Chapter 1

The Relevance of the Commentaries on the OECD and UN Models for the Interpretation of the UN Model

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1.1. Introduction

Initial work on the issue of double taxation was conducted by the League of Nations,[1] but the OECD has now taken the lead in this field. Most OECD member countries are developed countries, and the OECD Income and Capital Model Convention (OECD Model) was designed to meet their needs. From the perspective of developing countries, the application of the OECD Model is not seen as appropriate, because imbalanced income flows between states are not taken into account.[2]

The overall influence of the United Nations Double Taxation Convention between Developed and Developing Countries (UN Model) on bilateral treaties has grown in recent years, especially for tax treaties between developed and developing countries. In particular, clauses that seek to preserve greater sovereignty of the source state can be found in many tax treaties concluded between an OECD member country and a UN Member State in order to foster the economic development of developing countries.[3]

The tax literature accompanying the development of the OECD and UN Models initiated debates on the legal significance of the Models and their influence on the interpretation of tax treaties. Although the UN Model and the corresponding Commentaries are in no way binding, when negotiating a treaty, countries often take articles of the UN Model as a basis for the text of that treaty. This fact indicates the importance of the UN Model as a treaty template. Changes to the UN Model and the Commentaries thereon will almost immediately have an effect on the global treaty network, es-

1. *OECD Model Tax Convention on Income and on Capital: Introduction*, para. 4 (2014).
2. *UN Model Double Taxation Convention between Developed and Developing Countries: Introduction*, paras. 3 and 32 (2001).
3. L. Turcan, *The OECD Update 2014 and its Impact on the UN Model Convention*, in *The OECD-Model-Convention and its Update 2014*, at 209 (M. Lang, P. Pistone, A. Rust, J. Schuch, C. Staringer & A. Storck eds., Linde 2015).

pecially on bilateral tax treaties that are concluded between developed and developing countries.

Therefore, this chapter presents and discusses several key issues. Similarities and differences between the OECD and UN Models and the Commentaries thereon will be explained and analysed. The analysis will focus on the legal fundamentals, official languages and the possibility of stating dissenting opinions on the Model Conventions and their Commentaries. Finally, the relevance of the OECD Model and the Commentaries thereon for the UN Model will be revealed through some examples.

1.2. Legal fundamentals of the UN Model and the Commentaries thereon

1.2.1. The OECD Model and the Commentaries thereon

Public international organizations are established by treaty.[4] The constitution of a public international organization is the basis which establishes its legal order. Each organization has a unique structure and legal order. Nevertheless, there are certain elements that all public international organizations have in common, namely, a plenary organ, a secretariat with independent staff and further subsidiary bodies.[5]

The OECD itself succeeded its predecessor organization, the OEEC, in 1961 and has established a plenary organ (the Council), an international secretariat and approximately 250 committees.[6] Under article 7 of the Convention on the OECD, all acts of the organization must derive from the Council.[7] In order to achieve the aims of the organization, article 5 of the Convention on the OECD gives the Council the power to make decisions that are legally binding on OECD member countries, make recommendations to member countries and enter into agreements with (non-)member countries or international organizations. Decisions made under article 5(a) are – according to the unmistakable wording – legally binding. What is

4. A. Aust, *Modern Treaty Law and Practice*, at 393 (Cambridge University Press 2007).
5. N. Blokker, *Skating on Thin Ice? On the Law of International Organizations and the Legal Nature of the Commentaries on the OECD Model Tax Convention*, in *The Legal Status of the OECD Commentaries*, at 14 (S. Douma & F. Engelen eds., IBFD 2008).
6. *See* www.oecd.org/about/whodoeswhat (accessed 4 August 2016).
7. Convention on the Organisation for Economic Co-operation and Development (1960).

more, agreements concluded on the basis of article 5(c) are of a certain legal relevance, depending on the specific agreement. The term "recommendation" is not explicitly defined in the Convention on the OECD. Recommendations made by a plenary body (such as the Council) of an international organization are usually defined in a negative way, as legally not binding.[8] In the context of article 5(a), which already gives the Council the possibility to take a legally binding decision, it would not make much sense to constitute another act with the same legal consequences.[9] Therefore, it cannot be assumed that recommendations adopted on the basis of article 5(b) are of a legally binding nature.

