The Relevance of OECD Documents for the Interpretation of Bilateral Tax Treaties

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A. Abstract

Since its foundation in 1948/1961 and the publication of its first Model Double Taxation Convention, OECD has gained undisputed leadership in authority and expertise on the field of tax treaties. The course reflects on the early days of OECD and tries to mark the decisive steps in the evolution of what has now become a highly sophisticated network of rules and reports, customs and institutions on international taxation. The idea is that understanding the historic environment of a rule and of its travaux préparatoires (cf. Art 32 of the Vienna Convention on the Law of Treaties) are valuable means of interpretation – but that such understanding is also helpful for any future reformatting of tax treaty law in Europe and world-wide.

By role playing and the in-depth analysis of archive material, participants will learn to utilize OECD archive material, assess its historic relevance, and connect it to up-to-date issues of tax treaty law. In doing so, the course aims at equipping all of you with sound methodological skills for the LL.M. theses.
B. Vienna Convention on the Law of Treaties (Excerpt)

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to
   the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text,
   including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connexion with
       the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connexion with the conclusion of the
       treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the
       application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the
       parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of
the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from
the application of article 31, or to determine the meaning when the interpretation according to
article 31:
   (a) leaves the meaning ambiguous or obscure; or
   (b) leads to a result which is manifestly absurd or unreasonable.

Article 33 Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative
   in each language, unless the treaty provides or the parties agree that, in case of divergence, a
   particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated
   shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. 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.
C. OEEC/OECD Materials: Selected Documents

I. 1963 OECD MC

The OECD MC of 30 July 1963 reads:

CONVENTION BETWEEN (STATE A) AND (STATE B) FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL

PREAMBLE

The preamble of the Convention shall be drafted in accordance with the constitutional procedure of both Contracting States.

CHAPTER I
Scope of the Convention

Article 1
Personal scope
This Convention shall apply to persons who are residents of one or both of the Contracting States.

Article 2
Taxes covered
1. This Convention shall apply to taxes on income and on capital imposed on behalf of each Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.
2. There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.
3. The existing taxes to which the Convention shall apply are, in particular:
   (a) In the case of (State A):
   (b) In the case of (State B):
4. The Convention shall also apply to any identical or substantially similar taxes which are subsequently imposed in addition to, or in place of, the existing taxes. At the end of each year, the competent authorities of the Contracting States shall notify to each other any changes which have been made in their respective taxation laws.

CHAPTER II
Definitions

Article 3
General definitions
1. In this Convention, unless the context otherwise requires:
a) the terms "a Contracting State" and "the other Contracting State" mean (State A) or (State B), as the context requires;
b) the term "person" comprises an individual, a company and any other body of persons;
c) the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;
d) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;
e) the term "competent authority" means:
   1. in (State A)................
   2. in (State B).............

2. As regards the application of the Convention by a Contracting State any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State relating to the taxes which are the subject of the Convention.

Article 4

Fiscal domicile

1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the law of that State, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature.

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then this case shall be determined in accordance with the following rules:
   a) He shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him. If he has a permanent home available to him in both Contracting States, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closest (centre of vital interests):
   b) If the Contracting State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either Contracting State, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;
   c) If he has an habitual abode in both Contracting States or in neither of them, he shall be deemed to be a resident of the Contracting State of which he is a national;
   d) If he is a national of both Contracting States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the Contracting State in which its place of effective management is situated.

Article 5

Permanent establishment

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on.

2. The term "permanent establishment" shall include especially:
   a) a place of management;
   b) a branch;
   c) an office;
   d) a factory;
   e) a workshop;
   f) a mine, quarry or other place of extraction of natural resources;
   g) a building site or construction or assembly project which exists for more than twelve months.

3. The term "permanent establishment" shall not be deemed to include:
a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the enterprise;

e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise.

4. A person acting in a Contracting State on behalf of an enterprise of the other Contracting State - other than an agent of an independent status to whom paragraph 5 applies - shall be deemed to be a permanent establishment in the first-mentioned State if he has, and habitually exercises in that State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise.

5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business.

6. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

CHAPTER III
Taxation of income

Article 6
Income from immovable property

1. Income from immovable property may be taxed in the Contracting State in which such property is situated.

2. The term "immovable property" shall be defined in accordance with the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property.

3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property.

4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise and to income from immovable property used for the performance of professional services.

Article 7
Business profits

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through, a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate
enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere.

4. Insofar as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles laid down in this Article.

5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

6. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

7. Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

### Article 8

**Shipping, inland waterways transport and air transport**

1. Profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

2. Profits from the operation of boats engaged in inland waterways transport shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

3. If the place of effective management of a shipping enterprise or of an inland waterways transport enterprise is aboard a ship or boat, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship or boat is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship or boat is a resident.

### Article 9

**Associated enterprises**

Where

a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

### Article 10

**Dividends**

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may be taxed in the Contracting State of which the company paying the dividends is a resident, and according to the law of that State, but the tax so charged shall not exceed:

   a) 5 per cent of the gross amount of the dividends if the recipient is a company (excluding partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends;

   b) in all other cases, 15 per cent of the gross amount of the dividends.
The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation. This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights assimilated to income from shares by the taxation law of the State of which the company making the distribution is a resident.

4. The provisions of paragraphs 1 and 2 shall not apply if the recipient of the dividends, being a resident of a Contracting State, has in the other Contracting State, of which the company paying the dividends is a resident, a permanent establishment with which the holding by virtue of which the dividends are paid is effectively connected. In such a case, the provisions of Article 7 shall apply.

5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company to persons who are not residents of that other State, or subject the company's undistributed profits to a tax on undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

Article 11
Interest
1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such interest may be taxed in the Contracting State in which it arises, and according to the law of that State, but the tax so charged shall not exceed 10 per cent of the amount of the interest. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.

3. The term "interest" as used in this Article means income from Government securities, bonds or debentures, whether or not secured by mortgage and whether or not carrying a right to participate in profits, and debt-claims of every kind as well as all other income assimilated to income from money lent by the taxation law of the State in which the income arises.

4. The provisions of paragraphs 1 and 2 shall not apply if the recipient of the interest, being a resident of a Contracting State, has in the other Contracting State in which the interest arises a permanent establishment with which the debt-claim from which the interest arises is effectively connected. In such a case, the provisions of Article 7 shall apply.

5. Interest shall be deemed to arise in a Contracting State when the payer is that State itself, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment, then such interest shall be deemed to arise in the Contracting State in which the permanent establishment is situated.

6. Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of the interest paid, having regard to the debt claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

Article 12
Royalties
1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State shall be taxable only in that other State.

2. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience.
3. The provisions of paragraph 1 shall not apply if the recipient of the royalties, being a resident of a Contracting State, has in the other Contracting State in which the royalties arise a permanent establishment with which the right or property giving rise to the royalties is effectively connected. In such a case, the provisions of Article 7 shall apply.

4. Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of the royalties paid, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

Article 13
Capital gains
1. Gains from the alienation of immovable property, as defined in paragraph 2 of Article 6, may be taxed in the Contracting State in which such property is situated.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing professional services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in the other State. However, gains from the alienation of movable property of the kind referred to in paragraph 3 of Article 22 shall be taxable only in the Contracting State in which such movable property is taxable according to the said Article.

3. Gains from the alienation of any property other than those mentioned in paragraphs 1 and 2, shall be taxable only in the Contracting State of which the alienator is a resident.

Article 14
Independent personal services
1. Income derived by a resident of a Contracting State in respect of professional services or other independent activities of a similar character shall be taxable only in that State unless he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities. If he has such a fixed base, the income may be taxed in the other Contracting State but only so much of it as is attributable to that fixed base.

2. The term "professional services" includes, especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

Article 15
Dependent personal services
1. Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:
   a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the fiscal year concerned, and
   b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and
   c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.

3. Notwithstanding the preceding provisions of this Article, remuneration in respect of an employment exercised aboard a ship or aircraft in international traffic, or aboard a boat engaged in inland waterways transport, may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.
Article 16
Directors’ fees
Directors’ fees and similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.

Article 17
Artists and athletes
Notwithstanding the provisions of Articles 14 and 15, income derived by public entertainers, such as theatre, motion picture, radio or television artists, and musicians, and by athletes, from their personal activities as such may be taxed in the Contracting State in which these activities are exercised.

Article 18
Pensions
Subject to the provisions of paragraph 1 of Article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State.

Article 19
Governmental functions
1. Remuneration, including pensions, paid by, or out of funds created by, a Contracting State or a political subdivision or a local authority thereof to any individual in respect of services rendered to that State or subdivision or local authority thereof in the discharge of functions of a governmental nature may be taxed in that State.
2. The provisions of Articles 15, 16 and 18 shall apply to remuneration or pensions in respect of services rendered in connection with any trade or business carried on by one of the Contracting States or a political subdivision or a local authority thereof.

Article 20
Students
Payments which a student or business apprentice who is or was formerly a resident of a Contracting State and who is present in the other Contracting State solely for the purpose of his education or training receives for the purpose of his maintenance, education or training shall not be taxed in that other State, provided that such payments are made to him from sources outside that other State.

Article 21
Income not expressly mentioned
Items of income of a resident of a Contracting State which are not expressly mentioned in the foregoing Articles of this Convention shall be taxable only in that State.

CHAPTER IV
Taxation of capital

Article 22
Capital
1. Capital represented by immovable property, as defined in paragraph 2 of Article 6, may be taxed in the Contracting State in which such property is situated.
2. Capital represented by movable property forming part of the business property of a permanent establishment of an enterprise, or by movable property pertaining to a fixed base used for the performance of professional services, may be taxed in the Contracting State in which the permanent establishment or fixed base is situated.
3. Ships and aircraft operated in international traffic and boats engaged in inland waterways transport, and movable property pertaining to the operation of such ships, aircraft and boats, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.
4. All other elements of capital of a resident of a Contracting State shall be taxable only in that State.
CHAPTER V
Methods for elimination of double taxation

Article 23A
Exemption method
1. Where a resident of a Contracting State derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in the other Contracting State, the first-mentioned State shall, subject to the provisions of paragraph 2, exempt such income or capital from tax but may, in calculating tax on the remaining income or capital of that person, apply the rate of tax which would have been applicable if the exempted income or capital had not been so exempted.

2. Where a resident of a Contracting State derives income which, in accordance with the provisions of Articles 10 and 11, may be taxed in the other Contracting State, the first-mentioned State shall allow as a deduction from the tax on the income of that person an amount equal to the tax paid in that other Contracting State. Such deduction shall not, however, exceed that part of the tax, as computed before the deduction is given, which is appropriate to the income derived from that other Contracting State.

Article 23B
Credit method
1. Where a resident of a Contracting State derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in the other Contracting State, the first-mentioned State shall allow:
   a) as a deduction from the tax on the income of that person, an amount equal to the income tax paid in that other Contracting State;
   b) as a deduction from the tax on the capital of that person, an amount equal to the capital tax paid in that other Contracting State.

2. The deduction in either case shall not, however, exceed that part of the income tax or capital tax, respectively, as computed before the deduction is given, which is appropriate, as the case may be, to the income or the capital which may be taxed in the other Contracting State.

CHAPTER VI
Special provisions

Article 24
Non-discrimination
1. The nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected.

2. The term "nationals" means:
   a) all individuals possessing the nationality of a Contracting State;
   b) all legal persons, partnerships and associations deriving their status as such from the law in force in a Contracting State.

3. Stateless persons shall not be subjected in a Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that State in the same circumstances are or may be subjected.

4. The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances,
reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

5. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of that first-mentioned State are or may be subjected.

6. In this Article the term "taxation" means taxes of every kind and description.

**Article 25**

**Mutual agreement procedure**

1. Where a resident of a Contracting State considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with this Convention, he may, notwithstanding the remedies provided by the national laws of those States, present his case to the competent authority of the Contracting State of which he is a resident.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation not in accordance with the Convention.

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.

4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. When it seems advisable in order to reach agreement to have an oral exchange of opinions, such exchange may take place through a Commission consisting of representatives of the competent authorities of the Contracting States.

**Article 26**

**Exchange of information**

1. The competent authorities of the Contracting States shall exchange such information as is necessary for the carrying out of this Convention and of the domestic laws of the Contracting States concerning taxes covered by this Convention insofar as the taxation thereunder is in accordance with this Convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons or authorities other than those concerned with the assessment or collection of the taxes which are the subject of the Convention.

2. In no case shall the provisions of paragraph 1 be construed so as to impose on one of the Contracting States the obligation:

   a) to carry out administrative measures at variance with the laws or the administrative practice of that or of the other Contracting State;

   b) to supply particulars which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

   c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

**Article 27**

**Diplomatic and consular officials**

Nothing in this Convention shall affect the fiscal privileges of diplomatic or consular officials under the general rules of international law or under the provisions of special agreements.
**Article 28**

**Territorial extension**

1. This Convention may be extended, either in its entirety or with any necessary modifications, to any part of the territory of (State A) or of (State B) which is specifically excluded from the application of the Convention or to any State or territory for whose international relations (State A) or (State B) is responsible, which imposes taxes substantially similar in character to those to which the Convention applies. Any such extension shall take effect from such date and subject to such modifications and conditions, including conditions as to termination, as may be specified and agreed between the Contracting States in notes to be exchanged through diplomatic channels or in any other manner in accordance with their constitutional procedures.

2. Unless otherwise agreed by both Contracting States, the denunciation of the Convention by one of them under Article 30 shall terminate, in the manner provided for in that Article, the application of the Convention to any part of the territory of (State A) or of (State B) or to any State or territory to which it has been extended under this Article.

Note: The words between brackets are of relevance when, by special provision, a part of the territory of a Contracting State is excluded from the application of the Convention.

**CHAPTER VII**

**Final provisions**

**Article 29**

**Entry into force**

1. This Convention shall be ratified and the instruments of ratification shall be exchanged at ... as soon as possible.

2. The Convention shall enter into force upon the exchange of instruments of ratification and its provisions shall have effect:
   
a) in (State A):....................
   
b) in (State B):....................

**Article 30**

**Termination**

This Convention shall remain in force until denounced by one of the Contracting States. Either Contracting State may denounce the Convention, through diplomatic channels, by giving notice of termination at least six months before the end of any calendar year after the year ... In such event, the Convention shall cease to have effect:

a) in (State A):....................

b) in (State B):....................
II. Introduction to the OECD Model Tax Convention

(as of 17 July 2008)

Historical background of the OECD MC

4. Progress had already been made towards the elimination of double taxation through bilateral conventions or unilateral measures when the Council of the Organisation for European Economic Co-operation (OEEC) adopted its first Recommendation concerning double taxation on 25 February 1955. At that time, 70 bilateral general conventions had been signed between countries that are now Members of the OECD. This was to a large extent due to the work commenced in 1921 by the League of Nations. This work led to the drawing up in 1928 of the first model bilateral convention and, finally, to the Model Conventions of Mexico (1943) and London (1946), the principles of which were followed with certain variants in many of the bilateral conventions concluded or revised during the following decade. Neither of these Model Conventions, however, was fully and unanimously accepted. Moreover, in respect of several essential questions, they presented considerable dissimilarities and certain gaps.

5. The increasing economic interdependence and co-operation of the Member countries of the OEEC in the post-war period showed increasingly clearly the importance of measures for preventing international double taxation. The need was recognised for extending the network of bilateral tax conventions to all Member countries of the OEEC, and subsequently of the OECD, several of which had so far concluded only very few conventions and some none at all. At the same time, harmonization of these conventions in accordance with uniform principles, definitions, rules, and methods, and agreement on a common interpretation, became increasingly desirable.

6. It was against this new background that the Fiscal Committee set to work in 1956 to establish a draft convention that would effectively resolve the double taxation problems existing between OECD Member countries and that would be acceptable to all Member countries. From 1958 to 1961, the Fiscal Committee prepared four interim Reports, before submitting in 1963 its final Report entitled Draft Double Taxation Convention on Income and Capital. The Council of the OECD adopted, on 30 July 1963, a Recommendation concerning the avoidance of double taxation and called upon the Governments of Member countries, when concluding or revising bilateral conventions between them, to conform to that Draft Convention.

7. The Fiscal Committee of the OECD had envisaged, when presenting its Report in 1963, that the Draft Convention might be revised at a later stage following further study. Such a revision was also needed to take account of the experience gained by Member countries in the negotiation and practical application of bilateral conventions, of changes in the tax systems of Member countries, of the increase in international fiscal relations, and of the development of new sectors of business activity and the emergence of new complex business organisations at the international level. For all these reasons, the Fiscal Committee and, after 1971, its successor the Committee on Fiscal Affairs, undertook the revision of the 1963 Draft Convention and of the commentaries thereon. This resulted in the publication in 1977 of a new Model Convention and Commentaries.

8. The factors that had led to the revision of the 1963 Draft Convention continued to exert their influence and, in many ways, the pressure to update and adapt the Model Convention to

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changing economic conditions progressively increased. New technologies were developed and, at the same time, there were fundamental changes taking place in the ways in which cross-borders transactions were undertaken. Methods of tax avoidance and evasion became more sophisticated. The globalisation and liberalisation of OECD economies also accelerated rapidly in the 1980s. Consequently, in the course of its regular work programme, the Committee on Fiscal Affairs and, in particular, its Working Party No. 1, continued after 1977 to examine various issues directly or indirectly related to the 1977 Model Convention. This work resulted in a number of reports, some of which recommended amendments to the Model Convention and its Commentaries.\(^3\)

9. In 1991, recognizing that the revision of the Model Convention and the Commentaries had become an ongoing process, the Committee on Fiscal Affairs adopted the concept of an ambulatory Model Convention providing periodic and more timely updates and amendments without waiting for a complete revision. It was therefore decided to publish a revised updated version of the Model Convention which would take into account the work done since 1977 by integrating many of the recommendations made in the above-mentioned reports.

10. Because the influence of the Model Convention had extended far beyond the OECD Member countries, the Committee also decided that the revision process should be opened up to benefit from the input of non-Member countries, other international organisations and other interested parties. It was felt that such outside contributions would assist the Committee on Fiscal Affairs in its continuing task of updating the Model Convention to conform with the evolution of international tax rules and principles.

11. This led to the publication in 1992 of the Model Convention in a loose-leaf format. Unlike the 1963 Draft Convention and the 1977 Model Convention, the revised Model was not the culmination of a comprehensive revision, but rather the first step of an ongoing revision process intended to produce periodic updates and thereby ensure that the Model Convention continues to reflect accurately the views of Member countries at any point in time.

11.1 Through one of these updates, produced in 1997, the positions of a number of non-Member countries on the Model Convention were added in a second volume in recognition of the growing influence of the Model Convention outside the OECD countries (see below). At the same time, reprints of a number of previous reports of the Committee which had resulted in changes to the Model Convention were also added.

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\(^3\) A number of these reports were published and appear in Volume II of the blue loose-leaf version of the OECD Model Tax Convention.
The Influence of the OECD Model Convention on Bilateral DTCs

12. Since 1963, the OECD Model Convention has had wide repercussions on the negotiation, application, and interpretation of tax conventions.

13. First, OECD Member countries have largely conformed to the Model Convention when concluding or revising bilateral conventions. The progress made towards eliminating double taxation between Member countries can be measured by the increasing number of conventions concluded or revised since 1957 in accordance with the Recommendations of the Council of the OECD. But the importance of the Model Convention should be measured not only by the number of conventions concluded between Member countries but also by the fact that, in accordance with the Recommendations of the Council of the OECD, these conventions follow the pattern and, in most cases, the main provisions of the Model Convention. The existence of the Model Convention has facilitated bilateral negotiations between OECD Member countries and made possible a desirable harmonization between their bilateral conventions for the benefit of both taxpayers and national administrations.

14. Second, the impact of the Model Convention has extended far beyond the OECD area. It has been used as a basic document of reference in negotiations between Member and non-Member countries and even between non-Member countries, as well as in the work of other worldwide or regional international organisations in the field of double taxation and related problems. Most notably, it has been used as the basis for the original drafting and the subsequent revision of the United Nations Model Double Taxation Convention between Developed and Developing Countries, which reproduces a significant part of the provisions and Commentaries of the OECD Model Convention. It is in recognition of this growing influence of the Model Convention in non-member countries that it was agreed, in 1997, to add to the Model Convention the positions of a number of these countries on its provisions and Commentaries.

15. Third, the worldwide recognition of the provisions of the Model Convention and their incorporation into a majority of bilateral conventions have helped make the Commentaries on the provisions of the Model Convention a widely-accepted guide to the interpretation and application of the provisions of existing bilateral conventions. This has facilitated the interpretation and the enforcement of these bilateral conventions along common lines. As the network of tax conventions continues to expand, the importance of such a generally accepted guide becomes all the greater.
III. OECD Recommendations and Reports - Milestones since 1977

In addition to the OECD MC and its Commentary (as updated), selected other OECD works have been accompanied by, thus released in the form of, official recommendations under Article 5(b) of the OECD Treaty (see the slides for a non-exhaustive list).

