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Book Review: *Tax Treaty Interpretation under the Vienna Convention on the Law of Treaties*, edited by Robert Danon, Guglielmo Maisto and Adolfo Martín Jiménez

Juliane Kokott reviews *Tax Treaty Interpretation under the Vienna Convention on the Law of Treaties*, edited by Robert Danon, Guglielmo Maisto and Adolfo Martín Jiménez.

This impressive volume[1] unites high-level scholarship in public international law and tax law, reflecting the necessary integration of the two disciplines. Both the International Fiscal Association (IFA) and the International Law Association (ILA) have been working on this integration in recent years. The IFA has devoted conference sessions to topics in public international law, including good faith at its 2023 Cancun Congress and nexus at its 2024 Cape Town Congress. The ILA established a study group on international tax law in 2016, which was transformed into a committee in 2020.

The book is structured into four main parts. Part I (pp. 3–88) contains the General Reports. The longest part, Part II (pp. 89–352), addresses fundamental issues of tax treaty interpretation in light of the Vienna Convention on the Law of Treaties (VCLT). Part III (pp. 353–440) addresses specific interpretative tools of tax treaty law and their relationship to the VCLT. Finally, Part IV (pp. 441–558) examines the role of OECD and UN soft-law materials and their status under the VCLT.

Part I, "General Reports", begins with chapter 1, Robert Danon's "Tax Treaty Interpretation and the International Legal System: A Necessary Link" (pp. 3-38). Danon begins by quoting Klaus Vogel and Rainer Prokisch, who, at the 1993 IFA Congress in Florence, emphasized the importance of interpreting tax treaties in line with the VCLT. This approach has been accepted by domestic courts, even though the author still sees room for improvement. In particular, there seems to be a lack of systemic interpretation of tax treaties. This is at odds with the work of the International Law Commission (ILC), which has stressed the importance of interpreting treaties against the broader international law normative environment to avoid fragmentation within treaty regimes (p. 4). According to Danon, systemic interpretation includes taking into account not only treaties regulating state-to-state relationships but also treaties conferring rights upon individuals; viewing tax treaties as merely regulating a state-to-state relationship would therefore be incomplete (p. 12 et seq.). In this framework, the author attributes special importance to the principle of good faith, which can be operationalized to strengthen the position of taxpayers. Good faith could also be used to lend binding power to the OECD Commentaries:

> Given the legitimate expectations that taxpayers may have in this regard, the topical report submits that if a state refuses to use the OECD Commentaries for the interpretation of a relevant tax treaty, those could very well infringe the principle of good faith in the absence of legitimate reasons for such non-compliance. [p. 26]

The section on "Good faith interpretation and the improper use of tax treaties by taxpayers and states" (p. 27 et seq.) focuses on treaty dodging and abuse by states. According to Danon, the principle of good faith may also operate to neutralize practices by states that rely on a literal interpretation of the treaty that is found to be unreasonable (p. 29).

Part I, chapter 1 concludes with five recommendations:
(1) increased focus on systemic interpretation in tax treaty interpretation;
(2) the OECD Commentaries should provide guidance concerning the improper use of tax treaties by states;
(3) the OECD Commentaries should clarify the meaning of article 27 of the VCLT, according to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty;
(4) recommendation 4 seems to move towards considering evolutionary, as opposed to contemporaneous, interpretation of tax treaties; and
(5) recommendation 5 invokes tax certainty.

