The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model

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PREFACE

The Canadian Branch of the International Fiscal Association is pleased to publish this treatise in collaboration with the International Bureau of Fiscal Documentation.

David A. Ward, who, with the assistance of the other members of a group of tax practitioners and academics which has become known as the International Tax Group, is the primary author of this treatise, is a past president of the Canadian Branch of the International Fiscal Association. Throughout his long and distinguished career as a Canadian tax practitioner, he has been a significant contributor to the field of international taxation concerning the interpretation and application of income tax treaties. With this treatise, David makes another outstanding contribution to this field.

As the number of tax treaties that rely on the OECD Model Tax Convention on Income and Capital grows and the OECD Model and its Commentaries continue to change at an ever increasing pace, the need for a comprehensive treatise on the principles applicable to the interpretation of tax treaties based on the OECD Model, including, in particular, the relevance and importance of the Commentaries thereon, has become critical. This treatise goes a long way in satisfying that need.

Sections 1 and 2 of the treatise began with a brief description of the origins of the OECD Model and its Commentaries. In Section 3 the application of Articles 31 and 32 of the Vienna Convention on the Law of Treaties to the Commentaries is analyzed. Section 4 examines the extent to which the Commentaries constitute binding rules of international law and Section 5 discusses the effect of observations entered by OECD member countries on the Commentaries. Section 6 discusses the effect on tax treaties of additions and changes to the Commentaries published after the time that such treaties have been concluded. Lastly, Section 7 summarizes the conclusions reached in the previous Sections.

The Canadian Branch of the International Fiscal Association hopes that this treatise together with its Appendices will be a valuable resource and will serve as a beacon in guiding practitioners, academics and judges to a thoughtful appreciation of the principles involved in interpreting income tax treaties for many years to come.

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The authors would like to express their thanks to Prof. Donald M. McRae for his comments and suggestions on an earlier draft of this work, particularly the parts of it dealing with international law. We also acknowledge the contribution of Richard J. Venn (Australia) to Section 2. The OECD and the Work of the Committee on Fiscal Affairs and in providing some of the Australian material. Juergen Killius, a long-time member of our “International Tax Group”, unfortunately passed away before this work was published.
1. Introduction

One of the features that has been consistent in the development of model income tax treaties, first by the League of Nations,1 followed by the Organization for European Economic Cooperation (OEEC),2 the Organization for Economic Cooperation and Development (OECD)3 and the United Nations4 is that each model has been accompanied by commentaries that explain and in some cases expand on the provisions included in the particular model. Model treaties are, of course, not treaties at all but the practice of providing commentaries undoubtedly was adopted from the common practice of drafters of multi-party treaties to provide commentaries or explanatory reports. The first drafters of model tax treaties adopted this useful practice which has continued to this day and has been followed each time a model income tax treaty has been prepared by the League of Nations, the OECD (the 1963 Draft Model, the 1977 Model and the looseleaf Model) and the United Nations Models (1980 and 2001).5 In many cases, where the wording of particular Articles in succeeding model treaties did not change, there were, however, changes to the accompanying commentaries.6

2. The model tax treaty work of the OEEC is also published in LHUSTC.
4. UN document ST/ESA/102 (for the 1980 treaty) and ST/ESA/PAD/SER.E.21 (for the 2001 treaty).
5. The earliest model was that developed for the League of Nations by the Committee of Technical Experts on Double Taxation and Tax Evasion and was published in their report of April 1927: LHUSTC at 4124 with commentary at 4126 et seq.
6. See, for example, the League of Nations commentary to Article 3 of the 1933 Draft Convention: LHUSTC at 4246, which draft was revised in 1935 (to which there was no commentary) and was incorporated into the Mexico and London Draft Models with joint commentary: LHUSTC at 4338. An earlier commentary on the Mexico Draft Model was not published in LHUSTC but was published by the League in Document C.2:M.2 1945 II.A. The practice of changing commentaries was not a very frequent practice by the Fiscal Committee of the League of Nations.
After 1992, with the introduction by the OECD of the current Model in looseleaf form, the practice developed of changing the commentaries continuously, often without any change to the relevant Article of the Model. Over the years, the commentaries have expanded, become more detailed and sometimes have departed in several places from what could fairly be said to be the literal or textual interpretation of the Model to a point where it is widely believed that the OECD Committee on Fiscal Affairs (herein “CFA”) is sometimes attempting to change the Model by changing its interpretation, and indirectly to change existing treaties derived from the Model, without the necessity of changing the wording of the Model or having states negotiate amendments or protocols to existing treaties. In fact, in expressing his personal views, this was stated to be the case by the then Chair of OECD Working Party No 1 on the Model Tax Convention.8

The question has often been raised: what is the proper role of the commentaries in the process of interpreting tax treaties?9 Although the subject has been well canvassed by various commentators, including some of the authors of this article, because there does not seem to be a consensus on the legal role that the commentaries can play in the interpretive process, it appeared appropriate to the authors to consider this important subject again. As is the case with the commentaries themselves, we have not arrived at unanimity in our views. What we express as our views in this article should be understood by the reader to be a wide, but not always full agreement of the authors.

In our consideration of this matter, we first summarize the work of the OECD Committee on Fiscal Affairs and its role in developing and amending the Model and the commentaries. We then review the question of how the commentaries should be applied in interpreting bi-lateral tax treaties in accordance with the interpretive rules of the Vienna Convention on the Law of Treaties and how the commentaries may be used to determine the intention of tax treaty negotiators in relation to the meaning of tax treaty provisions adopted by them from the Model. We then consider whether, in international law, the explanations of the meanings of various Articles of the Model as expressed by the commentaries become binding for interpretations on OECD member states in international law and municipal law. We then turn to a consideration of the proper effect in the interpretive process of the various observations on the commentaries entered by member states. Next we consider the proper role of commentaries published after a bi-lateral tax treaty has been negotiated and has entered into force. Finally we express and summarize our conclusions respecting the role of the commentaries in the interpretive process.


2. The OECD and the Work of the Committee on Fiscal Affairs

To frame the discussion, we first outline how the OECD and, in particular, how the CFA works, and how the commentaries are prepared in the context of the legal foundation of the OECD and its relationship with its member countries.

The Convention on the Organization for Economic Cooperation and Development of December 14, 1960 (herein “OECD Convention”) created the OECD.\(^{10}\) It is based in Paris and is a successor to the OEEC\(^{11}\) which in turn grew out of the US Marshall Plan for the reconstruction of Europe after World War II.\(^{12}\) The original members of the OECD were the 18 members of the OEEC, joined by the USA and Canada who had been associate members of the OEEC. It currently has 30 members.

The OECD is run by the Council which is composed of the 30 member countries and the European Commission and meets in sessions of Ministers or of permanent representatives.\(^{13}\) The Council appoints the Secretary General who chairs the regular meetings of the Council and appoints and controls the secretariat. The technical work of the OECD is primarily carried out by committees in the many areas of its operation which are supported by the secretariat of some 2,000 staff, all of whom must be citizens of the member countries. The annual budget is €300,000,000. The committees and their many subgroup sessions generally meet a few times each year and consist of representatives of member countries and others by agreement with the OECD (for example, the International Monetary Fund and the Russian Federation may send representatives to committee meetings). The OECD is financed by contributions from members based on the size of their economies.\(^{14}\)

Pursuant to Article 5 of the OECD Convention, to achieve the aims of the OECD it may take decisions which, except as otherwise provided, are binding on all members when they have complied with their respective constitutional procedures, and may make recommendations to members which are not binding but have “moral force.”\(^{15}\) Pursuant to Article 6, decisions are taken and recommendations are made, unless the Organization otherwise agrees, by “mutual agreement” with members each having one vote. Effectively any member can veto a decision or recommendation but often will abstain and retain its freedom of action rather than preventing other members from proceeding as they desire.\(^{16}\) Decisions and recommendations are taken or made, as the case may be, by the Council. In practice, very few decisions are taken as, generally, the Council acts by making recommendations. The OECD is essentially a consensus organization which works by peer review and peer pressure rather than coercively.\(^{17}\) Policy cooperation occurs in many areas and many domestic policies implemented in member countries emanate from OECD work although this may not always be obvious in domestic affairs.

The OECD essentially runs by meetings of government officials but it always has consultative mechanisms to obtain non-government input into its work. This, in the past, was mainly formalized through the Business and Industry Advisory Committee to the OECD (herein “BIAC”) and the Trade Union Advisory Committee to the OECD (herein “TUAC”).\(^{18}\) In the last decade the OECD has become a much more open organization. It now regularly involves non-member countries and private sector representatives in its work.

Various draft model tax conventions and model tax conventions have been published by the OECD starting with the Draft Double Taxation Convention on Income and Capital (1963) followed by the Draft Double Taxation Convention on Estates and Inheritances (1966), the Model Double Taxation Convention on Income and Capital (1977), the Model Convention for Mutual Administrative Assistance in the Recovery of Tax Claims (1981), the Model Double Taxation Convention on Estates and Inheritances and on

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10. The OECD Convention is found on the OECD website. http://www.oecd.org/document/7/0,2340,en_26991915847_1_1_1,00.html. See also Appendix I.
11. The OEEC came into being on April 16, 1948 on the signing of the Convention for European Economic Co-operation.
12. The history is recounted on the OECD website at http://www.oecd.org/document/63/0,2340,en_26991915847_1_1_1,00.html.
13. The permanent representatives of the members meet regularly at OECD headquarters in Paris. Generally there is an annual Ministerial meeting of the Council attended by ministers from member countries responsible for economic affairs which sets the overall high level agenda.
15. http://www.oecd.org/document/46/0,2340,en_269933483_1925230_1_1_1,00.html.
16. Article 6 of the OECD Convention.
18. See www.biacc.org and www.tuac.org. The OECD also has associated with it several semi-autonomous organizations such as the Nuclear Energy Agency and the International Energy Agency.
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Gifts (1983) and the looseleaf Model Tax Convention on Income and on Capital first published in 1992 and updated regularly at intervals of approximately two or three years. In addition, the OECD was the joint sponsor with the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters which was opened for signature in 1988 and came into force on 1 April 1995.

The 1963 Draft, the 1977 Model, the looseleaf Model and their respective commentaries are all the subject of recommendations of the Council. Such recommendations, as provided in Article 5(b) of the OECD Convention, are not legally binding. Rule 18(b) of the Rules of Procedure of the OECD provides that OECD members may, if they consider it to be opportune, provide for the implementation of recommendations. The latest version of the recommendation in respect of the Model dates from October 23, 1997 and provides in part as follows:

"The Council ... Taking note of the Model Tax Convention and the commentaries thereon (as last modified by the 1997 Report), which may be amended from time to time hereafter;

I. RECOMMENDS the Governments of Member countries

1. to pursue their efforts to conclude bilateral tax conventions on income and on capital with those Member countries, and where appropriate with non-Member countries, with which they have not yet entered into such conventions, and to revise those of the existing conventions that may no longer reflect present-day needs;

2. when concluding new bilateral conventions or revising existing bilateral conventions, to conform to the Model Tax Convention, as interpreted by the Commentaries thereon;

3. that their tax administrations follow the Commentaries on the Articles of the Model Tax Convention, as modified from time to time, when applying and interpreting the provisions of their bilateral tax conventions that are based on these Articles.


20. The words "as modified from time to time" appeared for the first time in the 1997 recommendation. The effect is to allow the CFA to change the commentaries and publish them without any concurrent recommendation of the Council, which is what has occurred since

2. The OECD and the Work of the Committee of Fiscal Affairs

II. INVITES the Governments of Member countries to continue to notify the Committee on Fiscal Affairs of their reservations on the Articles and observations on the Commentaries.

III. 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 light of experience gained by Member countries, and to make appropriate proposals for periodic updates ..."

This and the previous recommendations are the conclusion of a process that began in the work of various committees. During 1961-1971, the OECD work on taxation was almost exclusively concerned with the development of model treaties and the commentaries through the Fiscal Committee. In 1971, this committee was reconstituted as the CFA which was given a broader mandate as follows:

"The Committee on Fiscal Affairs shall be responsible for investigating the methods by which taxation can be used to promote improved allocations and use of economic resources, both domestically and internationally, and for proposing ways of increasing the effectiveness of taxation as a policy instrument for achieving governmental objectives, but excluding work on the use of fiscal policy for demand management purposes."

Despite the emphasis on tax policy and the passing reference to international issues, the work of the CFA has remained focused on international taxation.

Until 1971, the membership on the Fiscal Committee was restricted essentially to the tax treaty negotiators of each country. Although the pre-1971 committee became only one of the working parties of the CFA, Working Party No 1 on Tax Conventions and Related Questions (hence: "WP 1"), the tax treaty negotiations have continued for a number of years to dominate the work of the CFA. The other working parties are the tax policy experts in Working Party No 2 on Tax Analysis and Tax Statistics (hence: "WP 2") and the specialists in Working Party No 6 on Taxation and Multinational Enterprises (hence: "WP 6") and Working Party No 8 on Tax Avoidance and Evasion (hence: "WP 8"). The primary work of WP 6 and WP 8 in the past

1997. The History Notes included in the looseleaf Model indicate that the 2000 update to the Model was "adopted" only by the CFA, whereas the 2003 and 2005 updates were also "adopted" by the Council, presumably without a formal resolution and recommendation similar to that of 1997, as at the date of writing (September, 2005), none has been published in the condensed or looseleaf Model and none has been published on the OECD website.
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has been transfer pricing and exchange of information, respectively, both of which are intimately connected to the OECD Model. In addition, the working parties themselves have a number of subgroups focused on particular issues, of which there are several in the case of WP 1. The CFA also has a number of other groups currently in operation dealing with matters such as innovative financial transactions, financial market liberalization, taxation and the environment, consumption taxes and harmful tax practices.

In a bureaucratic sense, the tax part of the OECD secretariat has also evolved, particularly in recent years. Until recently, the Fiscal Affairs Division was part of the Directorate of Financial, Fiscal and Enterprise Affairs. The Fiscal Affairs Division grew rapidly in the 1990s under Jeffrey Owens and evolved first into a semi-autonomous centre within the Directorate and then into a separate Directorate, with the title of Centre for Tax Policy and Administration, a slightly misleading name given the continuing focus of its work on international tax rules and norms.

The CFA and WP 1 each meet twice each year in Paris for a period of two or three days (CFA in January and June, WP 1 in February and September). WP 1 has a steering group and operates by identifying and then working on various issues. These are identified mainly by the delegates themselves but also, to some degree, by the private sector, informally and through the formal OECD consultation framework with BIAC. For the first time in 1992, paragraph 10 of the Introduction to the Model explicitly requested suggestions from outside parties.

All identified issues are compiled by the secretariat into a catalogue which is then prioritized by WP 1 (or by its steering group which is a smaller group that meets beforehand and makes recommendations to WP 1). If the issue is a major one, a working subgroup may be set up as was the case for partnerships, permanent establishments and pensions in recent years. Position papers are prepared mainly by the secretariat but also in some cases by delegates. These are debated and usually a change, often minor, will be made to the Model or the commentaries. The usual incremental nature of the changes often disguises the fact that considerable debate usually goes into each of them. The understanding and collective experience of the delegates on the interpretation and application of the Model is considerably augmented by the debates even in cases where no change is in fact made. For over a decade the main figure in the secretariat has been Jacques Sasseville, formerly a treaty negotiator for Canada.

The process is fairly slow so it may take substantial discussion, and sometimes some pressure before all or almost all of the delegates will agree to a change. With so many tax treaties already in existence using OECD Model wording, the CFA and WP 1 recognize the ongoing dilemma of finding a way to make significant commentary changes which will have the intended effect on existing treaties.

WP 1 operates essentially by substantial consensus (like the rest of the OECD) which means, in practice, that unanimous agreement, or at least widely-based agreement, is needed amongst the representatives of the major OECD states before a change will be made. The ability of states to enter reservations on the text of the Model or observations on the commentaries means that unanimity does not apply in practice, but it is recognized that there is little point in making changes if they do not have the support of the major countries. Once approved by WP 1, the changes go to the CFA where they are usually approved and thence to the Council where the changes were approved by a resolution and recommendation until 1997, and by being “adopted” thereafter (except for the 2000 changes), where adoption is usually a matter of course.

In recent years the taxation area has been one of the leaders in opening up the OECD to external influences. The process started with the movement by the OECD to a looseleaf ongoing revision process for the Model in 1992 which has resulted in frequent and numerous changes to the commentaries and frequent but less numerous changes to the Model (1992, 1994, 1995, 1997, 2000, 2003 and 2005) compared to the previous gaps of about 15 years.

The OECD now publishes draft or proposed changes to the Model and commentaries for public consideration which changes may not take effect for some years. It also participates in a regular seminar at the annual congress of the International Fiscal Association (herein “IFA”) where its current work is discussed.

Examples of the current process were seen when changes to the commentary on royalties made in 2000 were first circulated in draft form in 1998.21 In 1998, the OECD e-commerce project commenced under which various Technical Advisory Groups were established consisting of government and private sector representatives. The reports on taxation of e-commerce were first released electronically as drafts before becoming final,22 which led to

changes in the commentaries. This process is still continuing, although the e-commerce project has all but concluded. Almost the whole of the 2003 update was published at the IFA congress in 2001. The work on employee stock options which has involved a small group, including private sector representatives, has been published in two drafts (2002 and 2003) and appeared as amended commentary to Article 15 in the draft update of the Model and commentaries on March 15, 2004 and finally was adopted by the Council in 2005 and is included in the 2005 commentary on Article 15. In the first few months of 2004, proposed changes in the areas of permanent establishments, employment and international transport appeared on the OECD website for public comment and were also adopted by the Council in 2005 and included in the 2005 update. Ongoing work on the attribution of profits to permanent establishments which partly originated in the e-commerce project has produced various drafts which, when finalized, will fundamentally change the commentary on Article 7 (business profits) of the current Model and perhaps will result in some amendments to the Model. The initial work was carried out under the auspices of WP 6 and has involved ongoing meetings with private sector representatives and submissions from interested parties. The work has now moved to refining the drafts of Parts I to IV and revising the commentary on Article 7, and is being carried on as a joint project, by WP 1 and WP 6 with an expected completion date of no later than January 2007.

The March 15, 2004 draft changes to the Model and commentaries were published at that time on the OECD website for comment and were finalized on July 15, 2005.

At the same time, there has been a large scale involvement of non-member countries in the OECD tax work, including in the tax treaty area.23 The initial work in this area was the large technical assistance and training program conducted by the OECD for former Eastern bloc countries in their transition to market economies which was subsequently broadened to Latin American and South-East Asian countries and the rest of the world. There is usually an annual meeting of the OECD members with non-member countries back-to-back with one of its other meetings, frequently including WP 1 in the tax treaty area. In addition, an increasing number of countries is allowed to send observers to OECD tax meetings, most recently China and South Africa.24 The best public evidence of this involvement in relation to tax treaties is the 2005 positions of non-Member countries on the OECD current Model and commentaries which, as expanded and revised in 2005, covers 25 countries.25 As the commentaries have historically been produced largely by treaty negotiators, not surprisingly they involve compromises like those that occur in negotiating tax treaties themselves. Indeed, because revision of the commentaries is, in effect, a multilateral negotiation rather than a bilateral one, the recorded outcome is sometimes expressed in flexible or ambiguous language because of the attempt to accommodate a number of nuances of meaning and to reflect the lowest common denominator of agreement and not necessarily to reflect the complete view of any state or group of states represented on the CFA.26 This tends to lead to ambiguity in the commentaries, and sometimes to gaps in the interpretation when one would expect more clarification. Although the CFA has made amendments and proposed

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25. Other publications indicating the activity are, for example, The Role of Tax Reform in Central and Eastern European Economies (OECD, Paris, 1991), and Tax Treaties: Linkages Between OECD Member Countries and Dynamic Non-Member Economies (OECD, Paris, 1996).

26. The authors discussed the ambiguity in the commentary on Article 15 on the hiring out of labour in "Interpretation of Article 15(2)(b)" of the OECD Model Convention: 'Remuneration Payed by, or on Behalf of, an Employer Who Is Not a Resident of the Other State', 54 Bulletin for International Fiscal Documentation, 503 (2000) at 509 et seq. A point made in that article that paragraph 8 of the commentary on Article 15 is ambiguous was endorsed by two dissenting judges of the Danish Supreme Court in Re Halliburton Company Germany GmbH, 5 FTR 784 (2003). Because the UK has an opposite view to Denmark, Denmark has agreed not to apply its domestic hiring out of labour proviso (according to which the Danish tax of the seconded employee is to be treated as the employee's) to cases involving U.K. residents (and also involving Dutch residents for the same reasons: TIS 1987, nos. 361 and 597). Denmark now includes a special rule governing the hiring out of labour in its treaties, for example the treaties with the United Kingdom (1991) and with Germany (1995). The UK (Inland Revenue Tax Bulletin 1995 at 220) and Australia (TR 2003/II paragraph 31) have, in effect, taken the observance of Switzerland in paragraph 13 of the commentary on Article 15 to mean that the commentary applies in cases where no tax avoidance is involved. The OECD released proposals to clarify and substantially expand the commentary, omitting paragraph 8 (dealing with the international hiring out of labour) and replacing it with much more detailed commentary in proposed paragraphs 8 to 8.21, see public discussion draft: Proposed clarification of the scope of paragraph 2 of Article 15 of the Model Tax Convention, 5 April 2004, available at www.oecd.org.
amendments to the commentaries which it believes business favours (not going as far as business would like) from a private sector viewpoint, some of the statements or explanations in the commentaries are often regarded as pro-government as traditionally they have been negotiated and drafted by government officials. Although certain private sector representatives now have a larger input into the development of the OECD Model and commentaries, their disagreement with existing commentaries or any changes to them is not recorded by any observations or in any other formal way. There is also no indication yet that this involvement has led to greater clarity or “balance”.

3. The OECD Commentaries and the Vienna Convention

(a) To what extent do the commentaries come within Articles 31 and 32?

The Vienna Convention on the Law of Treaties (herein “Vienna Convention”)[33] was opened for signature on May 23, 1969 and entered into force in accordance with Article 84 on January 27, 1980, 30 days after the deposit of the 35th instrument of ratification or accession. Articles 31 (the General Rule of Interpretation) and 32 (Supplementary Means of Interpretation) are widely regarded, even in states which have not ratified or acceded to the Vienna Convention, to represent an accurate codification of customary international law. Conflict with the treaty. As a caveat, however, paragraph 26 of the commentary on Article 1 states that as a general rule the CFC provisions should not be applied where the relevant income has been subject to taxation that is comparable to that in the country of residence of the taxpayer. Paragraph 41 of the Introduction says that the CFC continues “to examine the improper use of tax conventions”.

26. Richard M. Hamer, in “Amending the OECD Model Income Tax Convention and Commentary: An Imperfect Process”, 2003 Tax Management International Journal 425 has commented that the 2003 anti-abuse commentary and certain other revisions to the Model and commentary were made in 2003 without any effort to obtain the input of the BIAC.


30. England in his doctoral thesis, note 9, has undertaken a detailed and careful review of the travaux préparatoires of the Vienna Convention, concentrating on the interpretative provisions of Articles 31, 32 and 33, and also on the princip of good faith in international law.

31. See Englein, note 9 at 83 et seq. for a review of the differences of view as to the principles to be applied to treaty interpretation (the teleological, subjectivistic or textual approach) that were expressed in the travaux préparatoires of the Vienna Convention, before Articles 31 and 32 were finally settled. This has earlier been discussed by G. Fitzmaurice, “The Law and Procedure in the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points” (1951), XXVIII.BYIL 1. See also Ward, note 9 at 24 of seq. Article 6 of the Vienna Convention provides that it applies only to treaties which are concluded by states after the entry into force of the Convention with regard to those states. That date was January 27, 1980 in respect of the 35 states that had signed or deposited instruments of ratification or accession prior to December 28, 1979. For states that deposited such instruments later, the Vienna Convention entered into force on the 30th day following the date of deposit by such
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Articles 31 and 32 of the Vienna Convention provide as follows:

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:

state of its instrument of ratification or accession: Article 84 of the Vienna Convention. Despite the fact that views as to international law were not uniform prior to the Finalization of the Vienna Convention as Anthony Aust. Modern Treaty Law and Practice (Cambridge University Press, 2007) (hereinafter “Aust”) at 10 et seq. has noted, to attempt to determine whether a particular provision of the Vienna Convention represents customary international law is now usually a rather futile task as it is widely regarded that the modern law of treaties is authoritative set out in the Convention. The Vienna Convention has been quoted as authoritative in the courts and tribunals of the United States in Italian Centers Council, Inc. et al. v. Gene McNary et al., 969 F. 2d 1350 (1992), Cementos Anauac de Golfo v. Cementos Portland Nacional SA de CV et al., 12 C.I.T. 401 (1988) and Coplin v. US, 6 Cl. Ct. 115, and was described by the U.S. Treasury as reflecting customary international law observed by the United States and other countries in the concluding paragraph of the Technical Explanation of the US-UK Treaty (2001), although the Vienna Convention has never entered into force there. The Vienna Convention entered into force in Belgium on October 1, 1992. In its opinion to the Supreme Court decision of 27 January, 1977 the Proctor-General made it clear that Articles 31 and 32 of the Vienna Convention are a codification of general principles of international law and can therefore be applied to pre-existing treaties (Supreme Court, 27 January, 1977, Pac, 1977, 1 L. 574). Articles 26 and 27 of the Vienna Convention were applied by Belgian Courts of Appeal in relation to the Belgian-France Tax Treaty (1964) in cases holding that the Belgium exit tax infringed the pension provision of that treaty: Court of Appeal Brussels, 15 February, 2002, F.I.J. 2002/109, affirmed by the Supreme Court (Supreme Court, 3 December 2003, F.I.J. 2004/46) and Court of Appeal Brussels, 17 October, 2002 www.fiscalnet.be. The first mentioned case is discussed by Luc De Broe, “Hard Times for Emigration Taxes in the EC,” in A Tax Globalist: Essays in Honour of Maurits J. Ellis (BPFD, Amsterdam, 2005), at 230 et seq. Articles 31 and 32 have been applied to treaties made before the Vienna Convention came into force in the UK in Fostergill v. Monarch Airlines Ltd. (1981) A.C. 251 (ILL); in Canada in Gladden Estate v. The Queen, 85 DTC 5188 (FCTD); and in Caud Pressure Control Inc. v. The Queen, 98 DTC 6630 (FC); in Belgium in Bonn, 27 January, 1977, Pac, 1977, 1 L. 574; in Australia in Lamaze Holdings BV v. Comm. (1997), 56 ATR 599; in Italy in Conte di Caracresco, July 21, 1995, no. 7950 (la Giustizia Penale Italiana, 1997, I. 697); in Germany in the BFH decision of October 9, 1985, BFHRE 145, 341 at 347, the BFH decision of February 1 1986, BSBl. 1990 II 445 at 650 and the BFH decision of April 11, 1990, BFHRE 160, 513. The International Court of Justice has also applied provisions of the Vienna Convention to a treaty made before it came into force: Gantinbro case, ICI Reports (1997) 7 at 42-6 and 99 and it has generally declared various relevant provisions as codifications of prior law: Namibia case, ICI Reports 1971, 47, India & Pakistan case, ICI Reports 1972, 67, Fisheries Jurisdiction case www.convention-convention-261572, para. 26, and the Katibil/Susita Island case, ICI Reports 1999, 1059 para. 18.