Here is an example how these recommendations read:

**OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010**

**Recommendation of the Council on the Determination of Transfer Pricing between Associated Enterprises**


This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

The COUNCIL,

Having regard to Article 5(b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December, 1960;

Having regard to the Declaration of 21st June, 1976 adopted by the Governments of OECD Member Countries on International Investment and Multinational Enterprises and the Guidelines annexed thereto [C(76)99(Final)];

Having regard to the Report on the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, hereafter referred to as "the 1995 Report" [DAFFE/CFA(95)19 and Corrigendum I] adopted on 27 June 1995 by the Committee on Fiscal Affairs, as supplemented by

by the report on intangible property and services adopted on 23 January 1996 by the Committee on Fiscal Affairs [DAFFE/CFA(96)2] and incorporated in Chapters VI and VII; by the report on cost contribution arrangements adopted on 25 June 1997 by the Committee on Fiscal Affairs [DAFFE/CFA(97)27] and incorporated in Chapter VIII; by the report on the guidelines for monitoring procedures on the OECD Transfer Pricing Guidelines and the involvement of the business community [DAFFE/CFA/WD(97)11/REV1], adopted on 24 June 1997 by the Committee on Fiscal Affairs and incorporated in the Annexes; by the report on the guidelines for conducting Advance Pricing Arrangements under the mutual agreement procedure adopted on 30 June 1999 by the Committee on Fiscal Affairs [DAFFE/CFA(99)31] and incorporated in the Annexes; by the report on the transfer pricing aspects of business restructurings, adopted by the Committee on Fiscal Affairs on 22 June 2010 [CTPA/CFA(2010)46] and incorporated in Chapter IX; revised by the report on comparability and profit methods, adopted by the Committee on Fiscal Affairs on 22 June 2010 [CTPA/CFA(2010)55], which replaced Chapters I-III; modified by an update of Chapter IV which was adopted by the Committee on Fiscal Affairs on 6 June 2008 [CTPA/CFA(2008)30/REV1]; by an update of the Foreword and of the Preface which was adopted by the Committee on Fiscal Affairs on 22 June 2009 [CTPA/CFA(2009)51/REV1]; and by an update of the Foreword, Preface, Glossary, Chapters IV-VIII and Annexes which was adopted by the Committee on Fiscal Affairs on 22 June 2010 [CTPA/CFA(2010)47];

Having regard to the fundamental need for co-operation among tax administrations in order to remove the obstacles that international double taxation presents to the free movement of goods, services and capital between Member countries;

Considering that transactions between associated enterprises may take place under conditions differing from those taking place between independent enterprises;

Considering that the prices of such transactions between associated enterprises (usually referred to as transfer pricing) should, nevertheless, for tax purposes be in conformity with those which would be charged between independent enterprises (usually referred to as arm’s length pricing) as provided in Article 9 (paragraph 1) of the OECD Model Tax Convention on Income and on Capital;

Considering that problems with regard to transfer pricing in international transactions assume special importance in view of the substantial volume of such transactions;

Considering the need to achieve consistency in the approaches of tax administrations, on the one hand, and of associated enterprises, on the other hand, in the determination of the income and expenses of a company that is part of a Multinational Enterprise Group that should be taken in to account within a jurisdiction.

I. RECOMMENDS to the Governments of Member countries:

I.1. that their tax administrations follow, when reviewing, and if necessary, adjusting transfer pricing between associated enterprises for the purposes of determining taxable income, the guidance in the 1995 Report, as amended – considering the integrity of the Report and the interaction of the different chapters – for arriving at arm’s length pricing for transactions between associated enterprises;

I.2. that tax administrations should encourage taxpayers to follow the guidance in the 1995 Report, as amended and to that end that they give the 1995 Report as amended publicity in their country and have it translated, where necessary, into their national language(s);

I.3. that they develop further co-operation between their tax administrations, on a bilateral or multilateral basis, in matters pertaining to transfer pricing.

II. INVITES the Governments of Member countries:

II.1. to notify the Committee on Fiscal Affairs of any modifications to the text of any laws or regulations that are relevant to the determination of transfer pricing or of the introduction of new laws or regulations.
**III. INSTRUCTS** the Committee on Fiscal Affairs:

III.1. to pursue its work on issues pertinent to transfer pricing and to issue the additions to the guidelines referred to in the 1995 Report as amended;

III.2. to monitor the implementation of the 1995 Report as amended, in cooperation with the tax authorities of Member countries and with the participation of the business community and to recommend to the Council to amend and update, if necessary, the 1995 Report as amended, in the light of this monitoring;

III.3. to report periodically to the Council on the results of its work in these matters together with any relevant proposals for improved international cooperation;

III.4. to develop its dialogue with non-Member countries, consistently with the policy of the Organisation, with the aim of assisting them to become familiar with the 1995 Report as amended, and where appropriate encourage them to associate themselves with the 1995 Report as amended.

**IV. DECIDES** to repeal the Recommendation on the Determination of Transfer Prices between Associated Enterprises issued on the 29th May 1979 [C(79)83(Final)].
D. Richard Vann, The Relevance of Historical Work

In his paper “Writing tax treaty history”, Richard Vann (University of Sydney) has elaborated thoroughly on the impact of the methods of legal history for daily-life work with tax treaties. The entire paper will be published soon by Michael Lang & Ekkehart Reimer (eds.), The History of Double Taxation Conventions in the Pre-BEPS Era (2019). The following sub-chapters I. and II. have been taken from Richard Vann’s excellent essay. Please do not cite or disseminate.

1. How?

At the moment writing the history of tax treaties is at the very early stage of simply uncovering the sources, much like an archaeological dig, or an antiquarian scholar prowling mediaeval libraries for ancient manuscripts or collecting inscriptions from monuments and tombs. The distilling and interpretation of the historical material is mainly a matter for the future. This section will thus give some account of the sources and their availability and use, with use understood here in the sense of trying to discover the legal meaning of the text of the treaty.

As most tax treaties are based on common models developed in a more or less continuous historical sequence by the League of Nations, the OECD and the UN, the obvious starting point in writing the history of tax treaties is the models themselves: how did they develop and how can the history of their development assist us in interpreting them? There is a wealth of material here but it has only gradually become readily accessible, and the process of making it accessible will take a long time despite the large jump forward with the release of the OECD archives. Even the published sources of the international institutions on tax treaties have been difficult to source until recently. As often with historical sources, however, one source simply leads to another and it is often necessary to dig through several layers before finding answers (if then).

1. Publications of international organisations

The League of Nations publications on tax treaties beginning in 1923 are difficult to find in a complete set in a single library. The US Congress reproduced a significant part of the League of Nations publications in 1962 as background to the large US international tax reform then in train but that collection generally is found only in US libraries. The University of Sydney Faculty of Law digitised this volume for the internet several years ago.4

4 The main gap is 1946-1945 when the general superintendence of the models rested with the United Nations and nothing much happened, see Vann, A Model Tax Treaty for the Asian-Pacific Region? Part I, Bulletin for International Fiscal Documentation 99 (1991), which was my first broad and fairly basic attempt at understanding the institutional history of tax treaties. In fact there are several dead ends in tax treaty history in the sense of species that have largely died out, including the UK inspired Dominion tax relief and its associated agency treaties which partly explain why the UK did not enter the modern tax treaty world until 1945 even though it was involved in the original formulation of the League of Nations model. Another line of worthwhile historical work not discussed here is the writing of histories of the (parts of the) international institutions that have been responsible for the development of tax treaty models. This has been done for the League of Nations, Chrétien (1954), Le rôles des organisations internationals dans le règlement des questions d’impôts entre les divers états, 86-II, Recueil des Cours 1 (1954), which also covers the UN in part and very benignly.

5 See United States, Model Tax Conventions, in Joint Committee of Internal Revenue Taxation, 4 Legislative History of United States Tax Conventions (1962) available at http://setis.library.usyd.edu.au/oztexts/parsons.html, items 3 and 4. It is important for the text to be digitised in a way which is searchable as otherwise the gain from placing the material on the internet is simply to save a trip to the library. The process of digitisation has varied. Professor Michael McIntyre
That still leaves a considerable volume of League of Nations published material uncovered, including the several volumes collecting tax treaties, statutory and other material relevant to international taxation (the final volume being published by the United Nations in 1948). These volumes have considerably more tax treaty material than the League of Nations official treaty publication series which is available electronically through the United Nations. They seem to be the source of the versions of old treaties digitised by one of the main electronic publishers on international taxation, Tax Analysts, but these include only the English language version, whereas the original League volumes have the treaties in their authentic languages as well as French and English versions.

So far as the OEEC/OECD is concerned, the four reports published by the OEEC were also included in the US Congress volume which fortuitously was published just before the 1963 OECD draft and so gives a fairly good coverage of international institutions’ publications up to then. These have also been digitised by the University of Sydney. Even from 1963, the OECD publications that are electronically available are not complete. Tax Analysts and the IBFD have digitised the major forms of the OECD Models, and Volume II of the official looseleaf OECD Model Tax Convention on Income and on Capital which is also available online via SourceOECD contains most of the reports that the OECD produced on the Model since the publication of the 1977 Model (though it has apparently self censored one of them on hiring out of labour). This may still leave three reports of the 1970s: the 1974 draft of some of the articles and commentary included in the 1977 Model, the 1977 publication *The Taxation of Collective Investment Institutions* and the 1979 *Transfer Pricing Guidelines for Multinational Enterprises*. Further OECD reports on other matters which incidentally deal with tax treaties and led to changes to the Commentary may be missing from electronic sources such as the 1994 report, *Taxation of new financial instruments*. From 1997 OECD publications generally are available online on SourceOECD.

The UN publications from its early work in the 1945-1954 period are not readily available nor for that matter are the published reports of the Ad Hoc Group before and after the 1980 Model. In more recent times the UN is making a wide range of documents readily available electronically, and it is hoped that the UN can be encouraged to digitise the earlier material and make it publicly available.

Both the OECD and UN use the internet to publish current work in draft form (though for the OECD at least, the final publications are not usually freely available online, but only by subscription). The looming problem in this area from an historical perspective is one that is emerging generally with the internet. The volume of material published online means that organisations look to remove it in a systematic way when projects are complete in order to contain the volume. While this makes sense from an organisational perspective in its current work, it does not make sense from an historical perspective. Unless scholars have been astute to download the documents and archive them personally, the documents are lost from public view within a relatively short period of time and disappear into hardcopy and electronic archives of the publishing organisation that are not readily accessible. The OECD and the UN should be

who began working with League of Nations material at around the same time, see

http://www.law.wayne.edu/mcintyre/tax_treaty_materials.htm, scanned the 1927 League publication and then manually checked it for errors. The errors are considerable as these publications are in typefaces not used nowadays and so the recognition of the characters by the scanning software is a problem. The advantage is that he was able to reproduce it in a very similar typeface with an authentic appearance. The US volume which itself was actual copies of the original documents and not a new type setting was double-keyed by an Indian digitisation house used by the University of Sydney for many of its internet publication projects and then crossed checked electronically, a method which produces a much more reliable text than scanning technology is currently capable of and which thus requires much less checking. The problem with this method is that it still requires a level of manual checking and reproduces a text that has no resemblance to the appearance of the original unless a lot of extra formatting work is undertaken. There are other League of Nations publications in the course of digitisation by the University of Sydney, including the five Carroll reports that led to the separate enterprise arm’s length standard and a history of the work of the League on tax treaties up to 1939 also authored by Carroll which in due course along with other League of Nations materials will be added to the website www.taxtreatieshistory.org.
encouraged to archive documents published electronically is a systematic and readily available way or alternatively should allow other organisations to do so for them. It should not be necessary in the electronic age to have projects to restore to public availability documents that were originally electronically available.

These hardcopy and electronic publications have been widely used in the literature on tax treaties, but generally not in an historical way, rather just directly as aids to interpretation of tax treaties. There is an emerging strand of literature, however, that tries to place the published material in an historical context to provide a richer interpretation background, though the historical objective is still the lawyerly instrumental one of interpretation of current treaties. The published material can nonetheless supply answers to mysteries that seem to survive for many years without comment, such as whether the agent of independent status is a genuine exception or just a restatement of the agency PE rule, and the possible paradox that no profits are attributable to an agency permanent establishment beyond the arm’s length remuneration of the agent. What that literature also shows, however, is that the published material of international organisations is just the beginning of the historical interpretation exercise, and often raises as many questions as it answers.

2. Archives of international organisations

The natural places to turn to seek more elucidation of the published material of international organisations on tax treaties are the archives which provide details about the drafts, meetings and correspondence that led to the publications. At the OECD it was discovered in the 1990s if not before that the tax treaty archives were difficult to use because they were not well ordered. Accordingly an index was prepared and that was the start of the project that will eventually lead to the online publication of the archives. These archives have been already used by some scholars to seek to elucidate various aspects of the OECD Model including international transport, dividends, royalties, and non-discrimination.

The archives should assist in understanding the current state of the Model and Commentaries. For example, the current OECD Commentary on agency PEs states:

Persons whose activities may create a permanent establishment for the enterprise are so-called dependent agents i.e. persons, whether or not employees of the enterprise, who are not independent agents falling under paragraph 6. Such persons may be either individuals or companies and need not be residents of, nor have a place of business in, the State in which they

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7 The other main events along the way were the capacity of the Vienna Institute of Austrian and International Tax Law and others to provide significant resources and scholars for the project and a conference held in Toronto in 2004 sponsored by the Canadian Branch of IFA, the Canadian Tax Foundation and the OECD. The proceedings of the conference are described in Friedlander/Wilkie, The History of Tax Treaty Provisions And Why It Is Important To Know About It, Canadian Tax Journal, 907 (2006).

8 Harris, Origins of the 1963 OECD Model Series: Working Party Twelve and Article 10, Australian Tax Forum, 1 (2000) (Peter Harris was the original indexer of the OECD archives); Lang, Non-Discrimination: What Does History Teach Us?, in Fiscalité et entreprise: politiques et pratiques: Mélanges en l’honneur de Jean Pierre Le Gall, 104 (2007) and in detail Lang, Die Arbeiten der OEEC und der OECD zur Schaffung der Diskriminierungsvorbote, in Die Diskriminierungsvorbote im Recht der Doppelbesteuerungsabkommen, 31 (Lang et al. eds., 2006); Vann, The History of Royalties in Tax Treaties 1921-1961: Why?, in Comparative Perspectives on Revenue Law: Essays in honour of John Tiley 166 (Avery Jones et al. eds., 2008); Maisto, Shipping, Inland Waterways Transport and Air Transport (Article 8 OECD Model Convention), in Source Versus Residence: Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives, 21 (Lang ed., 2008). The problems of digitising the archives are even more than for the official publications. Often the papers are carbon copies of typed originals much decayed with age. Peter Harris retyped the whole of the archives on article 10 for his book length article and in doing so was able to reproduce both the look and content of the documents. The OECD archives are produced in both scannable re-keyed text and portable document files (pdf) of the originals which is probably the best compromise.
act for the enterprise. It would not have been in the interest of international economic relations to provide that the maintenance of any dependent person would lead to a permanent establishment for the enterprise. Such treatment is to be limited to persons who in view of the scope of their authority or the nature of their activity involve the enterprise to a particular extent in business activities in the State concerned.

The italicised words are odd as article 5(5) only deals with agency and not with other activities. One suggestion that came to mind was that it was another and/or mix up and that the sentence was intended to indicate that both power to contract and its habitual exercise were necessary to establish the necessary connection with a state to found taxing jurisdiction. If the published documents which produced this language are traced back to their source, there is not much further illumination – the same words appear in the first 1958 OEEC report. That report does indicate that consideration had been given to the inclusion of delivery of goods in the provision so that there was an activity beyond agency which might explain the words. The archives show that the earlier drafts considered by the OEEC in fact included the delivery provision and the mysterious words are a reference to this case. Someone just forgot to delete them when the delivery provision was omitted from the article.

In addition to the OECD archives, in due course it would be desirable to have the League of Nations and the UN archives readily accessible. Some investigation of the League of Nations archives has been undertaken, and like the OECD, they are in need first of proper indexing. Once the OECD archive project is complete, there is an obvious next candidate. The benefits of using the League of Nations archives have been recently demonstrated in relation to capital gains. Capital gains are mysteriously (to a common lawyer) absent from the early League Models and it is only in the 1943 Mexico and 1946 London draft models published together in 1946 that they appear fully formed. The League of Nations archives for the period of 1940-1945 when the Fiscal Committee was still remarkably active show the process by which the drafts were developed which throws considerable light on their purpose, influences and ultimate drafting.

3. Treaty practice

One of the most striking features to me in examining one small part of the OECD archives on royalties for the period 1958-1961 was the extent to which the models were derived from actual treaty practice. The point should perhaps be obvious but it is easy to fall into the trap, as I have, of thinking that the international institutions study a problem, develop the policy and draft model provisions based on that policy which countries then adopt. The League of Nations history on the surface suggests that this was the process. It started its work by commissioning the four economists to devise the policy solution and then proceeded to develop its models. Thereafter there was significant development of the tax treaty network. The problems of taxing business profits was the subject of an extensive five volume study by Carroll

9 See Taisei Fire & Marine Insurance 104 TC 535 (1995) (US) for discussion of an example of this confusion in the 1963 OECD agency permanent establishment English Commentary which was fixed in 1977.
11 I am indebted to Jacques Sasseville for this explanation. See the Report of Working Party no. 1 of the OEEC, FC/WP1 (56) 1 available at www.taxtreatieshistory.org. Such oversights can have real world effects. During the hearing of two recent tax treaties cases in Canada, American Life Income TCC 306 (2008) and Knights of Columbus TCC 207 (2008), these words were the subject of some discussion in the context of insurance agents as PEs, though the discussion is not mentioned in the judgment.
13 Simontacchi, Taxation of Capital Gains under the OECD Model Convention, 65 et seq (2007). The same neglect occurred at the OEEC. Capital gains do not appear in any of the four reports of the OEEC and article 13 was only developed late in the process of the 1963 draft after article 22 on capital on which it is clearly based. Early published OEEC drafts of other articles such as immovable property and royalties indeed included their own provisions dealing with alienation of the property with which they dealt.
on behalf of the League which then proceeded to produce tax treaty drafts for business profits and associated enterprises which have since become the established norms. In fact the history is not as linear as these progressions suggest. The League had set up the committee of technical experts to develop models before the four economists reported and it was the work of this group based on existing tax treaties that was more influential in the early models. Countries had to deal with the problems of taxing business profits while Carroll was at work and the France US treaty 1932 was concluded before the League produced its very similar draft for associated enterprises in 1933. By contrast it took almost a decade for the 1933 draft on business profits to establish any hold in actual treaties with the Canada US treaty of 1942.

In fact there is an iterative process between models and actual tax treaties. Existing treaties influence models which in turn influence future treaties. Both the existing treaties and the work of the international organisations thus contribute to any new version of a model and it is often hard to identify precisely where ideas that are adopted in models ultimately originate. As already noted we are relatively well served with electronic databases of treaties both past and present, in English at least, which makes it relatively easy to see this process in action, including the way convergence in treaty practice occurs as countries pick up ideas from others in their treaty negotiations. Such convergence makes it easier to then develop models reflecting fairly widespread existing practice. While there is some selective research which looks at this interaction, a recent article has attempted more broadly to trace the influence of actual tax treaties in the models and the influence of the models in turn on the domestic law of states.

Indeed the interaction can go further. The treatment of know-how in the 1950s was not simply an issue for tax treaties of the kind with which we are familiar but was of concern to many countries under the French turnover tax and various agreements were entered into by other countries with France to sort the problem out. Nonetheless I have not been able to finally track down the origin of the use of the language “information concerning industrial, commercial or scientific experience” to describe know-how currently used in the OECD Model.

4. Country tax history

Once the role of treaty practice is recognised in the development of treaty models, in turn affecting treaties based on the models, it is obviously necessary to have regard to country histories of tax treaties. The Rust conference on tax treaties history fills a void in the (readily) available material on country specific tax treaty history and at the same time greatly informs our understanding of the model treaties once we can see the lines of development from particular country’s practices to general treaty practice convergence and thence into the models. In addition it will provide grist for the lawyer’s historical interpretation mill to the extent that countries have specific provisions they insert in their treaties which are not reflected in the models.

The sources for this research will be evident from the Rust conference papers and are similar to the kinds of sources for the models – government published materials and archives. In many countries the official published materials on tax treaties may be considerably less than that on the international models but equally many countries provide a great wealth of material. That material has been generally known to country tax scholars for many years but a recent development in some countries at least is that the long times that have to expire before government archives are open for research have passed, for early tax treaties at least and these

17 Vann, The History of Royalties in Tax Treaties 1921-1961: Why?, in. Comparative Perspectives on Revenue Law, 187 (Avery Jones et al. eds.), Because of the UN interlude in the 1940s and 1950s, see note 2, there is a distinct break between the last League of Nations models of 1946 and the OEEC work published from 1958 on. The OEEC work seems to have been influenced more by treaty practice than earlier League of Nations models.
are often the formative treaties. Hence we can expect to see a lot more country archival research on tax treaties with a contribution on the first UK tax treaty of the modern type having already appeared.\textsuperscript{18} The nature of government archives and the way in which tax treaties are handled bureaucratically with at least usually three departments involved (foreign relations, finance and the tax administration) are likely to mean that the national archival material is scattered, unlike the international organisations. Further, for any particular bilateral tax treaty there will be two governments’ archives that are of interest to the scholar and already there has been some exploitation of this possibility.\textsuperscript{19}

As many country specific features of tax treaties reflect domestic tax law of the country concerned, it is ultimately impossible to separate a country’s tax treaty policy and history from its domestic tax policy and history. Countries have constantly to consider the interaction of the international tax rules in their domestic tax legislation and tax treaties. For some major countries which substantially established their income tax systems before the growth of tax treaties (and that includes countries which developed their income taxes before or during World War I) often it was a matter of fitting tax treaty policy to the international rules that had already been established. The interaction of these two processes in close succession in the US has been well illustrated for the US.\textsuperscript{20} The US developed many of the basic outlines of its international tax policy in the brief period 1918–1921 which are still present today (the foreign tax credit and its source rules).\textsuperscript{21} The US then sought to preserve much of its domestic position in the development of the original League models in the period 1923–1928 and similarly there is strong consistency in US tax treaty policy (and text) over many years. The same seems to have applied for some European countries.

