 1 encompasses, first of all, the historical development of model conventions and commentaries promulgated by the OECD and its predecessors, i.e. the League of Nations and the Organisation for European Economic Development (OEEC). The determination of the relevant policies underlying the choice for a model convention and commentaries will then be assessed in light of the research findings pertaining to the legal status of extrinsic instruments.

23. In line with the research hypothesis above, Part 1 further contemplates an empirical examination of the content of commentaries on model conventions. This is motivated by the objective of ascertaining what the OECD actually enunciates in its Commentary, as scholarship generally considers that it merely contains either interpretive views or alternative model provisions, notwithstanding the fact that any structured analysis in this respect is absent in the literature. The analysis of the content of the Commentaries

56. There has been, to the author's knowledge, only one comprehensive contribution dealing with the legal status of the OECD Transfer Pricing Guidelines: *see* M. Kobetsky, *The Status of the OECD Transfer Pricing Guidelines in the Post-BEPS Dynamic*, 3 Intl. Tax Stud. 2 (2020), Journal Articles & Opinion Pieces IBFD.

implies an examination of the various statements incorporated into the Commentaries, followed by an examination of their functional relationship vis-à-vis the text of the respective model provisions, i.e. the function that individual statements have when jointly read with the relevant treaty term or provision (e.g. defining a term or providing examples). Account will systematically be taken in this regard of both the English and French authentic versions. The examination of the Commentaries will cover the practices of the League of Nations and the OEEC in order to verify on which points the OECD's practice may differ from its forerunners, up to the 2014 version of the OECD Commentaries. The materials produced by Van Raad[57] and individual scholarly contributions on specific tax treaty provisions will aid in establishing the content of the Commentaries and their evolution throughout the various updates to the OECD Model.

24. Part 1 further empirically studies the interplay of the OECD Commentaries with other multilateral, bilateral and unilateral extrinsic instruments. This equally stems from the above research hypothesis, pursuant to which the legal status of the Commentaries is expected to (partly) depend on its interplay with other extrinsic instruments. In view thereof, both an empirical and a comparative approach are adopted, with a view to exhaustively outline the various practices whereby extrinsic instruments refer to the OECD Commentaries and vice versa.[58] The practices in Belgium, the Netherlands and the United States will be studied for that purpose, and the insights that will be derived from this comparative research will be relied upon for the analysis in Part 2 of the book. The research project is confined to these jurisdictions for reasons of practicality and feasibility. They are chosen for the following reasons.

57. K. van Raad (ed.), *Materials on International, TP & EU Tax Law* p. 2282 (ITC Leiden 2014). The sections on the commentaries run from pp. 66-593.

58. An exhaustive overview of judicial decisions in which national courts refer to the OECD Commentary or other extrinsic instruments is not useful for answering the central research question and therefore remains outside the scope of this research project. For that purpose, *see*, e.g. Belgium: F. Hoogendijk, *Het gebruik van het Commentaar bij het OESO modelverdrag voor de interpretatie van Belgische dubbelbelastingverdragen – Een onderzoek van de Belgische rechtspraak en de rulingpraktijk*, 12 AFT, pp. 6-26 (2016); the Netherlands: A. Nooteboom, *De invloed van de OECD-modelbelastingverdragen terzake van inkomen en vermogen van 1963 en 1977 op de rechterlijke oordelen in Nederland gepubliceerd in de BNB's in de jaren 1981-1993* p. 30 (Koninklijke Vermande 1994); R.W. Tieskens, *De betekenis van het OESO-modelverdrag voor de interpretatie van belastingverdragen*, 1757 WFR (1999); E.C.C.M. Kemmeren, *De rol van het OESO-Commentaar bij de uitleg van belastingverdragen en het Europese recht: trias politica onder toenemende druk*, in *Principieel belastingrecht – Vriendenbundel Richard Happé* p. 101 et seq. (H. Gribnau ed., Wolf Legal Publishers 2011); and the United States: R.R. Young, *The Use of Extrinsic Aids in the Interpretation of Tax Treaties*, 28 Tax Management International Journal 12, pp. 805-812 (1999).