Jacques Sansovini in “The Canadian Experience”, Chapter 2 of Multilingual Texts and Interpretation of Tax Treaties and ITC Tax Law, Osculento Masuoi, ed. (BFPD Publications, Amsterdam, 2005) (hereinafter “Multilingual Texts”) at 61, expresses the opinion, correctly in our view, that because the Vienna Convention has not been implemented by statute in Canada, it does not have legal force there. The House of Lords in England came to the opposite view in Fostergill v. Monarch Airlines Ltd. (Third) (Ferdinand, ed., 1995, note 9 at 83 after canvassing the authorities stated: “The preferable view is that the interpretative provisions of the Vienna Convention should be considered as a codification of international law which does not conflict with Canadian law and, therefore, the Vienna Convention does not require implementation by statute to be effective in Canada.”

Richard Gardner, “Treaty Interpretation in the English Courts since Fostergill v. Monarch Airlines (1980)”, 44 International and Comparative Law Quarterly (1995) 620 at 622 also expresses the view that under English law an implementing statute is not necessary to give effect to the Vienna Convention in English courts. See also the discussion below concerning the effectiveness of international law in Canada, the USA, UK, Australia and other countries where it does not conflict with internal law, without the necessity for parliamentary action.

We do not discuss Article 33 of the Vienna Convention which deals with the interpretation of treaties authenticated in two or more languages. This subject is dealt with extensively by various authors in Multilingual Texts.

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(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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
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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;
(b) leads to a result which is manifestly absurd or unreasonable.

There is no consensus concerning the application of Articles 31 and 32 of
the Vienna Convention to the OECD commentaries. This undoubtedly
arises because the commentaries on the OECD Model are, as we discuss
below, not intended to be binding and are unique as they do not relate to an
actual treaty but to a Model treaty, which also is non-binding. In attempting
to fit the OECD commentaries within these Articles, some commentators
have expressed the view that those parts of the commentaries that explain
or interpret the Model may be referred to in order to establish the ordinary
meaning of treaty terms within paragraph 1 of Article 31.26 Others suggest
that paragraph 2 of Article 31 may be applicable.21 Some commentators
have expressed the view that the commentaries may be covered by para-
graph 3 of Article 31.24 Others take the position that they are covered by
paragraph 4.5 Still other commentators take the position that the comment-
aries constitute preparatory work to a tax treaty to which recourse is
allowed for interpretative purposes under Article 32.28 One commentator
suggests that it is necessary to fit the commentaries within Article 31 or 32
in order to give them a legitimate role in the interpretive process,27 which
view seems to have encouraged efforts to fit the OECD commentaries
within the Vienna Convention.

The commentators who are of the view that the commentaries fall within
Article 31(1) argue that they provide evidence of the ordinary meaning of
the terms used in tax treaties. One difficulty with this argument is that, as
the Vienna Convention commentaries to draft Articles 31 and 32 state,28 this

32. Vogt et al., note 7, introduction paragraphs 80, and Remmer, note 9, at 468, both citing
R. Prokisch, “Fragen der Auslegung von Doppelbesteuergungsabkommen” SWI 52 (1994),
Vogel 2000, note 19 and Waters, note 8 at 677 and 682.
33. Keon van Raai, “Interpretatie van Belastingverdragen”, 47 Maandblad Belasting
Beschouwingen, 49 at 55.
34. Vann, note 9 at 156; Keon van Raai, ibid.; and Waters, note 8 at 683.
35. Auitt, note 7 at 64; Vogt and Prokisch, note 9 at 62; Vogel 2000, note 19; and Waters,
note 8 at 678.
36. David Oliver, “Employees and Double Taxation Agreements” in 1995 Br. Tax Rev. 529
at 531; Engelke, note 9 at 465; and Waters, note 8 at 679.
37. Auitt, note 7 at 64.
38. Paragraph 12 of section III, part 5 of the commentaries on the draft articles of the

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part of the general rule was probably taken from the Advisory Opinion of
the International Court of Justice on the Competence of the General As-
sembly for the Admission of a State to the United Nations where it said:

“The court considers it necessary to say that the first duty of a tribunal which
is called upon to interpret and apply the provisions of a treaty is to endeavour
to give effect to them in their natural and ordinary meaning in the context in
which they occur. If the relevant words in their natural and ordinary meaning
make sense in their context, then that is the end of the matter.”

What has sometimes been called “an international tax language” could
hardly, in many cases, be said to be the natural and ordinary meaning of the
relevant words.20 Where, as is frequently the case, the commentaries en-
large upon, add to and expand the terms of the Model, they can hardly be
said to provide the “ordinary meaning” of treaty terms. It may be, therefore,
more accurate to consider, if there is sufficient proof that treaty negotiators
intended to adopt the meaning of terms set out in the OECD commentaries,
that they, or at least some parts of them, may provide a “special meaning”
for treaty terms. If so, those parts of the commentaries could be covered by
paragraph 4 of Article 31, as originally suggested by Auitt.41

commentaries”) also published in the Yearbook of the International Law Commission, 1996,
vol. II. The Vienna Convention commentaries are found in Appendix IV. The draft interpretation
articles 27 and 28 to which the commentaries relate are virtually identical to Articles 31 and 32 of
the final version. The differences are the addition of words “or the application of its
provisions” and the substitution of the word “agreement” for the word “understanding” in the
final wording of Article 31(3)(a). Auitt, note 31 at 12 describes the Vienna Convention
commentaries as “the single most valuable source of material on the meaning and effect of the
articles of the convention”, which is a view with which we agree. Engelke, note 9 at 473, on the
other hand seems to be of the view that the Vienna Convention commentaries have less authority
than he ascribes to the OECD commentaries but Engelke’s view is that the OECD commentari-
ies are binding in international law, which we discuss below and with which we disagree.
dictionary meanings of a word to establish its ordinary meaning. The International Court of
Justice generally gives a word the ordinary meaning intuitively. We know of no international
law authority to go to technical extraneous documents such as the OECD commentaries to
establish the ordinary meaning of treaty terms.
40. Waters and Maires, note 9 at 226 disagree. Vogel 2000, note 19 seems to be of the view
that, only after a lengthy period, the OECD commentaries seep into the consciousness of treaty
negotiators and other experts to provide the ordinary meaning.
41. Auitt, note 9 at 64 et seq. Vogt et al., note 7, introduction at paragraphs 80 also supports
such a view and adds that if it is correct, the special meaning becomes “binding as such”
Waters, note 8 at 678 also seems to add his support. Vogel 2000, note 19, writing after the
OECD had started to release new commentaries in approximately two-year intervals, seems to
consider paragraph 4 to be applicable generally after the first ten or so years have elapsed after
new commentary has been published.
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Waters notes that in dealing with undefined terms in a tax treaty, Article 3(2) of the Model provides that the meaning of such terms is to be determined under the domestic law of the state applying the treaty "unless the context otherwise requires". His view is that "context" in this respect should include the OECD commentaries and where there is a discussion of the meaning of an undefined term in the commentary, the commentary should provide the meaning of the undefined term. Walters gives as examples of a special meaning that may come within Article 31(4) of the Vienna Convention, the following terms used but not defined in the Model: "permanent home", "centre of vital interests" and "habitual abode" all in Article 4(2), "place of effective management" in Article 4(3), "beneficial owner" in Articles 10, 11 and 12 and "special relationship" in Articles 11(6) and 12(4). In his view, the discussions in the related commentaries should be "taken into account" under Article 31(4) of the Vienna Convention as evidence of the special meaning to be given to these terms and perhaps under Article 31(1) as evidence of the ordinary meaning of those terms.

The Vienna Convention commentaries on Articles 31 and 32 state that there is a relationship between ordinary meaning and special meaning but the burden of proof lies on the party invoking the special meaning of a term which essentially is an exception to the use of ordinary meanings. However, the OECD commentaries frequently go much farther than this, that is to say, the meaning of a word, phrase, technical expression or group of words. The commentaries relate to whole

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articles of the Model and in many cases are much more extensive than what would be considered to be the explanation of a term. More importantly, clearly as paragraph 29 of the Introduction to the current Model states that the commentaries are not designed to be annexed in any manner to actual tax treaties signed by member countries, which are legally binding international instruments; the commentaries are not intended by the CFA to be binding. The OECD Council has "recommended", not "decided", that member countries should follow the commentaries when applying treaties, which further supports the view that they are not intended to fit into Articles 31 and 32 particularly if by providing a special meaning they become binding. Paragraph 29.1 of the Introduction states that tax officials "gave great weight to the guidance" contained in the commentaries. This is, of course, a further indication that they are not binding. Because both the CFA and the OECD Council have indicated that the commentaries are not legally binding, it can be argued that they are not intended to form a basis to establish that the negotiating parties of a bilateral tax treaty intended undefined terms in the bilateral treaty to be given special meanings taken from the OECD commentaries. In fact, paragraph 29 of the Introduction suggests that the commentaries would be of "great assistance" in the interpretative process and in the settlement of disputes, but this and the statement in paragraph 29.1 fall short of giving the commentaries a binding legal effect

commentaries which go further than providing the meaning of a term (or terms) are paragraphs 2 to 5.7 of the commentary on Article 1 which deal with the application of the Model to partnerships; paragraphs 7 to 26 of the commentary on Article 1 which deal with improper use of a tax convention; the incorporation of the Transfer Pricing Guidelines into paragraph 1 of the commentary on Article 9, paragraphs 41 to 67 of the commentary on Article 11, paragraphs 29 to 31 of the commentary on Article 11; paragraphs 16 to 18 of the commentary on Article 13; paragraphs 72 to 78.1 of the commentary on Articles 23A and 23B; and paragraphs 29 to 35 and 51 to 54 of the commentary on Article 24.

Waters and Marmes, note 9 at 226, endorse the idea that commentaries may be relevant under Article 31(1) of the Vienna Convention, but only if a term is involved, without defining "term".

Prior to 1995, this statement in the English language version of the Introduction was more clearly said that the actual tax treaties "alone constitute legally binding international instruments". The 2005 version in the French language continues to refer to the tax treaties between member States stating, "qui seule s'inscrit dans des arrangements juridiques internationaux ayant force obligatoire". The inclusion of the word "force" in the English version in 1995 without any change in the French version is therefore not indicative of any material change.

Engelen, note 9, at 551 expresses the view that the commentaries in international law are "binding" on the countries represented on the CFA. At 453, Engelen expresses the view that they can be regarded as international "soft law". Vagts et al., note 7, Introduction at paragraph 80 states that if a special meaning is found by applying Article 31(4), this becomes "binding". These issues are discussed further below.
they would seem to have if they fell within Article 31(4) which states in a
mandatory way that the special meaning "shall" be given to a term if it is
established that the parties so intended. In establishing this, the context,
textual context as defined in Article 31(2), can be used and, we suggest,
also subsequent interpretive agreements and practices relating to or estab-
lishing the agreement of the tax treaty partners as to its interpretation as
described in Article 31(3).

48. In the Australian case, Thei v. FC of T. (1990) 21 ATR 531 at 537, Dawson J in the
High Court of Australia applying Article 31 of the Vienna Convention found the commentators
an effective "guide to the current usage of the terms by the parties". In the Canadian case, in
which the other treaty partner, the United States intervened, The Queen v. Crown Forest
Industries Ltd, 95 DTC 5389 at 5398 the Supreme Court of Canada referred to the Vienna
Convention, but did not try to fit the commentaries into Articles 31 and 32 but found the
commentaries to be part of the "legal context" and "of high persuasive value". In Italy, the
Corte di Cassazione, in its decision of May 25, 2003, no. 7082 in Diritto e Pratica Tributaria,
2002, 953, referred extensively to the commentaries without, however, taking any position on
their effective role stating:

"... it is necessary to recall the principles contained within the OECD commentaries" and
"... it is significant to consider that the commentary itself mentions ..." and also
"... as a necessary methodological introduction it is necessary to consider that according
in order to protect the integrity of the Court on the ground that the judge ... has not taken into account the indications provided for the OECD Model and its commentaries," (Unofficial translation)

The use of existing OECD commentaries to assist the interpretation of tax treaties in the
United States is illustrated by the recent Tax Court case of Fidd v. Commissioner, 76 TCM 906 (1996). In that case the court stated:

"The commentary to the Model Treaty (commentary) further explains the requirements
of Model Treaty Art. 4.3. Because both the United States and Canada were OECD
members when the Model Treaty and the commentary were drafted, courts have used
the commentary to interpret income tax treaties between the United States and Canada.
See United States v. A.L. Burdick & Co., 325 F.2d 9, 15 (2d Cir. 1955); North W. Life
Assurance Co. of Canada v. Commissioner, 107 T.C. 363 (1991); see also Janss Fire &
for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with
the Model Treaty and its commentary).

The commentary to Article 4, pars. 12 and 13 of the Model Treaty explains the term
'permanent home' ...

It is noteworthy, of course, that in this case the US Tax Court, like the Supreme Court
of Canada in Crowe Forest, referred to the commentary on the 1977 Model on which the
Canada-U.S. Treaty (1980) was based even though the commentary on the introductory Model
was available at the time the court rendered its decision.

In the Swedish case, R&A 1996 ref. 84, the Supreme Administration Court, influenced by the
fact that the government when presenting the tax treaty to parliament stated that it closely
conforms to the OECD Model, looked at but found no help in the OECD commentaries
at the time the treaty in question was concluded. The Court also noted that there was no

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In the view of some commentators, where a tax treaty is negotiated between
two member countries of the OECD, the commentaries can be considered to
be an agreement relating to the treaty which was made between all the
disputing parties to it in connection with the conclusion of the treaty (or an instrument
made by one of the parties in connection with the conclusion of the treaty
accepted by the other party as an instrument related to the treaty) and
that the commentaries therefore fall within paragraph 2(a) of Article 31 of the
Vienna Convention. One of the difficulties with this interpretation, as
pointed out by Philip Baker, is that the French text of this provision uses the
phrase "à l'occasion de la conclusion du traité" in place of the English "in connection
with the conclusion of the treaty", indicating more strongly that the
agreement must be made at the time of the conclusion of the particular
treaty. Another difficulty is that if the commentaries fall within paragraph
2(a) of Article 31, they form part of the context, which includes the treaty
and so become binding, and as already stated, the commentaries,
supported by a Council recommendation rather than a decision and accord-
ing to paragraphs 29 and 29.1 of the Introduction to the current Model,
unlike bilateral tax treaties, are not legally binding.

help in subsequent commentaries stating a reluctance to use later commentaries by noting that
they were of no help, even if one disregards the fact that these were added several years later.
Mattias Dahlberg, in his article "Vilket rättskilleverk har kommentaren till OECD:s
modellavdrag?", in Forsvaret til Gjeld, Lindeprodusenter (Norwegian Juridical, Stockholm, 2000) at
149 states that the OECD Model Treaty seems to have roughly the same significance as
indicated in this 1996 Swedish Supreme Administration Court case in Denmark, Finland and
Norway.

The expatriate reports approved by the government experts who drafted the Conven-
ions of the Council of Europe and adopted concurrently and published with the conventions
are, in contrast, part of the context of the conventions. See Austria, note 31 at 191. On the other
hand, the Handbook on Procedures and Criteria for Determining Refuge Status that was
published by the U.N. High Commissioner for Refugees is regarded as an authoritative
commentary on the Refugees Convention and has been relied on by domestic courts and
tribunals. Austria, note 31 at 191. The difference between the expatriate reports and the
Refugee commentary on the one hand and the OECD commentaries on the other is that the
reports and the Refugee commentary relate to actual treaties whereas the OECD commentaries
relate to a Model. Waters, note 5, at 677 is of the view that the OECD commentaries cannot
form part of the context as defined in Article 31(2). Dawson J in Thei, note 48, although not
deciding that the commentaries existing when the treaty was concluded cause within Article
31(2)(b) of the Vienna Convention, stated he did not see why they should not, but did not so
find because of doubts expressed by Avery Jones et al. Interpretation, note 9 at 92. See note 99
for a discussion of Austria's practice of conceding a memorandum of understanding or
protocol to accompany a tax treaty in which the commentaries are stated to a status to which
Article 31(2)(a) of the Vienna Convention applies.

50. Philip Baker, Double Taxation Conventions in International Law, 2nd ed. (Sweet &
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In attempting to justify the use of subsequent OECD commentaries in the interpretation of treaties negotiated and concluded before the particular commentaries being considered were published, some commentators attempt to classify them as “subsequent agreements between the parties regarding the interpretation of the particular tax treaty, therefore falling within paragraph 3(a) of Article 31 of the Vienna Convention.” The argument is not entirely convincing. The commentaries are the result of multinational negotiations and peer pressure whereas a subsequent agreement between the parties to a particular tax treaty is almost always a bilateral agreement free of such pressures. If the treaty follows the OECD form and contains the counterpart of Article 25(3) of the Model, the treaty itself directs that “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.” The OECD commentaries are not such a mutual agreement made by the competent authorities of the particular tax treaty. As the Council 1997 recommendation and paragraphs 29 and 29.1 of the Introduction have indicated that the commentaries are not legally binding, they should not be given the status of interpretative mutual agreements made in respect of a particular bilateral tax treaty that contains the equivalent of Article 25(3) of the Model which we suggest do fall within Article 31(3)(a) of the Vienna Convention if they are genuinely interpretive and not disguised amendments, and are binding in international law. As we discuss at some length below, that does not mean that subsequent commentaries should be disregarded in the interpretive process.

Other commentators have argued that the commentaries constitute a supplementary means of interpretation to which recourse may be had either to confirm a meaning resulting from the application of Article 31 or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result. Article 32 of the Vienna Convention does not provide an exhaustive definition or description of supplementary means of interpretation, but states that supplementary means “include specifically the preparatory work of the treaty and the circumstances of its conclusion”, in the French language version of the Vienna Convention, “notamment aux travaux préparatoires et aux circonstances dans lesquelles le traité a été conclu”.

The difficulty here is that the commentaries are not preparatory work in respect of any particular income tax treaty. If the commentaries are considered to be within “the circumstances of the conclusion” of a particular treaty, or otherwise can be considered to be supplementary means of interpretation, Article 32 would permit them to be consulted only to confirm a meaning that has already been established through the application of the general rule in Article 31 or if the treaty language is ambiguous or obscure or leads to an absurd or unreasonable result. As stated in the Vienna Convention commentaries, the recourse to supplementary means under Article 32 should be confined to comparatively rare cases and rare references to the commentaries is not what the CFA and others consider appropriate.

Vogel, writing in 2000 after the CFA had adopted the practice of making biannual changes to the Model and commentaries, noted that there are often...

54. Paragraph 20 of the Vienna Convention commentaries to Articles 31 and 32.
55. Vogel, note 9 at 40 rejects the idea that the commentaries are “preparatory work” but later seems to suggest that some commentaries may come within Article 32: Vogel 2000, note 19 at 616.
56. The French language version of the Vienna Convention uses the expression travaux préparatoires where the English language version refers to preparatory work. The commentaries do not discuss what is intended by the words, “the circumstances of its conclusion”. In the Fisheries Jurisdiction (United Kingdom) v. Iceland case, ILC Reports 9 (1993), the International Court of Justice reviewed the negotiations that led to the Exchange of Notes in question, and perhaps this kind of negotiation is what falls within the circumstances of the conclusion of a treaty. In the Third Report on the Law of Treaties, draft articles 71(2) and 71(2) dealt with supplementary means of interpretation and the expression there was “the circumstances surrounding its conclusion”, again suggesting a close connection between the circumstances and the conclusion of the actual treaty, which of course would include the negotiations. Sir Ian Sinclair, The Vienna Convention on the Law of Treaties, (2nd ed., Manchester University Press, 1984) (herein “Sinclair”) at 14 notes that the circumstances of the conclusion of a treaty may also be relevant to determine its object and purpose for the purpose of paragraph (1) of Article 31.
57. Paragraph 19 of the Vienna Convention commentaries to Articles 31 and 32. See also Engle, note 9 at 332 who suggests that rare cases are generally confined to “drafting errors or texts that are otherwise materially defective”.
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significant time delays between the publication and distribution of the pages amending the Model and the commentaries in the looseleaf Model and the effective dates of the changes and that, although the members of WP 1 would be aware of the changes, those individuals may not be the same individuals who actually negotiate tax treaties on behalf of their respective states. Further, members of the legislature of particular states considering actual tax treaties will learn about changes to the commentaries only after they have been published. In light of these facts, Vogel suggests that using pre-existing commentaries to indicate the ordinary meaning of terms in a treaty under Article 31(1) or a special meaning under Article 31(4) of the Vienna Convention on the assumption that they were in the minds of the treaty negotiators and the legislature has "been destroyed" by the current practice of changing the Model and commentaries at "breathless intervals" and by the way in which the changes are published. Vogel expressed a variation of his original views indicating that the commentaries could be used now in a "step-by-step approach" namely:

1. If individual words, coherent expressions or sentences were used in the 1963 Draft Model and explained by its commentaries, they could be considered in the course of time to have become part of an "international tax language" and it should be assumed that the meaning attributed to them by those commentaries is the ordinary meaning within the meaning of Article 31(1) of the Vienna Convention.

2. If the terms (words, expressions or sentences) were used and explained for the first time in the 1977 Model and commentaries, the meaning attributed by those commentaries may have become the ordinary meaning except perhaps where a treaty was concluded during the first years after the introduction of the 1977 Model, but this issue should be decided on a case-by-case analysis.

3. If the meaning attributed to a term by the commentaries was not the ordinary meaning when the treaty was concluded and in particular if the amendment is more recent, one must determine whether the meaning conveyed by the commentaries can be presumed to have been agreed upon as a special meaning within Article 31(4) of the Vienna Convention. Vogel suggests that this presumption cannot be justified only when, between the amendment to the commentaries and the conclusion of the particular treaty, enough time has elapsed for the amendment to seep through to the common consciousness of international tax experts who are not members of WP 1, which he suggests should be a period of 10 years, but he acknowledges that that period is open for discussion.

4. If the amendment is too recent for such seeping through, the commentaries may still serve as supplementary means subject to the limitations of Article 32 of the Vienna Convention.

Finally, even though the use of the commentaries is not binding on taxpayers and courts, Vogel suggests that the commentaries still reflect the opinions of high-ranking experts on questions of treaty interpretation and are "clearly entitled to very great weight." Such commentaries, in Vogel's view, take their authority or at least part of it from the force of their arguments and should rank with opinions of similar high-ranking experts.

(b) The application of principles of logic and good sense to the use of the commentaries

It is sometimes not remembered that the Vienna Convention commentaries make the point that Articles 31 and 32 do not constitute a complete statement of all the interpretive rules that can be used in relation to treaties. Paragraphs 3 to 5 of those commentaries make this clear:

"Most cases submitted to international adjudication involve the interpretation of treaties, and the jurisprudence of international tribunals is rich in reference..."

60. Citing Mr. Justice Vintott in Sun Life Assurance v. Pearson, [1964] S.T.C. 461. Paragraph 29(1) of the introduction also states that tax officials give "great weight" to the "guidance" contained in the commentaries. Vogel's views concentrating on what is in the minds of tax experts might be criticised as being too focused on what is in the minds of particular individuals who negotiate tax treaties and the minds of members of parliament who take legislative or other action to implement or transform them as part of municipal or national law. A somewhat similar approach, referring to what must have been in the minds of the tax treaty negotiators, was taken by Mr. Justice Park in IRC v. Semiconductors Ltd v. IRC, [2004] STC 489 at paras. 23 of his decision. As Part 1 did not have any evidence of what actually was in the minds of the treaty negotiators, he obviously was expressing an in somewhat different way what would be the more conventional view that as the treaty negotiators are the states themselves, the commentaries are part of the legal context of the treaty, as the Supreme Court of Canada did in the Crown Forest case, note 48, without presuming on a subjective basis whether or not various individuals who participated in the treaty-making process were or were not fully informed.
maxima of interpretation applied by international tribunals. They point out that these are, for the most part, principles of logic and good sense which are valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions employed in a document; and that recourse to many of these principles is discretionary rather than obligatory, interpretation being to some extent an art rather than an exact science. Accordingly, the Commission concluded that "any attempt to codify the conditions of the application of those principles of interpretation whose appropriateness in any given case depends on the particular context and on a subjective appreciation of varying circumstances would clearly be inadmissible." 63

Although they may not fit comfortably within the interpretive rules set out in Articles 31 and 32 of the Vienna Convention, 65 it is our view that it is indisputably appropriate to refer to the OECD commentaries as they existed at the time a tax treaty based on an OECD Model was concluded, provided of course, they are helpful in establishing the meaning of particular tax treaty provisions. 66 As Sinclair put it in dealing with treaty interpretation generally:

"[I]t is clear that no would-be interpreter of a treaty, whatever his doctrinal point of departure, will deliberately ignore any material which can usefully serve as a guide towards establishing the meaning of the text with which he is confronted." 67

61. Sinclair, note 56 at 117, in "Interpretation of Tax Treaties", 40 Bulletin for International Fiscal Documentation, 73 (1986). Sinclair said the same thing, adding, "it would be wrong to regard the principles of interpretation contained in Articles 31 to 33 of the Vienna Convention as amounting to anything more than general guidelines."

62. See Ewing, note 9 at 459 who also concludes that the commentaries are not means of interpretation to be taken into account under Article 31. Waters, note 8 in his footnote 38, makes the point that the resolutions of the OECD Council and paragraphs 33 and 34 of the Introduction to the Model do not purport to give directions to national courts and the commentaries and are not binding on taxpayers, let alone courts.

63. We deal below with amended or new commentaries published after the particular tax treaty was negotiated. There is an issue, of course, as to which commentaries existed at the time a bilateral treaty was concluded. We suggest that draft amendments published for public comment by the OECD on its website should not be presumed to have been accepted by the treaty negotiators before they have been approved by the CFA and the OECD Council unless, of course, the particular treaty, or an exchange of notes or other evidence points to a contrary conclusion. A further issue arises concerning changes to the commentaries approved by the Council during the period of negotiation of a bilateral treaty. We suggest that these should be presumed to have been accepted by the treaty negotiators because, had one or both not accepted them, they presumably would have clarified the particular treaty article to state clearly their interpretation of it, or inserted an observation if they, or either of them was represented on the CFA.

64. Sinclair, note 56 at 116.
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Unlike the general rule of interpretation set out in Article 31 and the supplementary means of interpretation in Article 32 of the Vienna Convention, the reference for these purposes is discretionary and will be appropriate if it throws useful light on the intentions of the negotiators and assists in resolving issues of the interpretation of tax treaty articles based on articles of the OECD Model.