For smaller countries and later comers to the income tax, to some extent the process was initially the other way around. The basic rules of the tax treaty network have to be taken as given and domestic law is then shaped to fit into the network. Even the UK which was an active participant throughout the League process of developing the initial models but which chose to stay outside the system had to take the tax treaty system largely as given and significantly modify its domestic law once it began to conclude tax treaties based on the models. In more recent times the same process probably applies to all countries, even including the US. The changes in the early 1960s in the US which significantly abandoned the force of attraction approach to business income in domestic law seems to reflect at least in part the impact of the tax treaty models and the developing treaty network based on them. In most countries today, there has been a process of domestic law being modified to reflect and converging towards the norms of the tax treaty network.\textsuperscript{22}

So country tax history can give us new insights into tax treaty models but equally the history of the models can give us insights into country tax history. The iterative process that applies between actual tax treaties and the models also applies to tax treaties and their models on the one hand and country tax history, especially the international tax rules in domestic law, on the other hand.

As an example of one mystery in the models that may find an answer in a particular country, consider the non-discrimination article. The Swiss were the original proponents of both the deduction and the ownership non-discrimination rules\textsuperscript{23} which are essentially the additional

\textsuperscript{18} Avery Jones, The History of the United Kingdom’s First Comprehensive Double Taxation Agreement, British Tax Review, 211 (2007). This treaty with the US is arguably the most important influence on tax treaties and models after the Second World War.

\textsuperscript{19} See Taylor, National Report of Australia, in this volume in relation to Australia’s first tax treaty with the UK in 1946.


\textsuperscript{22} Avery Jones, Bulletin for International Taxation, 220 (2006).

\textsuperscript{23} See Lang, Non-Discrimination: What Does History Teach Us? in Fiscalité et enterprise, 107; Vann, The History of Royalties in Tax Treaties 1921–1961: Why?, in Comparative Perspectives on Revenue Law, 194 (Avery Jones et al. eds.).
contribution of the OECD to the (somewhat confusing) League 1946 rule covering nationality and PE non-discrimination (more on which below). One would hope to find an answer to this Swiss preoccupation in its country tax history – or perhaps it was a hobbyhorse of a particular delegate from Switzerland.

5. Significant persons

As in any field, so too in tax treaties there have been important figures who have been influential in developing the models (and actual treaties). Some obvious cases are Adams (1928 League Models), Carroll (1943 and 1946 League Models), van den Tempel (OEEC reports and 1963 OECD Model) and Surrey (1980 UN Model); no doubt there are others. Their published writings on tax treaties (including their accounts of the history) deserve special attention, though to date little effort seems to have been directed their way.

In at least one case, surviving personal papers have been closely examined and have provided considerable illumination about the early history of the models, especially the relative contribution of the four economists, the International Chamber of Commerce and the technical experts. It would be worthwhile to seek out the personal papers of other important figures to try to gain some further insight into the development of tax treaty models and international taxation. Official sources are not always fully frank or forthcoming on what actually happened and personal papers can fill this gap, though they come with their own biases.

One of the perhaps unfortunate side-effects of the electronic age is that collections of personal papers are likely to become a thing of the past, except for presidents and the like. Personal handwritten letters and other treasures found in dusty archive boxes are themselves rapidly becoming history which some of us will regret even as we welcome the electronic availability of archival material.

6. Language and legal culture

It is very easy to say that writing tax treaty history requires an understanding of the history of the models, treaty practice, country tax history and personal contributions by major figures in the process, but much harder to achieve this ideal. The existing source material and scholarly literature is in several languages which is a challenge to the Anglophones at least and spread over many countries, libraries and archives. Issues of language and distance in time and mind often involve potential for cultural misunderstandings, different interpretation in different legal cultures and even misunderstandings between similar legal cultures.

To the common lawyer tax treaty models are redolent with legal concepts derived from mainland Europe (permanent establishment, immovable property, usufruct, jouissance shares), mainland European geography (inland waterways), terminology that sounds foreign (also largely European: competent authority, enterprise, place of effective management, debt claims, independent personal services, dependent personal services and mutual agreement procedure) and political concerns of 1950s mainland Europe (stateless persons). In one sense none of this should be surprising as the original models were largely developed based on European treaty practice and the original OEEC/OECD Model was developed more or less exclusively by Europeans.

No doubt there are similar issues for non-common lawyers in relation to the models and their associated documents which the common lawyers are blithely oblivious to. A case in point is the arm’s length principle which seems to be an Anglophone metaphor (although the arm’s length

24 See Simontacchi, Taxation of Capital Gains, 65 et seq.
25 Carroll himself remarked in his official history of the work of the League, Prevention of International Double Taxation and Fiscal Evasion: Two Decades of Progress under the League of Nations, 11 (1939), that three delegates were involved throughout the period 1922-1939: Blau, Borduge and Sinninghe-Damaste.
26 Carroll, Prevention of International Double Taxation; van den Tempel, Relief from Double Taxation (1967).
language no longer appears in actual treaties) and another may be royalties, a term/concept that does not always translate easily into other languages.

One example of a more or less complete misunderstanding between civil and common lawyers that has been exposed relatively recently is the case of the agency PE. The doctrine of the undisclosed principal does not exist in civil law and so the civil lawyer sees paragraphs (5) and (6) of article 5 as saying the same thing in different words while the common lawyer sees the latter paragraph as an exception to the former but is mystified by the words “in the name of” in paragraph (5) and usually changes them to “on behalf of”. The Commentary simply serves to compound the confusion.

Another case where there is a difference between common law and civil law which seems to make the models operate differently in civil and common law countries is the conception of business profits and whether in particular all activities of a corporation give rise to business profits or whether it is possible to have an investment activity in a corporation which is not a business. This may or may not explain the mysteries of article 21(2) and the relation of articles 7(7) and 21. Another mystery arises from the fact that partnerships are generally legal entities in civil law countries but not traditionally in common law countries though this position is changing.

In the past I have suggested that there is a relationship on the one hand of civil law, the use of financial accounts to determine taxable income and exemption systems and on the other hand common law, separation of financial accounts and the taxable income calculation and the foreign tax credit which explains amongst other things differences in the calculation of business profits now identified by the OECD as the functionally separate enterprise approach and the relevant business activity approach. Some civil law friends have questioned this view of the exemption system which does not necessarily provide symmetry of the head office and the PE accounts, and some common law friends have noted that some civil law countries operate a general foreign tax credit and some common law countries an exemption system.

It is true that this thesis has many exceptions and is a caricature in the sense that any common law – civil law contrast is bound to be. Nonetheless I adhere to the view that the developers of the original models did not dictate that any of several methods which in one form or another use arm’s length transfer prices to determine PE profits is the only true method. They either did not realise that there was a difference or did not consider it necessary to favour one approach over others. The OECD in its attribution of profits work has sought to confess and avoid on this issue.

28 The expression “arm’s length” which creates some difficulty in translation (“pleine concurrence” in the French version of the OECD transfer pricing guidelines) has some history in treaties. Australia’s earliest treaties UK 1946, US 1953, Canada 1957 and New Zealand 1960 used the phrase “dealing at arm’s length” in the equivalent of art. 9 (1), see also New Zealand-UK 1947. In the French version of the treaty with Canada, this is expressed as “relations conduites au mieux de ses intérêts.” It was also common for early treaties of Anglo-Saxon countries to include the phrase in the business profits article (Canada-US 1942, UK-US 1945, Canada-UK 1946, Canada-New Zealand 1948, and New Zealand-US 1948). France-UK 1950 also includes it (expressed as “traitant d’une manière normale” in the French text) but not France-US 1932 or 1939.


31 Avery Jones, Does any income fall within Article 21 (2) of the OECD Model? in A Tax Globalist: Essays in honour of Maarten J Ellis 1 (Arendonk et al. eds., 2005); Rust, Other Income (Article 21 OECD Model Convention), in Source Versus Residence, 331 (Lang ed., 2008).

32 See Avery Jones, Characterisation of Other States’ Partnerships for Income Tax, Bulletin for International Fiscal Documentation, 288 (2002) and OECD Model, art. 3 (1) definition of company, art. 10 (2) (a).


34 Sweden and the Netherlands seem to reflect a transition position between civil law and common law “extremes” in a number of areas, the Netherlands perhaps being a case in point on this issue.
by not being “constrained by either the original intent or by the historical practice and interpretation of Article 7.” Whether this abrogation of history will be successful in overcoming different country practices may be doubted.

In other cases one wonders whether even the common lawyers of different countries understand each other. An example relates to article 7(3) on deduction of expenses. The OECD itself, perhaps ironically in the same attribution work, has explored the history of this provision to suggest that it is not concerned with the broad issue of when a mark up on expenses may be charged or when expenses are simply to be allocated to a PE but with the narrower purpose of excluding specific domestic law rules found in some countries which can deny deductions to PEs. The current wording “whether in the State in which the permanent establishment is situated or elsewhere” seems to originate in the Canada-US 1950 protocol in contrast to the League 1946 wording “a properly apportioned part of the general expenses of the head office of the enterprise may be deducted” without reference to where the expense is incurred.

Two domestic tax rules are in play here. One is found in the UK and many of its former colonies (as well as Belgium and maybe other countries) which only allowed deductions incurred wholly and exclusively for the purposes of earning taxable income and did not seem to permit of apportionment if an expense was incurred partly for the tax exempt head office and partly for the taxable PE. The other also found in Belgium and (formerly) many Latin American countries was to the effect that PE expenses incurred abroad were not deductible. The League rule was sufficient to deal with the former problem but not the latter.

The US seemed to think that it needed the latter rule for the UK (as appears from the 1966 protocol treaty) and Canada which had the same rule as the UK since the US made a protocol with Canada in 1950 to add the words “wherever incurred.” Apparently its Canadian and UK common law friends could not explain the nature of the problem under their deduction rules with sufficient clarity to the US. The words “wherever incurred” were then added by protocol in 1952 to the Belgium US treaty of 1948 before it came into force. In this case the words had real effect but there is nothing in the US legislative history to indicate that anyone understood the difference (though the Belgians do). The OEEC third report in 1960 then picked up the US treaty wording without any indication that it understood the significance either.

It is necessary to be sensitive to issues of language, legal culture and the precise operation of domestic rules in understanding the operation of tax treaties and the models on which they are based. It is not surprising that countries with different languages and legal cultures occasionally do not understand each other but it is also possible for misunderstandings to arise between countries with similar languages and cultures. In writing tax treaty history one needs to be a polymath even before getting to the issue of why do it.

II. Why?

The prior discussion assumed a very instrumental view for the use of tax treaty history – assisting in the interpretation of current day tax treaties from a lawyer’s perspective: what to advise a client if a private professional, whether to assess a taxpayer if an administrator, or how to decide a case if a judge. Anyone with even a nodding acquaintance with historiography will know that this is unlikely to be regarded as history by historians. I will forgo the reply that historians have a very narrow view of history and embrace the point that we should be conscious of the ways in which we approach the international efforts of developing tax treaties over the last ninety years.

I will start by looking at the uses to which tax treaty history has been put in disciplines with which
I am familiar (reading “history” for this purpose in the broad use of the word originating from
Herodotus of rational enquiry into the past). I will then turn to the historian’s point of view and
seek to assess the uses of tax treaty history to date in that framework and suggest the kind of tax
treaty history in the historian’s sense that we may find it useful and possible to write in the near
future.

1. Applying the law

Returning to the narrow perspective of the practising lawyer’s instrumental use of history to try
to extract specific meaning from tax treaty texts, there is an issue of whether courts will be
interested in tax treaty history in informing their interpretation. If they are not then the interest
of the adviser and the administrator in tax treaty history will quickly wane. In my view it is
already evident that the courts in common law countries are insatiable in the kind of historical
data that they will use to decide cases generally and tax treaty cases in particular.

This kind of history came with being a common lawyer before the age of statutes – the common
law is essentially an inquiry into the past. Even in the age of statutes, in most common law
countries lawyers have broken through the barriers of reading the text of the statute on its own
terms and look to what is called in the US the “legislative history” to assist in assigning meaning.
Further in most common law countries it has been accepted with greater or lesser enthusiasm
that treaties, though enacted as part of domestic law as tax treaties commonly are, should be
read in accordance with the interpretation canons of international law. It is not proposed here to
enter on the debates about interpretation of tax treaties but simply to make the point that
international lawyers traditionally look to the material surrounding treaties and international law
cases often involve delving deep into the past, for example, in border disputes. It seems
implausible that international lawyers or common lawyers will reject historical material out of
hand in interpreting tax treaties and that is all that is required to make history “useful” in
interpreting tax treaties along with all the other interpretive baggage that lawyers carry. 38

2. Developing tax policy

Lawyers in the academy are concerned with more than what the law on a particular issue may
be. At the least they are interested of what the law should be (or what principles should shape
the law) – tax treaty policy in the area of our interest. In the US there is a degree of scepticism
whether the history of tax treaties can provide any lessons as to what policy has been in the past
and why, and certainly as to whether it is any help for the future, as witness the title of an article
by a prominent tax professor, “Taxing International Income: Inadequate Principles, Outdated
Concepts, and Unsatisfactory Policies.” 39 It is not only those in the academy who are interested in
tax policy – so too are the government and international organisations like the OECD. In a similar
vein, an official now in charge of tax treaties and transfer pricing at the OECD, adopted a title that

38 Many examples can be cited among recent tax treaty cases in common law countries: Taisei 104 TC 535 (1995) on
changes in the OECD Commentary from 1963 to 1977, the series of Natwest cases 44 Fed Cl 120 (1999); 58 Fed Cl 491
(2003); 69 Fed Cl 128 (2005); S12 F 3d 1347 (2008) in the US where the court looked to the development of transfer
pricing rules for branches but ultimately rejected the use of later material to interpret a 1975 treaty, Smallwood UKSPC
669 (2008) in the UK decided by John Avery Jones and a colleague on the history of place of effective management,
Lamesa Holdings BV S ATR 239 (1997) affirmed on appeal 36 ATR 589 in Australia on the development of the 1977
Commentary on capital gains, and recent Canadian cases where expert evidence has been accepted on tax treaty
interpretation, including evidence on the history of tax treaties in various aspects, Prévost TCC 231 (2008); American

39 Graetz, 54 Tax Law Review, 261 (2001), given as a Tillinghast lecture shortly after co-writing his article on the history of
US international taxation including the development of the first tax treaty models; Graetz/O’Hear, Duke Law Journal,
1021 (1997). This is not to say that he considers history useless, but rather that it does not provide a sound policy basis
for the future.

A number of policy approaches have been suggested in relation to the tax treaty non-discrimination article. One view of the article’s general limitation to source taxation is that it complements the relief of double taxation article to which it is adjacent in the OECD Model. That is, a residence country will only wish to give double tax relief for source taxes if the source country has not picked on the resident and taxed it in a discriminatory manner. Such a view is consistent with both capital import and capital export neutrality views of double tax relief and hence with the exemption and credit systems. More broadly a distinction has been drawn by Professor Alvin Warren between tax discrimination against foreign products (for which trade rules provide a remedy), against foreign producers (for which the tax treaty non-discrimination rules provide a remedy) and against foreign production (which would require harmonisation of income taxes internationally).

The problem with these approaches is that while they explain tax treaty non-discrimination in the broad, they do not explain the specifics and that is what the latter title was designed to convey. The article has developed somewhat haphazardly over many decades without being clearly anchored in principle. The first model provision was found in the 1943 Mexico and 1946 London Models of the League of Nations:

A taxpayer having his fiscal domicile in one of the contracting States shall not be subject in the other contracting State, in respect of income he derives from that State, to higher or other taxes than the taxes applicable in respect of the same income to a taxpayer having his fiscal domicile in the latter State, or having the nationality of that State.

It will be noticed that this is a mixture of the current nationality and PE non-discrimination provisions but broader for non-residents as it is not limited to PEs and less clear for nationality. As already noted above the Swiss were responsible for the OECD additions of the deduction and ownership rules. Why these cases were suggested and apparently no others, and why they were of particular concern to Switzerland we may not currently know. In all cases the model provisions reflected what was happening in actual treaty negotiations.

We thus can probably draw from history that the development of the current rules was not consciously driven by a particular policy focus but arose out of specific suggestions for particular situations. That is not to reject or criticise the current rules but rather to suggest that at this point in history no underlying policy has been articulated. That is important information in itself and the tax policy lesson of history in this area (which the EU did not learn) may be that it is wise to proceed case by case where there is general agreement that non-discrimination should apply rather than proceed by grand theory or policy. In the meantime the efforts by scholars to develop an overarching policy should continue as should the efforts by international organisations to identify and restrict inappropriate income tax discrimination. The latter has not been much in evidence since 1977 but the OECD has recently returned to the issue.

In a more general sense the OECD is now paying more attention to history in its tax treaty work. As noted above it was consciously decided in the attribution of profits work not to be bound by history but history was nevertheless evident in the process. In virtually all tax treaty work, now that the archives are in better order and indexed, they are consulted to try to understand the current position when seeking policy and drafting solutions to current issues. The use of the archives may not be evident in all the published drafts and reports on tax treaties but it is increasingly there.

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40 Bennett, 59 Tax Law Review, 439 (2006), also given as a later Tillinghast lecture. The first 10 years of the Tillinghast lectures have been republished in The Tillinghast Lecture 1996-2005 (Mason ed., 2007).
3. Matching with theories

In the legal academy nowadays, especially in the US but increasingly elsewhere in the common law world, theories from outside the law are deployed to test the legal regime and rules in various ways. Even a relatively specialised area like tax treaties has been part of this trend.

Game theory has been used to analyse tax treaties and the theory shows that tax treaties nowadays are not mainly about relieving double taxation in the traditional residence-source sense as that can be and in nearly all countries is achieved by unilateral measures. The historian might note that the OECD removed the “double” word from the title to its Model in 1992 well before the article was written in recognition of the fact that tax treaties had moved well beyond their origins of dealing with residence source double taxation. The OECD still insists that double taxation problems are the main purpose of the Model but double taxation is defined in a much broader sense than residence source double taxation and game theory may produce other results when other kinds of double taxation are considered. A mix of theories “from a number of disciplines, including general legal philosophy, social psychology, international relations theory, game theory and the philosophy of international law” has been deployed to analyse the arm’s length principle enshrined in tax treaties as a case study of why theory supports the fundamental treaty principle *pacta sunt servanda*.45

These are but two samples of an expanding literature linking theory and tax treaties in the US. Neither of them, however, addresses the historical dimension of tax treaties which would seem relevant to their inquiry. A related problem with the use of theories in modern legal literature can be that the frame is defined so narrowly that it misses the fullness of reality and renders the conclusions of uncertain use. Nowadays tax treaty models and practice are but part of the larger international economic law framework and it is necessary to view tax treaties in that context at this point in history. They are often negotiated alongside investment, free trade and other treaties and are seen as part of a package by the states involved (a history which itself is interesting).46 One is reminded of the perhaps apocryphal story that a tax treaty negotiator of an unnamed superpower was asked what one of its major allies had got in exchange when it signed up to such an apparently bad tax treaty deal, to which the reply was, “Missiles!”

More recently there has been a greater use of history alongside theory and in a broader context. International relations theory has been applied to tax treaties in a way which explicitly addresses the historical dimension.47 The conclusion is that the theory does provide us with insights into the history of tax treaties and as a result possibilities for their future evolution. This approach seems both potentially richer as it applies the theory in an historical context rather than a schematic static present and more accurate in matching theory with the sweep of historical development. There is a large agenda for further research linking tax treaty history to international relations theory.

Similarly discourse analysis has been applied including to some degree the history of tax treaties to look at how a combination of economic liberalism and globalisation, international economic institutions including the OECD and tax treaties, and technical assistance experts sprouting a uniform discourse about tax reform have tended to help everyone except the intended objects of

46 The League of Nations work started out in the Financial Committee but one of the recommendations of the Technical Experts, see note 13 and text, was to set up a separate Fiscal Committee which occurred in 1929 from which time tax treaties seem to develop their own momentum separate from other areas of economic co-operation. The same was true of the OEEC and OECD from the outset with the Fiscal Committee and Committee on Fiscal Affairs but in more recent years there have been greater linkages between tax treaties and other areas of economic law, see further note 45 and text.
The strength of the approach is that it does link the various elements of international economic law together which tax treaty specialists may overlook and shows that there may be an ugly side to international economic institutions including tax treaties. It perhaps neglects to deal with the cases where the prescription of the tax reform discourse seems to have worked and the apparent correlation between economic successes by developing countries and active tax treaty programs (and a similar correlation between lack of economic success and of tax treaties, though the definition of success may itself be shaped by the discourse).