The OECD Model is not a treaty under international law. It is part of a recommendation adopted by the OECD Council on the basis of article 5(b) of the Convention on the OECD. Instead of using article 5(a) or (c), which would have made the OECD Model a legally binding instrument for its members, the OECD Council decided to establish a recommendation to OECD member countries, granting them the possibility of deviating from the provisions of the convention in treaty negotiations.

The OECD Council recommends the conclusion of bilateral tax conventions on income and capital with member and non-member countries on the basis of the OECD Model and the interpretation of such treaties in light of the Commentaries on the articles of the OECD Model.[10]

Although legally non-binding, when negotiating a treaty, most countries decide not to depart from the provisions of the OECD Model. By transforming the provisions of the OECD Model into bilateral tax treaties, they become legally binding on both contracting states.[11] In contrast to the provisions of the OECD Model, the related Commentary is not part of the treaty concluded by the contracting states and has no legally binding effect. This view is also stated in the introduction to the OECD Model.[12]

8. Blokker, *supra* n. 5, at 18.
9. M. Nieminen, *OECD Commentaries under the Vienna Rules*, at 18 (Kurikka 2014).
10. OECD, The Council, *Recommendation of the OECD Council concerning the Model Tax Convention on Income and on Capital*, C (97)195/Final (1997).
11. N. Alkema, *The Commentaries on the OECD Model Tax Convention on Income and on Capital: Effective in Domestic Law or in Need of Alternatives?*, in *The Legal Status of the OECD Commentaries*, at 163 et seq. (S. Douma & F. Engelen eds., IBFD 2008).
12. Introduction, para. 29 *OECD Model* (2014) ("Although the Commentaries are not designed to be annexed in any manner to the conventions signed by Member countries, which unlike the Model are legally binding international instruments, they can

1.2.2. The UN Model and the Commentaries thereon

The Economic and Social Council of the United Nations (ECOSOC) is one of the principal organs of the United Nations, together with the General Assembly, the Security Council, the Trusteeship Council, the International Court of Justice and the Secretariat. It consists of 54 members, which are elected by the General Assembly for overlapping 3-year terms. Under article 62(3) of the UN Charter, the ECOSOC may prepare draft conventions on matters falling within its competence, in particular as regards international economic, social, cultural, educational and health matters. For the purpose of preparation of draft conventions, the ECOSOC may set up commissions in the economic and social fields under article 68 of the UN Charter. With regard to the field of taxes, a resolution was adopted in 1967 to establish an ad hoc working group as a subcommittee for the purpose of exploring ways and means to facilitate the conclusion of tax treaties between developed and developing countries.[13] Following the resolution, the Secretary General set up the Ad Hoc Group of Experts, consisting of experts and tax administrators of developed and developing countries who are nominated by governments but act in their personal capacity.[14]

The Ad Hoc Group of Experts completed the formulation of guidelines for the negotiation of bilateral tax treaties between developed and developing countries in seven meetings between 1968 and 1977.[15] The aim of these guidelines was to give states technical assistance in the conclusion of tax treaties in the future.[16] According to the Ad Hoc Group of Experts, the objective of these guidelines was not to establish a worldwide multilateral tax agreement, which was recommended by the Group of Eminent Persons, but rather to lay a foundation for an appropriate network of bilateral tax treaties.[17] The position of the Secretary General was the completion of a model bilateral convention that was to be used as a basis for treaty negotiations between developed and developing countries on the basis of the work that had been done by the Ad Hoc Group of Experts.[18] Following the position of the Secretary General, stated in the first regular session of the

nevertheless be of great assistance in the application and interpretation of the conventions and, in particular, in the settlement of any disputes.").