The American Law Institute has said:

"[T]he OECD Model Treaty and the accompanying Commentary are the benchmarks against which income tax treaties between developed countries are negotiated. Many treaties, including most U.S. treaties, incorporate language of the OECD Model Treaty or, in some cases, deliberately modify it for specified reasons. While the OECD materials undoubtedly do not rise to the level of customary international law, they occupy a unique position in the hierarchy of international tax materials. In practice both administrators and tax advisors automatically consult these materials when attempting to understand the meaning of treaty provisions. It would be wholly unrealistic, at least in the absence of strong evidence to the contrary, to think that treaty negotiators who adopted language derived from the OECD text were not familiar with and therefore did not knowingly accept the common meaning of that language as agreed among the OECD member countries." 65

In our view, Articles 31 and 32 of the Vienna Convention have a limited role to play in the application of the OECD commentaries. That limited role is related to their use in the process of establishing the special meaning of treaty terms for purposes of the application of the general rule of interpretation if it can be shown that the parties to the bilateral treaty so intended. 66

The focus of establishing a special meaning is on the paragraph imposing the special meaning: paragraph 4 of Article 31. 67 In this respect, the commentators as they existed at the time of the conclusion of a bilateral treaty although not forming part of the textual (or internal) context as described in Article 31(2) of the Vienna Convention do form part of the "legal (or external) context" of the treaty. Any term in the treaty which is not defined should be considered to be under the equivalent of Article 3(2) of the Model be given the meaning which it has under the internal law of the country applying the treaty, "unless the context otherwise requires". Context, for purposes of Article 3(2) of the Model, is not defined, but is partly explained somewhat vaguely in paragraph 12 of the commentary on Article 3. We suggest context in Article 3(2) has a wider meaning than textual (or internal) context and includes the commentaries current when a bilateral treaty was concluded. "Requires" is a word of some force. If the undefined term is defined in internal law and is also given a special meaning in the commentaries current when a treaty was concluded, those commentaries as part of the context for purposes of Article 3(2) could, and perhaps in most cases would, if there is a difference between the two meanings, be the special meaning to be given to the undefined term. 68 However, much of the commentaries go well beyond the meanings of terms and those parts of the commentaries do not fit easily into Articles 31 and 32 of the Vienna Convention. It is our view that those parts of the OECD commentaries do not have to fit into Articles 31 and 32 of the Vienna Convention in order to give them a proper and effective role in accordance with principles of "logic and good sense" in the interpretive process in dealing with income tax conventions. We therefore do not attempt this exercise. 69

(c) The importance of the intentions of the parties to the treaty

Although mention is made only in paragraph 4 of Article 31 of the Vienna Convention of the intention of the parties in interpreting a treaty, the Vienna Convention commentaries underline the central importance of the role of the intention of the parties in the interpretive process in international law.

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66. This intention might be presumed by the interpreter simply by referring to the commentaries (if no observation has been extended) or might more clearly be established by reference to the textual context (a protocol or memorandum of understanding) referring to the commentators as the intended basis for the interpretation of a bilateral treaty, or by subsequent agreements and practices. Austin's practice in this respect is referred to in note 99.

67. Whether this concept can be discharged solely by a reference to the commentaries existing at the time a treaty was concluded has not been clearly established, but cases referred to below show judicial tendencies supporting such a conclusion.
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is clear, however, that the exercise of determining the intentions of the parties is not a search for a subjective determination but an objective determination derived from the text of the treaty itself and the application of the interpretative rules of Articles 31 and 32. The process also involves the application of interpretation principles of "logic and good sense", as "guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they have employed in the document". In the words of the Vienna Convention commentaries, Article 31 "is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties, and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation ab initio into the intentions of the parties". "[T]he parties are presumed to have the intention which appears from the ordinary meaning of the terms used by them." The intention of the parties is clearly objective, not subjective.

It has been recognized that a search for the intention of the parties is more legitimate in the case of bilateral treaties, such as income tax treaties and also for some multilateral tax treaties, such as the Nordic Tax Treaty which contains a number of bilateral agreements, than it would be in the case of multilateral treaties in light of the haste, confusion, mixed aims, motives, interests and ideologies of the countries represented at the drafting conference of a multi-lateral treaty and the fact that many states which participate in the drafting of such a treaty subsequently fail to become parties to it while others who took no part in the drafting become parties by

3. The OECD Commentaries and the Vienna Convention

subsequent accession. In other words, as most common law lawyers clearly understand, the intent of the negotiators is to be ascertained from the text of the document read in its context just as the determination of the intention of the legislature when dealing with statutory interpretation or contracting parties when dealing with the interpretation of contracts is ascertained from the text of the legislation or the contract read in its context. In many countries, as in international law, recourse can be had to supplementary means of interpretation, including legislative history if the statute is ambiguous or early drafts if the contract is ambiguous. The position

70. Paragraph 4 of the Vienna Convention commentaries to Articles 31 and 32.

71. Paragraphs 11 and 12 of the Vienna Convention commentaries to Articles 31 and 32.

72. See Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, Vol. 1, (Grotius Publications, Cambridge, 1966) at 338 et seq., and Sir Hersch Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in Interpretation of Treaties", [1949] 4 Y.B.I.F. 28 at 33. Morris Lezzer in his paper, "Interpretation of Tax Treaties According to German Theory and Practice", published in Interpretation of Tax Law and Treaties and Transfer Pricing in Japan and Germany, Klaus Vogel ed. (Kluwer, 1998) at 90 also underlines, in the context of tax treaties specifically, that the intention of the parties is not to be determined from the context in which the text is actually expressed in the text of the treaty. Lezzer has paraphrased Vogel et al., note 7, Introduction at paragraph 69(a), which quotes Burghele v. Commissioner, 80 TC 705 (1983) that the "basic aim of treaty interpretation is to ascertain the intention of the parties." See also Vogel and Proksch, op. cit. at 44 who emphasize the importance of determining the intention of the contracting parties in the starting point and goal of all interpretations.

73. "The cardinal rule for the construction of legislation is that it should be construed according to the intention expressed in the language used. So the function of the court is to interpret the legislation 'according to the intent of the persons that made it' and that intent is to be deduced from the language used'".クライス・オブ・レジスタンス, (6th ed., Sweet & Maxwell, London, 2004) at 543 (footnotes omitted). "The profession of the Court in construing a written contract is to discover the mutual intention of the parties, the written declaration of whose minds it is..."[T]his intention must be ascertained from the document itself. Accordingly the parties cannot give themselves direct evidence to show that their real intentions were at variance with the provisions of the document". Anns v. Lyell, [1970] 1 All E.R. 850 (H.L.) at 862. As recently explained by Lord Steyn in Sirus International Insurance Co. v. F.A. General Insurance Ltd., an impugned decision of December 2, 2004 of the House of Lords in the context of the interpretation of a contract: "The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The enquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual sense." The same approach is taken in the interpretation of tax treaties. In Australia, see: MLC Limited v. Commissioner, [2002] FCA 1491 for specific statutory and "[T]his intention must be ascertained from the document itself. Accordingly the parties cannot give themselves direct evidence to show that their real intentions were at variance with the provisions of the document". Anns v. Lyell, [1970] 1 All E.R. 850 (H.L.) at 862. As recently explained by Lord Steyn in Sirus International Insurance Co. v. F.A. General Insurance Ltd., an impugned decision of December 2, 2004 of the House of Lords in the context of the interpretation of a contract: "The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The enquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual sense." The same approach is taken in the interpretation of tax treaties. In Australia, see: MLC Limited v. Commissioner, [2002] FCA 1491 for specific statutory and [T]his intention must be ascertained from the document itself. Accordingly the parties cannot give themselves direct evidence to show that their real intentions were at variance with the provisions of the document". Anns v. Lyell, [1970] 1 All E.R. 850 (H.L.) at 862. As recently explained by Lord Steyn in Sirus International Insurance Co. v. F.A. General Insurance Ltd., an impugned decision of December 2, 2004 of the House of Lords in the context of the interpretation of a contract: "The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The enquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual sense."
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in the United States, however, is not as clear cut when determining the intention of the parties to a treaty, or of Congress in the case of legislation. \(^{74}\)

Where the parties to a bilateral tax treaty are both members of the OECD and as such are represented on the CFA, applying principles of logic and good sense, there may be reasonable presumption, in the absence of evidence to the contrary, that by adopting a provision of the Model convention, they intended that the provisions in the tax treaty negotiated by them should be interpreted on the same basis as set out in the relevant commentaries that were current and available to them at the time that they are negotiating the particular treaty. \(^{75}\) This was recognized in the recent decision of the U.K. Special Commissioners in *UBS AG v. HM Revenue and Customs*, \(^{76}\) where the Special Commissioners said:

"The OECD Model has a Commentary explaining the terms of the Model which is accordingly an important means of interpretation of the Model and treaties following the Model. Although not the subject of argument in this appeal, there is academic literature discussing how the Commentary fits into articles 31 and 32 of the Vienna Convention. Our view is that the negotiators on both sides could be expected to have the Commentary in front of them and can be expected to have intended that the meaning in the Commentary should be applied in interpreting the Treaty when it contains the identical wording and neither party had made an observation disagreeing with the Commentary. Article 24(4) of the 1977 Model is a short general statement that taxation on the permanent establishment is not to be 'less favourably levied' and how that phrase operates in practice is explained in 35 paragraphs of the Commentary. It seems clear that the parties to the treaty intended that such explanation should be more important than the ordinary meaning to be given to the terms of that phrase. This is either on the basis that the existence of the Model and Commentaries demonstrate that the parties intended it as a special meaning within article 31(4) of the Vienna Convention, or that the Vienna Convention does not purport to be a comprehensive statement of the method of treaty interpretation. Its own commentary states that 'Accordingly the [International Law] Commission confined itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties (Introduction paragraph 53).' \(^{77}\)

Of course, any interpretation set out in the commentaries to the relevant model would clearly not apply if the negotiating parties in a protocol to the particular treaty stated otherwise or if there is some other basis to conclude that the negotiating parties did not intend the OECD commentaries to be used as the basis of interpretation. \(^{78}\) Also, in the case where the commentary can fairly be said to depart from the textual meaning of an article of the Model and therefore the textual meaning of the particular Article of a bilateral treaty, the general rule of interpretation in Article 31 of the Vienna Convention, which gives the text of a treaty the primary role in the interpretive process, should result in the text of the bilateral treaty overriding the contrary commentary which could then be disregarded. \(^{79}\)

Where a particular tax treaty is negotiated between an OECD country and another country that is not a member of the OECD and therefore not represented on the CFA or the OECD Council, the presumption that the parties have a common intention that the meanings and the positions of

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\(^{75}\) Vogel et al., note 7, *Introduction*, paragraphs 81 makes the same point, but later qualifies it in light of the frequent changes to the commentaries since 1992; Vogel 2006, note 19.

\(^{76}\) If the bilateral treaty includes an article taken from an OECD Model which has been altered, or superseded, resulting in changes to the commentaries, the commentary that had been applicable to the article before its alteration or replacement would be the relevant commentary for these purposes. See *Australian Railg. TR 98/21*.

\(^{77}\) The 2005 update to the OECD Model is an interesting example of how long it takes for the update to be published and available to parties other than those on the CFA and the Council after it has been adopted by the CFA and the Council. In this case, the adoption by the OECD Council occurred on July 15, 2005 and the condensed version of the Model dated July 15, 2005 was first made available in Paris on September 15, 2005 and in North America several days later. The new pages for the 'Amended version' are expected several months later. The updated electronic version was expected in October 2005.

\(^{78}\) In light of such publishing delays, it is possible to argue that new commentaries should not apply as 'legis context' to treaties concluded before they have been published.

\(^{79}\) "Lemems Holdings B.V. v. Comm." (1997), 56 ATR 589 the Australian Federal Court used draft amended commentary released by the OECD in 1974 (and later approved by the Council in 1977) to interpret the 1976 Australia-Netherlands treaty.

OECD member countries on substantive issues as reflected in the OECD commentaries are to be adopted is, of course, much weaker as the non-OECD member country would not have had the opportunity to participate in the discussions and the drafting of the relevant commentary.79 The intention of the countries represented in the CFA and the OECD Council is that the commentaries are not intended to be binding either in international law or in municipal law. In the Introduction to the 1963 Draft Model it was said that, "Although the present commentaries are not designed to be annexed in any manner to the Convention to be signed by Member countries, which alone constitute legally binding international instruments, they can nevertheless be of great assistance in the application of conventions and, in particular, in the settlement of eventual disputes" (emphasis added). This sentence has been continued in successive model treaties and is still included in paragraph 29 of the Introduction to the current Model but the word "alone" was dropped from the English language version in the 1995 Model but the equivalent word has been continued in the French language version. Also the OECD Council has "recommended", not "decided", that the Governments of Member countries conform existing and new tax treaties to the Model as interpreted by the commentaries and that their administrations follow the commentaries, as modified from time to time.80

The Model and most treaties include an express provision that the competent authorities of the contracting states may resolve by mutual agreement, difficulties or doubts arising from the interpretation or application of the treaty.81 Mutual agreements of this kind between duly appointed competent authorities that do not go further than provide a fair or reasonable interpretation would, it is suggested, have a clear legal effect at least in international law under Article 31(3)(a) (The General Rule of Interpretation) of the Vienna Convention because they would represent a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".82 Although Article 31 says that these subsequent agreements are to be "taken into account together with the context", the Vienna Convention commentaries to Articles 31 and 32 state, in somewhat stronger terms, that such agreements represent "an authentic interpretation by the parties which must be read into the treaty for purposes of interpretation"83 and this element is not inferior to any of the elements to be taken into account under Article 31, the General Rule of Interpretation.84

That having been said, however, it is clear that the commentaries to the Model existing and published at the time a bilateral tax treaty is concluded, although not arrived at by the competent authorities in negotiating an interpretative mutual agreement to any particular treaty under the provisions of Article 25, do have, in the words of paragraph 29 of the Introduction to the Model, "special importance in the development of international fiscal law" and "they can ... be of great assistance in the application and interpretation of conventions and, in particular, in the settlement of any disputes" In other words, as paraphrased by the Supreme Court of Canada in the Crown Forest Industries case, in internal or municipal law they are of

79. See PGF Geophysical AS v. Norway, 6 ITTLR 212 (2004) at 228, a decision of the Norwegian Borgarting Appeals Court, affirmed by the Hayterstjø, 7 ITTLR 51 (2005) at 76, where in the Hayterstjø it was agreed by both parties that the commentaries (including later commentaries) are of great importance for the interpretation of the Norwegian-Finnish Treaty (1978), and the court apparently agreed. Since 1996, the CFA has organized annual meetings to allow experts of 25 non-member countries to discuss issues relating to the interpretation of tax conventions. There may, in respect of tax treaties concluded with such non-Member countries after they had participated and been given an opportunity to enter disagreements or observations (and reservations), be a stronger presumption that they intended to adopt the interpretive meanings as set out in the commentaries at least to the extent that their own observations of the many reservations that they have entered to the current Model would not indicate their view that the relevant commentaries are not to be followed. Non-member countries by the year 2005 had entered 572 reservations and 28 disagreements or observations on the commentaries.

80. As has already been said, a recommendation is not binding on the Member countries and merely directs them to consider whether following the recommendation is opportune. 81. Article 25 of the current Model.

82. See, however, for their effect under internal or municipal law, Commerzbank A.G. v. IRC, (1990) S.T.C. 305 for a view expressed by the Chancery Division of the English High Court that they are not binding and the note on this case by John Avery Jones, (1990) Br. Tax Rev. 388 and the response to that note by Roger White, (1991) Br. Tax Rev. 35. In the UK, the law has now been clarified that "specific case" mutual agreements have the force of law in internal law. See for further discussion, John Avery Jones, "Mutual Agreement Procedure", (2001) Br. Tax Rev. 9. See also Remer, note 9 at 466 for a discussion of interpretive mutual agreements and their non-binding effect in Germany. Norway's Supreme Court on November 9, 1992 in the Heerema case, however, held that mutual agreements are binding on courts in Norway: Arvid Skjart, in "The Continental Shelf and Tax Treaties — A Case Study", (1993) Br. Tax Rev. 189 discusses this case.

83. Paragraph 14. As the words "must be read into the treaty" are mandatory, this clarity implies that such subsequent agreements are binding in international law.

84. Paragraph 9. See the discussion by Engstrom, note 9 at 228 et seq. relating to the phrase "taken into account" as it was debated during the sessions of the International Law Commision. Vogel and Proksch, note 9, at 70 et seq. note some reservation about the binding effect of such interpretative mutual agreements, especially if such mutual agreements go beyond what could fairly be said to be an interpretation of the particular treaty, which of course, is a fair qualification.

85. Note 48.
4. Do the OECD Commentaries Rise to the Level of Binding Rules of International Law?

(a) Soft law

It has sometimes been suggested that the commentaries can be regarded as a form of international “soft law” directed to the member countries and as such have great authority and are often complied with. It is our view that to describe the commentaries as soft law does not mean that they are or have become binding interpretations in international law. The effect of “soft law”, an expression used by international law publicists, and whether international law recognizes soft law and, if so, what soft law is has been discussed extensively. It is our view that attaching the description “soft law” to the commentaries does not give the commentaries any status or position in international law that they would not have had in the absence of such a descriptive and somewhat ambiguous label. The most common meaning in international law given to the term “soft law” is a non-binding written instrument setting out international principles.

As described by Chinkin, the effect of soft law is as follows:

86. Note 48.
87. England, note 9 at 449 et seq. and Voges et al., note 7 at paragraph 80, Introduction.
88. Jan Klitbo, The Concept of Treaty in International Law (Oxford, The Hague, London and Boston, 1996) at 157 et seq. made a lengthy review of the decision of international and domestic courts and concluded (at 216 et seq.) that the soft law terms (i.e., that soft law is binding) is not sustainable as there are no varying degrees of legality or “bindingness” in international law and therefore only a “hard law” which is binding. If it is not binding, it is not law at law, but merely of potential legal relevance in that it may over time evolve into customary law or it may give rise to a political, not legal, obligation. See also Jan Klitbo, The Resilience of Soft Law”, [1996] Nordic Journal of International Law, at 107-185 in which Klitbo concludes that most courts when dealing with an instrument that has been described as of a soft law nature have either characterized the instrument into familiar categories of international law (i.e. customary international law, or a treaty) and if they consider the instrument to be binding, apply it as if it were hard law so that it becomes indistinguishable from hard law.
90. Ibid.

(b) Customary law, good faith, acquiescence, the protection of legitimate expectations and estoppel

In considering the question whether the OECD commentaries are binding in international law, and in consequence should be regarded as binding in domestic courts on tax administrations and taxpayers in OECD member countries, two questions arise. First is whether the commentaries in fact create a binding obligation in international law, either on the basis that they have become recognized as customary law or, on the less conventional basis of good faith, acquiescence, estoppel and the protection of legitimate expectations. The second question, if the first question is answered in the affirmative, is whether such international law has been transformed or otherwise has become part of domestic or internal law and therefore may be

91. For further discussion of soft law, see Ian Johnstone, “Plural Interpretation: The Authority of Interpretive Communities”, 12 Michigan Journal of International Law at 371 et seq., reprinted in International Law Anthology, Anthony D’Amato, ed., (Anderson Publishing Co., 1994) 121 at 148 et seq.; John Currey, Public International Law, (Irwin Law Inc., Toronto, 2005) at 98 et seq., D. Shelton, International Law and “Relative Normativity”, M. Evans, ed. (Oxford University Press, 2003) at 169 and Aalto, note 31 at 44, all of whom discuss the concept of “soft law” and arrive at similar conclusions. Waters, note 8 in his footnote 38 expresses the view that the commentaries, particularly later commentaries, do not bind taxpayers or courts but that fiscal authorities would be expected to take them into account. Jominen, note 7 at 27 expresses the view that the OECD commentaries are soft law (which he explains as rules that have no binding force but are intended to produce practical effects) that may turn into hard law when they are applied within a national tax system by the tax administration and the courts. The OECD website explains that the OECD is known for soft law. On the website, the term “soft law”, as understood by the OECD, refers to non-binding instruments such as its guidelines for multinational enterprises: http://www.oecd.org/ and the Belgium Commercial Tribunal found the OECD Code of Conduct on Multinational Enterprises to be a form of soft law which it explained to be an intermediary step between a classical binding norm and a non-binding norm, that although not binding could influence its decision: Comm. Trib. Namur, 16 June, 1993, JLMR, 1993, 949. More generally, we note that the term “soft law”, as used in international law is an ambiguous term. The most common meaning given to the term is a non-binding written instrument setting out international principles: Chilkin, note 89. This definition of soft law includes U.N. General Assembly resolutions, statements issued by international conferences, declarations, acts of rates, and codes of conduct commonly drafted and approved by international organizations and conferences but not signed or ratified by states. The premise is that certain principles are important and should ideally shape international law and policy even though they are not binding.
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applied as binding rules by domestic courts in tax disputes between taxpayers and the fisc, because these are the courts in which tax disputes involving tax treaty interpretations are usually settled.

(i) Customary international law

To be binding in international law as customary law, there must be both a proven existence of state practice and opinio juris sive necessitates ("opinio juris"). As the International Court of Justice and publicists have indicated, for there to be a recognition of customary international law, the ultimate question is whether or not a wide number of states have demonstrated the practice in question and the required opinio juris exists to show that the practice has become a rule of customary law.29 As put by a publicist, "State practice, even if frequently repeated, does not generate customary law unless it is accompanied by opinio juris. Acts of States forming the basis of custom.

92. In The North Sea Continental Shelf case, ICJ Reports 1969 at 42 et seq., the Court explained that Article 6 of the Geneva Convention of 1958 (which was never ratified by Germany) would be binding on Germany if it constituted a rule of international customary law. In determining whether this had occurred, the Court stated: "It clearly involves treating that Article as a norm-centring provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in origin, has since part into the general corpus of international law and is now as such accepted as the opinio juris, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is perfectly possible even and does from time to time occur. It constitutes indeed one of the recognized methods by which new rules of the customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained. Since very few states ratified or acceded to the Geneva Convention of 1958 and became parties to it were entitled to make reservations (a fact which, according to the International Court of Justice, does not itself preclude the demarcation principle contained therein becoming law but "does add considerably to the difficulty of regarding this result as having been brought about...") the Court held that Article 6 of the Geneva Convention of 1958 had not evolved into international custom..." for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of opinio juris sive necessitates. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. See also, to the same effect, Re Lotus, PCIJ, Series A, no. 10, 1927, 28; C. Chelmin, "Human Rights and the Politics of Representation: Is There a Role for International Law?" in The Role of Law in International Politics: Essays in International Relations and International Law, M. Byers, ed., (Oxford University Press, New York, 2000) 131 referred to by Broniole and Tope, note 89 at 13. See also the decision of the International Court of Justice in Military and Parliamentary Activities (Nicaragua/USA), ICJ Reports 1986 14 at 97-98 and 106-109.

93. Nancy Kentou, The Termination and Revision of Treaties in Light of New Customary International Law (Clarendon Press, Oxford, 1994) at 140. Footnotes omitted. Auli, note 31, at 10 in relation to opinio juris, also states that this refers to the belief by states that the state practice is legally binding on them. See also M. Aoki, "Custom as a Source of International Law" in Sources of International Law, M. Kostoom, ed. (Aslauge, 2000) at 286 et seq., who emphasizes that to form the basis of opinio juris, the practice must be regarded by states as obligatory not voluntarily.

94. In The Asylum case, ICJ Reports 1950, 277 it was found that continuing changes in practices or facts prejudiced the development of customary international law. The Court said: "The facts brought to the knowledge of the Court disclose too much uncertainty and contradiction, to much fluctuation and discrepancy in the exercise of diplomatic asylum and to the official views expressed on various occasions, that there has been too much inconsistency in the rapid succession of conventions on asylum, ratified by some states and rejected by others, and the practice has been too much influenced by considerations of political expediency in the various cases, that it is not possible to discern as in all this any constant and uniform usage accepted as law,..." 95. See the discussion, below under the subheading "<i>3. Acquiescence</i>"
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4. Do the OECD Commentaries Rise to the Level of Binding Rules?

after consulting the commentaries, actually do or do not follow them. The OECD Council has always supported the use of the commentaries by OECD member countries by a recommendation rather than a decision. A recommendation does not impose any legally binding obligation on member states and only obliges OECD member states to consider if the recommendation is "opportun" to provide for its implementation. The chair of WP I has expressed the personal view that the commentaries are not and are not intended to be binding on taxpayers and courts. Widespread views of national courts and judges and other officials of national courts are that the commentaries are useful interpretive aids but almost all of them fail short of stating that they are binding. In summary, our view is that the commentaries cannot pass the test of having become customary law because they change constantly there is no proof of their widespread adoption in state practice and, most importantly, because they fail to be supported by the requisite opinio juris.

(ii) Good faith

Next, we consider whether the commentaries could become a source of legal obligation in international law based on the application of the principles of good faith. One must again, in dealing with this issue, divide the commentaries into two groups: those current and available to the treaty negotiators when the particular tax treaty was negotiated and available to the legislature in those countries that implement treaties by legislative act (herein “prior commentaries”) and those developed by the CFA and published subsequently (herein “later commentaries”).

In respect of prior commentaries, we are of the view (as discussed above) that although they are not binding, and as explained below, the principle of good faith does not make them binding, they can be properly applied in accordance with the principles of logic and good sense in the interpretive process to determine the intentions of the parties in interpreting and applying a treaty between two OECD member countries where the treaty negotiators have adopted the wording of the Model. Much of the OECD commentaries existing at the time a bilateral treaty was concluded would meet the test. If one of the states has entered an observation on the relevant part of the commentaries, then there may be a basis to conclude that the parties did not intend that the commentaries should be applied in the interpretive process.

96. Water, note 8 in his footnote 38.
97. See Vogel 2000, note 19 who is of the view that the constant changes to the commentaries weaken their authority. See also Australian Ruling TR 2000/8 available at www.ato.gov.au/publications/hazards, which relates to different interpretations of treaties which were based on a different wording of the relevant articles in the Model on which the treaties are based.
either when applying the general rule of interpretation in Article 31 of the Vienna Convention, or as a principle of logic and good sense. 100

We are also of the view (which is also discussed below) that, not only do later commentators have no binding effect, they obviously do not indicate the intentions of the treaty partners at the time the treaty was concluded and they may have lesser value than existing commentaries in the interpretive process. It can hardly be argued that they have been made in "good faith" if, which is sometimes apparent, they depart from legitimate interpretations of the terms of the Model by attempting effectively to change the Model by filling gaps or reversing prior interpretations. Where the subsequent commentaries present genuine interpretations, not attempted amendments, although they are not binding, and are not part of the "legal context", they should not be disregarded but rather should be weighed together with the text of the treaty, its objects and purposes, the context, and the views expressed by respected publicists in the interpretive process to arrive at a good faith interpretation of bilateral treaties based on the OECD Model while bearing in mind that the commentaries are, in the end, drafted by the tax officials on WP 1 and approved by the tax officials on the CFA, and since 1997 have been "adopted" by the government officials on the Council (except for the 2000 amendments which were only "adopted" by the CFA).