Even to the extent that history is deployed in the legal academy in the application of theory to tax treaties as in these last examples, it is secondary to the theory. Indeed in all of the reasons canvassed above as to why we may be interested in tax treaty history, the history has been subservient to some other purpose of lawyers and for that reason is not likely to be viewed as true history by the historian.

4. Historiography

But what is history is just as controversial amongst historians as what is law among lawyers. Hence I am not going to venture far into the realm of the professional historian.

As noted in the previous section we are at an early stage in tax treaty history where for the first time tax treaty scholars are becoming aware of and getting access to historical resources in archives. Hence it is possible to proceed, in the historical spirit of Ranke, first to show how essentially things happened. Even for information that has been available, by a focus on it as history we are coming better to understand how it links together, in particular the history of the models, treaty practice and country tax policy. In my view this should be the first step and the lawyers need to put aside to the extent possible their predilections to interpret treaties, develop policy and test the data against their favourite theories.

This is neither a modest, nor a mundane task as should have been obvious from the discussion of “How?” above. Indeed it should be an exciting and creative process as is the writing of history generally. The facts are never fully known and are open to interpretation but the object in the history phase that is best likely to serve the lawyer as well as the historian is to discover as closely as we may what happened and why (just as we like to know the facts before expressing our legal opinion). Then we may revert to being lawyers and put the history to our particular uses.

This historical goal may sound naïve and old-fashioned to the Marxist, Annalist or post-modern historian but it is probably impossible nowadays to write history without being influenced (even if unknowingly) by the history of historiography. We are all likely to be generally aware of the economic and social context in which tax treaties exist – they are but one part of the economic liberalism of the international economic order. Lawyers in the academy nowadays understand the importance of cross disciplinary studies – otherwise they will not last there long. And it is unlikely in the post-modern era that scholars will seriously believe that they can ever know the complete and actual truth about the history but lawyers have never been afraid to work with a reasonable approximation on which there is broad agreement.

Two issues in particular which have largely been neglected in tax treaty history efforts to date may prove fruitful in addition to the analysis of the written sources that are available.

Tax treaty history can be more clearly located in the context of economic and political history generally. It is noteworthy in the historical sources available from international organisations directly concerned with tax treaties that even the economic history of the times is strangely absent, or at most shadowy background – whether it be the economic effects of major historical events like the Great Depression, or recent or threatening World Wars, or more mundane matters such as the development of international economic law and globalisation.

More attention can be directed to the people involved in the development of tax treaties and their relationships and interactions. While it is unlikely that princes will ever enter the history of tax treaties as major figures, there is some scope for the use of prosopography to enrich our understanding of the historical development of tax treaties.

We have at least one example in the tax treaty history area which has started down these tracks and demonstrates the benefits of trying to get the history right before embarking on more general analysis of its significance in legal interpretation, policy or theory terms.49

It seems highly unlikely that the writing of tax treaty history will become politically controversial and attract the ire of politicians and others of the right (or left) as has occurred in the US and other countries in recent times for history more generally and especially history teaching, which has become known in some parts as the “History Wars.”50 It is noteworthy when reading the documents and archives relating to tax treaty history how the traditional fare of history, princes and wars, are absent. Conversely tax treaties and the related institutions seldom make the news51 but their history is worth knowing for those who are interested in the tax treaty institution.

49 Graetz/O’Hear, Duke Law Journal, 1021 (1997). Most lawyers probably have a favourite historian to provide some guide to their history writing. Mine is Ronald Syme and his three major works drawing heavily on prosopography, The Roman Revolution (1939),Tacitus (1957) and Sallust (1964, paperback 2002 with biographical preface by Ronald Mellor).

50 Macintyre and Clark, The History Wars (2004), which covers mainly Australia but also mentions in passing the UK and the US.

51 The OECD and its Centre of Tax Policy and Administration have attracted some criticism in the US Congress and conservative elements in the US effectively stopped one half of its harmful tax competition exercise.
E. Klaus Vogel, Historical (Genetic) Interpretation of Treaties

The following excerpt has been written by Klaus Vogel, Introductory Comments: The OECD, Its Model Convention And Its Commentaries (op. post., unpublished). This paper is crucial for the understanding of methodological issues.

I. Double Taxation of Income and Capital

Where cross-border activities occur or where other cross-border relations exist, an item of income or an asset may be subjected to taxation by more than one state. Evidently this is a disincentive for international commerce, and a grave one. Therefore, and for reasons of equity, ever since income and wealth taxes became a relevant factor in commercial decision-making, states have taken measures against such international double taxation. Measures were particularly directed against taxation

- of the same taxpayer
- by two or more states
- on the basis of the same item of income or of the same asset

(specifically called “international juridical double taxation”). But it may happen as well that the states involved consider an item of income or an asset to be taxable

- by different persons

and both these persons are taxed accordingly, for example when income is derived by a wife and assessed as such by one state, but at the same time is considered to be part of her husband’s income in the state of his residence and is taxed by this state, too, as it is done in some states, or when under the law of one state a capital asset is considered to be owned by an individual, whereas under the law of the other state it is owned by a corporation. Because it is not the same person who is taxed this type of double taxation is called “international economical double taxation”. Here too, remedies are desirable and to some extent have been taken.

Double taxation can be avoided by provisions of domestic law (“unilaterally”) of one of the states involved withdrawing its tax claim. But both of them may decline to do so considering their claim to be the more legitimate one. Moreover, provisions of domestic law to avoid double taxation are not tailored identically. Therefore, gaps may exist, even wide gaps, where double taxation is not eliminated. As a consequence, for more than one hundred years states have concluded bilateral treaties defining conditions subject to which they agree to withdraw their respective tax claims in favour of the other contracting state.

Today the number of such bilateral treaties is approaching 2000. In contrast, multilateral treaties for the avoidance of double taxation are rare and concluded by only a few partners. In view of this multitude of individual treaties it may seem impossible to achieve a general overview over all of them. Notwithstanding, such overview is possible, because nearly all current treaties are based on a Common Model which today is developed in continuation of earlier work of other international organisations by the Organization for Economic Cooperation and Development (OECD). The individual treaties differ in detail, but they at least follow the structure and

52 On the history of such measures see infra .........
terminology of the OECD Model and to a high extent even their provisions are similar. In addition, the OECD has published Commentaries to the Articles of its Model which, like the Model itself, are continuously developed.

The present treatise will analyse the Articles of the OECD Model and their Commentaries in their different versions, as they have been changed from time to time. Where appropriate, similar but slightly different Models, in particular those published by the United Nations and by the United States of America, moreover important deviations found in individual treaties will be dealt with as well. As an initiation to the reader the following observations will discuss the legal nature and force of the OECD Model Convention (= MC) and Commentaries (= MC Comm.) and their practical impact. Subsequently OECD’s official introduction to its Model Convention (= MC) will be reproduced with comments discussing general questions of Double Taxation Conventions (DTCs, sometimes as well called “Double Taxation Agreements” = DTAs, or, more colloquially, “tax treaties”) such as their history, policies, their negotiation, conclusion, implementation and interpretation.

II. The OECD

The OECD is an international organisation founded by European states after World War II for the purpose of promoting co-operation to advance the member states’ economic and social progress. At that time its name was Organization for European Economic Co-operation (OEEC)\(^\text{53}\), Assistance for developing countries was included among the purposes of the organisation in 1960. Consequently it was reconstituted and renamed Organization for Economic Co-operation and Development (OECD)\(^\text{54}\). Today OECD has 30 member states from all parts of the world\(^\text{55}\), all of them industrialised states, and it entertains active relations with about 70 other countries. OECD’s work covers all economic and social issues, among them trade, environment, agriculture, technology, and taxation.

Official languages of OECD are English and French equally, each document being released in both languages. OECD headquarters are in Paris. The governing body of OECD is its Council which meets in sessions of Ministers or their permanent representatives, plus a representative of the European Commission\(^\text{56}\), and in which each member state as well as the Commission has one vote\(^\text{57}\). Responsibility for the various activities of OECD is vested in a number of committees, in particular for all issues concerning taxation in the Committee of Fiscal Affairs. This committee in turn constituted several Working Parties; among them the Working Party on Tax Conventions and Related Issues, colloquially called “Working Party No.1”, which is in charge of all matters of double taxation. Like the Council, these Committees and Working Parties are made up of delegates of the member states, usually of officials of their administrations.

\(^{53}\) Convention establishing the Organization for European Economic Co-operation of 16 April 1948. Signatories: the Governments of Austria, Belgium, Denmark, France, Greece, Ireland, Iceland, Italy, Luxembourg, Norway, the Netherlands, Portugal, the United Kingdom, Sweden, Switzerland and Turkey, further participating the Commanders-in-Chief of the French, United Kingdom and United States Zones of Occupation of Germany.

\(^{54}\) Convention reconstituting the Organization for European Economic Co-operation (OEEC) as Organization for Economic Co-operation and Development (OECD) of 14 December 1960.


\(^{56}\) Supplementary Protocol No. 1 to the Convention.

\(^{57}\) Article 6 (2) and Article 7 of the Convention.
Article 5 of the OECD Convention provides:

“In order to achieve its aims, the Organisation may:

(a) take decisions which, except as otherwise provided, shall be binding on all the Members;
(b) make recommendations to Members; and
(c) enter into agreements with Members, non-member States and international organisations.”

The OECD Treaty Model and Commentaries were released under the preceding Article 5(b) by a Council Recommendation.

III. The OECD Model Tax Convention in particular

In 1956 OEEC established a “Fiscal Committee”. This committee, as mentioned before, set about to develop a “Model Double Taxation Convention on Income and on Capital”. In four interim reports between 1956 and 1961 it submitted a series of model treaty articles, finally in 1963 a summary report to which the complete Model Convention (the “OECD MC”) and the official Commentaries to each Article (hereinafter referred to as the “Commentaries” or as “MC Comm.”) were appended. The Commentaries explained the individual articles; to the extent that OECD member States did not wish to follow particular recommendations of the model or disagreed with the explanations, they entered in the Commentaries their reservations. In a recommendation pursuant to Article 5 (b) of its charter the OECD Council advised member states to continue their efforts to enter bilateral double tax agreements, to adopt as the basis for their negotiations the model submitted by the Fiscal Committee “as interpreted by the Commentaries in the Report” (French version: “tel qu’il est interprété dans les Commentaires y relatifs”), and to make allowances for the limitations and reservations contained in the Commentaries.

In the following years, the OECD MC and Commentaries were revised by the Fiscal Committee (from 1971 named the Committee on Fiscal Affairs) based on practical experience. In 1977, the Committee approved a new report with a partially revised Model and Commentary, which once again were sanctioned by a recommendation of the Council, dated 11 April 1977. In the next decade and a half the Committee on Fiscal Affairs published a series of reports and position papers on particular issues. These reports also contained recommendations on potential treaty amendments and their formulation. Many of these suggestions were included in the new 1992 Draft Convention, which was also approved by a recommendation of the Council, dated 23 July 1992. At the same time the Committee on Fiscal Affairs stated that in the future it intended to publish more frequent updates to the MC and its Commentaries as individual issues were discussed and resolved. MC and Commentaries, therefore, were published at that time in loose leaf form rather than in the bound volumes previously used. Following this intention the Committee published new amendments in 1994, 1995, and 1997 which all were adopted by resolutions of the Council. In its resolution of 1997 the Council finally authorised the Committee on Fiscal Affairs to “amend” on its own the Model and Commentaries “from time to time” which the Committee did in the years 2000 and 2003.

The changes since 1977 did not affect the model as much as the Commentaries. They were made more comprehensive and the number of reservations increased. Aside from the reservations, a number of member States included “observations”; these observations, the Committee explained, “do not express any disagreement with the text of the Convention, but furnish a useful indication of the way in which those countries will apply the provisions of the Article in question”.

IV. Legal Value of the Treaty Model

Rule 18(b) of the current 1992 Rules of Procedure of OECD provides:
„b) Recommendations of the Organisation, made in accordance with Articles 5, 6 and 7 of the Convention, shall be submitted to the Members for consideration in order that they may, if they consider it opportune, provide for their implementation.“

Since Model Treaty and Commentaries were released by such recommendation, it seems that according to Rule 18 (b) they only oblige the member states to consider whether in their view it is “opportune” to implement the recommended rules and their explanations. In OECD practice, however, the legal force of recommendations is treated as being somewhat stronger. States file “reservations” or include “observations” explaining their particular interpretation of a clause when filing their general consent to a recommendation; such reservation or obligation would not be necessary if the legal effect of a recommendation would not go slightly beyond obliging the States to examine whether its implementation seems appropriate to them. Certainly Article 18 of the Rules of Procedure reserves the character of being “binding” on the member states to “decisions” by the OECD Council. And it would be much too far-fetched to construe its recommendations, as has been suggested, as constituting international treaties. The representatives sent to the Council have no authority to conclude treaties nor do they observe the procedures for concluding and implementing them. But at least some form of a “soft obligation” must be derived from the recommendation. “To consider” opportunity as requested by Article 18 (b) cannot be understood to convey to the member states unlimited discretion. Rather, the recommendation has to be observed unless a member state entered a reservation or unless material reasons, such as peculiarities of the domestic law of the member state, weigh against following the recommendation. To this extent the member states’ discretion is limited. The recommendation, in other words, generates “a loose legal duty, but a legal duty nonetheless”.

Based on such reasons member states may deviate from MC when negotiating tax treaties and in many respects use to do so. When important interests are involved, hard and extended haggling is not unusual; sometimes such controversial negotiations may last over years. Moreover, MC does not bind taxpayers or courts when they have to decide cases of double taxation. This is a consequence of the fact that MC does not apply to individual legal situations. Being a model, it applies to the negotiation and conclusion of international treaties which, when having come into force on their turn apply to such individual situations. In other words: a case of international double taxation can never be solved by direct reference to MC. It is not governed by MC, rather it is — or may be — governed by a treaty rule which may or may not be shaped according to MC.

Notwithstanding, MC may be helpful in interpreting tax treaties, in particular those, which have been concluded in languages different from the two original languages of MC, English and French. Where a term of such treaty is unclear and where it is evident that the contracting states intended to follow the Model, a recourse to the two original versions may clarify what the contracting states meant when they used a particular wording. Vice versa, where a provision of MC is not included in an individual treaty, this may be an indication that the negotiators of the treaty did not want its rule to apply. This argument, however, is not always conclusive: there may have been other reasons for the treaty drafters to abstain from including the rule.

Example: The DTC between the United States and Canada of 1980 defined “residence” in its Article 4 (1) (1) in accordance with MC, but did not include — and still does not include — Article 4 (1) (2) which says “This term” (i. e. “residence”, K. V.) “does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein”. From this omission the Federal Court of Appeal of Canada in The Queen v. Crown Forest Industries inferred that the drafters of the treaty wanted to include as residents even persons who would be excluded under Article 4 (1) (2). Canada’s Supreme Court, however, rejected this inference pointing out that the sentence may have been omitted for other reasons as well, e. g., “because it simply was not required in the context of the Canadian and U. S. taxation systems”
In addition, knowledge of MC helps to organise our knowledge of individual treaties. Memory works by association; thus it is easier to remember an individual treaty rule after we have compared it with a familiar MC provision. The same is true for analysing a new provision.
Interpretation of Double Tax Treaties

I. Distinctions from Interpretation of Domestic Law

71 International agreements, like domestic law, require interpretation. The need for interpretation can arise from a difference of opinion between the Contracting States; the agreement will then be interpreted by these States, or, if they have subjected themselves to its jurisdiction in general or for a particular case, by the International Court of Justice. Questions of interpretation with regard to application of a treaty can also arise, however, before domestic administrative authorities or courts.

72 In most countries, the courts are authorized to interpret treaties. France was until recently a major exception. In cases requiring interpretation of a tax treaty, the French Conseil d’État was legally bound to consult the Foreign Ministry, which in turn would forward the inquiry to the Ministry of Finance. However, the Conseil d’État even then did not feel obligated to make a presentation to the Foreign Ministry if, in its opinion, the meaning of the treaty provision could be considered to be ‘clear’. The Court had ever increasingly laid claim to this power; thus there was extensive case law by the Conseil d’État addressing such ‘clear’ questions of DTC law. In its decision on 29 June 1990, the Court finally abandoned this line of reasoning. It now feels entitled to interpret all aspects of a DTC and no longer considers Ministry consultation to be necessary. In the US, and to a certain extent in other States as well, courts may refuse to interpret a treaty to

58 Cavare, L., 2 Le Droit International Public Positif (1969) at 156; Rousseau, C, 1 Droit International Public (1970) at 258; Conseil d’État, Droit International et Droit Francis, 29 et seq..
the extent that a political question is involved (‘Political Question Doctrine’, see also the ‘Act of State Doctrine’); apparently, however, no case has yet arisen in which a court has applied this doctrine to tax issues.

73 ‘To interpret’ is: To unfold a text, to bring it to be understood. Interpretation occurs in poetry as well as in theology. It has therefore been claimed that interpretation is such a general cognitive process that it cannot be regulated through law. That this view is incorrect follows from the existence of different rules of interpretation within the legal systems of various States.  

74 In the UK, the judge is bound strictly by the wording of the statute, especially with regard to tax law. In principle, he is not permitted to consider the intention of the legislators or the equity of the matter. A teleological interpretation and even more so a development of the law would be considered to be a usurpation of the rights of the legislators. To an extent, however, the above has to be viewed in the light of the ‘new approach’ of UK courts in the limited instance of tax avoidance schemes. In a 1992 decision, the House of Lords even approved, though only under very limited circumstances, of evaluating the legislative record and materials (Hansard) for the interpretation of a law. In the US, a somewhat more liberal interpretation of the tax law did not emerge until the 1930s. In Canada, the majority opinion apparently continues to follow the British view. Here, too, however, a new tendency has emerged recently to handle those traditional principles less rigidly. Tax treaty interpretation in particular is now expressly regulated in Canada by the Income Tax Conventions Interpretation Act of 1984. In a similar way, courts in Israel now tend to prefer a ‘purposive’ instead of the former ‘strict’ or ‘literal’ construction. According to French and Belgian practice, tax laws are to be interpreted against the fiscal authorities in case of doubt; in France, however, the issue apparently is contested. In the US and also in Germany, such a rule has been rejected. These principles regarding the greater or lesser degree to which a judge is bound to the statutory wording determine the distribution and the balance of power between the legislative and judicial branches of the State; in this sense they are part of – unwritten – constitutional law. It is difficult, of course, to formulate these interpretive principles in precise terms. They do, however, share this characteristic with many other constitutional principles.

75 The Interpretation of international agreements, even by domestic courts, cannot be based on the application of these various domestic rules of interpretation. This is clearly the case for interpretation by an international forum, which cannot be bound, of course, by the constitutional principles of the participating States. However, it must also hold true for treaty interpretation by domestic courts, if domestic application of the treaty is not to conflict with international obligations of the State in question. For the effective interpretation of international treaties, it is

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60 See in general Lenz, R., 30 Rassegna Tributaria 155 (1987).
61 British Court of Appeals of 1 January 1921, Cape Brandy Syndicate v. Commissioner of Inland Revenue, 12 Tax Cases 358, 366 (1921).
64 US Supreme Court of 5 December 1938, White v. United States, 305 US 281, 292 (1938); Walz, R., 59 StuW 1, 4 et seq. (1982); for a general discussion of the US point of view toward treaty interpretation, see Restatement of the Law Third, supra m. no. 7, §§ 325 et seq.
69 Schrameck, conclusions, at Conseil d’État of 4 December 1981, req.n. 39.985, 37 Dr. Fisc. comm. 397 (1982); Van Houtte, J., 1 Beginselen van het Belgisch Belastingrecht (1966) at 204.
70 White v. United States, supra; Tipke/Kruse, § 4 AO Rz. 95.
therefore necessary to reconcile the various national methods of interpretation. On the other hand, the text of the treaty must be binding to a greater extent than is recognized in European (continental) practice regarding domestic law.\textsuperscript{71} On the other hand, treaties must be interpreted more liberally than are statutes in Anglo-American law, a principle which has been confirmed by Anglo-American case law.\textsuperscript{72} The fundamental principles of interpretation for international agreements, seen as a whole, are not so different from those which would govern interpretation under domestic law.\textsuperscript{73}

II. Principles for Interpretation of International Agreements


78 The extent to which statutory text or statutory purpose should control the interpretation of an international agreement was actively disputed in the older literature on international law. Difference of opinion also existed regarding the meaning of protocols of negotiations and other materials. The most widely held view was that treaty obligations are to be interpreted restrictively, because parties to a treaty in doubtful cases should only be presumed to have waived their sovereignty to the extent that is unequivocally apparent from the text of the treaty.\textsuperscript{74}

79 In Germany, the case law regarding interpretation of international agreements was ample, but did not indicate a clear direction. In particular, the meaning of treaty wording and purpose and their relation to each other was evaluated in different ways.


\textsuperscript{74} PCU B 12, 25; Verdross, A. \textit{et al.} (eds), \textit{Völkerrecht} 5th edn (1964) at 174; Berber, F., 1 \textit{Lehrbuch des Völkerrechts} 2nd ed. (1975) at 482; this point is left open by the Bundesfinanzhof, see German Bundesfinanzhof of 18 September 1968 \textit{BStBl. II} 797, 800 (1968) on Germany’s DTC with the United States.
Among older decisions it was also very unclear to what extent the unilateral statement of the particular government whose courts were interpreting a treaty would be admissible or whether such statement would even be requested. For more discussion on this issue, see infra m.no. 94 et seq.