Part I, chapter 2 (pp. 39-85), co-authored by Guglielmo Maisto and Adolfo Martín Jiménez, is titled "The Dialogue between Tax Treaties and the Vienna Convention on the Law of Treaties". As Danon does in chapter 1, Maisto and Martín Jiménez accentuate that tax treaties are enforced and interpreted by tax administrations, whereas human rights or investment treaties, for example, are interpreted by international fora. Another distinctive feature of tax treaties is their high degree of uniformity, which is due to the OECD and UN Models, their Commentaries and BEPS; the Commentaries are also important for treaty interpretation. "This uniformity helps ensure a more cohesive understanding and application of treaties, which

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1. Robert Danon, Guglielmo Maisto and Adolfo Martín Jiménez, eds., *Tax Treaty Interpretation under the Vienna Convention on the Law of Treaties (VCLT)* (Amsterdam: IBFD, 2026).

can be very beneficial, as courts can look at how similar treaties have been interpreted by the judiciary of different countries" (p. 40). The authors highlight the singularity of tax treaties as "hybrids" between public international law and domestic tax law (p. 40 et seq.). According to them, tax treaties are different "in that taxpayers' rights are derived directly from their incorporation into each contracting state's legal system and are enforceable before domestic rather than international courts" (p. 41). I think this also applies to provisions of treaties other than tax treaties that are incorporated into national law. In any case, tax treaties have a particularly close connection to domestic law, given their frequent renvois to definitions under the law of the state applying them (p. 43). A further special feature of tax treaties is the overwhelming influence of mostly OECD soft law on their interpretation. Reciprocity still plays an important role in tax treaty interpretation. The authors plead in favour of a more substantive approach instead of formal reciprocity (p. 49). Moreover, they rely on public international law to support an "objective" approach rather than the contracting state's subjective intentions when signing the treaty. This harmonizes with Danon's recommendation 4 considering evolutionary (as opposed to contemporaneous) interpretation of tax treaties. Maisto and Martín Jiménez give many interesting examples of national decisions in their section on the ordinary meaning as the "starting point" of the treaty interpretation (p. 52 et seq.). "Unlike in some domestic systems", article 31(2) of the VCLT sets the limits of interpretation in the "ordinary meaning" of the terms. The authors refer to US[2] and Spanish[3] decisions in which purposive interpretation apparently went beyond the ordinary meaning of the terms of the treaties. They set forth that the "ordinary meaning" under article 31(1) of the VCLT refers not to what the contracting parties intended (subjective intention), but to how experts in the relevant field, such as the authors, commonly understand the terms (p. 55). It is important to consider the treaties in their authentic language version. Under article 31(1) of the VCLT, the context of treaty provisions also needs to be considered. In this respect, the authors point to the importance of the OECD Commentaries as well as of the domestic law of the other contracting state (p. 58 et seq.). When interpreting the treaty in light of its object and purpose, attention must be paid to the whole text of the treaty and its real object and purpose as inferred from thorough consideration of its precise language. Just looking at the title or the preamble or the Commentaries on specific articles of the OECD Model is not enough. Not all tax treaties have the same goal and not all aim at eliminating double non-taxation (p. 60 et seq.). The authors thoroughly examine case law based on article 3(2) of the OECD and UN Models, which indicates a preference for domestic law when treaty terms are not defined and when the "context does not otherwise require" or "the competent authorities agree to a different meaning" (p. 62 et seq.). Further clarification is needed, including on the relationship of this provision to article 31 et seq. of the VCLT, and the authors contribute to that clarification.

In the following section, "Specific topics" (p. 70 et seq.), Maisto and Martín Jiménez address the status and role of foreign court decisions and of soft law in tax treaty interpretation. The use of foreign court decisions is important as it relies on the principle of common interpretation and reciprocity of international conventions, under which a treaty concluded by two or more parties should be intended to have just one interpretation (p. 70). However, court decisions are not sources of law but means of identification of the sources of public international law (p. 71). Pursuant to article 38(1)d of the Statute of the International Court of Justice, the Court shall apply "judicial decisions [...] as subsidiary means for the determination of rules of law". In this regard, the authors refer to draft conclusion 8 of the ILC on guidance as to the weight to be given to judicial decisions. According to the ILC, the following factors matter: (i) the competence of the court in the subject; (ii) whether the decisions form part of established case law; and (iii) the extent to which the reasoning has remained relevant over time. These are objective criteria which may equally apply to articles 31 and 32 of the VCLT (p. 74). Generally, the authors favour increased consideration of court decisions delivered in the other contracting state.