25. First of all, Belgium is the author's home jurisdiction, which implies effective access to all relevant legal sources, both in Dutch and in French. Moreover, Belgium has also been a cooperative member of the League of Nations, the OEEC and the OECD and has contributed to the works that these international organizations have carried out in relation to international tax treaty policy, notably the work on model conventions. The 2007 and 2010 Belgian Model Conventions are patterned after the OECD Model, as are most of its actual tax treaties. Preliminary research further indicates an array of extrinsic instruments that make reference to the OECD Commentaries.

26. The Netherlands has also been a member of the aforementioned organizations. Moreover, there is no language barrier for the author, and the author is, partly due to studying at Tilburg University, familiar with the relevant legal databases for consulting administrative practices and doctrine. It should also be noted that Dutch academics have left an important mark in respect of international taxation.[59] It is submitted that this has likely resulted in many Dutch practitioners and scholars having a strong interest in tax treaties, as well as an executive branch that is sensible in respect of international tax treaty policy.[60] Preliminary research indicates, in this regard, the availability of multiple extrinsic instruments pertaining to Dutch tax treaties.

27. The inclusion of the United States may appear odd at first glance, as the US treaty interpretation approach does not entirely resonate with international practice.[61] Moreover, the United States was not a formal member of the League of Nations or the OEEC, and it considers its own US Model the starting point for treaty negotiations instead of the OECD Model.[62] However, an examination of US practice can be enriching for this research project. Indeed, the divergent treaty interpretation approach essentially encom-

59. E.g. Prof. AJ van den Tempel, Prof. Maarten J. Ellis and Prof. Kees van Raad.

60. This is evidenced by the publications on Dutch tax treaty policies; *see* Algemeen fiscaal verdragsbeleid, Tweede Kamer, 1987-1988, 20 365, Nos. 1-2; Internationaal fiscaal (verdrags)beleid, Tweede Kamer, 1997-1998, 25 087, No. 4, 19 and 20; NL: *Rijksoverheid*, *Notitie Fiscaal Verdragsbeleid 2011*; and NL: *Rijksoverheid*, *Notitie Fiscaal Verdragsbeleid 2020*, available at https://www.rijksoverheid.nl/documenten/rapporten/2020/05/29/notitie-fiscaal-verdragsbeleid (accessed 4 May 2021).

61. American Law Institute (reporters H.J. Ault & D.R. Tillinghast), *Federal Income Tax Project – International Aspects of United States Income Taxation II* p. 27 (1992); R.S. Avi-Yonah, *International Tax as International Law*, 57 Tax Law Review, p. 492 (2003/3004); M. Kirsch, *The Limits of Administrative Guidance in the Interpretation of Tax Treaties*, 87 Texax Law Review 6, p. 1082 et seq. (2009); and R. Kysar, *Interpreting Tax Treaties*, 101 Iowa Law Review, p. 1404 et seq. (2016).

62. C. Gustafson, *The USA*, in M. Lang et al. (eds., *The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties* p. 1150 (CUP 2012).

passes the frequent (albeit inconsistent) reliance on extrinsic instruments by both the tax administration and courts, including unilateral materials, such as technical explanations, that are unique to the US tax treaty system.[63] Moreover, the United States has strongly impacted the architecture of international taxation despite not being a formal member of the aforementioned international organizations.[64] Furthermore, the US Model employs many of the concepts and much of the language of the OECD Model.[65] This part of the research project strongly benefits from the extensive resources available to the author during his studies and research stay at Harvard Law School.