The VCLT (see supra m.no. 31) has rendered many of these earlier differences of opinion with regard to treaty interpretation obsolete. It is true that the VCLT contains only relatively general rules and it therefore cannot make allowances for the peculiarities of tax treaties. It has nevertheless resolved some of the uncertainties in prior international practice. The rules of the Vienna Convention are therefore used today in case law on the interpretation of DTCs as a basis even with regard to States that have not yet ratified the VCLT. The International Fiscal Association firmly supported this through a resolution at its 1993 Congress in Florence. According to the view of this Commentary, they constitute customary international law (supra m.no. 31). The relevant provisions of Articles 31 through 33 VCLT are reproduced below. The US Restatement of the Law Third, supra m.no. 7, at § 325 adopted only Article 31(1) and partly (3)7.

In interpreting international agreements according to these rules the text of the treaty is of primary importance (i.e., the ‘ordinary meaning’ of the ‘terms’, and the wording not of the individual provision, but that of the entire agreement in context. The older view that primarily looked for the subjective intent of the parties to the treaty is thereby rejected. However, subjective elements are not entirely excluded from consideration as they are implied within the purpose of the treaty. The ‘purpose’ referred to by the VCLT is certainly not synonymous with the subjective intention of the Contracting States but refers to the goal of the treaty as reflected objectively by the treaty as a whole. Moreover, such purpose is subordinated to the wording of the treaty by the rule of Article 31 VCLT that the purpose shall influence interpretation merely by giving ‘light’ to the terms of the treaty. In other words, ‘purpose’ is not itself an independent means of interpretation.

By contrast, the intention of the parties, according to Article 31 VCLT and § 325 of the Restatement Third, is only significant to the degree to which it has been expressed in the text of the agreement. The view that the ‘basic aim of treaty interpretation is to ascertain the intention of the parties’ is thus contrary to current international law as established in both the VCLT and the Restatement Third. Considering the intent of the treaty parties while interpreting an international treaty does not, however, always contradict the VCLT. According to Article 31(4) VCLT, the parties may attribute a special meaning to a term. If such a meaning is clearly established, then the intent of the contracting parties must of course be observed as in this particular case it is expressed in the wording of the treaty. Excluded, therefore, is only an interpretation which, though corresponding to the intent of the parties, is in no way supported by the wording of the treaty. It is even less acceptable for a court to use as a basis of interpretation.

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75 See Becerra, A.G., 64 BIT 1 (2010).
78 See supra pp. 21 et seq. of this reader for the text of the relevant VCLT provisions.
79 See Korn & Debatin, Syst. III Rdn. 130.
interpretation that which it assumes the parties must have intended. This is true even in cases where the interpretation of the treaty according to its wording may lead to a non-logical result.82

84 The ‘ordinary meaning’ of the terms is not necessarily that of everyday usage. Only to the extent that an internationally uniform legal usage or a legal usage consistent between the Contracting States has developed, or to the extent that a specific technical language has developed in certain specialized areas, such as tax law, is this the ‘ordinary’ usage within the meaning of Article 31(1) VCLT. This is particularly true for those terms which, under the influence of the OECD MC and its Commentary, have since developed into an international tax language.83 Paragraph 4 of Article 31 clarifies, as already mentioned, that the Contracting States can also ascribe a meaning to a term that deviates from the ordinary meaning.

85 ‘Object and purpose’, as supra m.no. 82 tacitly assumed, is one integral expression.84 It is used in international case law as such and there appears to be no reasonable interpretation of ‘object’ separate from ‘purpose’. According to Paragraph 2, the context of the agreement includes any related completing documents made in connection with the treaty. In the case of tax treaties, these include notes and letters exchanged at the time the treaty is signed. Subsequent agreements and State practice are also to be observed according to Article 31(3) VCLT.85 Whether such later agreements may be considered for the domestic use of a treaty depends of course on the constitutional law of the State concerned.

86 In contrast, Article 32 VCLT States that ‘accompanying materials’ that were created in the context of the treaty negotiations, such as elaborations on the treaty, supporting documents, position papers, etc., may only be referred to as a supplementary source if they confirm the interpretation resulting under Article 31 or in cases of doubt. This rule was included to take into account multilateral conventions, which are usually drafted in difficult and protracted negotiations. States that later enter into such a treaty, especially the small and/or newly formed States, are often unaware of the voluminous materials that may accompany the treaty. Moreover, they cannot be expected to study these materials before entering the treaty. ‘Technical Explanations’, usually published by the US Treasury Department of the Treasury in connection with the publication of a treaty text, and the Reports of the Senate Foreign Relations Committee regarding a particular treaty, or the memorandum that the German Federal Government submits to the legislature with the draft of the implementing legislation for a tax treaty, as well as other types of explanations that are created following the conclusion of the treaty negotiations, often during the parliamentary approval process, are therefore neither part of the context of the treaty nor materials, and neither Article 31(1) and (2) nor Article 32 grant their use in treaty interpretation (see infra m.no. 109). They are materials in the sense of Article 32 only to the extent that these items reproduce the content of notes or letters exchanged between initialling and final signature. Documents that do not meet this requirement are therefore neither part of the context of the treaty nor materials, and neither Article 31(1) and (2) nor Article 32 permits their use in treaty interpretation.

87 With respect to bilingual or multilingual agreements, Article 33 VCLT provides (as did customary international law prior to the VCLT) that the original versions in each language are equally binding.86 Tax treaties are generally concluded in the languages of both Contracting States (see supra m.nos 36) if those States do not share the same language. States will occasionally agree that where differences exist between the two versions, a version in a third language – usually English or French – shall be binding. The domestic judge, therefore, when

82 As in US Court of Claims of 5 May 1982, Great-West Life Assurance Co. v. US, 678 F.2d 180 (1982); regarding this decision, see American Law Institute, Federal Income Tax Project, International Aspects of United States Income Taxation II, Proposals on United States Income Tax Treaties (ALI-Project) at 46, with justified criticism.
83 This phrase is used by the High Court of Australia of 22 August 1990 in Thiel v. FCT, 21 ATR 531, 537 (1990).
86 Lang, M., 20 IStR 403, 410 (2011).
interpreting treaties cannot and may not limit himself to the version of the treaty written in his mother tongue; he must always refer to the foreign version as well. If the Contracting States have agreed that in cases of doubt a version in a third language shall prevail, the judge must also take this version into consideration. In such cases, the third version must of course have been approved through the applicable constitutional procedure (see supra m.nos 32 et seq.) and must be applicable under domestic law. Pointedly, but correctly, Lord Scarman described this situation in a case where the French version of a treaty was to be decisive by saying that, ‘The French text is, therefore, English law’. For examples in which courts referred to the version of a treaty in a foreign language and found that the meaning of the treaty was reflected more clearly in the text in the foreign language than in their own one: Dutch Hoge Raad Rolno. 25 419, BNB 1990/60: DTC Netherlands/Canada; FG Köln, 32 EFG 460 (1984): Germany’s DTC with France). A counterexample, in which the court concluded that the treaty version in their own language would be the better one, is Hoge Raad Rolno. 28 217 BNB 1992/223: the Netherlands’ DTC with Germany.

It is inevitable in the case of such bilingual or multilingual treaties that discrepancies in meaning between the various linguistic versions will arise. According to Article 33(4) of VCLT, in such cases, the interpretation to be chosen is that which best reconciles both (or all) texts. A recognizable influence of a State’s domestic law on the wording of the treaty may be one of the factors influencing this choice. By contrast, the language of the treaty negotiations is not a factor to be considered. If the two (or more) versions are irreconcilable – which can result, e.g., from a drafting error – the interpretation is to be guided by Articles 31 and 32 VCLT (i.e., by considering the object and purpose of the treaty, its context and any supplementary means of interpretation). If this approach is not possible, the treaty is defective due to the contradiction and the case is not governed by the treaty provision in question. For example, according to Article 5(3) of the former 1925 DTC between Germany and Italy, the German version of the rules covering dividends also applied to income from other ‘securities’ (Wertpapiere) ‘that are substantially equivalent to stock’ (‘die in ihrem Wesen der Aktie entsprechen’), which does not include shares of a German limited liability company (GmbH). The Italian version, however, referred to ‘valori mobiliari’, which would include shares of a German limited liability company. Here, in view of the contradiction, ‘valori mobiliari’, if they were not ‘Wertpapiere’, were not covered by the article; consequently, the treaty provisions concerning business activities applied. Another example is from the DTC between Germany and Turkey. Article 18(2) in the German text covers annuities from ‘accident insurance’ (Unfallversicherung) and in Turkish from ‘compensation for damage’. The English text, which is supposed to settle the issue, states, ‘annuities paid ... in respect of insuring personal accidents’. In the foregoing context this makes absolutely no sense. Thus, if supplementary means of interpretation (Article 32 VCLT) do not help here, this particular article must be considered void.

III. Particularities of DTCs

1. Common Interpretation


87 See Hilf, M., Die Auslegung mehrsprachiger Verträge (1973) for numerous references.
89 Sundgren, id., at 299.
90 See German Reichsfinanzhof of 17 April 1935, RStBl. 1160 (1935); German Reichsfinanzhof of 1 October 1936, RStBl. 1209 (1936) on Germany’s DTC with Switzerland.
Treaties are meant to allocate tax claims equally between the Contracting States. This goal can only be achieved if the treaty is applied consistently by the authorities and courts in both Contracting States. Therefore, the mandate to interpret a tax treaty 'in the light of its object and purpose' (Article 31(1) VCLT) leads to the requirement that States should seek the treaty interpretation that is most likely to be accepted in both Contracting States (the goal of 'common interpretation'). The most important precondition here is that courts and administrative bodies charged with applying a double tax treaty take into consideration and evaluate the merits of relevant decisions made by comparable institutions in the other Contracting State and, if necessary, by those of third States.

Two courts of highest jurisdiction, the UK House of Lords and the US Supreme Court, have issued decisions that may serve as models concerning the interpretation of an international agreement on the standardization of private law provisions. Both cases dealt with the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air (12 October 1929). As the purpose of the Convention was legal standardization, here, too, a common interpretation had to be sought by the Courts; the Supreme Court acknowledged this obligation by stating, 'We must also consult our sister signatories'. Both decisions used as a basis for their consideration the textual (French) meaning of the relevant rule. To do this they consulted, inter alia, legal dictionaries and French scholarly literature. Also, both Courts examined previous judicial rulings from domestic and foreign courts. The Supreme Court in particular discussed a decision of the Israeli High Court, which, however, it then did not follow. Both Courts ultimately justified their own results from the purpose of the regulations being interpreted. However, before arriving at this result they thoroughly evaluated the foreign literature and case law. This goal of a cross-border, common interpretation has also been recognized when other international agreements standardizing private law were interpreted; their areas include securities law, international sales law and the private law of the international transport of goods by road and sea. In the scholarly literature concerning international private law such an interpretation is even postulated for choice of law rules, albeit domestic ones.

The same must apply to tax treaties. UK case law considers, rightly, the decision of the House of Lords in Fothergill v. Monarch Airlines to be the leading case for international tax law as well. That the principle of common interpretation must be considered here has been expressed with particular clarity by the New Zealand Court of Appeal. It stated, it is well established following New Zealand's commitment to CER that commercial legislation applicable to Australia/New Zealand transactions should in the ordinary course be accorded the

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94 As stated expressly by the UK Court of Appeals of 1 January 1990, in Commerzbank, STC 285 (1990).
same interpretations on either side of the Tasman. For similar reasons it is obviously desirable that the same interpretation answer should be given whether a double taxation treaty question arises for determination in New Zealand or the US and in our view appropriate consideration should be given to the considered official opinion of the other party of the treaty as to its meaning’ [emphasis added].

A similar point was also made by a lower Norwegian court: ‘Der bør være stor grad av harmoni i tolkningen i de enkelte land’ (‘There should be a high degree of harmonization in the [treaty] interpretation of individual States’). Many courts in other States also frequently follow the principle of common interpretation, even if not stated explicitly. In interpreting the DTC between the Canada and the US, for example, Canadian courts have referred to decisions of authorities and courts in the US noting that these decisions, although not binding on Canada, are nevertheless persuasive, or, in another case, noting that they are at least not clearly erroneous and that inconsistencies should be avoided because they could result in double taxation. The US courts have responded similarly, creating a productive dialogue. In Germany, RFH and BFH have applied this principle in cases involving international model agreements (see *infra m.nos.* 82 et seq.) or regulations acknowledged by authorities of another State, or they have compared provisions in one treaty with those of another treaty, or have relied on decisions of a foreign court.

The precept of common interpretation is also embodied in the provisions of Article 33 VCTL regarding the interpretation of treaties negotiated in two or more languages, especially in paragraph 4.

‘Common interpretation’ does not mean that the case law of the other State must be accepted without review. It is true that in *Corocraft v. Pan American Airways* Lord Denning supported the following of foreign decisions as if they were binding, stating: ‘[E]ven if I disagreed, I would follow them in a matter which is of international concern. The courts of all the countries should interpret this Convention in the same way’. However, it is the opinion of this

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96 New Zealand, Court of Appeal of 14 June 1990, Judge Richardson in CIR v. JFP Energy Inc., 14 TRNZ 617 (1990): DTC New Zealand/US.
98 Canadian Number 630 v. M.N.R., 59 D.T.C 300 (1959); see also Tax Court of Canada of 8 April 2010, TD Securities (USA) LLC v. The Queen, TCC 186 (2010) para 89: DTC Canada / USA „The interpretation and administration of the provisions of a treaty by a treaty partner can also be instructive and provide evidence of the intentions, objects and purposes of the treaty.“
99 Canadian Pacific Ltd. v. The Queen, D.T.C 6120, 6135 (1976); see also Utah Mines Ltd. v. The Queen, 45 D.T.C. 5245 (1991) and Qing Gang K. Li v. The Queen, 48 D.T.C. 6059 (1994).
100 *Donroy Ltd. v. United States*, F.2d 200 (9th Cir. 1962); see also *United States v. A.L. Burbank & Co. Ltd.*, 525 F.2d 9 (2d Cir. 1975), where the Second Circuit Court of Appeals came to a conclusion diverging from the Canadian case law; furthermore, see Roberts, S. & Warren, W., *US Income Taxation of Foreign Corporations and Non-resident Aliens* (loose-leaf, as of 16 June 1971, IX/7 C).
101 German Bundesfinanzhof of 2 May 1969, *BStBl. II* 579, 581 (1969) on the DTC between Germany and the US.
Commentary that this statement, while certainly impressive, goes too far. First, the decisions of foreign courts can be very inconsistent. A good example of common interpretation is the House of Lords decision in Fothergill v. Monarch Airlines, in which the Court thoroughly discussed and evaluated the foreign case law and commentary while emphasizing that the persuasive value of a decision depended, inter alia, on the reputation and rank of the foreign court. The situation, in other words, is similar to that where a court considers the decisions of another court of equal competence within the same State. Common interpretation is also a rule of interpretation in domestic law: A judge is expected to examine other decisions and evaluate their reasoning. Rather than adhering stubbornly to a unique personal view, he must choose the interpretation that is most likely to find general acceptance by other courts of his country. The same is true with regard to courts in foreign countries. As Lord Scarman quite correctly observed in Fothergill: ‘Our courts will have to develop their jurisprudence in company with the courts of other countries from case to case’. Whether a judge himself must endeavour to learn about the relevant foreign cases, whether this decision is left to his discretion or whether he is limited in a particular case to calling on the parties, are questions whose answers are dependent on each States’ procedural laws. A judge is obliged to consider decisions of foreign courts, at least those regarding the treaty in question, that are brought to his attention by the parties. If he cannot read the foreign language, he must have the decisions translated. Naturally, he will make allowance for the fact that the parties will attempt to provide him primarily with the decisions that are most favourable to their positions. In most countries the judge must also use all available means to find relevant cases of foreign courts on his own. This duty to conduct research is subject, however, to a limitation of reasonableness, and, in view of the limited possibilities currently existing in most countries to research foreign case law, the boundary of reasonableness will most often be reached rather quickly. Thus, the practical problem of access to information may be a hindrance to common interpretations. Nevertheless, exceptions do exist. The decisions of English-speaking courts are available as a rule to UK and US judges without great difficulty, as are those of the Austrian Administrative Court and the Swiss Federal Court to the German judge. However, given the vast array of online databases available today on court cases in the field of tax law, the practical problem of access to information on foreign judgments is considerably alleviated.

2. References to Domestic Law

The principle of common interpretation is not applicable where tax treaties refer to the domestic law of the Contracting States in such a way that each Contracting State is supposed to apply its own law, independent from that of the other Contracting State, to fulfil its treaty duties. A reference of this type back to domestic law is provided for by the MCs in Article 3(2). In other cases it may be provided for implicitly, whereas in some situations an interpretation other than through recourse to domestic law is not possible (infra m.no. 134 et seq.). The MCs and the individual treaties based on the MCs accept the ‘divergent interpretations’ that result from such recourse to domestic law as unavoidable.

Wassermeyer therefore correctly maintains that treaties must be interpreted with the understanding that they can also refer to domestic law outside of the scope of Article 3(2) OECD and UN MC (with the consequence of a divergent interpretation). However, contrary to Wassermeyer, this present Commentary does not agree that where a treaty does not define an

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106 E.g., Ulster-Swift Ltd. v. Taunton Meat Haulage Ltd., 1 WLR 625, 631 (1977) lists no less than 12 different legal interpretations.
108 3 WLR 209 (1980).
109 Id. at 234.
expression, there is a presumption in favour of such reference to domestic law; Wassermeyer gives no reasons for his view. The object and purpose of tax treaties (Article 31(1) VCLT) militate for their congruent application in the Contracting States since differing applications may either not prevent double taxation or may lead to double non-taxation. Considerations of practicality may, if under Article 31(1) VCLT practicality is considered a ‘purpose’ of the treaty, perhaps weigh against the goal of common interpretation, but they may do so only in individual cases. If the treaty adopts an MC provision, it is clear evidence for the uniform interpretation. Furthermore, a reference back to domestic law does not in any way necessarily bring greater legal certainty. Wassermeyer’s example\(^\text{111}\) shows this clearly; it is true that whether a computer adviser with a university degree exercises a profession is neither expressly defined in (the former) Article 14 OECD and UN MC nor in section 18 of the German EStG. The fact that the BFH has decided this question regarding section 18 makes it indeed convenient to apply, or to transfer, the maxim of this decision to (the former) Article 14 OECD and UN MC; however, convenience is hardly a consideration that should govern interpretation.\(^\text{112}\) In order to accept that treaty measures refer to domestic law, it must therefore be justified in each individual case according to the principles of Articles 31 and 32 VCLT.

3. The Importance of the OECD MC and Its Comm.


99 The OECD MC and its Commentary are very important for the interpretation of tax treaties in that they provide a source from which the courts of different States can seek a common interpretation. As early as 1934, to support an interpretation of the \textit{Article 3} of the OECD Model, the Netherlands \textit{Hoge Raad} and the \textit{Schweizerisches Bundesgericht} (Swiss Federal Court) have all relied on the OECD MC in interpreting DTCs.\(^\text{114}\) The BFH in two instances has even referred to the

\(^{111}\) \textit{Id.} at 406.

\(^{112}\) For more on this issue, see the discussion in Blumenwitz, D. et al (eds), \textit{Doppelbesteuerungsabkommen und nationales Recht}, 18 Münchener Schriften zum Internationalen Steuerrecht (1995) at 61 et seq.

\(^{113}\) German Reichsfinanzhöf of 25 April 1933, RStBl. 417, 419 (1934) on the DTC between Germany and Italy.

100 Controversial, however, is whether this practice of considering the OECD MC and Comm. when interpreting tax treaties is in accordance with the rules of the VCLT. They are not ‘instrument[s] which [were] made ... in connexion with the conclusion of the treaty’ in the sense of Article 31(2)(b) OECD and UN MC. Nor are they ‘preparatory work’ within the meaning of Article 32 (see supra m.no. 81), which refers to the papers used or produced in preparing an individual treaty, not to the OECD MC or Comm. That is evident from the rationale of the rule as described above: In contrast to the preparatory work related to an actual agreement, the OECD MC and the Comm. are generally known and easily obtainable. No reason would therefore exist to refer to these sources only as secondary means of interpretation as is the case for ‘preparatory work’ within the meaning of Article 32.