101. Paragraphs 29 to 29.3 of the Introduction to the Model.
102. All OECD member countries are represented on the Council and vote on the resolutions. In the most recent action (1997), the Council has "recommended", not "decided", that tax administrations follow the commentaries "as amended from time to time"; which, as discussed above, only requires member countries to consider whether this is "appropriate". 103. T.I.C Reports 1998.
105. For an extensive discussion of the role of "good faith" in international law, see Shoshana Rosenn, Developments in the Law of Treaties 1945-1986, (Cambridge University Press, Cambridge, 1989) 135-179. In that part of his work, Rosenn discusses at considerable length the inclusion of the concept of good faith as the Vienna Convention, and the U.J. charter, in intertional legal systems, in international case law and what he calls the "peaked impact of good faith. Rosenn's analysis would not support the position that through the application of the principle of good faith, tax treaty obligations, being rules of law, can be overridden or revised by non-binding interpretations such as those of the CFA or the OECD Council through the commentaries. See also Sir Ian Smith, "Fiscope and Acquiescence", in Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings, (Cambridge University Press, Cambridge, 1996) at 104; Christine Chinkin, "Normative Development in the International Legal System" in Commitment and Compliance, Dinish Sheehan, ed. (Oxford University Press, Oxford, 2000) at 21: T. Cotter and K.A. Schreger, "Good Faith and the Protection of Legitimate Expectations in the WTO", in New Directions in International Economic Law, M. Bronsters and R. Ruit, eds. (Kluwer, The Hague, London and Boston, 44
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O’Connor sums up his view of the role of good faith in the law of treaties:

“If an agreement between States is a formal treaty, or in the form of an informal instrument which is intended to be legally binding, the principle of good faith will apply. If a question arises as to whether an informal agreement was intended to be legally binding, the principle of good faith will also be very relevant, because good faith applies in the legal relations generally between states, and this is precisely the kind of legal difficulty in which the principle finds its paradigm function. But a more difficult question arises about the scope of good faith where it is accepted that an informal agreement was not intended to be legally binding.

[The International Court has not applied good faith otherwise than in situations where a legal obligation was present. If therefore, an informal agreement is not legally binding, it would seem to follow that there is no scope for the principle in such a case. We are concerned with a legal principle, which must operate in a legal context, and whatever obligations states may be under by virtue of entering into ‘understandings’ or ‘agreements’ of a non-legal character (political, moral or whatever), they are not obligations to which the legal principle of good faith can attach.

However, because good faith applies generally in the legal relation between states, the principle will often continue to be relevant to situations arising from non-legally binding agreements, if those situations are themselves governed by or re驾照able to, legal rules. For example, factual reliance, perhaps over a long period, on a non-legally agreement may give rise to a legal claim based on estoppel.”

2000) at 47; and Edwin Van der Bruggen, “Good Faith in the Application and Interpretation of Double Taxation Conventions”, [2000] Br. Tax Rev. 25 (herein “Van der Bruggen”). Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (Stevens & Sons, London, 1953) at 114 and 118 makes the point, in explaining the principle of good faith, that treaty obligations should be carried out according to the common and real intention of the parties at the time the treaty was concluded. While the principle of good faith prohibits the evasion of an obligation as established by the common intention of the parties, it also prohibits a party from exacting from the other party advantages which go beyond their common and reasonable intention at the time of the conclusion of the treaty as, for example, by invoking the treaty to cover cases which could not reasonably have been in contemplation of the parties at the time of its conclusion.” See also Klabbers, The Concept of Treaty in International Law, note 88, as to the legal effect of a memorandum of understanding that was not “intended...to create independent legally enforceable obligations” that could nevertheless be used as an aid to interpretation if it represented consensual subsequent practice. Waters, note 8 at 670 raises this issue as a question but does not answer it.

105. O’Connor, ibid. at 113.

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Chunkin,106 in discussing the current situation in international law, where views are diverging as to how international law is made, discusses the question of whether non-binding international instruments have come to have a part in international law making. She concludes that there is a reluctance to abandon the consensual basis of international law in determining the weight that is traditionally accorded to the question of whether states intended to create a legal relationship, stating:

“The intention to be bound may be deduced from the language employed in the agreement, the circumstances of its conclusion, and, occasionally, the subsequent actions of the parties.”

She notes that the language of the instruments tends to be more specific in denying a legal obligation than in accepting that the instruments create one.107 Also, she concludes that the intentions of the drafters of the instruments may be irrelevant where they lack international law-making capacity.108 Coster and Schefler say “good faith goes beyond a faithfulness to obligations objectively so defined; it incorporates a faithfulness to behaving in a way so as not to disappoint the subjective beliefs of others, so long as the subjective beliefs, or expectations, can be logically deduced from the state’s prior actions or inactions”.109 Van der Bruggen deals extensively with the concept of good faith as known in international law and specifically its application in the interpretation of tax treaties. He concludes that the concept of good faith is a yardstick applicable to existing international obligations rather than a source of those obligations itself.110

106. Note 104 at 38.
107. This is true of the OECD commentaries, as discussed above.
108. This is an important qualification as the members of WP 1 and the CPA are not pluripersonal and cannot be presumed to have capacity to bind their respective states in international law. These officials who represent their states on the OECD Council which can make binding “directions” have only approved non-binding “recommendations”. Article 7 of the Vienna Convention deals with persons who have full powers (as defined in Article 23(1)(d)) to make treaties which include those who produce or appear to have appropriate full powers which include, inter alia, Heads of State, Ministers for Foreign Affairs, heads of diplomatic missions for the purpose of adopting the text of a treaty and “representatives accredited by States to an international conference or to an international organization or one of its organs for the purpose of adopting the text of a treaty.” Article 8 provides that an act relating to the conclusion of a treaty performed by a person who cannot be considered as authorized under Article 7 to represent a state for that purpose is without legal effect unless afterwards confirmed by that state.
109. Note 104 at 50.
110. Note 104 at 66.
These authorities are convincing that good faith in international law does not create legal obligations where none otherwise existed. As good faith is an interpretive guide to international agreements, the concept of good faith does not of itself transform non-binding commentaries into binding international law.

(iii) Acquiescence

The next issue is whether the commentaries can be considered to be binding in international law on the application of the principles of acquiescence, the protection of legitimate expectations or on the basis of estoppel. First we look at the question whether in the absence of an observation a member state should be presumed to have acquiesced or agreed to the commentaries.

It has been suggested that member states of the OECD always enter reservations when they disagree with a provision of the Model and enter observations when they disagree with the commentaries. It has therefore been concluded that the failure to enter an observation can be taken as a positive indication that a state agrees to interpret its bilateral treaties that follow the Model on the basis set out in the relevant commentaries. In other words, acquiescence in the commentaries is equivalent to assent. An examination of actual tax treaties concluded by member states shows that in many cases actual treaties have been negotiated and concluded between member states with provisions that do not correspond with the Model even though the parties to the bilateral treaty have not entered a relevant reservation. Practices in respect of the interpretation of treaties by member states of the OECD are not so publicly available to determine whether member states always enter an observation when they disagree with the commentaries because assessments of tax by taxing authorities are traditionally confidential. However, there is some evidence that observations in the commentaries are not always entered even when there are dissenting views of member states. This is illustrated by paragraph 7 of the commentary to Article 1 which first appeared with the 1977 Model and reads as follows:

"The purpose of double taxation conventions is to promote, by eliminating international double taxation, exchanges of goods and services, and the movement of capital and persons; they should not, however, help tax avoidance or evasion. True, taxpayers have the possibility, double taxation conventions being left aside, to exploit the differences in tax levels as between States and the tax advantages provided by various countries' taxation laws, but it is

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for the States concerned to adopt provisions in their domestic laws to counter possible manoeuvres. Such States will then wish, in their bilateral double taxation conventions, to preserve the application of provisions of this kind contained in their domestic laws."

This wording was continued virtually unchanged until the 2003 update without any of the member states indicating disagreement by entering a relevant observation. In paragraph 40 of "Double Taxation Conventions and the Use of Base Companies" (herein "Base Companies Report") it was said:

"It is not easy to reconcile these divergent opinions in theory, nor in mutual agreement procedures on specific cases. The main problem seems to be whether or not general principles such as 'substance-over-form' are inherent in treaty provisions, i.e. whether they can be applied in any case, or only to the extent they are expressly mentioned in bilateral conventions. On the dissenting view, to give domestic rules precedence over treaty rules as to whom, for tax purposes, is regarded as the recipient would erode the protection of taxpayers against double taxation (e.g. where by applying these rules, base company income is taxed in the country of the shareholders even though there is no permanent establishment of the base company there). However, it is the view of the wide majority that such rules, and the underlying principles, do not have to be confirmed in the text of the convention to be applicable."

A somewhat similar statement was also made in paragraph 44(a) of the "Double Taxation Convention and the Use of Conduct Companies" (herein "Conduit Companies Report") as follows:

"A State may wish to protect itself against 'abuse of law' by applying the general provisions in its domestic laws: it will then deny the benefits of the convention to income paid by a resident of that State to a company situated in the other State when it has reasons to suspect an improper use of the convention. The question arises as to whether the denial of treaty benefits in such cases is compatible with treaty obligations. This relates to the issue of the priority accorded to international law in relation to domestic law, a matter on which opinions differ among States, some taking the view that where the beneficiary of the income fulfils the conditions set in the convention (beneficial ownership, residence), the provisions of the convention should apply, notwithstanding the domestic provisions of the State of source (see also paragraphs 43 to 48 in the foregoing report on 'base companies') others taking the contrary view."

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The first opportunity after 1987 to enter an observation by the unidentified states that by 1987 had disagreed with paragraph 7 was when the commentary on Article 1 was substantially expanded in 1992 but paragraph 7 was continued. The expanded commentary reflected some of what was said in the Base Company Report and the Conduct Companies Report, in particular paragraph 24 of the 1992 commentary on Article 1 reflected the view of the wide majority of OECD member countries that anti-abuse rules such as substance-over-form do not have to be confirmed in treaty texts to be applicable, whereas there was a dissenting view to the contrary. However, no observation was entered on paragraph 7.

Another example occurred in respect of Article 14 of the Model. In Issues Related to Article 14 of the OECD Model Convention113 paragraph 59 states:

“Paragraph 3 of the Commentary on Article 14, however, clearly states that the expenses incurred for the purposes of a fixed base should be allowed as a deduction in determining the income attributable to a fixed base in the same way as is provided by paragraph 3 of Article 7. Most Member countries confirmed that, in practice, their country would allow the deduction of expenses in taxing the income attributable to a fixed base and agreed that there would be no policy justification for allowing tax to be levied differently under Article 3 and 14. They did, however, recognize the difficulty created by the use, in Article 14, of the phrase ‘income derived’. Again, any uncertainty in that respect will be removed through the elimination of Article 14.”

Despite the fact that only most member countries complied with paragraph 3 of the commentary on Article 14, those member countries that did not comply did not note any observation.114

113. OECD, Paris, 2000, also reproduced in Volume II of the International Model.
114. There are also some reported cases where the revenue authorities appear to have taken a position contrary to the interpretation set forth in the OECD commentary, even though no observation was entered by the country. See for Canada, Cudd Pressure Control Inc. v. The Queen, 95 DTC 559 at 564 et seq. and Specialty Manufacturing Ltd. v. The Queen, 97 DTC 2511 at 2515 et seq., for the United States, National Westminster Bank, plc v. US, 95 Fed.Ct. 120 (1989) at 130 et seq.; National Westminster Bank, plc v. US, 88 Fed Ct. 491 (2005) at 496 et seq.; Northwest Life Insurance Co. v. US, 107 T.C. 363 (1996) at 383 et seq.; and Tauber Fire Marine Ins. Co. v. CIB, 104 T.C. 533 (1995) at 540 et seq.; and for France, Ministere for the Economy and Industry v. Interhome AG, (2003) 3 ITLR 1001 at 1037 et seq. In the first mentioned National Westminster Bank case, the court referred to Revenue Ruling 89-115 also holding at p. 136 that it was inconsistent with the treaty in question and the OECD commentary. We have also noted that Canada entered no observation on paragraph 9.5 of the commentary on Article 1 of the Model even though Canada’s general anti-avoidance rule which Canada extends to treaties can be applied unless the main purpose for entering into the transaction that avoids tax is to achieve a non-tax objective. Paragraph 9.5 on the other hand says that domestic anti-avoidance should not deny treaty benefits unless the main purpose of the transaction is to avoid tax. 115. See Sialas v. note 104 for a discussion of acronyms in International law which has most frequently been applied by international courts and tribunals in boundary dispute cases when the modern international law recognizes international boundaries based on the principle of ad impossam partes. This principle is discussed by S.N. Laskan, Determining Boundaries in a Conflicted World: The Rule of Uti Possidetis (McGill-Queen’s University Press, 2003-3).
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... The elements necessary for a claim of a violation of legitimate expectations are: an expectation that an action do something or refrain from doing something; a legally valid reason to have the expectation; damage; and causation between the action or inaction and the damage."[16]

Sinclair, in discussing the concepts of estoppel and acquiescence in international law, says:

"What do we mean by estoppel? In international law, the term 'estoppel' has been used to denote a legal principle which operates so as to preclude a party from denying before a tribunat the truth of a statement of fact made previously by that party to another party whereby that other has acted to his detriment or the party making the statement has secured some benefit."[17]

Our view, therefore, is that the OECD commentaries do not give rise to binding obligations in international law by virtue of the application of the principles of good faith, acquiescence and estoppel or protection of legitimate expectations.[18] As we have discussed above, member states of the OECD do not always enter observations on the commentaries even when it is known that they may disagree with them. Further, paragraph 30 of the Introduction does not indicate that member countries always enter observations when they disagree with the commentaries. Therefore, it is tennis to conclude that in the absence of an observation, a member country should be presumed to agree with or acquiesce in the commentaries. Also, none of the member states of the OECD (all of whom are represented on the Council) is

[16] Note 104 at 53. There is no consensus in international law that it in fact recognizes the protection of legitimate expectations although it does recognize estoppel.

[17] Note 50 at 105. See also Amst, note 51 at 45 who discusses estoppel in relation to non-binding memoranda of understanding and emphasizes the necessity of finding reliance and determent before estoppel and good faith can give rise to legal obligations in international law.

[18] Erga omne, note 9 at 665 et seq. expresses the contrary view. His view is that because of the principle of good faith found in international law, member states of the OECD are legally bound to conform to the OECD commentaries when interpreting and applying provisions of a tax treaty that are identical to those of the Model except in circumstances where they have noted an observation.

His conclusion is that the commentaries, although not legally binding instruments, can be a source of legal obligations in international law on the basis of the principles of "substantive good faith" and the equitable principles of acquiescence and estoppel (arising from common law) and the principle of the protection of legitimate expectations (in civil law) all of which are in his view directly related to considerations of honesty, fairness and reasonableness and are manifestations of the principle of good faith in international law. Member countries that do not enter an observation on the commentary on an article of the Model in his view acquiesce in the commentary and are then estopped from denying its validity in international law.

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under any misapprehension that the commentaries themselves are not intended to be legally binding on it, on other member states, on taxpayers or national courts. As between the member states, if one state departed from the commentaries in the interpretation of an existing tax treaty, it would not give rise to any damage or injury to the other contracting state. It may be true that a taxpayer might in a particular case suffer damage in the form of increased taxation if a state (be it the source state of income or his residence state) refused to interpret and apply a particular tax treaty provision in accordance with the commentaries. If the source state departed from an interpretation set out in the commentaries, and imposed tax on a basis contrary to the commentary, the residence state would not be required to give relief under Article 23A or 23B as the relief against double taxation under these articles is provided only when the source state has taxed (in the case of relief under Article 23B) or may tax (in the case of Article 23A) "in accordance with the provisions of this convention." The residence state, if it applied the interpretation set out in the commentary would therefore refuse relief, and consequently suffer no damage because of the departure from the commentary by the source state.[19] The taxpayer, the only party suffering damage, could attempt to resolve the problem through a competent authority procedure, or by going to the courts of the residence and/or source states. In the courts, the legal issue would be the proper interpretation of the treaty which may, and probably would in most cases, be determined by the application of Articles 31 and 32 of the Vienna Convention, and in accordance with principles of logic and good sense, by reference to the commentaries existing and published at the time the treaty was concluded as part of the legal context.

(c) Transformation of international law into municipal law

We are therefore of the view that the commentaries are not binding in international law except perhaps those parts of prior commentaries that, combined with other facts, establish by convincing evidence that the parties to a tax treaty had a common intention to apply a special meaning of an undefined treaty term that is explained or defined in the commentaries, and then only if no relevant observation has been entered. We nonetheless review, from the perspective of various countries, the extent to which international law obligations can, without more, become binding on taxpayers

[19] See paragraph 32.5 of the commentary on Articles 23A and 23B for a discussion of other examples where double taxation relief is not available where the two contracting states interpret or apply a tax treaty differently.
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and revenue authorities in matters before municipal courts, in the absence of legislative action or its equivalent to transform those obligations into municipal law because it is in these courts that bilateral tax treaties are interpreted and the rights and obligations created by them are determined.

Although most countries have rules dealing with the transformation of international obligations and customary international law obligations into municipal or national law, there is little authority in respect of international law obligations arising from estoppel or the protection of legitimate expectations.

In Canada it has been recognized, although views may be changing, that the legal system is what publicists have described as “dualist” in nature requiring the transformation of international law into domestic law. There appears, however, to be a trend towards treating all international law, whether custom or treaty, as binding on Canada, whether implemented or unimplemented, in the same manner, namely, as relevant and perhaps persuasive, but not as determinative or obligatory. However, there is a difference between binding on Canada, and binding in Canada.

In a 1937 case in the Judicial Committee of the Privy Council, *Canada (A.G.) v. Ontario (A.G.)*, Lord Atkin declared:

“Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the

nonmal executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it.” (Emphasis added)

The current prevailing Canadian view is that, except for international law or international obligations altering or conflicting with existing domestic law, or statute law, parliamentary approval of the international obligations is not necessary for such obligations to be transformed into internal or municipal law in Canada, a country whose legal system is generally now considered by publicists to be partly monistic and partly dualistic. Income tax treaties are always made part of Canada’s internal or municipal law by the passage by Parliament of an implementing statute to which the treaty is annexed. This is, of course, necessary because tax treaties derogate from the provisions of the internal law, namely the *Income Tax Act*. To the extent, therefore, that any part of the commentaries on the OECD Model may be viewed as attempts to make effective amendments to the Model itself and therefore amendments to existing treaties made by Canada based on the Model which have become part of domestic law by implementing statutes, it is likely that Canadian courts would not consider those parts of the commentaries binding in international law or on the courts in municipal law without the support of legislation which is necessary in these circumstances for transformation of international law into municipal or domestic law (if in fact the commentaries can be said to create obligations in international law which we do not accept).

In the United Kingdom, there are various methods by which treaty provisions are incorporated into domestic law. Although there is no requirement for Parliament to consent to the Crown entering into a treaty, the constitutional practice is that a treaty which is subject to ratification or a similar procedure is laid before Parliament with an explanatory memorandum for 21 days while Parliament is sitting so that Parliament can be informed of the treaty. Parliament may debate the treaty if it wishes but this seldom happens unless an Act of Parliament is needed or the treaty is of major political importance. No provisions of a treaty which requires a change in English law in order to make internal or municipal law conform to the provisions of the treaty can have effect in municipal or internal law unless legislation has so provided. The legislation can take any of three main forms, namely an Act of Parliament to which the treaty is attached as a schedule, an Act of Parliament conferring all the powers necessary to carry out obligations under future treaties or an Act of Parliament which provides a framework within which secondary legislation can be made to give effect to

120. Broude and Toope, note 89 at 5.
121. [1937] AC 326 (PC) at 347-8. This view of the law applies not only in Canada but also would apply in the UK and Australia.
122. Only the French and English language versions of the treaties are annexed to the statute making it somewhat unclear whether the version in a third, or even fourth, language has the force of law in Canada. See the discussion of this issue by Jacques Saussville, “The Canadian Experience” in Multilingual Texts, note 31 at 57.
123. See also the discussion of this issue by Kielbierski, note 88 at 221.
to a certain category of treaty.125 The practice of incorporating tax treaties into domestic law in the UK by section 788 of the Taxes Act 1988 has the unfortunate result that certain articles or parts thereof of UK tax treaties (e.g., part of the non-discrimination article) are never transformed into domestic law.126 As is the case in Canada, to the extent that the commentators are viewed in the UK as attempts to make effective amendments to the Model, and indirectly to existing UK treaties based on the Model, it is likely that UK courts would not consider those commentators binding in international law or on the court in municipal law without the support of legislation.

Australia, as a commonwealth country whose laws developed under the sovereignty of the United Kingdom, also adopted what would be described by publicists as a dualist approach requiring parliamentary action to give treaties and international law effect in domestic law where the rights and obligations in international law conflict with those in domestic law.127

International law is considered to be part of the law of the United States without the need for any Congressional action or action by the President. The courts have applied it and given effect to it, as the UK has done. Customary international law, as developed at the time of the creation of the United States, became incorporated in United States law. Customary international law developed subsequent to the creation of the United States is transformed into the law of the United States from time to time as new norms of customary international law are recognized. Under the supremacy clause of the Constitution, self-executing treaties concluded by the United States also become law as of the time they come into force in respect of the United States.

The Constitution of the United States reflects both dualist and monist approaches. Under Article II, section 2(2) of the Constitution, the President may ratify a Treaty only with the “advice and consent” of the Senate supported by the affirmative vote of two-thirds of the members present. An

international treaty of the United States is non-self-executing if it manifests an intention that it is not to be effective as part of the domestic law without the enactment of implementing legislation, if the Senate in giving consent to the treaty or Congress by resolution requires implementing legislation, or if implementing legislation is constitutionally required.128 Sometimes to avoid the difficulty in obtaining the advice and consent of the Senate, an alternative form is employed by the United States Government by entering into treaties that are called “executive agreements”, that do not have to be submitted to the Senate, but are regarded by the United States Government and by other states as treaties for the purposes of international law. Under a federal statute, the Case Act,129 all executive agreements have to be notified to Congress within 60 days of their entry into force and published thereafter.

Under Article VI, section 2 of the Constitution, all treaties that require the advice and consent of the Senate are the “supreme law of the land” which has been interpreted by the Supreme Court as also applying to executive agreements. There is often confusion in determining whether treaties such as such executive agreements are self-executing, that is to say, they enter into force directly as if by Act of Congress.

If a treaty is self-executing, it may conflict with U.S. domestic law and, if so, the courts may seek to reconcile the two, but if that is not possible then the residiary rules are:

(a) treaties prevail over common law;
(b) treaties prevail over state law;
(c) the Constitution prevails over all treaties; and
(d) in the case of a conflict between a treaty and an Act of Congress, the later in time prevails.

It is not certain, however, whether the last rule applies to executive agreements as it is probable that an executive agreement concluded by the exercise of the executive power of the President does not prevail over a prior Act of Congress.130

125. See Aust, note 31 at 151 et seq.
126. See NAC Semi- Conductors Ltd. v. IRC, [2004] RTC 298 at 220 et seq. and U3 Systems AG v. HM Revenue and Customs, note 76. It is possible that the Australian practice of implementing tax treaties under the International Tax Agreements Act 1953 which typically states that the treaty has force "so far as those provisions affect Australian tax "may also be imperfect in respect of such treaty provisions as the exchange of information articles.

129. Public Law 92-403 as amended by H.R.20110 P.L.111-172 (1972), at 82.
130. United States law is discussed by Aust, note 31 at 157 et seq.
In dealing with customary international law (including its codification as, for example, by the Vienna Convention) parliamentary approval is not required in Canada, the United Kingdom, Australia and the United States if the international law does not conflict with internal or national law and, in the United States, it also does not conflict with the Constitution. In this respect, the laws of the United Kingdom, the United States, Canada and Australia are similar. Also, in these countries, if internal or national law is sufficiently imprecise or ambiguous, internal or national law is generally interpreted by the courts in a way not to conflict with international law obligations of the country, even if such international law has not been transformed to become part of the internal or national law.

In Japan, under the Constitution, a treaty can be self-executing, depending on its contents. This includes tax treaties. This, however, has nothing to do with a monist or a dualist theory of the law, which distinctions are regarded in Japan as theories of old dogmatic international law scholars.

Sweden, like the UK, Canada and Australia, has a dualist system of law. Tax treaties are transformed into domestic law by statute by the Riksdag (parliament). The implementing statute, as in the case in Canada, annexes the actual treaty.

131. For non-codified customary international law conflicts with internal or national law in these countries, the internal or national law would have to be amended to be consistent with international law before international law could be transformed into national law.

132. For the United Kingdom, see Halway, note 124, para. 604 at 446 and Trendex Trading Corp. Ltd. v. Central Bank of Nigeria, [1977] 4 QB 539 at 553-4 (C.A.). See also the ALI Restatement of Foreign Law, note 128 for a discussion of the role of the US Constitution and for a discussion of self-executing treaties. The Canadian law in this respect is considered to be the same as in England. R. St. J. Macdonald in Macdonald, Morris and Johnson, eds., Canadian Perspectives on International Law and Organization, (University of Toronto Press, 1974) 88.

133. In the United Kingdom, see Halway, note 124, para. 604 at 446 and Garland v. British Rail Engineering Ltd., [1983] AC 751 at 771. In Australia, see Minister of State for Immigration et al. v. AH Kim Teok FC, [1995] HCA 20. See also Coleman v. Power, [2000] HCA 39 for a full discussion, and some disagreement among the judges. In Canada, see R. v. Kegastro, [1990] SCR 697 at 754 and Brunelle and Toope, note 80 at 32 et seq. and the cases referred to therein which also indicate some judicial disagreement. In Australia and in Canada, where a non-income tax statute adopts terms used in tax treaties, the courts have in Australia used the commentaries and in Canada, used income tax treaty cases and the commentaries aids to their interpretation. Unique Corp. v. Fed. Comm., [2002] NSWSC 1115 and Toronto Blue Jays Baseball Club et al. v. Ontario, 2005 DTC 5356; 7 ITLR 591 (2005) (OCA) which is an approach to interpretation based on a similar view that international law can inform the interpretation of domestic statutes.