As to soft law in treaty interpretation, Maisto and Martín Jiménez follow the convincing view that later OECD Commentaries must not change the meaning of earlier treaties. However, it is not always easy to draw the line between interpretation/clarification and change in meaning. Again, the authors support interpretation in accordance with public international law and warn against automatic application of the Commentaries to all tax treaties (p. 78).

Chapter 2 ends with "Recommendations and conclusions" for interpreters of tax treaties, for national legislators and for treaty negotiators and international organizations (p. 82 et seq.): Treaty negotiators should have a closer look at text, object and purpose under the VCLT; national legislators should also consider mediation and facilitate courts' access to tax treaty experts' opinions; treaty negotiators and international organizations should pay more attention to the VCLT. Moreover, the OECD and UN Commentaries should encourage taking into account foreign case law.

Part II, "Fundamental Issues of Tax Treaty Interpretation in Light of the Vienna Convention on the Law of Treaties", begins with chapter 3, written by Katarina Perrou and Pasquale Pistone, on "Interpreting Tax Treaties as a State-to-State or State-to-Taxpayer Relationship" (pp. 89–108). The authors also emphasize the importance of the principle of good faith in both state-to-state and state-to-taxpayer situations. Moreover, they stress the application of human rights standards to tax treaties (p. 108).

Next, Stef van Weeghel writes on "The Role of the Text in Tax Treaty Interpretation" (chapter 4, pp. 109–129). He

2. *Great-Western Life Insurance Co. v. U.S.*, 230 Ct. Cl. 447, 678 F.2d 180 (182), 5.5.1982, U. S. Ct. of Claims, No. 114-79T.
3. ES: TS (Supreme Court), 18.6.2012, Rec. No. 1933/2011 (*Borax*); of 12.1.2012, Rec. No. 1626/2008 (*Roche*) and of 20.1.2016, Rec. No. 2555/2015 (*Dell Spain*).

analyses important cases from various jurisdictions. The chapter concludes by noting the unique position of tax treaties due to the prevalence of defined treaty terms, the reference to domestic law in article 3(2) of tax treaties, and the existence of a vast body of explanatory material on the meaning of treaty terms contained in the Commentaries on the OECD Model and UN Model (p. 129).

Chapter 5, written by Adolfo Martín Jiménez, treats the role of "context" and "object and purpose" in tax treaty interpretation and their relationship to the "ordinary meaning" of the text (pp. 131-181). "In this respect, the evolution of the OECD Model Convention (MC) and Commentary (its emphasis on goals of tax treaties that are not confirmed by the whole text of the treaty and its focus on double taxation or improper use of tax treaties) may have distorted the interpretation of tax treaties. Public international law can help international tax law, and especially courts, in more clearly delineating the 'object and purpose' of tax treaties and interpreting them more correctly" (p. 132). He rightly understands article 31(1) of the VCLT as "one holistic rule", not a sequence of separate tests, and illustrates this with a decision of the Colombian Council of State[4] (p. 133 et seq.). Martín Jiménez then analyses the often-cited *Fowler* case[5] as revealing the tensions between a public international law approach to interpretation giving more regard to other provisions of the treaty and a more domestic one (p. 143). As to "context" and tax treaties, the author concludes that the definition of "context" in international tax treaties may have a broader meaning than the one in article 31(2) of the VCLT. In particular, tax treaties can only be understood and applied in connection with domestic tax law. The domestic tax legislation of both contracting states is the overall context of the tax treaty, which the author marvellously describes as the "ecosystem" where the tax treaty "lives" (p. 152). As to the object and purpose of tax treaties, he warns against assuming a uniform goal for all tax treaties on the basis of OECD material. Instead, the object and purpose of each individual tax treaty need to be inferred from a full reading of the treaty as a whole (p. 158). Tax treaties may permit double non-taxation or even tolerate some forms of treaty shopping.