28. Part 2 encapsulates the legal analysis of extrinsic instruments under international law, with the OECD Commentaries and Transfer Pricing Guidelines as the central elements. Account will be taken of the insights gathered in Part 1. Part 2 will, first of all, discuss in detail the legal framework that underpins the OECD Commentaries and Transfer Pricing Guidelines, as well as the potential relevance of certain specific international law concepts that were briefly addressed in the literature. In addition, Part 2 demonstrates a thorough analysis of the general provisions on treaty interpretation, with a view to ascertaining their application to tax treaties that are based on the OECD Model and how extrinsic instruments may impact the legal status of the OECD Commentaries and Transfer Pricing Guidelines and, hence, the outcome of the interpretive process. Account will be taken, in this regard, of the specific features pertaining to the OECD Commentaries and Transfer Pricing Guidelines. Lastly, the two interpretive provisions of the OECD Model will be studied in detail and in light of the applicable rules and practices of (tax) treaty interpretation and of the various extrinsic instruments.

29. This part of the research adopts a black letter and intra-disciplinary approach relying on the works of scholars and practitioners in the field of both international law and international taxation. The consulted works are mostly published in English, but occasionally also in Dutch and French. An original element in this regard is the inclusion of works by US authors, as the literature review indicates that international (tax) authors generally rely on the works of other international (tax) authors, whereas US (tax) authors tend to focus primarily on US (tax) practice. However, as study

63. American Law Institute (reporters H.J. Ault & D.R. Tillinghast), *Federal Income Tax Project – International Aspects of United States Income Taxation II* p. 27 (1992); P. Baker, *Double Taxation Conventions* E.05 (Sweet & Maxwell); and R. Kysar, *Interpreting Tax Treaties*, 101 Iowa Law Review, p. 1404 et seq. (2016).
64. Two US citizens were heavily involved in the early work on tax treaties (Prof. Thomas S. Adams and Mitchell B. Carroll).
65. J.A. Townsend, *Tax Treaty Interpretation*, 55 Tax Lawyer, p. 276 (2001/2002).

and research stays in the US have shown, this research project will strongly benefit from the views of US authors and the more policy-oriented approach that is adopted in US law schools.[66]

30. This book will refer to case law if necessary to support or discard a particular element addressed in this study. Hence, it does not aim to provide an exhaustive overview of various court decisions, as this is not required in order to answer the central research question and would not allow for a comprehensible dissertation.[67] The case law referred to in this book encompasses that of international judicial bodies, such as the International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ), as well as of national courts around the globe on treaty interpretation. This book will, for that purpose, strongly benefit from multiple country reports,[68] international tax law reports and the IBFD Tax Research Platform.

31. Tentative recommendations and suggestions will be made, if necessary, on the basis of the research findings developed in Part 1 and Part 2 and the formulated answers to the central research question and various sub-research questions.

This research project was closed on 17 February 2021.

1.9. Research questions

32. Central research question:

What is the legal status of extrinsic instruments under international law for the interpretation of tax treaties?

66. W. Schön, *Tax Law Scholarship in Germany and the United States*, Working Paper of the Max Planck Institute for Tax Law and Public Finance No. 2016-7 (2016), available at https://ssrn.com/abstract=2775191 (accessed 4 May 2021).
67. In this regard, *see*, for example, M. Edwardes-ker, *Tax treaty interpretation* (1994); and G. Garbarino, *Judicial Interpretation of Tax Treaties – the Use of the OECD Commentary* (Elgar Tax Law and Practice 2016).
68. E.g. IFA, *Interpretation of double taxation conventions* (vol. LXXVIIIa Cahiers de Droit Fiscal International 1993); M. Lang (ed.), *Tax Treaty Interpretation* (Kluwer Law International 2001); G. Maisto (ed.), *Courts and Tax Treaty Law* (IBFD 2007), Books IBFD; M. Lang et al. (eds.), *The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties* (CUP 2012); and G. Maisto (ed.), *Departures from the OECD Model and Commentaries* (IBFD 2014), Books IBFD.

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