101 In accordance with Ault, supra m.no. 98, the starting point should instead be that where OECD member countries conclude tax treaties following the text of the MC, it is presumed that those States want the treaty provision to convey the meaning intended by the MC and its Comm. This meaning is, then, as Prokisch, supra m.no. 98, has correctly explained, the ‘ordinary meaning’ of the terms of the DTC in the sense of Article 31 VCLT. However, if this view is not followed, as supported by Ault, id., it is a ‘special meaning’ in the sense of Article 31(4) VCLT and is binding as such for the treaty interpretation. An identical view has been presented by the High Court of Australia by saying that the OECD MC and Comm. are ‘a guide to the current usage of terms by the parties’; but then the deduction that they are ‘a supplementary means of interpretation’ in the sense of Article 32 VCLT is contradictory. Sceptics may certainly ask how one knows that the contracting parties actually intended to incorporate the meaning intended by the OECD MC and Comm. as opposed to some other meaning into the particular treaty. That they wanted to follow these OECD documents may be presumed, however – as long as no particular circumstances indicate to the contrary – because as member countries of the OECD they are legally obligated to follow the Model and Comm. in principle. Both documents were the objects of two important recommendations (see supra m.no. 22) in which the Council recommended that the governments of the member countries follow the model ‘when concluding new bilateral

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116 German Bundesfinanzhof of 27 July 1965, BStBl. III 24, 27 (1966); German Bundesfinanzhof of 22 März 1966, BStBl. III 463, 464 (1966) on the 1931/1957 DTA between Germany and Switzerland.  
117 German Bundesfinanzhof of 15 September 1971, BStBl. II 281, 283 (1972); concurring German Finanzgericht Köln of 16 December 1986, 33 RIW 484 (1987).  
118 UK High Court of Justice, STC 461, 513 (1984).  
120 As Van Raad, C., 47 MBB 49 (1978) argues; in contrast, but correctly, see Ault, H., Essays Int. Tax 63 (1994).  
Conventions or revising existing bilateral Conventions between them, to conform to the Model Convention ... as interpreted by the Commentaries thereto ...'. Such ‘recommendation’ is a measure of the Council that is provided for in Article 5 of the OECD MC. According to Article 18(c) of the Procedural Rules of the OECD, a Council recommendation obliges the member countries to examine whether the recommended measures are ‘opportune’. In OECD practice the legal importance of recommendations is even greater, as evidenced by the fact that members filed ‘reservations’ or included ‘observations’ regarding their particular interpretation of a recommendation when filing their general consent to the Comm. Such affirmation would not have been necessary if a recommendation merely obliged the member countries to examine whether the recommendation was appropriate. At least some form of a ‘soft’ obligation must therefore be derived from the recommendation of the Council: The OECD MC must be applied unless the member country has entered original reservations or unless material reasons, such as peculiarities of the domestic law of the Contracting State, weigh against the adoption of the model with regard to an individual treaty provision. The recommendation, in other words, generates ‘a loose legal duty, but a legal duty nonetheless’.

102 The US, as mentioned earlier, has been reluctant to conform to the OECD MC. Rosenbloom explains that this is a consequence of the relatively late and detached participation of the US in the drafting of the model. However understandable this may be from a psychological point of view, it does not dispose of the fact that the US did have the opportunity to file ‘reservations’. It is therefore also obligated, in the foregoing sense, to follow the OECD MC and Comm. Thus, it may be presumed for the US as well as for the other OECD member countries that to the extent that a treaty follows the MC, they intend to incorporate into such treaty the meaning which can be derived from the MC and its Comm.

103 As far as the interpretation of tax treaties between OECD countries is concerned, the following general points can be observed:

1. If the text of the OECD MC has been adopted unchanged, it is to be assumed that the Contracting States intended to conform to the Council’s recommendation. It follows that when interpreting such treaties, whether or not official versions are drafted in one or more languages, the model in both its original language versions (English and French) should be considered in addition to the individual treaty text(s), as should the MC Comm. (Obviously, the Comm. cannot be applied to the extent that OECD members have indicated a view divergent from that of the Comm. by entering a reservation or observation.)

2. If (a) the text of the OECD MC is not adopted literally, but a formulation is chosen that permits an interpretation consistent with the model, or if (b) a provision was adopted literally, but a related provision that differs from the OECD MC suggests a different interpretation of the literally adopted provision, a presumption nevertheless arises that an interpretation consistent with the OECD MC should apply.

3. It is only if (a) and (b) above occur simultaneously, in other words, if (a) a model provision is not adopted literally and (b) the context suggests an interpretation diverging from the model, that the OECD MC and Comm. may be disregarded in determining the proper interpretation of the provision.

104 By contrast, with regard to the interpretation of treaties with or among non-OECD members, the OECD MC and Comm. are less important. An intention by the contracting parties to adopt a provision within the meaning of the OECD MC can be presumed only where (1) the

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124 See Guillaume, G., *id.*, at 135.


text of the provision coincides with the OECD MC and (2) its context suggests no other interpretation. The weight to be given to the Comm. in such cases cannot be stated generally, but must be determined according to the circumstances of the individual cases. With regard to recent treaties with developing countries, the UN MC and its official Comm. must be considered, but since both MCs coincide for the most part, the OECD MC and Comm. can be helpful for such treaties, too.

105 When interpreting treaties concluded by OECD member countries, only that edition of the MC Commentary which was applicable at the time of the treaty’s completion can be binding; Vinelott J. correctly observed this and referred to the 1977 OECD Comm. in Sun Life Assurance, supra m.no. 99, at 513. This conclusion is particularly compelling if, as previously discussed, the MC Comm. conveys the ‘ordinary meaning’ of the treaty under Article 31(1) VCLT and thus is binding, or in the sense of Article 31(4) conveys a ‘special meaning’ which the contracting parties attributed to a particular term (see supra m.no. 101), for only the Comm. that was available at the time of the treaty’s conclusion was able to determine the wording, and hence the ‘ordinary meaning’, of the parties.127 If one does not subscribe to that view, it is unclear from the outset how the obligation to consider the MC Comm. in interpreting treaties could ever be derived from the VCLT. It is hardly convincing to consider ensuing changes to the Comm. as a subsequent agreement of the treaty parties in the sense of Article 31(3)(a) VCLT.128 The 1977 OECD MC Comm. is therefore in principle only significant for treaties that were completed after 11 April 1977, while the 1992 MC Comm. should apply only to those treaties concluded following 23 July 1992. The same pattern applies of course for future Commentaries.129

106 Many changes and supplements of the OECD MC and Comm. in revisions since 1977 are only to clarify, however, that which, in the opinion of the OECD Committee of Fiscal Affairs (CFA), already applied under the earlier MC edition. The Report accompanying the 1977 OECD MC thus expressed in paragraph 30 the CFA’s expectation that member countries should consider those clarifications when applying their existing treaties ‘if necessary according to a prearranged explicit understanding’. In the introduction to the 1992 OECD MC, the CFA reiterated this ‘view’. Such ‘clarifications’, being the views of the CFA’s experts on how the earlier versions of the MC or Comm. were to be understood, as Vinelott J. correctly commented, ‘are clearly entitled to very great weight’. Nonetheless, they are mere subsequent comments that were not included in the earlier treaty and therefore cannot be binding for treaty interpretation (see previous m.no.). In other words, such ‘clarifications’ do not absolve the interpreting parties from determining to what extent the new version actually only clarified what already had been the correctly understood meaning of the earlier MC and to what extent it in fact attempts to alter the MC. In principle there is no difference where a treaty provision – as with the Negotiating Protocol (Verhandlungsprotokoll) to DTC between Germany and Switzerland of 18 June 1971 – obligates the contracting parties to interpret the treaty according to the standards of the OECD MC Comm. This, too, can only be understood to refer to the MC Comm. as on the date of the agreement.


128 Such changes are discussed by Ward, D.A., Ward’s Tax Treaties (1993/94) at 31, whose conclusion, however, seems to be the same as the one advocated here, id. at 41; agreeing, Lang, M., id., at 25.

129 A different view is taken by the OECD in ‘Recommendation concerning the Model Tax Convention on Income and on Capital’ of 23 October 1997, m.no I.3: The OECD is pleading for a dynamic interpretation, meaning that always the current version of the Comm. is relevant. Also a few voices in literature are in favour of a dynamic interpretation. See for example: Czakert, E., 21 ISR 703,707 (2012); Lampert, S., 21 ISR 513,519 (2012). Also some tax courts are of that view: Canadian Federal Court of Appeal of 26 February 2009, The Queen v. Prévost Car Inc., DTC 5053 (2009), para 10, 11 and 12: DTC Canada / Netherlands: „[...] have made the Commentaries on the provisions of the OECD Model a widely-accepted guide to the interpretation and application of the provisions of existing bilateral conventions“; „The same may be said with respect to later commentaries, when they represent a fair interpretation of the words of the Model Convention and do not conflict with Commentaries in existence at the time a specific treaty was entered [...]”; „the OECD 2003 Amendments to the 1977 Commentary are a helpful complement to the earlier Commentaries, insofar as they are eliciting, rather than contradicting, views previously expressed“.

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which in the example means only the 1963 OECD MC Comm. Where a treaty would determine explicitly that the current version of the MC as existing at the time of the treaty application should be controlling, it would have to be examined to what extent the constitutional laws of the Contracting States permit such a ‘dynamic’ reference. A reference of this type would be a de facto authorization for a non-domestic institution – the OECD CFA – to implement binding domestic legal measures. This would most probably not be acceptable to most member countries. However, some changes to the OECD MC or Comm. are merely intended to improve the language of the text or to make the English and the French texts more alike. Thus, not every change in the text will have legal significance.

4. Administrative Agreements and Explanations

If the Contracting States should agree on a particular meaning of a treaty provision following the completion of the treaty, the treaty may be amended or, if necessary, changed. As international law does not require a specific means or form of concluding a treaty, any common expression of the parties’ intentions suffices to bind them. Interpretation agreements following the mutual agreement and consultation procedures of Article 25 OECD and UN MC may therefore contain an amendment or possibly a supplement to the treaty to the extent that the competent authorities of the respective States are authorized to conclude such internationally binding agreements. The preceding includes agreements that are in accord with the treaty (thus only confirming a ‘correct’ interpretation), since determining the correct interpretation with binding effect is not legally different from supplementing the treaty.

However, such amendment to the treaty can be agreed upon implicitly, too, by a common practice of the Contracting States carried out with mutual consent. According to Article 31 (3)(a) and (b) VCLT, subsequent agreements and actual practices in the application of a particular treaty are to be considered upon subsequent interpretations of this treaty when in a similar context. These rules express either something obvious (the view of this commentary) or they refer to events below the threshold of treaty amendments, for which the ensuing observations regarding amendments should apply all the more.

Whether, and under what circumstances, such express or implicit subsequent amendments to a treaty are binding domestically (i.e., whether they have to be respected and applied by courts and other authorities of that State), depends on the constitutional law of the particular State. If, according to the constitutional law of the State, international treaties are domestically binding even absent a specified implementation procedure, then this includes interpretive agreements and, where applicable, a binding interpretive practice. The competent authorities can then be viewed as authorized through the treaty article corresponding to Article 25(3) OECD and UN MC to conclude such binding interpretive agreements. It is also conceivable that the constitution indeed requires an implementation of the agreement into domestic law, but that the competent authorities are authorized not only to conclude interpretive agreements, but also to implement them. This seems to be the legal situation in Norway, where the highest court confirmed the binding nature of such interpretive agreements if, however, the constitutional law of a State in principle requires, as in most States, the enactment of domestic implementing legislation by the parliament (see supra m.no. 44 et seq.), the only remaining way to claim binding force for interpretive agreements would be to assume that provisions of the original treaty of the type comparable to Article 25(3) OECD MC may be considered to delegate to the competent authorities the power to enact derivative domestic legislation (regulations, arretes, Rechtsverordnungen). But, again, it depends on the constitutional laws of the States in question whether such derivative legislation is admissible and whether its requirements, among them

130 See e.g. no. 16 of the Prot. DTC Austria/Germany 2000/2010.
134 In Germany this would be the requirements of Art. 80(1) GG.


137 German Bundesfinanzhof of 1 March 1963, *BStBl. III* 212 (1963): DTC Germany/Switzerland. In line with the BFH, Austrian Verwaltungsgesichertshof of 27 August 1991, *OStZB* 127 (1992): DTC Austria/Germany; on the laws in Austria in detail, see also Long, M., *Doppelbesteuerungsabkommen und innerstaatliches Recht* (1992); at 21 et seq.) and the Italian Corte di Cassazione of 24 March 1988 (*Dir. e Prot. Trib. 547* (1989): DTC Italy/France) recently rejected the notion that interpretive agreements were binding domestically under their respective national laws. It is also doubtful, considering that such constitutional rules exist in a majority of OECD countries, whether a treaty article corresponding to Art. 25(3) OEC MC may generally be seen as authorization to conclude a binding agreement. According to this commentary’s view, such an agreement can bind only the administrative authorities to apply the treaty in accordance with the agreement as long as the courts of the concerned state do not decide otherwise (see also infra Art. 25, m.no. 110). See in particular the comments by Geiger, R. et al., in: Blumenwitz et al. (eds), *Doppelbesteuerungsabkommen und nationales Recht*, 18 Münchener Schriften zum Internationalen Steuerrecht (1995) at 37, 47, 55. The question of the binding nature of interpretive agreements is not raised of course if the agreement convinces the interpreting court (thus, see US Court of Claims of 17 March 1988, Xerox Corp. v. US, 14 Cl. Ct. 455 (1988).

138 Diverging, Korn & Debatin, Syst. III, m.no. 157.


140 StuW 1809, 1810 (1931): DTC Germany/Hungary; German Reichsfinanzhofs of 19 April 1939, *RStBl*. 878 (1939): DTC Germany/Italy 1925.
Department concerning the interpretation of a particular treaty provision,\textsuperscript{141} while a US District Court relied on the statements of a Treasury official who had served as a witness for the particular treaty issue in question before a Senate Hearing.\textsuperscript{142} By contrast, the BFH has tended to be more reserved, as opposed to the RFH, in its use of information on the views of the contracting parties provided by the Federal Ministry of Finance. It noted that it will ‘not do, merely to use the unilateral subjective position of the German treaty partner as a basis for interpretation’.\textsuperscript{143} The view of the other Contracting Partner will seldom be known, however.

5. The Importance of Parallel Treaties


\textbf{113} Even where the treaties of a particular State deviate from the OECD MC or other model, on which they are based, such deviations are often relatively consistent. Negotiators tend to incorporate formulations developed in prior negotiations into subsequent treaties. This may result from the particular interests of the State for which they are acting; it may also result, however, from demands of a new treaty partner. It often occurs, for instance, that concessions made once to a Contracting Party (e.g., to a developing country) are demanded subsequently by similarly situated partners and are difficult to deny to them. Thus, each State develops its own \textit{standard formulations} and incorporates them, parallel to those of the OECD, UN and US MCs, in its negotiations. They are carried forward as needed into subsequent treaties and therefore, even if they are not summarized in an independent treaty model (like the US MC), they produce an additional level of continuity in the tax treaties of the respective State. It is therefore obvious and – generally speaking – permissible as well, to refer to parallel treaties when interpreting a DTC. Thus, for instance, when interpreting the DTC between the US and Italy, the Tax Court quite properly reverted to the legislative history of the – earlier – DTC between the US and Canada.\textsuperscript{144} Similarly, while discussing provisions of the DTC between the UK and the US in \textit{Union Texas Petroleum Co. v. Critchley}, Harman J. drew comfort from provisions of the DTC between the UK and Finland.\textsuperscript{145}

\textbf{114} On the other hand, the use of such standard formulations, as well as of model treaties, should never eclipse the fact that each \textit{individual treaty} is \textit{autonomous}, that it concerns important and conflicting interests of the two Contracting States and that a coordination of these interests will usually be reached only after difficult and protracted negotiations. As Harman J. stated (\textit{id. supra} m.no. 113) it should be borne in mind ‘that the words of the Convention are not those of a regular Parliamentary draftsman but a text agreed upon by negotiation between two contracting governments’. One need only to listen on those rare occasions, usually at a very late hour, when former tax treaty negotiators relate their war stories: Stories of delaying negotiations on important issues until the airplane for the return trip is ready to take off, so that the other party is pressed to make additional concessions if the negotiations are to be concluded in the current round; stories of the famous night negotiations, in which the physically robust have the advantage; stories of the host delegation that promised to serve an evening buffet after conclusion of the negotiations, and even arranged the food in an adjacent room in view of the delegations, only to prolong the negotiations mercilessly into the night (according to rumour, the hosts were able to sneak out individually for snacks). Even if 90% of these stories may be

\textsuperscript{141} Canadian Federal Court of 7 September 1979, Hunter Douglas Ltd. v. The Queen, \textit{D.T.C.} 5340 (1979).


\textsuperscript{143} German Bundesfinanzhof of 24 April 1975, \textit{BStBl. II} 605, 606 (1975); DTC Germany/US 1954/65; see also German Bundesfinanzhof of 17 February 1975, \textit{BStBl. II} 584, 585 (1975): DTC Germany/Netherlands. German Bundesfinanzhof of 19 October 2010, \textit{BStBl. II} 443 (2011): DTC Germany / Switzerland.

\textsuperscript{144} U.S. Tax Court of 11 April 1983, Burghardt v. Commissioner 80 \textit{Tax Court} 705 (1983).

\textsuperscript{145} STC 691, 700 (1988); \textit{aff’d}, Court of Appeal, STC 305 (1990).
comparable to stories told by sailors, hunters or fishermen, enough remains to demonstrate that treaties very often result from stubborn and wily battles in which the negotiating parties are ready, willing and able to make use of every possible advantage. This fact cannot be neglected when interpreting tax treaties.

In interpreting an individual treaty, inferences from other treaties into which a Contracting State has entered can therefore be drawn – in view of the circumstances just described – only with extreme caution. Differences in the express wording do not necessarily imply that substantive differences are intended. In particular, the absence from one treaty of a rule expressly contained in another treaty does not determine conclusively that this rule does not apply (no argumentum e contrario). It is entirely conceivable that a Contracting State in one instance desired a clarification not deemed necessary by the parties to another treaty. It even occurs occasionally that a particular rule is expressly negotiated out of the treaty, but then nevertheless applies through the application of another provision of the same treaty (e.g., it may be intended that particular items of income be excluded from taxation in the Residence State and that the provision referring to them is therefore omitted, but that by means of a catch-all clause corresponding to Article 21 of all three MCs, the income is still allocated to the Residence State in the end). Such discrepancies can be a result of the tenacity of negotiators on both sides.

The fact that a State’s treaty practice does not forever remain unchanged must also be taken into consideration when referring to parallel treaties. It is clear that treaty policies change, as do the particular formulations of treaty provisions used by a State. The meaning of a rule can be derived by reference to a similar or divergent rule in another treaty only if both treaties are considered in the light of the prior and subsequent treaties of both Contracting States. In addition, it should also be noted that the influence of one treaty on another does not depend on the order in which the treaties enter into force, but rather on the order in which they were negotiated. This order of course is often difficult to determine.

Occasionally, it also may be necessary to distinguish between various types of treaties negotiated simultaneously by a particular State. For example, with regard to German practice between 1954 and the early 1960s, three types of treaties can be distinguished: Those entered into with neighbouring European countries, those entered into during the same period with Anglo-American countries, including the 1959 DTC treaty with Egypt and, for unknown reasons, the treaty with Greece, and finally, the treaty entered into with France, which follows a pattern of its own. Currently, although their differences are less radical, German treaties can be divided into those with Western industrialized nations, those with developing countries and those with countries that were communist at the time of the treaty’s signing. The category of a particular treaty may be a determining factor in the interpretation of a provision.

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147 A good example is contained in a BFH ruling made in 1985 and for which the court – a German court, it should be recalled – in interpreting a provision of the DTC between Germany and the US, had recourse to earlier and later DTCs concluded by the US; see German Bundesfinanzhof of 9 October 1985, 145 BFHE 341 (1985).

148 For the latest developments, see Lüdicke, J., Überlegungen zur deutschen DBA-Politik (2008) and the German Verhandlungsgrundlage (supra m.no. 25).
G. Klaus Vogel, Relevance of the OECD Commentary

The following excerpt, too, has been taken from Klaus Vogel, Introductory Comments: The OECD, Its Model Convention And Its Commentaries (op. post., unpublished)

I. Commentaries “soft” obligation to administrations, yet not obliging courts

Like the Model Convention and its amendments the Commentaries to its Articles were (and are) passed as Council recommendations. This means according to Article 18 (b) of OECD’s Rules of Procedure which has been cited above, that they are “submitted to the Members for consideration in order that they may, if they consider it opportune, provide for their implementation”. It was shown that this wording does not convey to the member states unlimited discretion to follow or not to follow the recommendation. Though under Article 18 (a) of the Rules of Procedure only “decisions” of the Council are binding and the recommendations, as was pointed out, cannot be construed to constitute international treaties, recommendations provide for a “soft” kind of obligation: if the member state has not filed a reservation, its decision whether it is “opportune” to follow a recommendation has to be based on material reasons.

But what does this imply with respect to the Commentaries? On the face of it, the Commentaries explain the provisions of MC. Their underlying and primary purpose, however, is to interpret the provisions of current and future treaties to the extent that they have adopted or will adopt the wording of MC. The Council decisions by which MC and its Commentaries were passed originally and amended subsequently (and the more recent decisions by which the Committee of Fiscal Affairs was authorized to amend both) expressed this by using the following (or similar) wording,

“THE COUNCIL ... RECOMMENDS the Governments of Member countries ... that their tax administrations follow the Commentaries on the Articles of the Model Convention ... when applying and interpreting the provisions of their bilateral tax conventions that are based on these Articles”.¹

This wording makes clear that it is the governments to which the recommendation is directed and that it is their tax administrations which they are obliged – if they did not enter a reservation or are caused by material reasons – to instruct to follow the Commentaries.