134. See Dahlberg, note 9 at 61-4.

135. In France the executive has the sole responsibility for concluding treaties but because of the supremacy of treaties under the Constitution, the National Assembly and the Senate should authorize ratification if a treaty concerns peace, trade, an international organization which has the power to restrict the exercise of French sovereignty, expenditure not budgeted for, individual status or territory, or if the treaty would modify existing legislation or have new legislative effect. If the executive ratifies a treaty without the approval of Parliament when the approval should have been obtained, as Article 53 of the French constitution requires such approval in many cases, the treaty would be unconstitutional and should be so declared by the Conseil Constitutionnel. Otherwise, if a treaty is ratified by the executive without parliamentary approval, the sanction would be political. The Conseil Constitutionnel has authority to determine whether a treaty conforms to the Constitution but only if the President, Prime Minister, President of the Senate, President of the National Assembly or 60 members of either of those two lower bodies ask the Conseil. Treaties which may affect the rights and duties of individuals must be published in the Journal Officiel and when published they prevail over existing or later legislation but, if not so published, they cannot be applied by the courts.

136. Under the German Constitution, the making of treaties is the responsibility of the Executive although the Foreign Relations Committee of Parliament is informed when a treaty is concluded. Only a limited number of categories of treaties require parliamentary consent before they can be ratified, which categories include normative treaties, the transformation of which requires legislation and treaties affecting federal legislation or of high political importance. In acting, Parliament has no power to amend the treaty or impose conditions or require reservations to be made. Whether a treaty requires the consent of Parliament is a matter for determination by the Constitutional Court, but if the Foreign Relations Committee considers that the consent of Parliament is needed, in practice it will be sought. The passing of an implementing law approving the ratification of a treaty has the effect of making the treaty part of German law. If a treaty affects existing laws of Germany or requires new legislation, a separate law must be enacted.

Since 1971 it has been generally accepted that Belgium has what publicists would describe as a monist legal system albeit not pure monism since a statute is required to give full legal effect to the provisions of a treaty under
domestic law. The relationship between Belgian domestic law and international law in case of conflict was settled in the Supreme Court in the leading case, Franco Suisse Le Ski which held that the rules of international law and those of domestic law belong to one and the same legal order. In the case of conflict, the rules of international law prevail over rules of national law.

There is no provision in the Belgian Constitution or in any other statutory provision in Belgium that governs the question whether customary international law is recognized in the Belgian domestic law order. However, for at least two centuries, the Supreme Court has ruled that customary international law is recognized in Belgian domestic law. That rule is generally accepted by Belgian authors. There is no requirement of ratification by parliament in these cases.

The prevailing view in the Netherlands is that international law has direct internal effect and that is an integral part of the law of the Netherlands and therefore within the limit of their authority. Netherlands state organs, including courts, are in principle bound to comply with international law. This applies to legal rights and obligations of citizens of the Netherlands affected by international law and applies also to both written and unwritten rules of international law. The decisive question according to the Dutch government in determining whether approval is required is whether the parties intended to create legally binding obligations under international law. According to the Dutch Constitution (1983), all agreements that are binding under criteria of international law must, in principle, be submitted to Parliament for approval which can be express or tacit. This applies to non-written agreements as well as agreements concluded with international organizations. This would include a mutual agreement validly concluded by the Dutch competent authorities and the competent authorities of another state under the equivalent of Article 25(3) of the OECD Model. However, Parliamentary approval is not required in the Netherlands if the treaty pertains exclusively to the implementation of a treaty (an impending treaty) that has already been approved (“implementing treaties”) but Parliament must be informed of the government’s intention to conclude an implementing treaty and must be informed as soon as possible of any implementing treaty concluded. A competent authority mutual agreement under the equivalent of Article 25(3) of the Model may be considered to be an implementing treaty not requiring prior Parliamentary approval. This is the case for both interpretive and legislative mutual agreements. However, Parliament under Article 8(2) of the Kingdom Act may require legislative mutual agreements to be subject to its prior approval. Under Article 120 of the Netherlands Constitution, the courts are not entitled to verify whether treaties have been concluded in accordance with the required formal procedures, but this may not apply to mutual agreements. However, the Hoge Raad, without dealing with the limitation imposed by Article 120 of the Constitution, refused to apply a mutual agreement, which was regarded by many as an “executive” treaty, implementing a formal treaty, because it had not been properly published.

In Italy, Article 87 of the Constitution provides that the President ratifies international treaties. However, Article 80 of the Constitution provides that some particular treaties may be ratified only after the prior consent of the Parliament. These provisions are generally interpreted to mean that only treaties for whose ratification prior consent of Parliament is necessary must be concluded in accordance with the procedures described in Article 14 of the Vienna Convention whereas other treaties do not require ratification. The Italian government may therefore express its consent to be bound by such a treaty without a further act of the President or of Parliament. Those treaties that need the consent of Parliament include treaties that change existing laws which would include most income tax treaties. It is the general view, however, that treaties of a technical nature or which involve compliance or interpretation of other previously concluded treaties can be


139. Supreme Court, 19 March 1842, Pau, I, 1842, 122; Supreme Court, 26 June 1846, Pau, 1846, I, 117; Supreme Court, 8 February 1849, Pau, 1849, I, 239; Supreme Court, 25 January 1906, Pau, 1906, I, 130; Supreme Court, 26 May 1966, Pau, 1966, I, 1211.


141. See for further discussion Engelen, note 9 at 52 et seq. and 533 et seq. and Aust, note 31 at 148.

142. HR 29 September, 1999, nr. 33367, BBN 2000/16.
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concluded in simplified form without ratification.\textsuperscript{143} Therefore an international agreement concluded in simplified form without ratification would appear to be valid in Italian internal or municipal law if it does not involve a modification of acts formerly classified as laws which would be the case for interpretative acts of previously concluded treaties.

In Italy, only customary international law is considered to be part of internal law without the need for a further act of implementation.\textsuperscript{144} On the other hand the case law in the Constitutional Court has held that treaties are only transformed from international law into municipal or internal law after their implementation (ordini o di esecuzione).\textsuperscript{145} There is general consensus that an international treaty awaiting implementation has not yet become part of the internal legal system of Italy.\textsuperscript{146}

There is also a view in Italy that before its implementation, a concluded treaty can play an interpretative role in internal law in the sense that it may be used as a guide in the interpretation of internal law provisions so that they are interpreted in a way that are not at variance with the unimplemented treaty provisions.\textsuperscript{147} This view seems to accord also with Article 18 of the Vienna Convention which provides that a state is obligated to refrain from acts that would defeat the object and purpose of a concluded treaty pending its entry into force within its internal laws. Some scholars have argued that where an international instrument, even if concluded in simplified form can have a purely interpretative role in respect of a prior treaty already in force when the interpretative instrument derives its implementation from the first treaty to which it refers and in this case a separate act of implementation is not required as long as the interpretative instrument is valid at the international law level.\textsuperscript{148}

Under the Swiss Constitution, treaty-making power is vested in the Confederation. The Federal Council is entitled to conclude treaties even on matters within the competence of the cantons. Although the Constitution provides that the Federal Assembly is to approve treaties, in constitutional practice about 60% of treaties are not specifically approved by the Federal Assembly. The Federal Council concludes such “executive treaties” provided the Federal Assembly has authorized them beforehand, either expressly or implicitly, or if they concern a matter of minor importance which does not primarily affect individuals. In other cases, if the matter is urgent, the Federal Council may apply a treaty provisionally but cannot ratify it without the approval of the General Assembly. In practice the Federal Council has a large discretion as to whether or not it submits the treaty for approval. When it does so it must be submitted between the time of its signature and the time of ratification and will be accompanied by the text of any reservations which the Federal Council proposes to make. The Federal Assembly may then either reformulate the reservations or add new ones. A treaty approved by the Federal Assembly which is of an indefinite duration and not capable of being denounced and provides for the participation in an international organization or concerns multilateral law-making must be submitted to a referendum of all Swiss citizens if 50,000 citizens or eight cantons so require. Other treaties are submitted to a referendum if both Houses of the Federal Parliament so decide.

Once a treaty enters into force in Switzerland, it becomes part of Swiss municipal law and there is no need for it to be formally transformed. This is the case whether or not the Federal Assembly has specifically approved the treaties. Treaties prevail over inconsistent internal law, whether existing or future laws. However, Parliament can enact a law which is inconsistent with the treaty to which Switzerland is bound, provided this is done so deliberately, although there is a growing tendency in the jurisprudence of the Supreme Court to recognize the primacy of treaties. Once a treaty has become part of a law it can be invoked before domestic courts, provided it is self-executing and provided of course that its terms are precise enough for the courts to apply it.\textsuperscript{149}


\textsuperscript{144} Article 10 of the Constitution.


\textsuperscript{146} In a case involving a treaty concluded in simplified form the Corte di Cassazione held that: “The fact that such agreements are valid after their signature [without ratification] has a weight only at the international level ... as far as implementation into an internal legal system is concerned, a legislative act concerning the order of execution and inserting the provisions within the domestic legal order is always necessary.” Cassa di Cassazione, United Branches, 22 March, 1972, n. 867. B. Conforti, note 143 at 320.

\textsuperscript{147} A. SANTAMELEA, “Sui valori dell'interpretazione dell'art. 11 del Trattato fra Italia e Francia per evitare le doppie imposizioni della 12 ottobre 1952 ai sensi dello scambio di lettere del 5 ottobre 1989”, in Diritto e Pratica Tributaria, 1991, 1, 1413.

\textsuperscript{148} See Aust, note 31 at 150.
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By 2005, OECD member countries had entered 286 reservations on the current Model and 69 observations on the commentaries on the current Model. Observations express disagreement with the Model and observations express disagreement with its interpretation in the commentaries. Disagreements with the commentaries may, however, number far more than the number of observations recorded because when a country notes a reservation to a provision of the Model, an observation to the related commentary would often be redundant. No observations appeared in the League of Nations commentaries and no reservations appeared in any of the League of Nations Models although the Report accompanying the 1943 Mexico Draft Model said that it was contemplated that governments would communicate their observations directly to the Secretariat of the League. There also were no observations on the commentaries in the 1963 Draft Model because, as stated in paragraph 34 of the Introduction to the 1963 Draft, the commentaries were agreed upon unanimously by the experts appointed to the Fiscal Committee by the governments of Member countries. Since the 1977 Model, when 36 observations were recorded, they have almost doubled. Nonetheless, this, the commentaries themselves do not discuss in any adequate detail the status or role of observations in interpreting tax treaties and the recommendation of the OECD Council of 1997 makes no mention of observations or reservations. The purpose of observations is dealt with in the Introduction to the current Model which states:


151. Twenty-five of the member countries of the OECD by 2005 had recorded a total of 572 reservations on the Model and 28 disagreements or difficulties with the commentaries.

152. The reservations on Article 12 entered by Greece in paragraphs 46.2 and 46.3 of the commentary and on Article 17 entered by Canada, Switzerland and the United States in paragraph 16 of the commentary and on Article 16 by Belgium (in the 1992 version of the Model) are examples as these reservations not only reserve the right to amend the articles, they also imply disagreement with its interpretation in the commentary. The Court of Appeals of Brussels held that Belgium's 1992 reservation to Article 16 which implied a disagreement with the interpretation in the commentary could not be applied to interpret its 1967 treaty with the UK: Court of Appeals Brussels, 2 May, 2001, F.J.E., 2001/214.

153. League of Nations document no. C.2.M.2. 1945.B.A. at 5. Although the Report used the term "observations", it was probably intended to refer to observations on the commentaries as well as reservations on the draft treaty articles.

154. Water, note 8, does not deal with the role or effect of observations.

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"As recommended by the Council of the OECD, Member countries, when concluding or revising bilateral conventions, should conform to this Model Convention as interpreted by the Commentaries thereon and having regard to the reservations contained thereon and their tax authorities should follow these Commentaries, as modified from time to time and subject to their observations thereon, when applying and interpreting the provisions of their bilateral tax conventions that are based on the Model Convention." "Observations on the Commentaries have sometimes been inserted at the request of Member countries that are unable to concur in the interpretation given in the Commentary on the Article concerned. These observations thus do not express any disagreement with the text of the Convention, but usefully indicate the way in which those countries will apply the provisions of the Article in question. Since the observations are related to the interpretations of the Articles given in the Commentaries, no observation is needed to indicate a country's wish to modify the wording of an alternative or additional provision that the Commentaries allow countries to include in their bilateral conventions.

The principal difficulty in assessing the relevance of the observations in interpreting tax treaties and appreciating their impact on the use of the commentaries is that they relate to a non-binding OECD Council recommendation that is addressed to OECD member countries. The question then must be what relevance, if any, the observations have in the interpretation of treaties made between two OECD states, if one of them entered an observation.

Observations on the commentaries are not the same as unilateral reservations or unilateral interpretative declarations, which can be made in respect
of both multilateral and bilateral treaties, as observations are expressed in relation to non-binding commentary and not in respect of the interpretation of a particular provision of a bilateral treaty. However, the treatment of unilateral reservations and declarations in international law may, by analogy, assist in dealing with this issue.

Articles 19 to 25 of the Vienna Convention deal with the effect of reservations in international law. The treaty law on the effect of reservations was partially clarified early on by the International Court of Justice in the Genocide Convention case, in which the court held that the question of whether a reservation should or should not be permitted to any particular treaty would depend on the terms of the treaty itself. A state that has made and maintained a reservation that has been objected to by one or more of the other parties to the treaty (but not all of them) could, in the view of the court, be regarded as being a party to the treaty if the reservation is compatible with the object and purpose of the treaty, while if the reservation is not

approving or according to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state. Since 1993, the International Law Commission of the United Nations has undertaken the formulation of "Draft Guidelines on Reservations to Treaties", a major work on the "The Law and practice relating to reservations to treaties". The study, yet to be completed, considers reservations and interpretative declarations to international treaties which should lead to a "Guide to Practice", that is to say as the International Law Commission itself expresses — "draft guidelines with commentaries which would be of assistance for the practice of States and international organizations". The importance of this study is also given by the fact that it relies on the practice of states and it is based upon answers formulated by the states in reply to a questionnaire prepared by the Law Commission. At present, the Commission has not yet addressed specifically the fundamental aspect of the legal effect of unilateral declarations. Reports of the International Law Commission from 1997 to 2003 are available on the website of the Organization http://www.un.org/law/ilo/ 58. On the subject of reservations, see Malcolm N. Shaw, International Law (5th ed., University Press, Cambridge, 2003) at 821 et seq. and Ivo 91 at 121 et seq. On the subject of reservations and interpretative declarations and the difference between them, see D.M. Mackie, "The Legal Effect of Interpretative Declarations", 1978 R.T.L. 155. See also Sintiacer, note 56 at 52; and R. Saposnik, Disparities in Interpretative Unilateral Acts Treated Internationally, (Mila, 1996). Since 1993, the International Law Commission has been working on the law and practice relating to reservations and interpretive declarations to treaties, and has produced draft guidelines on reservations and interpretative declarations. The study is reported on the website of the International Law Commission http://www.un.org/law/ilo/. The work is further advanced with respect to reservations than it is in respect to interpretive declarations. The published minutes and draft guidelines are referred to extensively by Maisto, note 150. The International Law Commission has already arrived at a consensus that, as a result of its work on reservations, there will be no change to the relevant provisions of the Vienna Convention.


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compatible that state cannot be regarded as having become a party to the treaty. If another party to the treaty objects to the reservation on the basis that it is incompatible with the object and purpose of the treaty, it can in fact consider the reservation state not to have become a party to the treaty, but, on the other hand, the party that accepts the reservation as being compatible with the object and purpose, can consider the reservation state a party. Article 19 of the Vienna Convention largely reflects this decision. Article 20 provides that a reservation expressly authorized by a treaty does not require subsequent acceptance by the other states unless the treaty provides otherwise. When it appears from the limited number of negotiating states and the object and purpose of the treaty that the application of the treaty in its entirety between all parties is an essential condition of the consent of each of them to be bound by the treaty, a reservation requires acceptance by all parties. In all other cases, unless the treaty otherwise provides: (a) the acceptance by other contracting states of a reservation makes the reserving state a party to the treaty in relation to those other states if and when the treaty is in force for those states; (b) an objection by another contracting state to a reservation does not preclude the entry into force of the treaty as between the objecting and the reserving states unless a contrary intention is definitely expressed by the objecting state; and (c) an act expressing a state's consent to be bound by the treaty and contain a reservation is effective as soon as at least one other contracting state has accepted the reservation. A reservation that is established with regard to another party in accordance with the foregoing modifies, for the reserving state in its relations with that other party, the provisions of the treaty to which the reservation relates to the extent of the reservation and modifies those provisions to the same extent for that other party in its relations to the reserving state. However, the reservation does not modify the provisions of the treaty for the other parties of the treaty inter se. When a state objecting to a reservation is not opposed to the entry into force of the treaty between itself and the reserving state, the provisions to which the reservation relates do not apply between the two states to the extent of the reservation. Reservations may be withdrawn at any time without the consent of a state that

160. When a treaty is a constituent instrument of an international organization, unless it otherwise provides, a reservation also requires the acceptance of the competent organ of that organization.

161. For these purposes, a reservation is considered to have been accepted by a state if it has raised no objection to the reservation by the end of the period of 12 months after it was notified of the reservation or by the case in which it expressed its consent to be bound by the treaty, whichever is later.

162. Article 21 of the Vienna Convention.
accepted the reservation and an objection to a reservation may also be withdrawn at any time.163 A reservation, an express acceptance thereof and an objection thereto, as the case may be, must be in writing and communicated to the contracting states and to other states entitled to become parties to the treaty. A reservation, if formulated when signing a treaty subject to ratification, acceptance or approval, must be formally confirmed by the reserving state when expressing its consent to be bound by the treaty and in that case the reservation is considered as having been made on the date of the confirmation.164

Maisto has given an example showing that Greece, in negotiating a tax treaty with Uzbekistan, did not respect its own observation and examples of the OECD commentaries which have actually been reflected in the treaty text. There are other instances where both States expressed the same observation but notwithstanding this incorporated the observation into the text of the treaty so as to confirm the interpretation previously expressed in the observation on the commentaries.165 These examples which show that countries do not always maintain their positions in their observations, and when they do, they sometimes clarify their positions expressly, raise questions of whether and to what extent it may be appropriate when, as in most cases, the treaty text does not clarify which interpretation has been accepted, to consider (a) that one state (the non-observing state) in negotiating a tax treaty provision based on the wording of the Model accepts the interpretation of the other state (the observing state), or (b) that the non-observing state maintains the position that the commentary provides that correct interpretation and the observing state accepts this, or (c) that the observing state maintains its position and that position is accepted by the non-observing state, or (d) that both states maintain their respective positions and therefore there is no agreement between them as to the proper interpretation of the treaty provision in question. A reservation, an acceptance and an objection to it must all be formulated in writing. This may buttress the conclusion that there is a somewhat tenuous analogy to be drawn between commentaries, observations, objections and reservations as the formulation in respect of observations, although in writing, is reflected only in the commentaries to the OECD Model and is not normally repeated in writing as part of the negotiating process of a particular tax treaty.166 Because it is not repeated in writing as part of the negotiating process, there is little evidence to show whether or not the observing party maintained the position reflected in the observation for the purposes of the particular treaty.

It is unlikely that the difference of view represented by the observation would be incompatible with the object and purpose of the bilateral tax treaty. Therefore, if observations are considered to be similar to or the equivalent of reservations and are considered to have been made or repeated at the time the treaty is concluded, then analogizing from Article 21 of the Vienna Convention, unless the other state rejected the interpretation, if any, set out in the observation, the interpretation of the particular treaty as set out in the observation, if any, would seem to override the interpretation set out in the commentary on the particular Article, not only for the observing state, but also for the non-observing state. This conclusion of course could not be applied in those cases where the text of the treaty Article negotiated between the two states departs from the wording of the Model and certainly could not be applied where the text expressly by its wording or a protocol or memorandum of understanding either rejects the interpretation given in the commentary or rejects the interpretation given in the objection on the commentary.167 The conclusion that the observation modifies the interpretation of the treaty by both contracting states depends for its force, by analogy to reservations, on the assumption that the non-observing state considers that the observing state has repeated its observation at the time the treaty is being concluded and that the non-observing state has raised no objection to that observation.168 If, however, the would-be interpreter of the tax treaty does not accept the proposition that the observing state is considered to have repeated the observation at the time the treaty was concluded and the non-observing state is considered to have accepted it or at least has not rejected it, then it appears that there is no agreed interpretation of that particular article either on the basis of the view expressed in the commentaries current at the time the treaty was concluded or of the view, if any, expressed in the observation on the commentaries. This

163. Article 22(1) and (2) of the Vienna Convention.
164. Article 23 of the Vienna Convention.
165. Note 150 at 15.
166. For example, see Article 8(2) of the Australia-Germany treaty (1972), where the contracting states have agreed that mixed transportation is outside the scope of the provisions on international transport, in accordance with the recommendation made by Germany (paragraph 29) and Australia (paragraph 30.1) on the commentary on Article 8 of the Model.

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presumably permits the interpreter to disregard both the commentary and
the observation.

Observations on the commentaries on the OECD Model are of course
neither reservations as defined in the Vienna Convention nor reservations as
dealt with under international law, and it may well be that there are too many
differences between reservations and observations for these international
law rules relating to reservations to inform the treatment of observations.

Observations, although unilateral, are also not the same as unilateral
interpretive instruments such as debates in parliament, explanatory or technical
memoranda or explanations which are generally drawn up following the
conclusion of a treaty and are not addressed to the other contracting state. 170
Observations, being unilateral, are likewise not the same as either bilateral
interpretive protocols or exchanges of notes which, to the extent that the
parties to the treaty accept them, constitute authentic interpretations of
the treaty.

Masato also discusses at considerable length the current status of the work
of the International Law Commission (the “ILC”) of the United Nations in
relation to interpretive declarations and their relevance to international
treaties, noting that the ILC has not yet addressed specifically the funda-
mental aspect of the legal effect of unilateral interpretive declarations.
An interpretive declaration as defined by the ILC in draft guideline 1.2 is “a
unilateral statement, however phrased or named, made by a state or by an

170. These include the memorandum the German government submits to the legislature with
the draft of legislation implementing a tax treaty, the Dutch government’s explanatory notes
made when the treaty is submitted to parliament, the comments of the Swedish government on
the interpretation of the particular treaty when it is submitted to the Swedish Riksdag, the
Technical Explanations by the U.S. Department of the Treasury on the text of tax treaties when
submitted to the Senate for advice and consent and the Explanatory Memorandum accompa-
nying the bill that introduces a tax treaty to the Australian parliament. These are discussed by
Edwards-Kee, note 9, Chapter 25; Vogel et al., note 7, Introduction, paragraph 71; H. Pfl, “The
Theory of the Interpretation of Tax Treaties with Reference to Dutch Practice”, 51
For a comparative analysis, see the National Reports in Cahiers de droit fiscal international
generally drawn following the conclusion of a treaty although they may contain statements
such as “it was agreed during negotiations that ...” and are not addressed to the other
contracting state, so that they should not be used in interpreting a treaty. According to Vogel et
al., note 7, Introduction, paragraph 71, to the extent that such documents do not impugn the
content of letters or notes exchanged during the negotiation of the treaty, they fall outside the
scope of Articles 31 and 32 of the Vienna Convention.

international organization whereby that state or organization purports to
specify or clarify the meaning or scope attributed by a declarant to a treaty or
to certain of its provisions”. Draft guideline 1.4.4 states that a unilateral
statement formulated by a state or an international organization whereby
that state or organization expresses its views on a treaty or on the subject
matter covered by a treaty, without purporting to produce a legal effect on
the treaty, constitutes a general statement of policy which is outside the
scope of the draft guidelines. If this view prevails even if the observations
are considered to be unilateral interpretive statements, because the com-
mentaries do not purport to have legal effect on a particular bilateral tax
treaty, they may ultimately not be dealt with in the final guidelines adopted
by the ILC.

There seems to be little present guidance in international law as to the effect
of unilateral interpretive declarations. In paragraph 121 of the Text and
Commentaries of the Draft Guidelines on Reservations to Treaties Provi-
sonally Adopted by the Commission on the First Reading at its Fifty-Third
Session, 2001, the ILC noted:

“It remained to be seen whether [the rules in relation to reservations] could be
transposed to interpretive declarations. Practice, which is neither readily ac-
cessible nor well established, is not very helpful in that respect.”

Masato distinguishes, however, the not uncommon practice for parties to a
tax treaty to annex a protocol or an exchange of notes to the text of the
treaty and points out that these interpretive declarations are therefore
expressly accepted by the other party and have legal effect. Draft guideline
1.5.3 prepared by the ILC reflects this position as follows:

“The interpretation resulting from an interpretive declaration made in respect
of a bilateral treaty by a state or an international organization party to a treaty
and accepted by the other party constitutes the authentic interpretation of that
treaty.”

If the bilateral interpretive instrument is made after the tax treaty has been
concluded, the instrument would fall under Article 31(3)(a) of the Vienna
Convention and the bilateral interpretive instrument should, in international
law at least, be taken into account in the interpretive process. 171

171. Such an interpretive instrument is contained in the exchange of notes which sets out the
understanding of Japan and the United States with respect to the Japan-USA Treaty (2003):

“With reference to Article 9 of the Convention, it is understood that double taxation can
be avoided only if the authorities agree to use a common understanding of the principles to be
applied in resolving transfer pricing cases. Therefore, the Contracting States shall
Although there are clearly differences between observations on the commentaries on the one hand and unilateral interpretive declarations on the other, they have a number of similarities. They are both unilateral statements and they both relate to treaty interpretation although observations relate to an international recommendation in support of the use of commentaries in the OECD Model while a unilateral interpretive declaration relates to an actual treaty. A unilateral interpretive declaration is also different from a reservation because a reservation seeks to exclude or modify the legal effect of treaty provisions in their application to the state making the reservation whereas an interpretive declaration seeks only to control the interpretation of the treaty terms clarifying their meaning and scope from the point of view of the state making the interpretive declaration.

What seems to be clear in international law is that unilateral interpretive declarations are not binding on the other contracting party or parties although they do become binding if and when the declaring state consents to be bound by the treaty only if the specific interpretation set out in the interpretive declaration is accepted. These cases involve conditional interpretive declarations which the ILC notes are similar to and may essentially be the same as reservations. Observations on the OECD commentaries are not conditional interpretive declarations as there are no such conditions attached to them and they are not usually repeated when bilateral treaties are concluded by states that entered observations.

An important difference noted by Maisto is that since unilateral interpretive declarations are not binding, the observing state may not consider the other state to be bound to interpret and apply the treaty pursuant to the observation.

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Maisto has expressed the view that although there is no clear answer to the question, it seems possible to infer that the observing or declaring state could not be considered to be acting in bad faith or in breach of the treaty in following its own interpretation in the absence of an objection by the other party. Moreover, if the other party objects, the observation or interpretive declaration would not be completely useless since it may be an element to be taken into account by the would-be interpreter.\textsuperscript{172}

Although they are similar to unilateral interpretive declarations, observations on the OECD commentaries are not formulated by the duly authorized treaty negotiators but are rather unilateral statements made by the representatives of a state who are members of the CFA and are probably meant to form part of or qualify the recommendation of the OECD Council to governments of member states to conform to the Model as interpreted by the commentators when concluding and revising bilateral treaties and that their tax administrations follow the commentaries, as modified from time to time, when applying and interpreting the provisions of their bilateral treaties based on the Articles of the Model. They are not made or expressed by the plenipotentiaries involved in the negotiation and conclusion of the actual bilateral treaty.