> The idea that tax treaties, as international agreements between two states, have to be interpreted with due attention to their own (whole) text, their specific context and object and purpose is, however, obscured by the evolution (and success) of the OECD (or the UN) MCs and their Commentaries. This evolution has probably also had a direct impact on the approach of tax administrations and courts, which tend to infer the object and purpose of tax treaties directly from their title or from vague ideas about what treaties are supposed to do. [p. 159]

He cites the *Molinos* case[6] as an example of how the signs of the times and the sensitivity towards "aggressive tax planning" as a consequence of the OECD's BEPS Project may have a negative impact on the process of interpreting a tax treaty (p. 172). The author adds a conclusion on the need to disentangle the object and purpose of tax treaties from anti-avoidance or fraud considerations (p. 173).

Chapter 6, titled "Tax Treaty Interpretation and Plurilingual Form" (pp. 183-231), is written by Richard Xenophon Resch. This author writes in a very judgemental fashion, identifying all kinds of "wrong", "absurd" or "artificial scholarly constructs", theories or views. He seems to be a fan of adopting English as a sole or prevailing language for all tax treaties (e.g. p. 224 et seq.). Resch features "ideological bias" as one of the contributing factors to the MLI including French as an authentic language (p. 226).

Approximately three quarters of all tax treaties contain more than one authentic language text. Nevertheless, tax courts rarely look at the other language texts but apply "routine interpretation". "Routine interpretation" means that, where the meaning is clear, it is admissible to rely solely on one linguistic version of a tax treaty, usually the domestic one. Resch considers this a "flawed academic construct" (p. 192). However, "routine interpretation" could just be a resource-saving pragmatic approach which also aligns treaty interpretation with the interpretation of domestic law to which tax treaties usually refer through renvois. The text of a treaty authenticated in two or more languages is equally authoritative in each language. Only where the treaty provides otherwise or the parties agree that a particular text shall prevail in the case of divergence does one text prevail (article 33(1) of the VCLT). Article 33(4) of the VCLT reads: "Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted." The question is whether the prevailing text should be consulted only after the interpretation of all language versions has led to the result that there is no common meaning. Such an approach seems to reconcile the intentions of both parties to the treaty text. Moreover, pursuant to article 33(1) of the VCLT, the prevailing linguistic version applies only exceptionally (where the treaty so provides or the parties agree) in the case of a "divergence". Article 33(4) of the VCLT understands "difference of meaning" as resulting from "a comparison of the authentic texts". Therefore, I am not convinced of Resch's dictum that the approach of taking into account other language versions despite the existence of a prevailing text is "one of those views which are so absurd that only very learned men could possibly adopt them" (p. 204).[7] Resch finds that "the view that priority should be given to the text in the original language of negotiation and drafting remains surprisingly common" (p. 210). What really surprises here is that Resch finds that common approach surprising. Also surprisingly, Resch is of the view that "[w]ithin the VCLT [...] language is regarded as immaterial". On the other hand, his approach, that when a divergence

4. Colombia Council of State (*Consejo de Estado*), judgm. of 4.4.2024, 11001-03-27-000-2020-00029-00 (25411).
5. *Fowler v. HMRC*, (2020) UKSC 22.
6. Molinos Rio de la Plata, AR: CSJN (Supreme Court), 2.9.2021, CAF 1351/2014/CAI-CSI CAF 1351/2014/1/RH1, Molinos.
7. Resch quotes Bertrand Russell, *My Philosophical Development*, Simon & Schuster, 1959, 148.

cannot be resolved, "the treaty must be considered defective, and the judge should resist the temptation to apply just *any* meaning somewhat plausible", seems reasonable (p. 215). Obviously, the author of this inspiring chapter is an expert in tax treaty interpretation and plurilingual form who has developed some strong preferences and opinions.

Daniel Gutmann is the author of chapter 7 on "Static Versus Evolutionary Interpretation of Tax Treaty Terms" (pp. 233-256). He explains that human rights and EU law can be factors supporting an evolutionary interpretation (p. 252 et seq.).