Of course, the obligation is of practical importance only when there is doubt how a treaty provision should be understood. The tax administrations of the OECD member states can in such cases, as a rule, be assumed to have been instructed by their governments to follow the Commentaries. Courts and citizens, in contrast, are subject only to the law – which in the present context are the treaties – and not to instructions by the government. From this follows that courts in principle are bound to MC Commentaries only when those have been elevated to the status of law (e. g., by statute or international treaty). Normally a court in following the general rules of interpretation is free to arrive at a result which differs from that of the Commentaries. If that has been the case, it will no more be “opportune” for the administration to deviate from the holding of the court by continuing to follow the Commentaries and it will not be “opportune” for the government to instruct them to do so.

II. Commentaries value for interpretation – before 1992

This does **not** mean, though, that the courts could – or even should – **ignore** the Commentaries in their judicial decisions. When there is doubt how a treaty provision should be understood, the courts are called upon to **interpret** that provision. This interpretation may be influenced, even heavily influenced, by the Commentaries.

The interpretation of international treaties, as will be discussed in more detail below, is governed by the Vienna Convention on the Law of Treaties of May 23, 1969. Article 31 (1) of this convention provides:

“**A treaty shall be interpreted in good faith in accordance with the ordinary meaning** to be given to terms of the treaty in their context and in the light of its object and purpose.”

And paragraph 4 of that same Article reads:

“**A special meaning shall be given to a term if it is established that the parties so intended.**”

Some countries, it is true, among them the United States of America have not yet ratified the convention. But in the present context this is of no importance, for at least the two paragraphs cited above are identical with traditional (customary) international law.

To establish a “bridge” for introducing the Commentaries into the interpretation of tax treaties under the Vienna Convention, **Hugh Ault** in an article of 1993 considered that “**[t]he Commentaries form the background against which the specific articles or provisions are tailored**”. He consequently, suggested that “the presumption is that the Commentary interpretation represents the intention of the parties” and, therefore, constitutes a “**special meaning**” in the sense of Article 31 (4) of the Vienna Convention. Indeed, as far as OECD member countries were concerned, at the time when the article quoted was published this was a **fair assumption**, all the more because the negotiators of these countries were (and are) bound by Council recommendation to follow MC and its Commentaries as long as they did (and do) not consider this to be “inopportune”. The same could be presumed with respect to the Members of Parliaments or Senators approving the treaty; for the Commentaries were published as paperbacks, thus were accessible to them as well as to every citizen who was interested. Finally, the Commentaries’ first two versions had remained unchanged for periods of 14 respectively 15 years so that with the exception of short periods of transition experts knew in general what was the Commentaries’ position on questions of relevance. Where a treaty between OECD members had adopted the wording of MC it could, therefore, **rightly** be assumed that the Commentaries revealed the “specific meaning” attributed by the negotiators to the terms of the treaty.

This was – and still is – true for Commentaries that were introduced 1963, 1977, and 1992. To which extent it is true for Commentaries introduced by any later amendment cannot be answered straightforward.

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3 Rainer Prokisch even went further by holding that the Commentaries defined with respect to tax treaties their “ordinary meaning” which is the normal basis of treaty interpretation under Article 31 (1) of the Vienna Convention: R. Prokisch, “Fragen der Auslegung von Doppelbesteuerungsabkommen”, Steuer und Wirtschaft International 1994 pp. 52 et seq. As it is recognized that the “ordinary meaning” includes an established technical meaning this view is as defensible as the other.

4 Or their „ordinary meaning“ as held by Prokisch; see the preceding footnote.
III. Commentaries value for interpretation – after 1992

The assumptions just expounded were well-considered and absolutely convincing when they were conceived. They have been destroyed as general assumptions, however, by the practice starting in 1992 of changing MC and Commentaries in short intervals and by the mode of publication applied to those changes. Since that date, as was mentioned before, OECD passes changes of the Model and, even to a much higher extent, of the Commentaries in intervals that are very much shorter than they were in the past. New amendments were released in 1994, 1995, 1997, 2000, and 2003. There are examples of interpretations introduced into the Commentaries which were revised a few years later already by another amendment. To publish those and other official documents the OECD does not have, as one would suppose, an “Official Journal” or “Gazette Officielle”. Rather, the older versions of MC and the Commentaries were published as paperbacks and it was mentioned that since 1992 OECD went over to publish both of them primarily as a looseleaf collection. The amendments are delivered as installments to the subscribers of the looseleaf. In addition, it is true, paperback versions of both Model and Commentaries, so-called “Condensed Versions” (“Versions Abrégées”), are published in irregular intervals. But this was not done every time when amendments had been released, in particular not in 1994. Moreover, everybody who has ever worked with looseleafs knows that their reliability has a tendency to decrease, very often after a few installments already. In addition, OECD’s installments are not absolutely reliable.

Now, that the negotiators of a tax treaty by adopting a wording from MC tacitly intend to adopt it as explained by the Commentaries is a presumption which evidently can only refer to that version of the Commentaries which was the current one at the time when the treaty was negotiated and signed. An amendment to the Commentaries at a later time can neither retroactively establish the “ordinary meaning” of the treaty terms at the time when they were drafted nor can it prove an intention of the parties to agree on a “special meaning” which was not in the Commentaries before. A change of the Commentaries after the treaty was negotiated can, therefore, not change the meaning of the treaty. This is the view prevailing in literature. What is more, it is the unanimous view of the courts.

Moreover, one cannot even assume that the Commentaries’ current version at the time when a treaty was negotiated and signed, if this was done after 1992, was known at that time to all persons involved. For it takes several months, more or less half a year, from the approval of an amendment to MC and its Commentaries by the Committee on Fiscal Affairs to its delivery as a looseleaf installment. For the condensed version it often took even longer; it was a considerable improvement that 2003 the condensed version was published in the Internet. The delegates to Working Party No. 1 will, of course, know about the changes. But they are not always the only persons in their country who negotiate tax treaties, and it is uncertain whether those other negotiators will be speedily informed. Finally, the Members of Parliaments and Senators, even the experts among them, will only after a considerable lapse of time learn about changes to the Commentaries.

As a more practical problem, it may be difficult to ascertain retrospectively when a certain amendment was passed by the Committee on Fiscal Affairs, let alone when this was made known to the public. It is true that annexed to each Article of MC and to each Commentary the looseleaf publication contains a section called “History” intended to inform the reader of all changes which the text has undergone since 1963. But this section is not reproduced in the paperbacks and it is not very easy to be read. Moreover, it does not give account of the exact dates of publication.

1 See, e. g., paragraphs 12 to 17 of the Commentary to Article 12 (version of 2000). Paragraph 12 emphasizes, it is true, that “in most cases, the revised analysis will not result in a different out come”, but thus admits “that at least in some cases the new interpretation will lead to a different result.

All this will raise doubts whether the negotiators of a recent treaty intended to adopt the interpretations given by a recent, though preceding, Commentary or whether they wanted their wording to be understood in another way. There can be no general presumption any more. Only when there is sufficient reason to assume that before a treaty was negotiated and signed a certain view expressed by an amendment to the MC Commentaries, due to the lapse of time, had already “sipped through” to the common consciousness of international tax experts – not only of the members of Working Party No. 1 – it may be justified to conclude that the negotiators intended to follow that view. How much time has to be allowed for this sipping-through will depend on the individual topic. It is suggested that at least after ten years’ time everybody who is interested in a subject will know about the relevant Commentary. But this is open to controversy.

However, even where there is no satisfactory indication that the drafters of an individual treaty intended to follow a MC Commentary – which will be the rule for recent addenda to the Commentaries as it will be the rule for tax treaties concluded with or among non-members of OECD – the Commentaries will by no means be irrelevant. They are still the opinion of high-ranking experts in the law of Double Taxation Conventions which, as Vinelott, J., put it in Sun Life Assurance v. Pearson, in all questions of treaty interpretation are “clearly entitled to very great weight”. As such, though, they do not outweigh the opinions of other, equally qualified experts. To decide a controversy between the OECD Commentaries and such other experts, it is the arguments brought forward which count and nobody’s pre-established authority.

H. Hans Pijl, The OECD Commentary as a Source of International Law
and the Role of the Judiciary*

I. INTRODUCTION

The unspecified question of whether or not the Commentary on the OECD Model Tax Convention on
Income and on Capital (hereinafter: the Commentary) is internationally legally binding¹ must be
answered with three other questions. These are:

(1) Binding on the tax administration or binding on the State? If the State (and all its organs, including
the judiciary) is intended, it is not binding. The Commentary is not a treaty or customary
international law and is not a declaration or another instrument that is binding under international
law.

(2) Binding on the judiciary as context within the meaning of Art. 31 of the Vienna Convention on the
Law of Treaties of 23 May 1969 (hereinafter: the Vienna Convention)? The Commentary as a whole is
not a context-similar element. It could, however, perhaps become this if State practice develops to
accept the Commentary as a required source of interpretation.²

(3) To which Commentary statement is reference being made? Some statements have a higher
interpretational status than others and already, at this stage, reflect State practice. In this respect,
“the” Commentary is irrelevant, i.e. not the “box”, but the separate “toys” in it must be considered
on their merits.

Only question (3) creates a perspective under which the original question can, at this stage, be
sensibly discussed. Each separate statement of the Commentary must be considered with regard to
its merits in respect of State practice. The “toy” does not derive its context-similar status from its
place in the “box” per se, but from its origin in State practice.

It could also be asked whether or not the executive is bound by the Commentary. In general, to avoid
the disadvantages inherent in treaties (i.e. complicated to conclude, inflexible and time-consuming to
change), informal administrative agreements are concluded that are merely intended to create some
common programme that is not legally binding and leaves the administrations free to deviate from
the agreement, yet at the same time coordinating the substantive issues covered. The author
assumes that, (as with informal agreements in general) with regard to taxation, the non-binding
instrument of a Recommendation was chosen in respect of the Commentary for these reasons.

With regard to the Commentary, the doctrine of State sovereignty requires respect of the intention
of the States not to be bound by the contents of a Recommendation. The author does not believe
that good faith can make binding what is so well embedded with statements expressing a non-
binding nature. Good faith, trust and confidence are inherent in international cooperation.
Specifically, good faith may make an international instrument binding, but it cannot have this effect
on the Commentary, as the analysis in this article demonstrates. If the Member countries of the

* European Taxation vol. 46 no. 5 (2006), pp. 216 et seq.
¹ Such that, with regard to non-compliance issues, State responsibility arises.
² Art. 31(3)(b) Vienna Convention.
OECD (hereinafter: the Member countries) did not allow the Commentary to enter through the front door as binding instrument, it is unacceptable to assume that they would implicitly permit it enter through the back door of good faith. Adhering to a different view also creates tension as to the role of good faith for the OECD Constitution and a State’s assertions of not wanting to be bound. A State would not act bonae fidei if it could claim that another State is bound by what they both agreed is not binding.

This article reflects the shared interest of the author and his Leiden colleague, Frank Engelen, regarding international law, in general, and the interpretation of tax treaties in particular. In 5., the author comments on Engelen’s position on good faith: the author and Engelen do not always agree.

II. THE NON-BINDING NATURE OF THE COMMENTARY

1. Introductory remarks
Art. 38(1) of the Statute of the International Court of Justice refers to, as sources of international law, international conventions, international customary law, the general principles of law as recognized by civilized nations, and judicial teachings and qualified publications. Reference in the article does not qualify these sources as binding. Judicial decisions and the teachings of the most highly qualified writers are, for example, interpretational aids rather than binding sources. Conversely, the binding decisions of international organizations and the binding ius cogens are missing.

The Commentary’s best chance would be to qualify as a Convention. The Commentary is, however, not a Convention because it is a Recommendation and as such does not meet the treaty criterion of “governed by international law” (meaning binding under international law). It is also not a Convention under the more lenient approach of the International Court of Justice towards treaties. Under this approach, in order to ascertain whether or not the instrument is binding, “the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up”.

The second best chance, customary law, does not work. In order to become customary law, opinio iuris is required to the effect that the Commentary’s use stems from an international obligation. Such an opinio iuris does not exist.

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2. The general principles of law recognized by civilized nations include pacta sunt servanda, good faith and its emanations acquiescence and estoppel. These also include certain general principles of interpretation, such as effectiveness (ut res magis valeat quam pereat, lex posterior derogat legi priori and lex specialis derogat legi generali). Finally, certain rules reflecting the logic of lawyers may be regarded as included in this list.

3. This follows from the preparatory work regarding the Statute of the International Court of Justice.

4. Ius cogens forbids torture, rape, genocide, etc. (Art. 53 of the Vienna Convention).

5. Art. 2 of the Vienna Convention states that “treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.


7. For the difficulties connected with this concept, see M. Byers, Custom, Power and the Power of Rules (Cambridge University Press: 1999), pp. 129-146.
The third best option for the Commentary would be to become binding based on the general principles of international law, i.e. good faith (which is, in abstract, also the basis for the binding nature of a treaty and of customary law). The circumstances for qualifying an instrument as binding under the general principle of good faith must be as strong as in a case of a treaty and customary law. As treaties and customary law are concretions of the general principle, the umbrella category of good faith requires similarly convincing elements.

Language and actual circumstances are the central elements in determining whether or not the Commentary is binding international law. The elements for this possible qualification are investigated in 2.2. to 2.5., i.e. the constitutional framework of the OECD, the language of the Commentary, the declarations made and judicial behaviour. None of these elements indicates the existence of a binding instrument.

2. Constitutional framework

Art. 5 of the OECD Convention reads:

In order to achieve its aims, the Organisation may: (a) take decisions which, except as otherwise provided, shall be binding on all the Members; (b) make recommendations to Members; and (c) enter into agreements with Members, non-member States and international organisations.

Within this constitutional framework, the decisions of the Council are legally binding on the Member countries, but Recommendations are not.

Each update of the OECD Model Tax Convention on Income and on Capital (hereinafter: the OECD Model) and its Commentaries was, until 1997, based on Council Recommendations. From 1997, due to the increasing number of amendments to the OECD Model and its Commentary, the internal procedure changed, without replacing a Recommendation as its basis. The Council’s Recommendation of 1997 serves as the instruction for the Committee on Fiscal Affairs to update the Commentary on a regular basis:

The COUNCIL ... INSTRUCTS the Committee on Fiscal Affairs to continue its ongoing review of situations where the provisions set out in the Model Tax Convention or the Commentaries thereon may require modification in the light of experience gained by Member countries, and to make appropriate proposals for periodic updates.

Consequently, no further Recommendations are required. From 1997, the Council merely approves the updates. The 2005 update, for example, was approved by the Council in a one-page document of 15 July 2005, to which the updates to the OECD Model and the Commentary were annexed.

With regard to the basis of the Commentary (ultimately a non-binding Recommendation), the Commentary cannot be considered to be legally binding on the Member countries. If the Member countries would have wanted to be bound, they would have chosen another instrument.

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4 No. C(2005)90: “Accordingly, the Council is invited to adopt the following draft conclusions: THE COUNCIL (a) noted document C(2005)90; (b) adopted the changes to the provisions of the Model Tax Convention and the commentaries thereon as set out in the Annex to C(2005)90.”
In this respect, a misunderstanding must be preempted. Although the OECD Council consists of Ministers or Permanent Representatives, a Recommendation does not become binding on a State because its Minister or Permanent Representative agrees. The Council’s output is, according to the OECD Convention, by definition a non-binding Recommendation. Although a Member country as a State contributes to the consensus reached in the Council, the result is an instrument that does not legally bind tax administrations nor the State as a whole. Engelen’s good faith position that voting in favour of a non-binding Recommendation prevents the Member countries from deviating from its contents, therefore, goes directly against the explicit agreement of those countries that Recommendations are not binding.

3. Language
The Commentary is not binding with regard to its language. Its text defines itself as non-binding and merely of “great assistance” and “great weight”, i.e.:

Although the Commentaries are not designed to be annexed in any manner to the conventions signed by the Member countries, which unlike the Model are legally binding international instruments, they can nevertheless be of great assistance in the application and interpretation of the conventions and, in particular, in the settlement of any disputes. (Emphasis added)

and

The tax administrations of Member countries routinely consult the Commentaries in their interpretation of bilateral tax treaties. The Commentaries are useful both in deciding day-to-day questions of detail and in resolving larger issues involving the policies and purposes behind various provisions. Tax officials give great weight to the guidance contained in the Commentaries. (Emphasis added)

Based on this, it must be concluded that the Member countries want the Commentary to be non-binding. At the most, the Commentary is important as an authoritative document that should be consulted by tax administrations.

4. Unilateral declarations and observations
A State’s unilateral international declarations can bind a State. Unilateral action regarding the Commentary does not, however, exist. Although it could be expected that a State would instruct its officials if it wanted the Commentary to be followed, in the case of the Netherlands, the instructions are, however, missing. The Netherlands State Secretary for Finance has only made a general and vague statement in the parliament, i.e. “To the extent that the Netherlands uses the provisions of the

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1. Art. 7 OECD Convention.
2. Art. 6(1) OECD Convention.
5. Commentary, Para. 29.1, Introduction.
6. For example, the French unilateral declarations that France would put an end to its nuclear tests in the Mururoa atoll in the Pacific, International Court of Justice, 20 December 1974, Nuclear Tests Case (New Zealand v. France) and the similar case of the same date between Australia and France. The International Court of Justice took a similar attitude in its judgment of 22 December 1986, Frontier Dispute (Burkina Faso v. Republic of Mali) and in its judgment of 26 November 1984, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).
7. O. Schachter, “The twilight existence of non-binding international agreements”, American Journal of International Law (1977), Vol. 71:2, p. 303, states that “Two aspects may be noted. One is internal in the sense that the commitment of a State is ‘internalized’ as an instruction to its officials to act accordingly. The political commitment implies, and should give rise to, an internal legislative or administrative response.” 21. V-N 1998/22.3.
OECD Model Convention, the Commentary thereto is guidance for the interpretation of those provisions” (author’s unofficial translation). Apart from the undetermined character of guidance, this statement cannot give rise to an effect on the international plane, as it does not meet the requirement that the State that made the declaration had the intention of being legally bound.

Observations on the Commentary and Reservations to the articles have the function of providing information on the domestic positions of Member countries. In the context of the explicitly agreed non-binding nature, any other function is inconceivable. A State making observations because of possible deviating judicial decisions implicitly confirms the non-binding nature of the Commentary on the State. This has occurred in a number of cases. For example, Italy recently observed that

*Italy* wishes to clarify that, with respect to paragraphs 33, 41, 41.1 and 42, its jurisprudence is not to be ignored in the interpretation of cases falling in the above paragraphs.¹

The Netherlands has observed that

The *Netherlands* will adhere to the conclusions on the application of the Convention to partnerships incorporated in the Commentary on Article 1 and in the Commentaries on the other relevant provisions of the Convention only, and to the extent to which, it is explicitly so confirmed in a specific tax treaty, as a result of mutual agreement between competent authorities as meant in Article 25 of the Convention or as unilateral policy.²

The implicit judgment became explicit when this observation was explained in the Netherlands parliament, i.e.:

For completeness’ sake, I note that the Observation the Netherlands made to the mentioned OECD Report did not relate to the conclusions therein. The backdrop of the Netherlands Observation is the jurisprudence of the Supreme Court, which does not accept that (important) changes in the Commentary after the conclusion of a bilateral tax treaty automatically have a bearing on the application of such an (existing) treaty.³ (Author’s unofficial translation)

5. State practice and the judiciary

International law is an output-oriented branch of law, which is not concerned with how a State complies as long as it complies. Output is delivered by the executive. Output is also delivered by the legislature, which in drafting laws takes treaty obligations into account. In addition, the judiciary delivers output. Empirical data on the executive’s use of the Commentary are missing, as the executive’s interpretational processes are hidden. A number of reasons may exist for the difficulty in measuring compliance, as Haas maintains,⁴ but in taxation matters it is mainly the secrecy provision that prevents the monitoring of the relevant data. It is, therefore, uncertain to what extent the Commentary is observed in a tax administration’s practice. In this problematic context, only judicial decisions are visible. For this reason, these play an important role in the evaluation of a State’s behaviour. They are even more important because the judiciary supervises the executive. Accordingly, international law attaches great importance to domestic judicial decisions in gauging

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¹ Para. 45.10 of the Commentary to Art. 5 of the OECD Model.
² Para. 27.1 of the Commentary to Art. 1 of the OECD Model. Similar remarks were made in Para. 80 of the Commentary to Art. 23A/B of the OECD Model.
State practice. This follows, for example, from the *Lotus* case. For this reason, the judiciary's attitude to the Commentary could establish its legitimacy and could move it to a more definite international order. Insufficient evidence of judicial decisions, however, exists to the effect that the Commentary is legally binding.

Based on these elements, the Commentary cannot be regarded as binding in any way. No further State behaviour exists on which the preclusion of the Member countries in claiming not to be bound can be concluded.

### III. SOFT LAW: WHAT IS IN A NAME?

#### 1. Soft law and non-binding Recommendations

No State would invoke State responsibility when it, i.e. in the form of a tax official or a judge, deviates from the Commentary, which can be regarded an additional element of the topics discussed in 2. The Commentary is not an international commitment in terms of the Articles on the responsibility of States, as it is not a hard, binding international rule.

It does not make much sense to use terms such as “soft law” in classifying the Commentary, as the adjective “soft” does not make the Commentary’s legal effect any clearer. Law is binding or non-binding, but not half-binding. The qualification “soft law” does not, therefore, result in a useful distinction. As Klabbers puts it:

> Our binary law is well capable of handling all kind of subtleties and sensitivities; within the binary mode, law can be more or less specific, more or less exact, more or less determinate, more or less serious, more or less farreaching; the only thing it cannot be is more or less binding.