However, as we have already noted, the commentaries existing at the time the treaty is concluded, when the bilateral treaty incorporates the wording of the Model, although not legally binding, can be presumed to reflect generally the intentions of the treaty negotiators, particularly if the states that are parties to the treaty are represented on the CFA.\textsuperscript{173} They therefore become relevant and can be presumed to reflect the intentions of both states as to the interpretation of a particular bilateral treaty provision that follows the OECD Model wording without requiring that express reference to them be made. Consistent with the introduction to the current Model, which states that member countries should follow these commentaries subject to their own observations,\textsuperscript{174} it may follow that the observations made by member states may, in the absence of evidence to the contrary, implicitly be considered to reflect the intention of the observing state at the time of the conclusion of a bilateral treaty if the observation was contained in the commentaries current at such date.

\textsuperscript{172} In support of this view, Maisto cites R. Supraman, note 138 at 254 et seq.

\textsuperscript{173} This is reinforced when, which is sometimes the case, the government, when presenting a bill to parliament to implement a tax treaty in domestic law, refers to the fact that the treaty was based on the OECD Model.

\textsuperscript{174} Paragraph 3 of the Introduction.
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In our view, an observation, if it is intended to produce a legal effect on bilateral treaties to be made by the observing state, unless there is evidence to the contrary, may be considered to have become a unilateral interpretive declaration at the time a particular bilateral tax treaty is concluded because, in the absence of evidence to the contrary, it may be fair to consider that it is implicitly reiterated and it indicates the way in which that particular country intends to apply the provisions of the Model in question. This would not be the case, however, if the state making the observation does not put forward an alternative interpretation in the observation but merely reserves the right to propose an alternative interpretation in the course of negotiations.\footnote{175}

The ILC has noted that the practice of states in respect of unilateral interpretive declarations is not readily accessible nor well established. Mastro concludes, however, and we agree that it may be possible in certain cases to maintain, in the absence of an objection made by the other treaty partner, if the observation is intended to have proper effect, the observing state may, acting in good faith, apply the treaty pursuant to the interpretation set forth in the observation. Furthermore, in light of the failure of the other state to express its objection during the treaty negotiations to the declared position in the observation, the non-observing state should not consider the observing state’s departure from the commentaries pursuant to its observation as being not in accordance with their common intention as to the interpretation of the bilateral treaty.\footnote{176}

The conclusion to be drawn from this, therefore, is that if the commentaries provide evidence of the special meaning of a term as referred to in Article 31(4), the observation may evidence an intention to accept a non-symmetrical interpretation of the relevant treaty term. When the observing state applies the treaty in accordance with its observation, the non-observing state, if it is the state of residence, might consider that the observing state has imposed tax in accordance with the treaty, thereby requiring the non-observing state to provide relief under the treaty’s equivalent of Article 23A or 23B.\footnote{177}

This position is illustrated by the following examples. In the first example, source state S entered an observation as to the meaning of a term and residence state R does not object to the observation in the negotiations for a bilateral treaty between them based on the Model. We suggest that the conclusion may be drawn that the application by state S of the treaty pursuant to the observation is in accordance with the treaty and thus state R must give relief under the treaty’s equivalent of Article 23 of the Model. This is also the case when both states claim their exclusive right to tax the item of income under the treaty based on a disagreement as to the meaning of a treaty term. Where state R provides for credit relief in the tax treaty, state R would be required to grant relief for the taxes levied in state S which would be considered to have imposed its taxes in accordance with the treaty. Thus, in the example discussed by Mastro,\footnote{178} Greek income taxes paid by an airline company engaged in international traffic which is a resident of, and has an effective management in Slovenia, on profits derived from the occasional leasing of aircraft on a "bareboat" charter basis should be creditable in Slovenia pursuant to Article 23 of the Greece-Slovenia treaty (2001), notwithstanding that paragraph 5 of the commentary on Article 8 (as amended in 1994 and therefore current in 2001) says that such profits are included within the term “profits from the operation of ships or aircraft in international traffic” in Article 8 of the Model. Greece entered an observation on paragraph 5 of the commentary in 1995 to express the view that such income is, in its view, included within the scope of Article 12. Greece also has entered a reservation on Article 12 reserving its right to tax royalties at the rate of ten percent. The definition of royalties in the Greece-Slovenia treaty follows the 1977 Model definition (which was amended by the OECD in the 1992 version and now excludes payments for the right to use equipment). The taxes levied by Greece should thus be considered to be taxes levied in accordance with the treaty (Article 12 of the Greece-Slovenia treaty) as interpreted by Greece in its observation on the commentary on Article 8. Neither state is applying the treaty differently: state S applies Article 12 and state R applies Article 23.

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5. Observations Recorded on the OECD Commentaries

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In another example discussed by Maisto, state R expressly objects to state S’s observation in the treaty negotiations. In this case, state R does not view state S’s application of the treaty pursuant to the observation as taxation in accordance with the actual bilateral treaty and thus state R should not be required to grant relief under the equivalent of Article 23 of the Model. Double taxation may only be resolved through the competent authorities procedure under Article 25 of the Model Convention.

In the first example, the priority of state S over state R in the application of the treaty makes it possible to eliminate double taxation. This is coupled by the fact that state S and state R apply two different provisions of the treaty.

There are limits to such a conclusion. For example, an article in a bilateral treaty based on Article 7 of the Model cannot be applied differently at the same time by the source state and the residence state as Article 7(2) states that “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 ...” (emphasis added). As the penultimate sentence of paragraph 2 of the commentary on Article 7 indicates, tax authorities should agree on mutually consistent methods of attributing profits to permanent establishments. Thus, the test of the “one and only one” interpretation of the treaty is to be made in the context of the treaty provision being applied for the same purpose by the source state and the residence state. This is to be distinguished from cases where the source state applies the meaning of a treaty term in a treaty distributive rule pursuant to its observation on the commentaries and the residence state, while disagreeing with the interpretation of the source state, considers such interpretation to be “in accordance with the Convention” and applies the relief provision contained in the treaty which is the equivalent of Article 23 of the Model. The source state applying the observation to the distributive treaty rule and the residence state applying the relief provision do so with the result that the treaty’s purpose of avoiding double taxation is satisfied.

As noted by Maisto, there are provisions other than Article 7(2) which also require simultaneous application of the same provision by the two states. An example is Article 4(2) of the Model which deals with dual residence of individuals. The issue is reflected by an observation made by Spain in paragraph 26 of the commentary, which disagreed with the interpretation given in paragraph 10 of the commentary on Article 4(2) that the facts to which the tie-breaker rules apply may be determined to apply for less than an entire taxable period. The observation was made because under Spanish internal law, the fiscal year coincides with the calendar year and cannot be part of a calendar year. The observation states that the relevant date would have to be ascertained under a mutual agreement procedure. This observation seems to imply that neither the commentary nor the interpretation advocated by the observation prevails and that the Spanish interpretation of the Model or its treaties in accordance with its observation would not be regarded as being in accordance with the treaties themselves as the other contracting state would probably be interpreting the same provision of the treaty in a different way.

Another example is the effect of the observations entered by Belgium, Ireland, Luxembourg, The Netherlands, Switzerland and Portugal to the anti-abuse commentary on Article 1 which is discussed in note 27 and in more detail below. In brief, it is our view that these observations to this commentary, which of course do not deal with the meaning of a term, should not be construed as referring to the application of anti-abuse rules by the observing countries; rather they refer to the application of anti-abuse rules generally. These observations should therefore be interpreted as statements that the observing countries do not agree that such anti-abuse rules should be applied by countries that enter into bilateral treaties with these observing countries.

On the other hand, it could be argued that a presumed unilateral declaration by a contracting state (i.e. that the commentators govern the interpretation) constitutes an objection to the presumed unilateral declaration of the other contracting state (i.e. that the observation governs) so that neither interpretation of the treaty would govern the case and the competent authority procedure under the treaty’s equivalent of Article 25 of the Model would apply, or the tax administration or the courts should resolve the issue by resorting to Articles 31 and 32 of the Vienna Convention and principles of logic and good sense without the aid of either the commentary or the observation. However, neither the Introduction to the Model nor the commentaries say that the views expressed in the commentaries are to be considered to be objections to the observations, or vice versa: the CFA rather seems to suggest that the interpretation advocated by the commentators and the view expressed by the observations may coexist.179

There is almost no doubt that the results of observations on the commentaries are not consistently viewed by member countries. The subject has not been adequately addressed in the Model or by the CFA either in the Introduction to the Model or in the commentaries. The issue when it involves the meaning of an undefined treaty term, we suggest might be dealt with in a

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179. See paragraph 30 of the Introduction to the current Model.
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way similar to that in which the commentaries have dealt with issues relating to the meaning of undefined terms of the meaning of which is established on a non-symmetrical basis by Article 3(2). The commentaries establish that the source state’s internal law meanings generally govern.180 Similarly, the commentary on Articles 23A and 23B could clarify in appropriate circumstances that the source state’s interpretation of terms reflected in an observation or in the commentary where the residence state has entered an observation could also be said to govern and be regarded as an interpretation in accordance with the convention in the absence of evidence that the parties intended otherwise. States disagreeing with this result would then be required expressly to object to, or otherwise deal with the observation at the time they conclude bilateral tax treaties or perhaps depart from the language of the article in the Model to make it clear in the text of their treaty which interpretive view is to govern.

The foregoing discussion has been limited to observations recorded on the OECD commentaries prior to the conclusion of particular bilateral tax treaties. A different analysis is appropriate in respect of commentaries made after the conclusion of particular treaties and observations entered on those commentaries. If the commentaries are genuinely interpretive in nature and do not have the apparent effect of making changes to the Model, they could be considered and given appropriate weight in the interpretive process. Where an observation has been made (and not later deleted) in relation to a change in such commentary which is genuinely interpretive and not an apparent attempt to make a change in the Model, the interpretive change in the commentary and the observation would be elements to be taken into account by a domestic court dealing with the question of interpretation. Our view is that the interpretive value, in respect of a pre-existing bilateral treaty between an observing state and a non-observing state, of the changed commentary in these circumstances would usually be slight or nil.

6. Use of Later Commentaries

(a) Classification of later commentaries

Although reference to the commentaries is clearly appropriate and supportable when interpreting a tax treaty, the terms of which were negotiated based upon the Model and the commentaries published at that time, particularly where the parties are OECD member countries, the question often has arisen as to whether commentaries which have been added or changed since the negotiation process was completed have the same role in the interpretive process.181 Waite, then the chair of WP 1, but expressing his personal views, has classified the new commentaries into four categories:

(a) it fills a gap in the existing commentary by covering matters not previously mentioned at all,

(b) it amplifies the existing commentary by adding new examples or arguments to what is already there,

(c) it records what states have been doing in practice, or

(d) it contradicts the existing commentary.182

We will, for this part of the discussion, adopt these categories and describe them as gap-filling commentary, amplifying commentary, state practice commentary and contradictory commentary, respectively. It should be recognized that these are not entirely separate categories. For example, state practice commentary may lead to amplification or gap-filling commentary.183 What is particularly interesting is Waters’ classification in the acknowledgement that some changes in the commentaries made by the CFA fill gaps in or contradict existing commentary. It should be recognized that these changes may be more than mere interpretations; they may essentially operate as amendments to the Model and treaties based on the Model to extend their operation or to change the basis of their interpretation as they can be presumed to have been negotiated on an understanding that they would be interpreted in good faith in accordance with the ordinary (or special) meaning of their terms in their context and in light of their object

180. See paragraphs 32.1 et seq. and 56.1 et seq. of the commentary on Articles 23A and 23B. However, as discussed below, the observation to anti-shoe commentary on Article 1, to be effective, may prejudice the source state from applying this commentary to existing treaties if the residence state has made an observation.

181. See, for example, Avery Jones et al., Interpretation, note 9; Avery, note 7 at 67; Vogel et al., note 7, Introduction at paragraph 82a and Vogel’s current views at Vogel 2000, note 19; Waite, note 8 at 679 et seq.; J.F. Avery Jones, “The Effect of Changes in the OECD Commentaries after a Treaty is Concluded”, 56 Bulletin for International Fiscal Documentation, 102 (2002); Waite and Murers, note 9; Van Brabant, note 9; and Waite, note 9 at 40-41 and the authorities referred to therein.

182. Note 8 at 680.

183. If OECD States have followed the OECD Council recommendation to follow existing commentaries when applying and interpreting their bilateral treaties, they presumably could not have developed different practices so that state practice should not, in theory at least, result in contradictory commentary.
and purpose, in the context of the commentaries current at the time of the negotiations.\footnote{184} In our view, later commentaries that represent a fair interpretation of the Model and that clearly arise from the words of the Model (e.g. new amplification commentary) and that do not conflict with commentaries current at the time the treaty was negotiated can be given weight as persuasive interpretations by the CFA of the meaning of the particular Article of the Model but they cannot be considered to have been adopted by the treaty negotiators for purposes of the particular tax treaty. The new commentary would not fall within Article 31 of the Vienna Convention and therefore would only represent a helpful paraphrase or explanation of what could be said to be the meaning of the particular Article. Of course, if the interpretation is clear and unambiguous, the words in the particular tax treaty do not require references to the commentaries to be interpreted.\footnote{185} The real difficulty lies with the subsequent commentaries of the other types, filling gaps, reversing prior commentary, and depending upon their nature, that follow prior state practice.

184. Obviouly views on such commentaries are not unanimous and should be formulated in relation to particular changes in them to determine whether the changes are an amplification of existing commentaries, and a correct analysis of the Model article providing a better or clearer interpretation of it, which can be usefully applied, or as reality are intended to fill gaps, not only in the commentary, but also in the Model (and bilateral treaties based on the Model) and also whether the provisions of the Model are at variance with the interpretation in the commentaries. Vogel 2000, note 19, refer to a paper distributed by Dr. Holstein Loughna, a long-term delegate on the CFA, at the IFJ Congress in Elat, Israel, in which Loughna noted as one of his ten principles, "Changing the OECD Commentary is preferable to changing the Model Convention". See also the discussion by Frizeuresse, note 72, at 359 of the principle of "contemporaneity", i.e. that a treaty must be interpreted according to the meaning the treaty terms possessed at the date the treaty was entered into which, of course, would not admit the legitimacy of providing subsequent new, expanded or reversed meanings of treaty terms which the terms cannot naturally convey when interpreted in light of the commentaries current when the treaty was concluded. See also Sinclair, note 56 at 124 et seq. for his discussion of this principle of contemporaneity. He expresses the view that this principle does not conflict with the dynamic meaning of "legal terms", which would explain the appropriate interpretation given to Article 3(2) of the OECD Model as being contemporaneous, not static in nature.

185. The ordinary, or if proven to be intuited, a special meaning of terms of a treaty is to be applied pursuant to the general rule of interpretations in Article 31 of the Vienna Convention. Vogel 2000, note 19, states that such new interpretive commentaries should rank no higher than opinions of qualified publicists as to the interpretation of treaty provisions.

Waters, note 8 at 685 has included paragraphs 38.2 to 38.7 of the commentary to Article 5 dealing with e-tailing as new amplification commentary. It is, however, by no means clear that this is a correct interpretation of Article 5 as the UK has entered a strong observation stating that a server used by an e-tailer could not constitute a permanent establishment. Greece, Spain, and Portugal also entered observations. For a discussion of some of the reasons why, in the context of Article 7 of the Model and its close connection to Article 5 (see paragraph 1 of the commentary on Article 7), a server alone should not be considered to be a permanent establishment without some clear basis having been established to attribute profits to it as if it were a separate enterprise engaged in the same or similar activities under the same or similar conditions: See David A. Ward, "Dependent Agency Permanent Establishments", Report of Proceedings of the First World Tax Conference (Cam. Tax Foundation, Toronto, 2000) at 41.

186. It should be noted that Article 5 does not in fact state that profits that constitute a permanent establishment to which income can be attributed must be "at the disposal" of the taxpayer. The commentary indicating that a permanent establishment must be "at the disposal" of the taxpayer dates from the 1977 Model. Paragraph 4.1 of the commentary on Article 5 somewhat neutralizes this concept saying that profits illegally occupied may nevertheless be considered to be at the disposal of the taxpayer.

187. See note 8 at 688, his footnote 38.
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commentary on Article 3(2) in 1995; the addition of paragraph 8.1 to the commentary on Article 4 in 1995; treating benefits in kind as salaries, wages and other [similar] remuneration under Article 15 in 1997 by adding paragraph 2.1 to the commentary on Article 15;188 paragraph 1.1 to the commentary on Article 16; and paragraph 2.2 to the commentary on Article 19. Although these changes are said to be supported by the existing practice of OECD member countries, it is not clear how universal the practice was. These changes, however, if applied to pre-existing treaties could, and in some cases would, operate as effective amendments.

In dealing with contradictory commentary, Waters says:

"...the Commentaries are careful not to put forward interpretations that cannot be justified on the basis of the wording of the relevant Articles themselves; and they often state that different treaty text would be required to achieve a different interpretation."189

The examples then given are amendments to the Model, not the commentaries, being amendments to Article 3 to redefine "international traffic"; to Article 10 to state a minimum period of ownership before reduced source taxation could be applied to dividends; to Article 11(6) to reclassify a loan as equity; to Article 13(2) to deal with computer software; and to Article 15(2)(a) because of a wording defect.

Waters also notes the 1992 commentary change in relation to Article 17(2) which indicates that teams, troupes and orchestras could be taxed under Article 17(2) even in the absence of tax avoidance. This reversal of the commentary is justified by Waters on the basis that the prior commentary was "simply wrong" as Article 17(2) made no mention in the text of tax avoidance. This is interesting as states that negotiated treaties with an understanding that Article 17(2) should be interpreted on the basis of the commentary then in existence surely must be concluded to have had that common intention. Unless one must ignore existing commentary which is not a fair interpretation of a treaty Article, there would be no basis, in the absence of an exchange of notes or a protocol, to consider that a change in the commentary should change such an intention and the interpretation and application of such a treaty.190

188. Paragraphs 12 to 12.15 of the commentary on Article 15, added in 2005, dealing with employee stock options would probably be another example.

189. See Waters, note 8 at 684.

190. In fact, it is quite arguable that the original commentary was correct as Article 17(2) refers to the income in respect of personal activities of an entertainer or a sportsman in his capacity as such. The members of teams, troupes and orchestras usually receive salaries, and it is those salaries that arguably are dealt with and cannot be diverted to "star" companies. The income of the employee of the performer who provides the audience with much more than the sportsman's or entertainer's services (e.g., the stadium, the concert hall, the audience, the lighting, etc.) is not dealt with in Article 17(2).

191. Waters, note 8 at 687. Wattel and Murres, note 9 at 228 et seq. are of the view that later commentaries may be relevant for purposes of Article 32 of the Vienna Convention, or as "authoritative literature" but later commentaries should bind tax authorities, not taxpayers. Baker, note 9 at E. 18 expresses the view that later commentaries can be relevant but may have less weight.

192. See note 7.

193. Waters, note 8 at 688, his footnote 38. Wattel and Murres, note 9 at 232 also express the view that taxpayers are not bound by later commentaries.

194. Note 8.

195. Michael Lang also does not share that view. See Michael Lang, "CFC Regulations and Double Taxation Treaties", 57 Bulletin for International Fiscal Documentation, 51 (2003) and Lang, note 9. Wattel and Murres also do not agree, note 9 at 227. Inez Hofbauer, "Tax Treaty Interpretation in Austria", in Tax Treaty Interpretation, Michael Lang, ed., (Kluwer, The Hague, London and Boston, 2001) at 27 notes that the Austrian tax authorities apply the most recent version of the commentaries and have tried to embed this into the Austrian legal system by a decree. They have also recently tried to include a provision to that effect in its tax treaties.
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signified disagreement with the later commentary, clearly Article 31.3(a) cannot be applied. Where, the subsequent commentary goes beyond genuine interpretation and moves into an area where it changes the meaning of the Model (and bilateral treaties based on the Model) it by-passes the role of parliament in attempting to amend existing bilateral treaties.200

Illustrations of commentaries that give rise to difficulties include many of those mentioned by Waters and some of those not mentioned by him. These include, but are not limited to, large parts of the changing commentary on Article 1 of the current Model dealing with the so-called improper use of tax treaties201 (which paragraph 41 of the introduction states is still being considered by the CFA), some of the 2003 changes to the commentary on Article 5,202 the 1993 changes to the commentary on Article 7,203 the expanding commentary on Article 26 (exchange of information), the new definition of "employer" in the commentary on Article 15 (income from employment) and the commentary on Article 17(2) reversing the meaning of Article 17(2).

We propose only to deal with two of these, namely, anti-abuse commentary on Article 1204 and commentary on incorporated sportsmen and entertainers in Article 17.205

The anti-abuse commentary on Article 1 is directed to the brief provision of the Model that simply states:

"This convention shall apply to persons who are residents of one or both of the contracting states."

6. Use of Later Commentaries

Such a brief provision probably needs no interpretation, except perhaps to elaborate the concept of who is a resident of a contracting state. A resident of a contracting state is defined in Article 4 of the Model and further explained in the commentary on Article 4 which does not include any anti-abuse discussion. It may therefore be puzzling why this discussion of anti-abuse appears in the commentary on Article 1. Perhaps the answer is that the CFA considered that there was no other place to put it and that the CFA and the Council wanted to put these provisions into the commentaries somewhere, rather than in the Introduction, in order to be covered by the Council's 1997 Resolutions. In any event, to the extent that the anti-abuse commentary deals with who is the taxpayer, this location for the commentary would be appropriate. It is less so to the extent the anti-abuse commentary deals with a recharacterization of a transaction and with CFC rules.

Article 1 has not changed since the 1963 Draft Model. The 1963 commentary on Article 1 said nothing about any limitation to the application of the convention based on any kind of anti-abuse concept. The first such commentary appeared in the commentaries on the 1977 Model206 which stated essentially that the states concerned with tax avoidance should adopt anti-abuse provisions in their domestic laws to counter possible tax manoeuvres and such states, if they wished in their bilateral double taxation conventions to preserve the application of provisions of that kind contained in their domestic laws, should specifically do so in such conventions. In other words, the 1977 commentary on Article 1 clearly implied that internal law anti-abuse measures could not be applied to tax treaties unless specifically adopted in them. The 1977 commentary also pointed out that some of the provisions of the Model already dealt with tax treaty abuses such as the concept of "beneficial owner" in Articles 10, 11 and 12 and the special provisions for so-called artiste-companies contained in Article 17(2), all of which were introduced in the 1977 Model.

In 1987, the OECD published the first in a series of publications in Issues in International Taxation. In this first issue, the OECD expressed its views on Tax Avoidance and Evasion, Four Related Studies published in one volume.207 In paragraphs 38 and 40 of the second study, the Base Companies Report, the CFA departed from the 1977 commentary on Article 1, stating that the large majority of members on the CFA was of the view that anti-

200. Paragraphs 7 to 10 of the commentary on Article 1.
201. Note 112. Two of the studies, "Double Taxation Conventions and the Use of Base Companies" and "Double Taxation Conventions and the Use of Conduct Corporations" are reproduced in Vol. II of the looseleaf Model.
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abuse and substance-over-form rules and their underlying principles are part of national tax law for determining facts and do not have to be confirmed in the text of a tax convention in order to be applicable to it. Switzerland, however, entered a strong reservation in paragraphs 55 to 97. In the third study, the Conduit Companies Report, the CFA took a different position stating in paragraph 43,

"Existing conventions may have clauses with safeguards against the improper use of their provisions. Where no such provisions exist, treaty benefits will have to be granted under the principle of 'pacta sunt servanda' even if considered to be improper."

When the current (looseleaf) Model was first published in 1992, these ideas were worked into the revised commentary on Article 1 while preserving a certain degree of ambiguity. Paragraph 7 of the commentary remained unchanged from the 1977 Model stating that if states wished to preserve their domestic law anti-abuse measures in tax treaties they should preserve them by specific provisions in their treaties. Paragraphs 9, 10 and 11 of the commentary referred to the four 1987 studies. Paragraphs 10 and 11 dealt with suggested wording for the inclusion of anti-abuse measures in tax treaties with samples of such anti-abuse measures provided in the commentary. Paragraphs 23 and 24, however, stated that a large majority of OECD member countries considered that substance-over-form rules and subpart F type provisions are part of national tax laws to determine the facts that give rise to tax liability, do not have to be addressed in tax treaties and are not affected by them. Paragraph 23 of the commentary, however, noted a dissenting view that applying such rules is subject to the general provisions of tax treaties against double taxation especially where the treaty itself contains provisions aimed at countering improper use. Paragraph 25 noted the difficulty in reconciling these divergent views.

The 1992 revised commentary on Article 1 therefore showed a significant interpretative departure from the previous commentary; while still leaving in favour of the view that, if they were to be applied, anti-abuse rules should be specifically included in tax treaties, it introduced (while mentioning a lack of unanimity) the idea that, even in the absence of a specific reference, substance-over-form rules could be applied to tax treaties to deal with treaty abuses.

The CFA substantially expanded the commentary on Article 1 in the January 28, 2003 revision, completing the reversal on anti-abuse but again not without some ambiguity. Some, but not all, of these changes had been referred to in the report adopted by the CFA on November 7, 2002, Restricting the Entitlement to Treaty Benefits. As indicated in that report, the work of the CFA on the restriction of entitlement to treaty benefits was identified as follow-up work in the Harmful Competition Report. The November 7, 2002 report on Restricting the Entitlement to Treaty Benefits which was adopted by the CFA proposed inter alia new paragraphs 9.6, 10.1 and 10.2 to the commentary on Article 1, the deletion of paragraphs 15 and 16 of the previous commentary, the inclusion of a new paragraph 20 recommending some limitation of benefits provisions that might be specifically included in tax treaties and similar draft provisions dealing with preferential tax regimes in new paragraphs 21.1 and 21.3 of the commentary. It also proposed a new paragraph 21.4 setting out a proposed treaty provision to deny the benefits of Articles 10, 11, 12 and 21 to persons if one of the main purposes of the creation or assignment of shares, rights, debt claims, etc. was to take advantage of the beneficial provisions of those corporation provisions were not inconsistent with tax treaties is being appealed to the courts. Courts that have dealt with these cases have not had a uniform view of subpart F type provisions and their relationship to the distributive provisions of tax treaties. See Broughton Holdings Ltd. v. CIR (1972) STC 1479, a decision of the English Court of Appeal, the decision of March 20, 2002, of the Supreme Administrative Court of Finanz Amts, BStz: 2000:26, 4 TLR 1009 (2002) and the decision of the French Conseil d'Etat of June 28, 2002, in the case of Société Schneider Electric: 4 TLR 1077 (2002). These cases are discussed by Michael Lang, "CFC Regulations and Double Taxation Treaties", 57 Bulletin for International Fiscal Documentation, 51 (2003) and Dariel Sandler, "Tax Treaties and Controlled Foreign Company Legislation" (1998) 11 Tax Rev. 52.