Chapter 8, written by Sjoerd Douma and Craig Elliffe, deals with "The Role of the Principle of Good Faith in Tax Treaty Interpretation" (pp. 257-278), which the authors categorize as perhaps belonging to the "impressionist rather than the realist school of legal concepts" (p. 257). According to Douma and Elliffe, the public international law principle of good faith may be seen as a corollary of the general principle of protection of legitimate expectations in a domestic legal system. "This means that taxpayers are the most important enforcers of the principle of good faith in their domestic legal order: they may invoke this principle directly in tax proceedings" (p. 265). Where good faith is operationalized to favour a dynamic interpretation of tax treaties, the authors clarify that "later OECD commentary can only be considered if there is sufficient democratic legitimacy for it – which is not the case if that later commentary leads to a different treaty interpretation than before" (p. 266). Under good faith and the behaviour of states, the authors critically discuss digital service taxes, domestic deeming provisions and GAARs which might dodge or sidestep existing tax treaties (p. 266 et seq.). In their conclusions, they emphasize the relationship between good faith and the principle that rights should not be abused.

Robert Danon, also the author of a general report (cf. supra), dedicates his chapter 9 to "The Principle of Systemic Interpretation under Article 31(3) of the Vienna Convention on the Law of Treaties and Tax Treaty Interpretation" (pp. 279-312). The chapter is devoted to article 31(3)(c) of the VCLT, according to which "there shall be taken into account, together with the context: [...] any relevant rules of international law applicable in the relations between the parties". This recognizes that treaties are not self-contained and "should not be interpreted in isolation, but against the entire background of the international normative environment, including other relevant treaty obligations". The author rightly sets forth that article 31(3) of the VCLT seeks to avoid fragmentation of international law caused by diverging interpretations within its specialized fields. According to him, article 31(3)(c) of the VCLT favours a dynamic interpretation in the sense that the rules of international law are those in force at the time of the application of a tax treaty (p. 287). Danon underlines that, in light of the substantive state-to-taxpayer dimension of tax treaties, other treaty obligations and general principles of law focusing on taxpayers' rights are also relevant to the interpretation of tax treaties pursuant to article 31(3)(c) of the VCLT (p. 294). Examples are, despite the differences to tax treaties, investment treaties and their FET (fair and equitable treatment) standard, as well as the European Convention on Human Rights (p. 294 et seq.). The author then illustrates how article 31(3)(c) of the VCLT can strengthen the position of taxpayers using four examples:

(1) "[I]n accordance with the international obligations deployed through article 31(3)(c) of the VCLT, a taxpayer is entitled to a fair and predictable operation of the MAP [mutual agreement procedure]" (p. 303).

(2) "[A]n interpretation of the PPT [principal purpose test] based on the principle of systemic integration [interpretation?] and taking into account the principle of proportionality confirms that the treaty benefits available in the absence of the abusive transaction or arrangement are to be granted even if the applicable tax treaty does not contain an express discretionary relief provision such as the one provided in article 7(4) of the MLI" (p. 305). In my view, such a result already follows from the concept of abuse as a general principle as also reflected in article 7(4) of the MLI in a declaratory manner.

(3) Limitation of retroactive effect (p. 308).

(4) "[T]he notion of a *mala fide* taxation measure is rooted in the prohibition of abuse of right under international law, which is, in any event, an applicable general principle of law for the purposes of article 31(3)(c) of the VCLT" (p. 310).