Courts have not used the concept of “soft” instruments in their reasoning, but have always recast the use of these instruments in terms of more familiar sources of law, such as treaty or customary law. The question of whether or not the Commentary is soft law does not make much sense from this perspective. The only sensible question is: why have the Member countries chosen the form of a non-binding Recommendation?

The reasons for selecting the non-binding Recommendation are the simplicity by which new provisions can be inserted and old ones amended and eliminated, UN registration and domestic procedures can be avoided, and quick political success can be achieved. Another reason is the impossibility of setting out complex technical details in a treaty and the rapidity by which changes can be made, as opposed to the time-consuming treaty amendment process. A quick practical nonbinding working agreement between tax officials is better than nothing. The Commentary has the important role of developing a consensus in a diversified world and is an impressive attempt to bring fiscal cultures together. More than this cannot, however, be ascribed to the Commentary.

The vague and diplomatic language of the Commentary reflects this. To bring Member countries together and to avoid a fiscal diaspora, unambiguous explanations are impossible and deliberately

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1. Permanent Court of International Justice, *S.S. Lotus* (France v. Turkey), 7 September 1927, in which it was stated that “Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in the point of fact the circumstances alleged ... it would ... show that States had often, in practice, abstained from instituting criminal proceedings ...”


eschewed. Although binding rules in general may also contain open norms, the openness of the Commentary is of a different character and demonstrates the struggle to (ever) arrive at a common policy. Phrases such as “should not result in” (Para. 5.3), “may lack” (Para. 5.4) and “there may be cases” (Para. 6.2) could not be terms used in a tax treaty. ¹ In this respect, it is generally recognized that the concreteness of the language is a criterion for distinguishing between binding and nonbinding law. ²

2. The OECD constitutional background
All this fits in with the OECD’s constitutional background. In the promotion of the highest sustainable economic growth and employment³ and the obligation of the Member countries to pursue their efforts to reduce or abolish obstacles to the exchange of goods and services and current payments and maintain and extend the liberalisation of capital movements,⁴ any possible means should be explored. By using the non-binding Recommendation, a first step towards coherence is made and an atmosphere in which subsequent steps may be taken is created.

The Commentary has a focussing role and is a futureorientated concept. In Chinkin’s words:

The programmatic use of soft law allows open-ended measures to be concluded, while affording time for their further elaboration within the agreed framework and timetable. This can be especially significant where some states are resisting international legal regulation but there is political awareness, perhaps engendered by civil society that “something must be done”. In this sense soft law can be presented “as the only alternative to anarchy”.⁵

IV. THE FUTURE OF THE COMMENTARY AND STATE PRACTICE

1. Introductory remarks
If the Commentary is non-binding because of the arguments expounded in 2. and 3., this is not to say that the Commentary or some of its elements could not be a contextual source of interpretation. Certain statements may be the reflection of State practice. These derive their status from this origin rather than from their place in the Commentary, which is only a “box” containing some binding statements. The Commentary is not one big bloc in which every assertion has the same cogency. There are certainly assertions lacking cogency. The Commentary’s ideal future would be that the statements that do not reflect State practice would benefit from what other more forceful statements achieve. This multiplier effect can only be achieved when the Commentary is judged to be so undisputed in its statements that it may be considered to reflect State practice as a whole. If this is ever to be achieved lies in the hands of the judiciary and ultimately in the Commentary’s aloofness, as is argued here.

¹ All are from the Commentary to Art. 5 of the OECD Model.
³ Art. 1 OECD Convention.
⁴ Art. 2 OECD Convention.
2. State practice?

The interpretational use of the Commentary as a whole cannot be considered to be State practice. Some of its statements may have attained this level of authority but most have not. This is not to say that these statements could not develop into something more and fall into Chinkin’s category of emergent hard law, i.e.:

principles that are first formulated in non-binding form with the possibility, or even aspiration, of negotiating a subsequent treaty, or harden into binding custom through the development of State practice and opinio juris. This process can be part of a deliberate strategy. The programmatic, educative, and evolutionary functions are widely accepted as one among the benefits of the soft form of reaching consensus.  

The Commentary (or its statements) could well be the pre-stage of hard law and could, as “subsequent practice”, become a contextual element of Art. 31 of the Vienna Convention. Whether the Commentary or its separate statements will attain this status depends on the behaviour of the States and mainly that of the judiciary (see 2.5.). A judicial practice that contravenes the Commentary would, however, conflict with the development of subsequent practice.

The author has, in an article published in 1997, submitted that State practice could bring the Commentary within the category of the contextual elements of Art. 31 of the Vienna Convention, i.e.:

In our opinion Article 31, paragraph 3(b) Vienna Convention offers more possibilities to justify the use of the Commentary. In connection with the content, “any subsequent practice in the application of the treaty which establishes the agreement of the Parties regarding its interpretation” is to be taken into consideration as well. In our opinion, this text can be broadly interpreted as comprising the interpretational activity itself, such as the use of the Commentary. It is not required that agreement is realised by common practice: we believe it is satisfactory if one of the parties practices and the other party does not object. This may also become clear from the Commentary to the Final Draft of the articles of interpretation of the International Law Commission: “The text provisionally adopted in 1964 spoke of a practice which ‘establishes the understanding of all the parties’. By omitting the word ‘all’, the Commission did not intend to change the rule. It considered that the phrase ‘the understanding of the parties’ necessarily means ‘the parties as a whole’. It omitted the word ‘all’ merely to avoid any possible misconception that every party must have individually engaged in the practice where it suffices that it should have accepted the practice”.

Later literature supports this.

3. 4.3. An example: the meaning of the term “permanence”

The 2003 Commentary has an open attitude as to the role the Commentary could play in the development of the law in the problematic issue of the meaning of the term “permanence”.  

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1 Id., p. 30 et seq.
2 Art. 31(3), umbrella and subpara. b of the Vienna Convention reads: “There shall be taken into account, together with the context ... b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”
5 Para. 6 of the Commentary to Art. 5. The required length of permanence is, in the context of the dominance of local content, left to domestic courts to decide. Quite unsurprisingly, the interpretation of the treaty term “permanent” and its
Commentary implicitly admits the lack of international consistency and diplomatically suggests a policy suitable to arrive at a common approach on the long term, i.e.:

Whilst the practices followed by Member countries have not been consistent in so far as time requirements are concerned, experience has shown that permanent establishments normally have not been considered to exist in situations where a business had been carried on in a country through a place of business that was maintained for less than six months (conversely, practice shows that there were many cases where a permanent establishment has been considered to exist where the place of business was maintained for a period longer than six months). One exception has been where the activities were of a recurrent nature; in such cases, each period of time during which the place is used needs to be considered in combination with the number of times during which that place is used (which may extend over a number of years). Another exception has been made where activities constituted a business that was carried on exclusively in that country; in this situation, the business may have short duration because of its nature but since it is wholly carried on in that country, its connection with that country is stronger. For ease of administration, countries may want to consider these practices when they address disagreements as to whether a particular place of business that exists only for a short period of time constitutes a permanent establishment.¹

The OECD, in admitting that a uniform practice must develop, has invited the Member countries to start doing so and has moved precisely within the confines of Chinkin’s only alternative to anarchy.² In the light of the circumstance that the Member countries cannot reach a more concrete joint position, there is wisdom in the approach of suggesting a six-month term. The OECD has, however, also taken a position with its controversial recurrence and nature of the business suggestions.

The effects of these suggestions are counterproductive if it is accepted that the Commentary is intended by its authors to reflect something more than policy suggestions or alternative approaches. The Norwegian Supreme Court recently rejected the nature of the business in the PGS³ case. In this case, the Norwegian corporation, PGS Geophysical AS, performed seismic activities offshore on the continental shelf of the Ivory Coast for 25 days and 41 days, respectively. As far as relevant in this context, the Norwegian Supreme Court found that the treaty term “permanent” according to its natural meaning could only refer to lasting activities. Taking the State practice into account, which requires special treaty provisions to bring very short activities within the scope of a permanent establishment (PE), i.e. the treaty offshore provisions, other activities of short duration fall outside the range of the term “permanence”. The Norwegian Supreme Court and Lower Court considered this part of the Commentary to be inapplicable.⁴

The Norwegian Court of Appeal reasoned as follows:

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¹ Para. 6 of the Commentary to Art. 5 of the OECD Model.
³ Norwegian Supreme Court, 8 June 2004.
The requirement as to the duration of the business must therefore be applied in accordance with what is customary in international law, and the Appeals Court refer[s] to the elucidation of this given by the District Court. It may vary from case-to-case how long the period of business must be before it constitutes a permanent establishment, but the Appeals Court cannot find that periods of less than six months have been sufficient in any practice. Even where the “nature of the business” is of shorter duration, a duration of less than six months has not been accepted — except in the particular provisions for offshore activities taking place in Norway. Such special provisions have no relevance for the interpretation in the present case. Even if the activities of both the vessels are seen together, the duration of the activities is no more than 66 days, which is approximately one-third of the duration generally accepted as a minimum.¹

Customary international practice was a core issue in the opinion of the Norwegian Court of Appeal. As judicial decisions are a reflection of the behaviour of the State and as international cases are relatively rare, a couple of these could be sufficient to consider State practice present. Cases such as PGS are not advantageous to this development. Far-reaching statements by the Commentary do not contribute to its status. If it were intended that the Commentary should become a contextual source of interpretation, the Commentary would have to take a more reserved position in driving international tax law forward.

Apart from a number of Commentary assertions reflecting State practice, the Commentary is, at this stage, a collection of the views of respected government experts, i.e. on the same level as the views of scholars and academics. Until the time when the entire Commentary is accepted as interpretational context, it remains, to paraphrase Shaw,² a practical recourse for common reference to a mutually understandable vocabulary book, which suggests possible solutions. Asking more from the Commentary than this would be exaggerating the expectations of what the Commentary can currently achieve.

V. GOOD FAITH AND THE NON-BINDING NATURE OF THE COMMENTARY

1. In general

The Commentary is not binding under the traditional sources of international law, i.e. it is not a treaty or customary law. The general principles of law could, however, result in it being binding. Apart from the role that these principles can fulfil as independent sources of law, they can “fill gaps or weaknesses in the law which might otherwise be left by the operation of customs and treaty”³ and could bring about what the traditional means of a binding nature do not. The principle of good faith has an overarching position in the collection of general principles,⁴ as States must behave with fairness and honesty.⁵

It is undisputed that, under the principle of good faith, a State is not allowed to act as if the non-binding Commentary did not exist at all. There is a moral obligation to take its contents into account.

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¹ Bogarting Court of Appeal, 13 August 2003, No. 02-02662 A/03, International Law Reports, 6 ITLR, pp. 212-232.
⁴ Id., p. 38.
in some way. This obligation is limited by the nature of the Recommendation and in what the Commentary says, i.e. it is not binding but should be routinely consulted. Member countries do exactly this and there is no evidence that they want to do more. As the attitude of the Member countries to the Commentary is a shared one, no injury is done and no case of estoppel or acquiescence arises. It is also a generally accepted principle that, under international law, conclusions as to the binding nature of acts are to be taken with the utmost care, i.e. “When States making statements by which their freedom of action is to be limited, a restrictive interpretation is called for”.²

In the author’s opinion, Engelen arrives at his conclusion that good faith is binding without taking a necessarily distant, restrictive and reserved position. In his evaluation as to whether or not good faith is binding in nature, Engelen dangerously bases his argument on the following two assumptions, i.e. that: (1) the Commentary is part of the negotiation; and (2) despite the clearly expressed non-binding character of the Commentary, treaty-concluding States would be under the additional obligation to make interpretational observations or interpretational declarations, which they do not comply with.³

As a State does not make Reservations during the negotiation of the actual treaty, Engelen continues that a State would be bound to the Commentary, i.e.

In circumstances such as those described above, a “need to speak or act” is clearly present if one of the parties, or both, consider that the provisions of the treaty that are identical to those of the OECD Model Tax Convention must be understood differently than as set out in the Commentaries thereon.⁴

The better view is, however, not to assume obligations and to rely on the basic instruments of the OECD Convention, the Recommendation and the Commentary.

Engelen goes a step further and contends that the foregoing even amounts to a real agreement:

... the parties must be considered to have acquiesced in the interpretation set out in the latest version of the Commentaries, which amounts to a tacit agreement regarding the interpretation of the treaty .... ⁵

A better interpretation is, however, to adhere to the sovereign will of the Parties and not to use the interpretational instrument of acquiescence in circumstances in which it should not be used (see 5.2.).

It is a matter of the evaluation of the terms of the instrument(s) and the circumstances of the case as to whether or not an instrument is binding. With regard to this, Engelen’s two assumptions must be weighed against the other elements, i.e. the facts of the case.

These other elements were dealt with in 2. They include the explicitly expressed non-binding character of the Recommendation, the explicitly expressed nonbinding nature of the Commentary

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² International Court of Justice, Nuclear Tests Case (New Zealand v. France), 20 December 1974, , Para. 47. The same in Nuclear Tests Case (Australia v. France), 20 December 1974, Para. 44.
⁴ Id., p. 466.
⁵ Id., p. 468.
itself, the observations in the Commentary reflecting the awareness of the Member countries that the Commentary cannot be considered to be binding, the practice of the domestic courts in considering the Commentary to be non-binding and the lack of any case in which a Member country has evoked State responsibility because of a breach of the Commentary.

As these elements reflect the intention of the States and express their sovereign wills, the author believes that caution is required in accepting Engelen’s assertions. In addition, good faith, which Engelen uses as a shield for the Commentary, becomes a spear against his arguments when it is considered that good faith forces the Member countries to take the position of the OECD Convention as a Recommendation and the other elements seriously.

These real elements are convincing, weighed against the assumptions that Engelen requires for his theory of the alleged binding nature of the Commentary. In weighing the arguments, the author, therefore, concludes that the principle of good faith does not make the Commentary binding. In contrast, good faith confirms what the Member countries have expressly agreed.

2. Insufficient support from the Temple case
Engelen relies on the International Court of Justice’s decision in the Temple case for his position that a non-binding document (the non-binding map indicating the Temple on Cambodia’s territory) is binding because of the principle of good faith. In this case, Thailand by not protesting (i.e. in acquiescing) accepted the definition of its border with Cambodia, although that border was different from what had originally been agreed. Engelen projects this onto the Commentary and maintains that a Member country is bound to the Commentary if it has not made observations or has given another reaction. In the author’s opinion, this reasoning does not hold.

a. Boundary regimes in international law
Engelen disregards the fact that the Temple case is a boundary case. The International Court of Justice confirmed in the Temple case that one of the primary objects of a boundary settlement is to achieve stability and finality. In other words, the Temple case boundary decision is one of war and peace. Accordingly, the Temple case and the case of the Commentary are completely different with regard to their subject. Boundaries have, indeed, a special position in international law, as their continued acceptance is a matter of world stability. The importance of this issue forces the International Court of Justice to adopt a special treatment in boundary cases. Consequently, whereas the normal expiry of a treaty would end the substantial agreement, when a boundary treaty expires the boundary regime remains in existence.

Apart from the Temple case, boundary issues have been brought before the International Court of Justice many times. Every time the International Court of Justice has taken the approach that boundary issues are subject to a special regime, i.e.:  

These provisions notwithstanding, the Treaty must ... be taken to have determined a permanent frontier. There is nothing in the 1955 Treaty to indicate that the boundary agreed was to be provisional or temporary; on the contrary it bears all the hallmarks of finality. The establishment of this boundary is a fact which, from the outset, has a legal life of its own, independently of the fate of the 1955 Treaty. Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability

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1 International Court of Justice, Temple of Preah Vihear (Cambodia v. Thailand), (Preliminary Objections), Judgment of 26 May 1961, ICJ Reports 1961, p. 17; (Merits), judgment of 15 June 1962, ICJ Reports 1962, p. 34.
of boundaries, the importance of which has been repeatedly emphasized by the Court (Temple of Preah Vihear ...; Aegean Sea Continental Shelf).\(^1\) (Emphasis added)

In other words, in boundary cases, world peace requires a more lenient approach with regard to “bindingness”. In tax cases, this requirement is not present.

**b. The missing analogy between the Temple case and the Commentary**

The circumstances of the Temple case are fundamentally different from those of the case of the Commentary, in particular because of the long period of time involved. In the Temple case, the boundary treaty was concluded in 1904, according to which the Temple of Preah Vihear would be in Thai territory. In 1907, the map was completed which, by mistake, showed the temple in Cambodian territory. In 1908, the map was published. More than a quarter of a century later (sic!), the Thai government discovered the mistake, but did not make any representation. It did not make any representation during the negotiation of the following 1937 treaty, in which the existing borders were expressly confirmed, nor on the occasion of the treaty of 1946. Thailand even presented maps showing the Temple on the Cambodian side of the border to international Commissions.

More than 40 years (!) after the 1904 treaty, Thailand stationed four keepers at the temple and almost half a century later, in 1954, Thailand considered itself entitled to station military troops in the temple. On this, in 1959, Cambodia appealed to the International Court of Justice. Not surprisingly, the International Court of Justice took the position that Thailand had precluded itself from claiming that the map was incorrect, which had been drawn up at Thailand’s request and in respect of which it had never claimed exceptions, not even following the discovery of the mistake in 1934.

The ultimate conclusion of the Court reveals the basic differences between the Temple case and the case of the Commentary in a nutshell, i.e. the boundary stability issue, the benefits Thailand had received under the regime, Thailand’s 50 years of silence and the fact that other States had relied on Thailand’s acceptance, i.e.

Even if there were any doubts as to Siam’s acceptance of the map in 1908 ... in the light of the subsequent course of events ... Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on France’s acceptance of the map. ... It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was never a consenting part to it. ... Both Parties, by their conduct, recognized the line and thereby in effect agreed to regard it as being the frontier line”\(^2\).

The Commentary is not about boundaries and is not an issue regarding which the parties were silent for half a century. In contrast, all the instruments in the case of the Commentary express the non-binding nature of the Commentary, i.e. the OECD Convention, the Recommendation and the Commentary itself. The later behaviour of the States confirms this non-binding nature, so that estoppel cannot be used against the States such that their behaviour went against their will as expressed in the three instruments. There is nothing equivocal in the case of the Commentary, and

\(^1\) International Court of Justice, *Territorial Dispute* (Libyan Arab Jamahiriya v. Chad), Judgment, ICJ, 3 February 1994, Para. 72.

\(^2\) International Court of Justice, *Temple of Preah Vihear* (Cambodia v. Thailand), (Merits), Judgment of 15 June 1962, ICJ Reports 1962, p. 34.
estoppel and acquiescence are, therefore, unable to help the interpreter here. In contrast, estoppel and acquiescence, must be used with caution.¹

It is exactly in its equivocal nature that the Temple case deviates from the case of the Commentary, i.e.:

... in instances like the Temple case, where much of [the] evidence is equivocal, acquiescence over a long period may be treated as decisive; here it is an aid in the interpretation of the facts and legal instruments. Acquiescence of the kind which closes the principal issue ... must rest on a very cogent evidence.²

In the unequivocal case of the Commentary, interpreting the instruments can better be undertaken without this juridical technique.

VI. CONCLUSIONS

The Commentary cannot be considered to be a binding source of international law. It is a legally non-binding document, which has no bearing on the State as a whole, and only creates a moral obligation for the executive. The legally non-binding Recommendation, to which the Commentary is an Annex, is quite clear on this. It recommends that tax administrations follow the Commentary, nothing more. The Commentary itself also denies its possible status as binding document. Tax administrations are merely required to consult it routinely. In addition, it is, from the perspective of the behaviour of the Member countries, impossible to conclude that it has a binding nature.

In his 1997 article,³ the author submitted that the Commentary could, perhaps, develop into State practice, i.e. a contextual element of Art. 31 of the Vienna Convention. The author still believes that this is the only way to attach a greater meaning to the Commentary other than the mere auxiliary role it could play under Art. 32 of the Vienna Convention. In terms of Chinkin,⁴ the Commentary could be regarded as emergent hard law. Whether the Commentary, or rather its constituent statements, could achieve the status of State practice, depends on the judiciary, which, as a result of the secrecy provisions in many tax systems, is the only observable source of an emergent practice. Interestingly, the Norwegian judges held in the PGS case that the statements in the Commentary went against State practice. The OECD should, therefore, take into account that far-reaching statements in the Commentary could harm the status of the Commentary as a whole.

Finally, the author does not believe that good faith as a general principle of law could result in a binding nature in an area of law, regarding which all the elements indicate that the Member countries do not want the Commentary to have this effect. Accordingly, State sovereignty and voluntarism require extreme caution in drawing more far-reaching conclusions.

² Id., p. 152.
I. Selected Bibliography (including Online Resources)

I. Historical Sources and Archives

1. 19th and early 20th century material
   joint venture of the Universities of Bonn, Heidelberg, Mainz and Zurich (in German)
   www.steuergeschichte.de (login: Guest, password: historyoftax)

2. History of Tax Treaties
   joint venture of WU Vienna, IBFD, Univ. Cattolica di Milano, Canadian IFA, and the CTF/ACEF),
   containing 747 documents 1954-1964 (in English and/or French)
   http://www.taxtreatieshistory.org/
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J. Slides

The following section of this reader reproduces the slides used in class. All comments are welcome. Please be aware of any last-minute changes which might not be contained in this pre-course version.