206. Published in Volume II of the looseleaf Model.
207. (OECD, Para, 1998).
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Proposed paragraph 21.5 addressed abuses directly by suggesting an article could be included in treaties stating that the benefits under Articles 6 to 22 of a tax treaty would not accrue to persons entitled to special tax benefits under the law of either of the contracting states that has been identified in an exchange of notes or a substantially similar law.

Although not mentioned in the November 7, 2002 report, when the Model treaty in its January 2003 version was published, the commentary on Article 1 contained the following broad-reaching new paragraph 7.1 in the commentary on Article 1:

"Taxpayers may be tempted to abuse the tax laws of a state by exploiting the differences between various countries' tax laws. Such attempts may be countered by provisions or jurisprudential rules that are part of the domestic law of the state concerned. Such a state is then unlikely to agree to provisions of bilateral double taxation conventions that would have the effect of allowing abusive transactions that would otherwise be prevented by the provisions and rules of the kind contained in its domestic law. Also, it will not wish to apply its bilateral conventions in a way that would have that effect."

Paragraph 9.1 of the revised commentary, which was also not included in the November 7, 2002 report, noted two fundamental questions, namely: whether the benefits of tax conventions must be granted when transactions constitute an abuse of the particular tax treaties and whether specific provisions or jurisprudential rules of domestic law that are intended to prevent tax abuse conflict with tax treaties. On the first question, the commentary noted that, for many states, an abuse of a tax treaty could also be characterized as an abuse of domestic law and because, as the commentary states, domestic anti-avoidance rules are part of the basic rules for determining the facts that give rise to tax liability and are not addressed in tax treaties, they are therefore not affected by them. The commentary therefore concluded that there is no conflict between domestic anti-avoidance rules and the provisions of tax treaties.

The commentary notes that other states view some abuses as being abuses of the treaty itself as opposed to domestic law and they consider that a proper construction of a tax treaty allows them to disregard abusive transactions

which are said to be those entered into with a view to obtaining "unintended benefits" under tax treaties. This view is supported by the reference to the object and purpose of tax treaties and the obligation to interpret them in good faith in Article 31 of the Vienna Convention. The commentary goes on in some considerable detail dealing with both conduit corporations and base corporations. Not only in respect of base companies the commentary makes the statement that possible ways to deal with them include the application of "substance-over-form", "economic substance" and general anti-avoidance rules. The commentary says that such rules are part of the basic domestic rules of domestic tax laws for determining the facts that give rise to tax liability, that these rules are not addressed in tax treaties and are therefore not affected by them. It gives an example that to the extent the application of these rules results in a recharacterization of income or a redetermination of the taxpayer who is considered to derive the income, the provisions of the tax treaty will be applied taking into account those changes.

As can be seen, the commentary on Article 1 has been completely reversed since 1977, and the most important parts of the reversal seem to have been developed between the release of the November 7, 2002 report, adopted by the CFA before its release, and the revised commentary adopted by the CFA and the Council on January 28, 2003.

Belgium entered an observation on the commentary indicating that it did not agree that subpart F type rules were consistent with treaty obligations and repeated the observation in relation to the commentary on Article 7. Ireland not only entered a similar observation, but also more broadly disentended from the view expressed in the commentary that anti-abuse rules were not inconsistent with treaties. Luxembourg also entered an observation stating that anti-abuse rules can only be applied after recourse to mutual agreement procedures. Luxembourg also entered an observation on paragraph 210.1 of the commentary on Article 7 indicating that subpart F type rules conflict with Article 7. The Netherlands also entered an observation on the Article 1 commentary noting that it disagreed that domestic anti-abuse rules and controlled foreign company provisions do not conflict with treaties as that would, in its view, depend on the wording of the particular treaty. Portugal entered a quite general observation. Switzerland's observation

208. Subsequently, on March 23, 2004, the Canadian Minister of Finance announced that the domestic general anti-avoidance rule in Section 245 of the ITA (Canada) would be amended retroactively to 1998 to apply it to tax treaties and that amendment was passed by Parliament in 2005. Australia, on the other hand, made it clear when it enacted its new general anti-avoidance rule in 1981 that it applied to tax treaties. See also note 212.

209. Paragraph 9.2 of the commentary.

210. Paragraph 22 of the commentary.

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stated its view that domestic anti-abuse rules must conform to the particular provisions of tax treaties.

In dealing with a bilateral tax treaty between two OECD countries, if one of the treaty partners makes an observation indicating that it does not accept the position expressed in the new anti-abuse commentary, there would be clearly no consensus that either party could apply domestic anti-abuse measures not reflected in the terms of the treaty itself. Anti-abuse rules are usually not automatic in their application because their application depends on an assessment of whether a transaction or a structure is actually abusive, and abuse, like beauty, often lies in the eyes of the beholder. In our view, therefore, the application of anti-abuse rules can be said to be largely discretionary. Accordingly, an observation would not be necessary to indicate that the observing country would not apply anti-abuse rules; rather the observation means that the observing country’s position is that its non-observing treaty partners should refrain from applying their domestic anti-abuse rules, unless of course the particular bilateral treaty expressly allows such anti-abuse rules to be applied. It is also our view that a treaty concluded between two states prior to the publication of the 2003 commentaries, if neither state made an observation, should not be interpreted on the basis of the 2003 anti-abuse commentary but rather on the basis of the anti-abuse commentary, if any, existing when the particular bilateral treaty was concluded.212

This conclusion may be qualified if it can be established that the concept of abuse of rights is recognized as a general principle of international law and this concept can be applied not only to states as treaty parties but also to taxpayers who are considered to have abused their treaty rights.213 Paragraph 9.3 added to the commentary on Article 1 in 2003 seems to refer to such a principle of international law stating that:

“Other States prefer to view some abuses as being abuses of the convention itself, as opposed to abuses of domestic law. These States, however, then consider that a proper construction of tax conventions allows them to disregard abusive transactions, such as those entered into with a view to obtaining unintended benefits under the provisions of these conventions. The interpretation results from the object and purpose of tax conventions as well as the obligation to interpret them in good faith (see Article 31 of the Vienna Convention on the Law of Treaties).”

If the treaty was negotiated between two OECD states at a time when the OECD indicated that anti-abuse measures had to be included in the treaty text in order to be effective, and cited the principle of pacta sunt servanda of Article 26 of the Vienna Convention in support of that view,214 and

212. Australia enacted a general anti-avoidance rule in 1981 which applies to all tax treaties. It is understood that Australia’s treaty negotiators drew the other country’s negotiators’ attention to this anti-avoidance provision which is said to have been accepted by its treaty partners who negotiated treaties with Australia after 1981. Australia believes the anti-avoidance rule is therefore part of the “legal context” of such treaties. However, none of these post-1981 treaties refers to this statutory provision. It should also be noted that Australia did not enter any observation to paragraph 7 of the commentary on Article 1 of the Model which, until 2003, stated that to apply domestic anti-avoidance rules to tax treaties, states should specifically so provide in their treaties. In fact, no member state of the OECD entered such an observation. In the absence of an express reference to the Australian anti-avoidance rule in tax treaties or accompanying protocols or memoranda of understanding, it is probably not supportive in international law to claim that the domestic law has been incorporated in treaties. Australia’s anti-avoidance rule and its application to tax treaties is discussed by Michael Kocot, “The Aftermath of the Lassens Case: Australia’s Tax Treaty Override”, 59 Bulletin for International Fiscal Documentation, 236 (2005).

213. See David West, “Abuse of Tax Treaties” in Essays on International Taxation in Honour of Sidney F. Roberts, H.H. Alpert and K. van Raai, eds., (Kluwer, Deventer, 1993) 397 at 399 et seq., Jannéna, note 7, at 25 et seq. and his articles, “Domestic Anti-Avoidance Rules and Double Taxation Treaties: a Spanish Perspective” — Part I, 56 Bulletin for International Fiscal Documentation, 542 (2003), Part II at 620 and Van der Bruggen, note 104. Writing in 1996, Sir Gerald Fitzmaurice, note 72 at 12 and 183, noted that the abuse of rights doctrine cannot be regarded as definitively established in the International Court of Justice, although it has figured prominently in a number of dissenting opinions. See van Weerden, The Improper Use of Tax Treaties with Particular Reference to the Netherlands and the United States (Kluwer, The Hague, London and Boston, 1998) at 257, notes that abuse of treaties is not a point of common understanding, and in particular there is no consensus on what constitutes abuse. René Mattoo, “Interpretation of Tax Treaties and Domestic General Anti-Avoidance Rules — A Skeptical Look at the 2003 Update to the OECD Commentary”, 2005 Interim 336 concludes that there is an abuse of rights principle recognized in international law respecting tax treaties. Brian Arnold in “Tax Treaties and Tax Avoidance: The 2005 Revisions to the Commentary to the OECD Model”, 58 Bulletin for International Fiscal Documentation, 244 (2004) argues that domestic anti-avoidance rules can be applied because they are used only to determine the facts which is of course the position taken in paragraph 22.1 of the commentary on Article 1. For a criticism of this view, see Frederick Zimmer, 59 Bulletin for International Fiscal Documentation, 25 (2005). In an opinion delivered on April 7, 2005, Case C-255/02, the Advocate General of the European Court of Justice in that case referred by the UK courts involving VAT expressed his view that the doctrine of abuse or abuse of rights operates as a principle governing the interpretation of community law. For a discussion of these cases, see Rodriguez-Corrada, “Hollab; A Conservative Opinion”, (2005), B. Tax Rev. 267. The issue is also likely to arise in the SCI in the Cadbury Schweppes case, Case C-196/04 and did arise in some earlier cases, the most recent being the Eisenbraun-Stürbe case, Case C-110/99 and the Owensboro Loading case, Case C-487/01.

nothing in the Model or the bilateral treaty stated that its objects and purposes included the prevention of fiscal avoidance, it is very likely that domestic courts and taxpayers should continue to interpret such a treaty based on the commentaries current at the time it was made, even if the commentaries may have misinterpreted international law or may have chosen to view that there are no "unintended benefits" available to taxpayers who rely on the text of the tax treaty. A strong argument could be made that when no such rules were included in the treaty, the treaty partners did not intend any such rules to be applied.

The other example of a complete reversal is found in the commentary on Article 17(2) (artiste and sportsmen). The 1977 commentary on Article 17 stated that the purpose of paragraph 2 was to counteract certain tax avoidance devices where remuneration for the performance of an entertainer or sportman is not paid to the entertainer or sportman himself but to another person, for example the so-called artiste-company. The purpose of paragraph 2 of Article 17 of the 1977 Model, according to the commentary, was to permit the state of source to impose tax on the profits diverted from the entertainer to the company. Amendments to the commentary in 1992, 1995 and 2000 have now reversed that position and state that paragraph 2 of Article 17 may be applied both to a management company that, in particular, receives the income from the activities of a group of sportsmen which is not constituted itself as a legal entity and where a team, troupe, orchestra, etc. is constituted as a legal entity and the performance income is paid to that entity. Individual members of the team, troupe, orchestra, etc. would be liable for tax in the state in which the performance is given. The legal entity would also be taxed on those profits not payable to the sportsmen or entertainers. In both these new cases, tax is levied on the individual performers and the legal entity even in the absence of abuse.215

Where the CFA has determined that the meaning and the interpretation of the Model should change, whether by filling gaps, by adopting practices of member states or by reversing prior commentary, in our view, it would be appropriate that the change should be made to the Model. However, in light of the number of actual income tax treaties that had been negotiated and are in existence based on the wording of the current Model or its predecessors, a change in the wording of the Model would not have any effect on the interpretation of those treaties. The CFA has taken the position in the Introduction to the Model that where both the articles in the Model and the commentaries have been changed or only the commentaries have been changed, existing treaties should, as far as possible, be interpreted in the spirit of the revised commentaries even though the existing treaties did not contain the more precise wording of the new Model. In this respect the CFA stated that member countries wishing to clarify their positions could do so by means of an exchange of letters between the competent authorities in accordance with the mutual agreement procedure but even in the absence of such an exchange of letters, the competent authorities could use the mutual agreement procedures to confirm an interpretation in particular cases.216 The CFA stated, however, that amendments to the Model with changes in commentaries that are a direct result of those amendments are not relevant to the interpretation of existing treaties “where the provisions [of the existing treaties] are different in substance from the amended Articles”. The CFA has taken the position, however, that other changes or additions to the commentaries are normally applicable to the interpretation and application of pre-existing treaties “because they reflect the consensus of the OECD Member Countries as to the proper interpretation of existing provisions and their application to specific situations”.217 This overstates the position, of course, as to the extent that there are observations on the commentaries, there is no consensus. It also ignores the difficult question of the effect, if any, of later changes to the commentaries in international law, and in municipal or internal law.

The question therefore is: how legitimate is it to apply changes and additions to the commentaries of the type referred to above in the interpretation and application of pre-existing treaties where the changed commentaries reverse the position taken in the commentaries that were current at the time the treaty was negotiated, or the revised commentaries depart from the clear meaning that can reasonably be derived from the wording of the Model or attempt to expand the Model by filling gaps? In these cases it is impossible

215. See paragraphs 86-87 of the OECD Report of 1987, Taxation of Entertainers, Artists and Sportsmen, for a "concessus" view that Article 17(2) on its wording does not apply to the profit of the incorporated team, orchestra, etc. This consensus view which in our view is correct, has now been reversed by the last sentence of paragraph 11(b) of the commentary on Article 17 without any member country entering an objection. Canada, Switzerland and the United States, however, all have entered reservations implying their disagreement in relation to the change in interpretations in the commentary. The effect of the change in the commentary authorises the taxation of profits of a corporation that owns a football, soccer or other sport team, or that employs an orchestra, circus performers, opera company, rock music band, or other artistic group even in the absence of a permanent establishment.

216. Paragraphs 33 and 34 of the Introduction. Why this procedure is more convenient in rejecting the application of later changes than in adopting later changes by a mutual agreement procedure is not discussed.


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to presume that such revised commentaries reflect the intention that the negotiating parties had at the time they negotiated the particular tax treaty and in those cases where the commentaries have been reversed, clearly they would not have been part of their common intention.

Another issue relating to later commentaries concerns the date of their effectiveness, if they are in fact effective or relevant at all in dealing with the application and interpretation of pre-existing treaties. Should they be applied (like most — but not all — amendments to domestic tax law) on a prospective basis only, and therefore only apply to transactions occurring or income arising after their publication or should they apply retroactively, and if so, how far back retroactively? Although we are of the view that those later gap-filling states’ practice and contradictory commentaries that essentially operate as amendments to the Model should not be applied, even prospectively, to treaties concluded before the commentary changes were made, the CFA, which has the opposite view, has not dealt with the issue of retroactivity. If such commentaries are to be treated as amendments to amend (which we do not support), we point out that tax treaties are to be interpreted “in good faith” and in “accordance with their terms” as required by Article 31(1) of the Vienna Convention, and retroactive amendments should clearly be avoided.

218. The CFA, except perhaps in respect of contradictory commentary, does not admit that no later commentaries effectively operate as amendments to the Model but commentaries, note 9, at 439 et seq. appears to be of the view that they become binding in international law.

219. Article 28 of the Vienna Convention provides that unless a contrary intention appears or if it is otherwise established, treaty provisions do not bind a party in relation to an act or fact that took place or a situation which existed before the entry into force of the treaty with respect to that party. Article 39 provides the basis for the amendment of a treaty, namely, agreement between the parties to which the rules laid down in Part II of the Vienna Convention apply unless the treaty otherwise provides. As the Vienna Convention commentaries to Article 39 state, the amendment is normally in written form. Article 41 of the Vienna Convention, which deals with “modifications”, provides that two or more parties to a multilateral treaty may conclude an agreement to modify the treaty if the possibility of modification is provided for in the text, or if modification is not prohibited by the text of the treaty and it does not affect the enjoyment by other parties of their rights under a multilateral treaty or the performance of their obligations and it does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole. These provisions are discussed by Simner, note 56, at 140. Simner at 138 also notes that subsequent practice, referred to in Article 31(3) of the Vienna Convention, may either operate as evidence in an interpretative process, or as modification of the terms of a treaty. It might be argued that any decision by a court interpreting a bilateral treaty also has retroactive effect, particularly in countries that adopt the stare decisis principle. However, a court's proper role is to interpret, not change or expand, a treaty. Later commentaries of the same effect should also be given weight by a court.

6. Use of Later Commentaries by Courts

Courts have not shown a consistent position in respect of the use of subsequent OECD commentaries. In the United States in T Zusse Fire and Marine Insurance Co. Ltd v. CIR, the Tax Court said subsequent commentary should generally not be used.220 The United States Federal Claims Court in National Westminster Bank v. United States221 also dismissed the relevance of OECD commentary and other OECD pronouncements made subsequent to the effective date of the applicable treaty as the subsequent statements could not reflect the understanding and the expectations of the negotiating parties at the time the treaty was negotiated.222

In the leading Canadian case on the use of the commentaries, Crown Forest Industries,223 the Supreme Court of Canada said the commentaries were part of the "legal context" and of "high persuasive value" but did not discuss the question whether later commentaries were part of the legal context or had such high persuasive value. The case involved the interpretation of the Canada-United States Treaty (1980) in which the court referred only to the commentaries on the 1977 Model stating that the treaty was based on that Model even though the commentaries on the current (later) looseleaf model were available at the time of the court's decision. A strong inference can be drawn that the court would not consider later commentaries to be of such high persuasive value. This was the position expressed by McDonald J.A. of the Canadian Federal Court of Appeal in the Cudd Pressure case224 where it was said that the relevance of later commentaries was "somewhat suspect". The commentaries on the 1977 Model were referred to by the Tax Court of Canada in 1991 in Hinkeby v. MNR225 interpreting the Canada-UK (1980) treaty. The 1992 commentaries, however, were referred to in 1999 by the same court in interpreting the Canada-US
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(1980) treaty in *Dudney v. MNR*,226 but on appeal, the Federal Court of Appeal227 referred only to the commentaries on the 1977 Model. The 2000 commentary on Article 17 was referred to by the Tax Court of Canada in *Samner v. MNR*,228 and applied to the same Canada-US treaty, without mention of the fact that both Canada and the USA had entered reservations from which it may be inferred that they disagreed with parts of that commentary on Article 17(2) and the 1992 commentaries were referred to by the same court in *Alchin v. MNR*,229 but the relevant parts are the same as the 1977 commentary.290

In the UK, the issue has not been considered by the courts. The Chancery Division in *Sun Life Assurance Co. v. Pearson*231 referred to the 1977 commentaries being those on the Model on which the Canada-UK (1980) treaty was based, and this was also done by the Court of Appeal in the same case,232 but at the relevant times there was no later commentary.

In Australia, in *Lanesa Holdings B.V. v. Comm.*,233 Einfield J. of the Federal Court applied the commentaries with "an important caveat... that the OECD model and commentaries are only applicable to those bilateral treaties subsequently concluded" This view was first expressed in Australia by Dawson J. in the High Court in *Thuet v. FC of T*,234 who was apparently of this view because the commentaries constituted "preparatory work" falling within Article 32 of the Vienna Convention.

In Germany, the Federal Tax Court has referred to the OECD Commentaries on a number of occasions. In some of the cases, the references to the commentaries were to later commentaries and in other cases to court-restricted references to commentaries that had been published before the bilateral treaty in issue was concluded.235

226. 99 DTC 147 at 149.
228. 2000 DTC 1657 at 1674 et seq.
229. 2005 DTC 603.
230. The report of this case at 7 ITLR 851 (2005) is different as the reference in that report of the case is to the 1977 commentaries. It is understood that the editor of the ITLR made this change.
231. [1984] STC 461 at 512-8 and 515.
233. Note 75. In the same court, see also McDermott Industries (Aust) Pty Ltd v. C of T., note 69. Vanam, note 9 discusses the Lanesa case.
234. Note 68 at 537.

In Switzerland, the Federal Tribunal found that the 1963 Draft Model and commentaries on it should not be taken into account in interpreting a 1951 treaty with the United States.291 In a later case, however, the Zurich Court made reference to the OECD Model and commentaries to interpret the same treaty, but noted that the later commentaries were to be used "with the required caution"237 The Federal Commission of Tax Appeals in tax matters in 2001 referred to paragraph 9(a) of the OECD commentary on Article 26 of the Model as it stood in 2000 to interpret the treaty with Luxembourg of 1993 although the text of the commentary was the same as that in the 1992 version. The Commission of Appeals also referred to the OECD Conduit Companies Report of 1987 in considering the issue as to whether a Luxembourg corporation that received dividends from Switzerland was the "beneficial owner". These materials and the definition in a dictionary, Petit Larousse Illustré were looked at to determine the meaning of the term beneficial owner.238

In Norway, the Supreme Court referred to the 1992 OECD commentaries in dealing with the interpretation of the Norway-Germany (1958) treaty and its application to taxation years 1987 to 1989 under a contract concluded where the 1963 OECD commentary was applied to the Germany-Switzerland Treaty (1931); BHF decision of January 23, 1985, BSBl, 1985 II 417 at 419 where the court referred to the 1963 commentary in a case involving the Germany-U.K. Treaty of 1964, the Germany-U.S. Treaty of 1966, the Germany-Greece Treaty of 1966 and the Germany-France Treaty which predated the 1963 Model, without noting the point relating to the use of later commentaries in interpreting tax treaties; BHF decision of December 20, 1995, BSBl, 1996 II 201 at 263-4; BHF decision of April 11, 1990, FMHE 166, 513 referring to the Germany-Bulgarian Treaty of 1967 where the court referred to Article 17 of the 1963 Draft Model concluding that neither Article 17 of the Model nor Article 17 of the particular treaty was restricted to performing artists and could extend to a director and stage designer; the BHF decision of April 8, 1997, BSBl, 1997 II 679 where the BHF did not follow the April 11, 1990 decision but applied the 1977 commentary to the earlier Germany-U.K. Treaty, as amended by protocol in 1976; BHF decision of October 11, 2000, ISR 2001, 182 involving the Germany-Austria Treaty of 1854 where it was held that changes in Germany's internal law made in 1856 could not be used to interpret the treaty, perhaps implying that later commentary also should not be applied; and BHF decision of July 18, 2001, ISR 2001, 653 where the court referred to changes in the interpretation of Article 17 of the 1977 Model and stated that the word "artists" in the two bilateral tax treaties in issue (with Austria and the Netherlands) should be interpreted autonomously. The court overlooked the fact that the treaty with Austria was signed in 2000 and came into effect in 2002 and The Netherlands treaty was concluded in 1959 and predated the 1977 Model.

236. ATF 22.06.1990, I.S. Eidgenössische Steuerverwaltung gegen L. und Bundesfinanz- 
Rat/Kommission des Kantons Zürich. AFA 66 (1991) 373 (Lichtenstein/Savannah/ 
between a German company and its Norwegian customer in 1985 saying that the new 1992 commentaries can be of importance to the understanding of the treaty concluded in 1958. In *PGS AS Exploration v. Norway*, there was agreement of both parties to the litigation that the OECD Commentaries including later commentaries "are of great importance in the interpretation of the [Norway-Ivoy Coast Treaty (1978)]". As some justification for the use of later commentary, the Supreme Court noted that the particular part of the treaty in issue, equivalent to Article 5(1) of the Model, had not changed between 1963 and 2003 although the commentary did.

In Belgium, the Brussels Court of Appeals referred to the 1977 OECD commentary in dealing with the Belgium-Switzerland treaty (1978) and the Belgium-Netherlands treaty (1970) in cases dealing with the non-discrimination article although the 1992 commentaries had already been published. However the same court relied on the revised 1992 commentary on Article 15 regarding the computation of the 183-day rule in a case involving the Belgium-France treaty (1964) and the income tax year 1986. The Antwerp Court of Appeals relied upon the 1977 commentary on Article 17 to construe the undefined treaty term "enterprise" in the Belgium-Netherlands Treaty (1970).

The Belgian tax authorities recently argued before the Supreme Court that (a) the OECD Model and commentaries existing at the time the relevant treaty was entered into are part of the context of the treaty for purposes of Article 31(1) and (2) of the Vienna Convention and (b) later commentary constitutes a subsequent agreement within the meaning of Article 31(3). Unfortunately, the Supreme Court did not deal with those arguments, but simply stated that the relevant treaty article (Article 15 of the Belgium-Luxembourg Treaty (1970)), interpreted in its context, did not require that the employee (a truck driver resident in Belgium) be permanently present in Luxembourg discharging the duties of his employment to be taxable on his salary there. It suffices, according to the court, that the employee starts or stops working in Luxembourg at premises of his employer from whom he receives his instructions.