Next, Guglielmo Maisto, also co-author of a general report (cf. supra), presents his analysis on "Interpretation of Tax Treaties and the Decisions of Foreign Tax Courts as a 'Subsequent Practice' under Articles 31(3)(b) and 32 of the Vienna Convention on the Law of Treaties (1969)" (chapter 10, pp. 313-349). Maisto warns that the law can be the same, but "the foreign decisions submitted to, or examined by, the judiciary of the *lex fori* are placed in different domestic legal contexts and are surrounded by different factual circumstances". This "must counterbalance the enthusiasm of scholars advocating the use of this undoubtedly helpful means of interpretation (i.e. the decisions of foreign courts)" (p. 315 et seq.). In most countries, foreign law is a fact. On the other hand, commentators have justified the use of the decisions of foreign courts by relying on the principle of common interpretation (p. 318) and good faith (p. 319). In line with the draft conclusion by the ILC rapporteur,[8] decisions of domestic courts in the application of a treaty may also constitute relevant subsequent practice under articles 31(3)(b) and 32 for the interpretation of the treaty (p. 323). Subsequent practice is, however, presumed not to amend the treaty (p. 336). Establishing a subsequent agreement (article 31(3)(b) of the VCLT) through the judiciary is difficult; through the executive it is also unlikely, but to a lesser extent (p. 342). Under article 38(1)(d) of the Statute of the International Court of Justice, judicial decisions are not a source, but only a "subsidiary means for the determination of rules of

8. ILC, G. Nolte, Special Rapporteuer in Fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, A/CN.4/694, p. 43 (7 Mar. 2016).

law" (p. 345 et seq.). The author concludes that foreign case law is relegated to the status of a supplementary means of interpretation under article 32 of the VCLT. It would be desirable to elevate the importance of the decisions of foreign courts. However, it is not the use of those decisions, but the duty to consider them, which should be mandated (p. 348 et seq.).

Part III, "Specific Interpretative Tools of Tax Treaty Law and Their Relation to the Vienna Convention on the Law of Treaties", starts with chapter 11, headed "Tax Treaty Interpretation and Article 3(2) of the OECD Model Convention" and written by Michael Lang (pp. 353-374). The often-changed article 3(2) of the OECD Model reads in its current version of 2017:

> 2. As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires or the competent authorities agree to a different meaning pursuant to the provisions of Article 25, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

Lang comes to the same conclusion as Klaus Vogel and Rainer Prokisch, in their General Report for the International Fiscal Association Congress in Florence, exactly 30 years ago, which he cites: "As article 3(2) of the OECD MC is ambiguous and open to controversy, it should be rephrased in an unambiguous way or simply deleted." The author continues: "In view of the countless interpretation issues, the attempt to rewrite article 3(2) of the OECD MC and thereby gain clarity seems futile. The best solution would still be to delete this provision without replacement" (p. 374).

A short chapter 12 by John Avery Jones treats "Article 3(2) and Conflicts of Qualification: A View from the Other End of the Spectrum" (pp. 375-381). He writes on a "friendly disagreement" on conflicts of qualification which he has with Michael Lang. His conclusion is that neither double non-taxation nor conflicts of qualification pose a serious problem in the United Kingdom (p. 380 et seq.)

Next, Bruno Gilbert and Jean-Blaise Eckert write on "Mutual Agreement Procedures under Article 25(3) of the OECD MC" (chapter 13, pp. 383-400). Article 25(3) of the OECD Model reads:

> 3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

The number of disputes relating to tax jurisdiction is constantly increasing (p. 383 et seq.). Article 25(3) of the OECD Model allows for a broad delegation of powers from the contracting states to the competent authorities to resolve such disputes, clear up doubts regarding the application or interpretation of tax treaties, and reach mutual agreements. In most countries, though, MAPs are not binding upon the courts (p. 391 et seq.).

Scott Wilkie purports to give "Insights into the Role of the First Sentence of Article 25(3) of the OECD Model Tax Convention on Income and on Capital Drawn from Principles Manifest in the Vienna Convention on the Law of Treaties" (chapter 14, pp. 401-437). "Contracts, *pacta sunt servanda* and the 'rule of law'" could be the title to this chapter, he starts. Wilkie's thesis is that the customary international law principle *pacta sunt servanda* substantially informs the significance and role of article 25 of the OECD Model (p. 402). According to the author, the MAP provides the means for fully effectuating a tax treaty. He refers to some "propositions advanced by the OECD in the Commentary purporting to temper its force", meaning most probably the force of the law of treaties as reflected in the VCLT. However, the author gives no precise reference to the propositions he criticizes as "dubious" (p. 420). Wilkie concludes with "*Pacta sunt servanda* indeed. This case[9] warrants careful examination."