In Denmark the *Casino Copenhagen KS* case involved the issue whether paragraph 8 of the 1992 commentary on Article 15 should be considered in competent authority proceedings under the Austria-Denmark Treaty (1961), in relation to employment of Austrian employees in 1991. Because the mutual agreement procedure did not seem to be proceeding to a conclusion, the Danish partnership that had imported Austrian workers applied to court for a refund of the tax imposed claiming the term "employer" in the treaty should be interpreted in accordance with the concept which was recognized at the time of the signing of the treaty or alternatively in 1991 and that paragraph 8 of the commentary added in 1992 should not be given retroactive effect. After the court proceedings had commenced, the Danish and Austrian authorities agreed that only Austria had the right to tax the salary income based on the fact that the relevant tax year was before 1992 when the commentary was amended. The court recognized the settlement ordering the repayment of the amounts wrongly collected by Denmark. The editor’s note to the case said, "one has to admire the approach taken by the Danish authorities here both in accepting that changes should not apply retrospectively to the detriment of taxpayers and in repaying the tax and contributions with interest". The same court however reached a different conclusion in the *Halliburton* case applying paragraph 8 of the Commentary on Article 15 in interpreting the word "employer" in the Canada-Denmark Treaty (1955) and the United States-Denmark Treaty (1948) in relation to the 1990 year. On appeal to the Supreme Court, the majority of the members of the court dismissed the appeal. In their decision, the majority referred extensively to the 1985 OECD Report, "Taxation Issues Relating to the International Hiring-Out of Labour" as well as paragraph 8 of the OECD Commentary on Article 15 that was added in 1992. Two dissenting judges however stated that in their view the commentary on the Model Treaty has no importance in construing bilateral tax treaties that predate the commentary where there is no abuse. They said this is the case even where the parties to the bilateral treaty have not "taken exception" to the postdated commentary "as this cannot be construed as an acceptance that the general rule of tax liability in the source state applicable to hired-out labour can be applied to pre-existing double taxation treaties". The minority added that a domestic law amendment to the Danish statutes introduced after the
treaties in question were concluded would if applied to those treaties in fact amend the treaties and therefore those amendments could not be applied. 247

In Finland, most treaties were concluded prior to 1992 but the commentaries on the current Model as well as the commentaries on the previous models are both considered although it is admitted that "the context of the specific tax treaty includes primarily only the Model and the commentaries as they were at the time of the actual treaty negotiations" 248. In Finland, the Supreme Administrative Court 249 in a case involving the Finland-Belgium Treaty (1978) dealt with the question whether the Finnish-controlled foreign corporation rules (enacted in 1995) infringed the treaty or the provisions of freedom of establishment and free capital movement under the EC Treaty. In the course of its decision, a court referred to a Belgian Ministry of Finance letter that took the position that the CFC rules if applied to the income of a Belgian company’s coordination centre would be in breach of the treaty and contrary to European community law. The Finnish Ministry of Finance submitted a statement to the court that the Finnish-controlled foreign corporation provisions were enacted to prevent tax avoidance and the intention was not to interfere with the limits of taxing rights of a state with which Finland has a tax treaty over that state’s own residents. In the course of its judgment, the court said, “The wording of the Commentary which was in force when the negotiations on the tax treaty in question were conducted lends particular weight to its interpretation but in the spirit of the Vienna Convention on the Law of Treaties, the amendments later made to the Commentary also have significance as an aid to interpretation. Similarly, as the Commentary describes the practices of the OECD member countries, the subsequent changes and amendments to it are relevant particularly to matters which concern new situations and phenomena. The positions gathered together in the Commentary indicate a generally accepted view of the OECD member countries as to the type of legislation which may be applied”. The court referred then to paragraphs 22 to 25 of the Commentary on Article 1 added to the Commentary in 1992 as well as the 1987 OECD Base Company Report and taking that into account said “There is no reason why the CFC Act should not apply to this income, notwithstanding the wording of Article 7 of the tax treaty between Finland and Belgium” and, “Although the wording of Article 7(1) of the tax treaty does not in itself support such an interpretation, the Supreme Administrative

247. Jannis Quasta, “Interpretation of Tax Treaties, Two Recent Danish Court Decisions”, 2001 European Taxation 284 discuss these two cases.
248. Marjaana Haiminen, in Tax Treaty Interpretation, note 9 at 83.

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Court considers, on the basis of the above reasoning and after taking into account that each country determines its own tax base, that the said paragraph of the tax treaty does not prevent the taxation of [the parent corporation] under the CFC Act in the circumstances described in the application for the advance ruling.”

In France, judges dealing with tax cases have shown little or no interest in the OECD commentaries. The first decision of the Conseil d’État that made reference to those commentaries was Banque française de l’Orient 250 in 1999. This decision was followed by three decisions of the Conseil d’État. In Banque française de l’Orient, no mention was made of the commentaries in the decision but the Commissaire de Gouvernement, Arrighi de Casanova (who expresses an objective opinion on the case) indicated that the commentaries gave a broad definition to a dividend in Article 10 of the Model (which was the question before the court) but rejected the relevance of the commentary on the grounds that the group of experts constituting the CPA “devotes thoughts on the elaboration of a Model in a multilateral framework” and cannot be mistaken for the state representatives having negotiated and concluded a bilateral treaty. He conceded that under Articles 31 to 33 of the Vienna Convention, negotiators of the treaty might be considered as having made reference to the commentaries but he refused to take into account commentaries issued after the treaty was signed and stated that the prior commentaries were not clear enough and further that neither of the parties argued that the negotiators of the particular treaty had referred to them. In Société Golay-Buchal France, 251 the issue involved the question whether certain payments constituted interest falling within Article 12 of the treaty between France and Switzerland (1966). The Conseil d’État noted that as the treaty characterizes interest as income from any debt of any kind and that as those terms are not defined in the treaty itself, under Article 3(2) French law should govern the interpretation. Because the interest in question arose from the late payment of a purchase price, it was held not to be interest governed by Article 11, but rather would fall within Article 7, taxable in France only if the Swiss corporation had a permanent establishment in France. The Commissaire de Gouvernement, Gouillard, among other arguments in this case, noted that the commentaries as well as the domestic law provisions do not state that late interest is interest dealt with under Article 11 of the Model and stated “negotiators of the tax treaty were aware of these commentaries and it is permitted to believe that they

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implicitly approved them”. In Société Interhome,252 a Swiss company attempting to find lessees for vacation houses in France incorporated a French subsidiary to do the work and to sign the lease contracts for the owners of the properties. The question was whether this created a permanent establishment of the Swiss parent company. The Conseil d’Etat held that for various (questionable) reasons it did not. The Commissaire de Gouvernement, Goulard, stressed that “the OECD commentaries are not binding but constitute nevertheless an important guide for the interpretation of tax treaties”. He then in various parts of his submissions referred to those commentaries to support his opinion. In SA Andritz,253 a French subsidiary of an Austrian company borrowed from its parent an amount in excess of what domestic French legislation allowed under the thin capitalization rules. However, the French domestic thin capitalization rules provide that the limitation does not apply when a subsidiary borrows from its parent company. The issue, as framed by the tax authorities, was whether this exception was available where the parent company was not a French resident. The question therefore concerned whether this was discrimination contrary to Article 26(3) of the Austria-France Treaty (1959). The tax administration argued that the commentaries supported its position that there was no discrimination. The court, however, held that no reference should be made to the commentaries where “those commentaries had been issued after the provisions of the treaty have been adopted”. The Commissaire de Gouvernement, Bachelier, took the position that “the administration may make the argument that the negotiators of the bilateral tax treaty have intended to make reference to the commentaries”, therefore, commentaries prior to the signature of a treaty could be invoked by the tax administration provided they establish this intention. He noted, however, that the issue is “more delicate” where additions to the commentaries were issued after the conclusion of the treaty although this is “not totally inconceivable”. To be acceptable, a reference to subsequent commentaries, that is to say, an ambulatory interpretation, should not extend the scope of the relevant article as understood at the time of the conclusion of the treaty.

From the foregoing it is concluded that in France, the Conseil d’Etat, in principle, does not take the subsequent commentaries into account but the Commissaire de Gouvernement, Bachelier, believes that in exceptional cases they can be considered provided that this does not result in extending the scope of the relevant treaty provision. Commentaries existing at the

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time the treaty was concluded are not binding on the court but they nevertheless have a strong value if it can be established that the negotiators of the bilateral treaty actually took them into account or are presumed to have taken them into account. Otherwise commentaries only constitute an interpretive tool or guide in the French courts.

The Italian Supreme Court254 has held that the OECD Model is not binding in the interpretation of tax treaty law and therefore, in Italy, the view has been expressed that this also extends to the commentaries.255

In Luxembourg, the latest version of the Model and commentaries is used both by the tax administration and by the courts in interpreting double tax conventions.256

In the Netherlands, the Supreme Court referred to existing OECD commentaries as early as 1978257 but did not refer to later commentaries until 1998.258 In its reference to the later commentaries, the court did not indicate, however, why it did so. Also the court did not provide a reason when it made similar references in later cases to such commentaries.259

In Sweden, the courts have not been directly confronted with the issue but the Supreme Administration Court260 looked at subsequent commentaries which had changed from prior commentaries but did not find them useful in respect of the particular interpretive issue. It added “that even if one disregards the fact that these statements were added several years after the conclusion of the treat with Luxembourg, they seemed to be irrelevant for the issue at stake”, which implies reluctance to look to later commentaries.

The Czech Supreme Administrative Court261 on February 10, 2005 considered a case where the issue was whether excessive interest paid of a Czech resident corporation on loans from related parties resident in the United States and The Netherlands constituted interest for tax treaty purposes or

254. See, Corte di Cassazione, case no. 1122 of 2 February 2000, in Bull. Tributario, 2000, 1026, where it was indicated that “the OECD Model Convention does not contain any provisions with direct effect in the domestic system”. (Unofficial translation)
256. Alan Stuetzen, in Tax Treaty Interpretation, note 9 at 234.
257. HR 18 October, 1978, BNB 1978/000.
259. HR 21 February, 2005, BNB 2005/177 and 188. See also the views of Mr. Justice van Bronschot of the Netherlands Supreme Court below.
260. RÅ 1996 ref. 84.
dividends. Under both treaties, if the amount was interest, there would be no withholding tax. On the other hand, if the amounts were dividends, there would be a liability to withhold tax. In holding that the amounts continued to be interest and therefore there was no withholding tax, the court rejected the argument based on subsequent commentary that the excessive interest should be considered to be a dividend. In the view of the court, that later commentary was not part of the context of the two treaties in the sense of Article 31(3) of the Vienna Convention because the tax administration did not establish that the commentary was a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, nor a subsequent practice in the application of the treaty" which establishes the agreement of the parties regarding its interpretation.

c) Views expressed by publicists

The position concerning the use of later commentaries has also been discussed extensively by various authors who, like courts, have also not reflected uniform views. Michael Lang is clearly of the view that later commentaries should not affect interpretation of already concluded treaties. Vogel has expressed a view stating that only the commentaries that were published at the time of the treaty's completion can be "binding." Vogel is, however, of the view that changes to the commentaries that merely clarify the views of the CFA are entitled to very great weight even though they are subsequent to the conclusion of the treaty. As Vogel indicates, the task of the parties interpreting tax treaties is to determine to what extent the new version of the commentaries merely clarified what had been the correctly understood meaning of the Model and to what extent did it in fact attempt to alter the Model. In his later article, Vogel shifted his views in light of the frequently changing commentaries after 1992, indicating that later commentaries, which are genuine interpretations of the pre-existing Model (and treaties negotiated based on that Model), have the same weight as the opinion of qualified publicists. Commentaries existing when a treaty is concluded should, in Vogel's current view, be aged before they can be used under Article 31 of the Vienna Convention to establish the ordinary or special meaning of treaty terms.


263. See Vogel et al., note 7. Introduction paragraphs 82(a) and 82(b).

264. Note 19.

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Both Justice Hill, a judge of the Federal Court of Australia and Peter Wattel and Otto Marro, are also of the view that subsequent commentaries have the same weight as opinions of textbook writers.

Ault seems to be of the same view as Vogel that clarifying changes to the later commentaries can assist in the interpretive process but dramatic changes in later commentaries should not be used as such changes in the commentaries really amount to changes in the Model.

Baker's view is that pre-existing commentaries and later commentaries may be relevant in the interpretive process. Neither version is binding on the courts and can only have persuasive authority, but subsequent commentaries may have a lesser weight.

Dr. Avery Jones, with specific references to the changed commentary on Article 17(2) of the current Model, suggests that the change in the commentary was, in effect, a change in the Model. A similar view was also expressed by him in relation to the changed commentary on Article 15 of the current Model which defined the term "employer." However, a slightly different position was expressed in a later article indicating that the real issue in respect of later commentaries is the weight that a court should give them.

Mr. Justice Frank van Brunschot, a Judge of the Netherlands Supreme Court (Hoge Raad), notes that in a number of cases the court had stated that the OECD Model and its commentaries in particular are of "great importance" for treaty interpretation. He notes, however, the propensity of governments, for example the Dutch government, to try to change the commentaries rather than changing its treaties (which is time consuming),
or agree on a bilateral interpretation (which has the same disadvantage), with the result that the Dutch courts "are not bound by the OECD Model and/or commentaries as if they were a treaty." In his view the maximum value of the Model and commentaries, not being a treaty in the sense that they are not binding on taxpayers and courts, is equivalent to an expert opinion of great weight with an uncontested significance for the interpretation of treaties to the extent they existed at the time a particular treaty was concluded. However, the significance of the later versions of the commentaries is less clear. They may be used in as much as they clarify what was previously unclear. If, however, the so-called clarification disguises a modification of the meaning of the term being interpreted, the clarification should be disregarded by the courts.

J. van Soest, 273 substitute Procurator General at the Hoge Raad of the Netherlands in his conclusion to the Hoge Raad's decision of 14 March 1979 concerning the use of the 1977 commentaries to interpret the treaty with Spain argued:

"The explanation [i.e. commentary] cannot, since it is posterior to the treaty, be used as a historical method of interpreting the treaty, but, in my opinion, it has added authority compared to other literature because of its relationship to all comparable provisions in various treaties and as such because of its contribution to the unity of the law."

Richard Vann 274 has supported the use of later commentaries for both practical and legal reasons. These reasons include the fact that they now change frequently, that OECD draft changes are often published before the changes are finalized and adopted, that negotiations to conclude tax treaties take significant time during which the commentaries may be changed, and that Article 3(2) of the Model, Article 31 of the Vienna Convention and Article 25(3) of the Model support the conclusion that the commentaries should be given an ambulatory effect.

Peter Wattel and Otto Marres, 275 Advocate General with the Netherlands Supreme Court and former Legal Secretary, Research Department of the Court, respectively, express the view that, in the case of post-treaty changes to the commentaries, a static interpretation of existing treaties should be the starting point as the commentaries existing at the time the treaty was concluded had received parliamentary approval. Their view is that later revisions of the commentaries do not have such democratic legitimacy, but are drafted by what they colourfully describe as a "club of governments".

Mattias Dahlberg 276 expresses the view that new or revised commentaries published after the 1977 Model should be considered as supplementary means of interpretation under Article 32 of the Vienna Convention.

René Matteoti 277 is of the view that the constitutional principle of separation of powers prohibits courts and agencies from considering subsequent amendments of the commentaries when they interpret tax treaty provisions.

Ekkehart Reimer 278 states that in Germany it is generally accepted that the parties to a treaty are free to adjust treaty interpretation to a new or revised OECD commentary by bilateral agreement. It is unclear, however, whether there is any automatic influence of later commentaries on earlier tax treaties as German case law has not yet dealt with the point clearly. Reimer quotes the views of Vogel et al., 279 Michael Lang, 280 and Aigner and Vetter 281 as scholarly literature that argues against an automatic impact of subsequent commentary. He notes that the scholars focus mainly on the historical intention of the treaty parties and that constitutional law forbids such "dynamic reference" of international treaties to future OECD provisions "unless the new OECD provisions were a mere clarification of an existing legal situation."

Mike Waters, 282 then Chair of WP 1, (perhaps anticipating an argument that tax authorities are bound by later commentaries, but taxpayers are not) 283

274. Id. at 151 et seq.
275. Id. at 224.

276. Note 48 at 149.
277. Note 213 at 340.
278. Note 9 at 468.
281. 38 European Taxation (1998) 3 at 94 et seq.
282. Note 8 at 685.
283. The argument was made by David Oliver in "Debates on Treaties", (1997) 76 Tax Rev. 1 at 2 and by Wattel and Marres, note 9 at 288 et seq. In municipal law, statements as to the interpretation of fiscal legislation made by the tax authorities might be considered in some states to be binding, but not in other states where they may nevertheless be given weight. In the UK and Commonwealth countries, revenue authorities may not be bound by their unprescribed statements as estopses does not run against the Crown. In the UK, however, the government may be prevented from changing its position retroactively: R v. IRC ex p. Unilever plc. (1996) STC 841. In some countries, statements by fiscal authorities can be relied upon by taxpayers but cannot be relied upon by fiscal authorities to bolster their case against a taxpayer. If tax is assessed by the fiscal authorities of a country on the basis of an interpretation of a tax treaty that is different from the commentary, and that country did not enter an

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expresses the personal view that it is difficult to see in Articles 31 and 32 of
the Vienna Convention any legal principle that would require states to apply
new commentary when interpreting previous treaties if this would be to the
taxpayer’s advantage but to ignore new commentary when it would not. He
qualifies this by saying “this is not to deny that a State’s internal adminis-
trative law and practice might require such a course of action, or require
changes that would clearly disadvantage a taxpayer to be applied on a
future taxable period, but that is a different matter”. This view is consistent
with the non-binding recommendation of the OECD Council that tax ad-
mnistrations should follow the commentaries on the articles of the Model
as modified from time to time when applying and interpreting the provi-
sions of the bilateral conventions that are based on the articles in the Model
and the view expressed by Waters in his footnote 38 that the commentaries
are not binding on taxpayers, let alone courts.

Waters makes several arguments in support of the non-binding applica-
tion of later commentaries in the interpretation of pre-existing treaties. The
first is that not to do so would lead to more litigation by taxpayers as the use
of later commentaries makes treaty interpretation by states more uniform,
reducing double taxation. The second is that it avoids the time-consuming
exercise of concluding protocols to amend existing treaties by deleting
existing articles that are explained by later commentary and replacing them
with new articles with the same wording. The third argument is that the
balance of an existing treaty is more likely to be maintained if both parties
apply the same commentary and that double taxation and disagreements are
more likely to be avoided if one party applies the new commentary and
the other does not or neither of them applies the new commentary “since
the new material will be intended to avoid double taxation and/or disagree-
ments as to the interpretation of treaties”. The fourth argument is that
applying the new commentary avoids the intellectually unsatisfactory result
of having to interpret identical wording in two treaties differently according
to when they were concluded as this would be contrary to the search for the
observation, the taxpayer should be able to claim he had a legitimate expectation that his
liability for taxes would be determined based on the commentary, and as a minimum, the
taxpayer would be able to avoid negligence-based penalties.

Note 87 at 686 et seq.

It might be suggested that it would be more appropriate to reward the new article to
adopt expressly within the text of the article the essence of the new commentary to make it
clear that the new commentary, which may be thought to mean more than a mere repetition of the
Model article wording, has in fact been adopted by the two states in negotiating the particular
protocol. At least a new protocol would have the beneficent effect of avoiding the retransac-
tion of the Model (and treaties based on the Model) by changing the commentaries.

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“one true meaning” that would help to bring about consistency of interpri-
etation and application of identical provisions in treaties which is at the heart
of the desirability of using commentaries in the first place. A related argu-
mation is that not applying the new commentaries would be “inconsistent with the
ambulatory approach to treaty interpretation that undermined the change
made in 1995 to Article 3(2)”. Waters notes that the changes to the commentaries are formally
approved by the OECD Council which meets in sessions of Ministers or of permanent
representatives, acts pursuant to the OECD Convention and is the body from which all acts of the
OECD derive. Therefore, in his view, there is much more substance behind the commentaries than merely
the views of the tax officials represented on the CFA. Waters is of the
view that the use of later commentaries is supported by Article 31 of the
Vienna Convention and as supplementary means of interpretation under
Article 32. Even though they are prepared by officials, he believes that the
later commentaries could similarly be taken into account. Finally, Waters
argues as follows:

“When States voluntarily enter into tax treaties they are agreeing to give up
collection of part of the tax revenue that their legislatures have determined
should be collected under their domestic laws. In a tax treaty one State is

286. Although the wording of Article 3(2) was changed in 1995, paragraph 11 of the
commentary on Article 3 has stated since 1992 that the provision was ambulatory, a position
advocated by Avery Jones et al., note 9 since 1984.

287. In making this comment, Waters does not apparently accept the relevance of existing
commentaries in establishing the intentions of the treaty negotiators.

288. The isolation of the Model's History Notes to the Model and to the commentaries indicate
that the changes to the commentaries made in 2000 were "adopted" only by the CFA, whereas
the changes made in other years after 1997 were "adopted" by the OECD Council. Presumably
the process of "adoption" of the changes to the Model and commentary by the Council in
2000 and 2005 gives them no greater status than the Counsel, "recommendation", of 1997
which continues to apply not only to the version of the commentaries then current, but also to
future amendments.

289. Waters, note 8 at 680. Article 32 of the Vienna Convention does not use the expression
"treaty text account", but rather uses the expression "treaty text account", which may be thought
by their very nature, later commentaries are not relevant preparatory or preparatory work nor
are they part of the circumstances of the conclusion of pre-existing treaties. Clearly Article 32
cannot be used as any support for a reference to later OECD commentaries.
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addressing another State and is entering into a binding agreement with that State about whether, to what extent, under what circumstances and how each of them will give up some of its taxes in the interests of eliminating double taxation. The parties to the bargain that they strike are the States themselves. Taxpayers benefit from the bargain that the States strike but they are not immediately involved in the relationship between the States that is represented by the treaty. It seems to me appropriate that States should have the major influence, subject to decisions of the courts, in describing, defining and circumscribing how they will maintain the bargain that they have entered into and give up their revenues, including in the Commentaries to the [Model], updating these and applying them to all their treaties, past and future, in light of the changing circumstances. 209

(d) Our views on later commentaries

Although the practical approach that Waters outlines and uses as support for the relevancy of later commentaries may be interesting, he accepts that commentaries including later commentaries are not binding on taxpayers and courts and thereby acknowledges that the later commentaries do not have the force of law either on an international level or on a national or municipal law level. We agree. In our view, it is a question, therefore, of the weight to be given to later commentaries in interpreting pre-existing treaties. Subsequent commentaries that elaborate on prior commentaries and are fair interpretations of the articles of the Model may be useful in the interpretive process. However, it is questionable how useful they may be, or what they may add in many cases when the articles of the treaty are interpreted in accordance with Article 31 of the Vienna Convention, with the aid of prior commentaries in accordance with the principles of logic and good sense. In our view there is little or no legal justification for the use of such commentaries where they fill gaps in the Model by purporting to fill gaps in the commentaries. If there is a gap in the Model, the only appropriate way to fill the gap would be to amend the Model and, in respect of a pre-existing treaty, the appropriate way, following the rule of law, would be to amend the treaty by a protocol or the negotiation of a new treaty, the wording of which clearly fills the gap. In the case of commentaries that follow state practices under existing treaties, if these state practices are in fact adopted by the two states to any particular treaty and if the state practice "establishes the agreement of the parties regarding its interpretation" and is a genuine interpretation and not effectively a change in the treaty, the subsequent practice forms one of the elements in the general rule.

209. Waters, note 8 at 688.

7. Summary and Conclusions

of interpretation of Article 31(3)(b) of the Vienna Convention and may have effect under international law. 292 Further, a change in the commentaries does not necessarily evidence a state practice of any particular OECD member state, or any two member states. More evidence than a change in the commentaries should be provided before Article 31(3)(b) of the Vienna Convention can be applied and this may be difficult to obtain because assessments of taxes are usually confidential as between particular taxpayers and the taxing authorities. Also the commentaries often refer to diverging practices. 292 We also are of the view that later commentary contradicting previous commentary should never be taken into account in interpreting existing treaties. To do so would be to deny the effectiveness of existing OECD commentary as part of the legal context in establishing the intentions of the parties negotiating particular tax treaties based on the commentaries and the Model current at the time and to delegate to the CFA an international law-making capacity for which there is no support. In short, later commentaries that go beyond a fair interpretation of the text of the particular treaty should be given little or no weight by national courts dealing with the interpretation and application of pre-existing treaties.

7. Summary and Conclusions

In our view, most of the OECD commentaries do not fit easily within the general rule of interpretation or the supplementary means of interpretation in Articles 31 and 32 of the Vienna Convention. The exception is to the extent the commentaries can be shown to have been intended by the treaty parties to provide a special meaning of such a term, the commentaries would be relevant in providing the meaning of the term when applying paragraph (4) of Article 31 of the Vienna Convention in the interpretive process.

Even though much of the commentaries does not fit within the interpretive rules of the Vienna Convention, it should be recognized that the interpretive rules described in Articles 31 and 32 are not a complete statement of all

291. A state practice also raises questions of effectiveness under municipal law if it actually changes pre-existing treaties.

292. See, for example, paragraphs 9.2 and 9.3 of the commentary on Article 1, paragraph 6 of the commentary on Article 5, paragraph 2.1 of the commentary on Article 15, paragraph 3.1 of the commentary on Article 16 and paragraph 8 of the commentary on Article 18. Also the commentary uses such expressions as, "Member States have generally ....", in referring to state practices and there is even an example of an error in referring to state practices. The Belgian tax authority took the position before the Belgium Supreme Court that Article 3(2) should be applied in a stasis way: Supreme Court decision, 21 December, 1990, Pan., I, 402, contrary to paragraph 13.1 of the commentary to Article 3(2) added in 1995.

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state has had this opportunity to express its views, the commentators may have lesser weight because such non-member state has not had the opportunity to participate in the discussions and the formulation of the commentators themselves. 294

In determining what commentary should be considered in accordance with the principles of logic and good sense in interpreting bilateral tax treaties, it is our view that the commentary should be limited to that which had been adopted by the CFA and the OECD Council and published prior to the conclusion of the bilateral treaty in question. Drafts of new commentaries and OECD reports that precede such drafts even if existing when the bilateral treaty is concluded should not be considered to have been part of the legal context and not be considered to indicate the intentions of the parties to the bilateral treaty at the time of its conclusion unless the treaty parties otherwise agree in a protocol or a memorandum of understanding.

We are also of the view that the commentaries do not rise to the level of binding interpretations in international law and although they are obviously helpful and important in the interpretive process, they may not be binding on tax administrations in municipal or internal law, and certainly are not binding on taxpayers or the courts.

When one of the two states concluding a bilateral treaty has entered a relevant observation on the commentary on a particular article of the Model and that article has been adopted by the two states in their bilateral income tax treaty, the effect of the observation has not been clarified by the OECD. In our view, if the commentary relates to the meaning of a treaty term and if the observation advances an alternate interpretation, it would be reasonable to apply the treaty on an asymmetrical basis in a way similar to the application of the treaty where an undefined treaty term is given a different definition in each of the two states on the application of Article 3(2) of the Model. In this respect, the state of source of income applies the treaty term in accordance with the meaning that it has accepted, the other state should accept the correctness of that interpretation and allow relief under the equivalent of Articles 23A and 23B of the Model. Where, however, the provision of the treaty requires there to be a single symmetrical interpretation, such as Articles 4(2) and 7(2), the issue as to which is the correct interpretation would presumably have to be established by mutual agreement procedures or in the courts disregarding both the commentary and the observation entered on the commentary. In cases where the observation is

293. And thereby is to be given the meaning that it has under internal law unless the context otherwise requires in accordance with Article 3(2) of the Model.

294. China has expressly stated that it will not be bound by its stated positions.
to more general commentary such as in those cases where the observation is in relation to the 2003 anti-abuse commentary on Article 1, the observation should be interpreted as a statement by the observing state that it does not agree to the application by the non-observing state of the anti-abuse rule or rules or principles other than those that have been expressly included in the bilateral treaty. An asymmetrical application of anti-abuse rules would be inappropriate in these cases as the application of such anti-abuse rules has not been supported by any consensus of the parties. In dealing with treaties concluded before the anti-abuse commentary in question was adopted by Council, the issue of whether anti-avoidance rules should be applied even though not expressly included in the treaty should be determined on the basis of the commentary and observations that existed and had been published when the particular treaty was concluded.

Commentaries that have been adopted by the CFA and the Council and published after the conclusion of a bilateral tax treaty may be considered in the interpretive process. In this respect such later commentaries should be carefully evaluated to determine to what extent, if any, the commentaries, if applied, would shift or alter the meaning of the bilateral tax treaty provision in question and if such later commentaries are considered to change the meaning of an existing bilateral treaty, they should not be applied.