Part IV, "The Role of the OECD and UN Soft-law Materials and Their Status under the Vienna Convention on the Law of Treaties", is opened by a comprehensive chapter 15 (pp. 441-510) by Johann Hattingh dealing with "The Relevance and Status of the OECD and UN Model Tax Convention and Commentaries in Tax Treaty Interpretation (Including OECD/G20 Inclusive Framework on BEPS Materials)". The author points to "a grave mistake for tax treaty interpreters to avoid, namely to assume that because a certain jurisdiction is, say, an OECD member, the country in question has relied on, or used the OECD Model regarding a tax treaty clause that needs interpretation. The same grave mistake can be made about non-OECD-member countries, namely that they may automatically be relying on, or using the UN Model" (p. 446 et seq.). Hattingh explains the UN committee's more open working method as compared to the "closed-door nature of the deliberations by government officials in the OECD's Working Party 1 and Committee on Fiscal Affairs" (p. 456). Around 1992, the OECD Model and its Commentaries moved to an ambulatory format purporting that commentaries subsequent to the adoption of a tax treaty would reflect the contracting parties' views. This is obviously not in line with the rules on treaty interpretation. In that respect, the author cites Klaus Vogel, who wrote in 2000:

> I think that these assumptions (that commentaries reflect the views of the contracting parties), which were well considered and absolutely convincing when they were originally conceived, have been destroyed *as general assumptions* by the current practice of changing the Model and Commentaries at breathless intervals and by the way the changes are published. [p. 463 et seq.]

The "attempted amendment of international treaties by the OECD's Committee on Fiscal Affairs through the proverbial backdoor by manipulating a soft-law instrument used by interpreters" (p. 464) is critical from a rule of law perspective (cf. p. 475). Moreover, this approach undermines legal certainty (cf. p. 485 with question mark). Hattingh shows that domestic courts generally reject the

9. Probably the case *Oracle Corporation Australia Pty v. Commissioner of Taxation*, 21.10.2025, Stay Application, (2025) FCAFC 145.

view that subsequent changes to the OECD Model and its Commentaries should always be assumed to clarify the meaning of earlier versions (p. 506). He concludes that interpreters must critically assess and differentiate Model Commentaries in all cases. “The international treaty law framework requires that, at the very least, a historical method to compare versions of the Commentaries needs to be performed, taking the version extant on treaty conclusion as the starting point and most relevant version” (p. 507). The author points out a problem that unfolded after 1992, whereby the responsible OECD organs were misdirecting the Commentaries as an amending instrument instead of an aid to interpretation. The evidence is overwhelming that the OECD’s working methods to frequently update the Commentaries since 1992 have eroded taxpayer certainty. “The reluctance shown by domestic courts to accept such an approach to change international legal obligations through the backdoor is a blemish on the record of the responsible organs within the OECD because the working method has caused an increase of costly disputes for over three decades” (pp. 508 et seq., 509 et seq.)

Chloe Burnett and The Hon Jennifer Davies are the authors of the next and last chapter (chapter 16), headed “The Status of the OECD Transfer Pricing Guidelines in Tax Treaty Interpretation (Including Inclusive Framework on BEPS Materials)” (pp. 511-535). The OECD Transfer Pricing Guidelines (TPGs) provide detailed guidance on the application of the arm’s length principle. “[I]f the TPGs did not exist it would be necessary to invent them” (quoting Voltaire, p. 535). They are an interpretative guide, not binding law, but exert a powerful practical influence.

This book, edited by Danon, Maisto and Martín Jiménez, is highly recommendable. It is a pleasure to come across such a carefully researched book. The contributors identify theoretically interesting and at the same time practically relevant problems and offer solutions based on thorough analysis and methodological thinking. Moreover, the book is written in clear and not overly technical language. It should be interesting not only to tax experts but also to other lawyers, and in particular to scholars of public international law.