13. UN, Economic and Social Council (ECOSOC), Resolution 1273 (XLIII), E/4429 (1967).
14. Introduction, para. 4 *UN Model* (2001).
15. Introduction, para. 5 *UN Model* (2001).
16. UN, Economic and Social Council (ECOSOC), Resolution 1541 (XLIX), E/4904 (1970).
17. Introduction, para. 6 et seq. *UN Model* (2001).
18. Introduction, para. 8 *UN Model* (2001).

ECOSOC in 1978, the Council requested the Ad Hoc Group of Experts to complete a draft model convention at its eighth meeting, in 1979.[19]

The draft model convention consisted of articles which reproduced guidelines formulated by the Ad Hoc Group of Experts and commentaries on these articles that reflected the view of the members of the Group.[20] In preparing the guidelines, the drafters of the convention relied heavily on the 1977 OECD Model. Where appropriate, the views of the OECD member countries on certain articles of the OECD Model were incorporated.[21]

The final text of the draft model convention was adopted at the eighth meeting of the Group of Experts, held in Geneva in 1979. This adoption led to the publication of the United Nations Model Double Taxation Convention between Developed and Developing Countries in 1980.

The Ad Hoc Group of Experts was renamed the UN Tax Committee in 2004. Its functions include "keep[ing] under review and updat[ing] as necessary the United Nations Model Double Taxation Convention between Developed and Developing Countries".[22] The UN Tax Committee consists of individuals who are appointed by the Secretary General after nomination by their governments, but who serve in their individual capacity and not as representatives of their respective governments.[23] In contrast to the meetings of the OECD Committee on Fiscal Affairs, where attendance is restricted to representatives of the member countries, meetings of the UN Tax Committee are open to the public, and every attendee may participate in the discussions.

In recent years, attempts were made to upgrade the status of the UN Tax Committee to an intergovernmental subsidiary body of the ECOSOC, with the aim of increasing the influence and funding of the Committee's work. One of the ways to reach this goal was to have the Tax Committee composed of governmental representatives. A possible upgrade to an intergovernmental organization was a key issue at the UN's Third International Conference on Financing Development, held in Addis Ababa in July

19. Introduction, para. 8 *UN Model* (2001).
20. Introduction, para. 9 *UN Model* (2001).
21. Introduction, para. 9 *UN Model* (2001).
22. UN, Economic and Social Council (ECOSOC), Resolution 2004/69, E/2004/L.60 (2004).
23. B.J. Arnold, *Tax Treaty News*, 65 Bulletin for International Taxation 3, at 119 (2011).

2015.[24] This plan was ultimately rejected, but an agreement was reached to strengthen the effectiveness and operational capacity of the UN Tax Committee by increasing the number of meetings to two sessions per year, with a duration of 4 working days each.[25]

The ECOSOC itself may prepare draft conventions for the purpose of submission to the General Assembly under article 62(3) of the UN Charter. These are restricted to matters falling within its competence. In order to promote international cooperation in the economic field, article 13(1)(b) of the UN Charter provides that the General Assembly may make recommendations to UN Member States. As explicitly mentioned in the introduction to the UN Model, the convention itself is not enforceable.[26] The provisions of the UN Model are not binding and may not be interpreted as formal recommendations of the UN.[27]

1.3. Official languages of the UN Model and the Commentaries thereon

1.3.1. The OECD Model and the Commentaries thereon

The OECD Model does not contain a specific rule on the interpretation of authentic languages. Nevertheless, most countries include a provision on authentic languages in their tax treaties. Countries in which the same language is spoken tend to make this language authentic.[28] States are not restricted in their choice of authentic languages. This is implied by the principle of equality of states.[29] As a result, it is possible that states in which different languages are spoken will establish both languages as authentic.[30] There are also treaties in which a third language has been made authentic as well, or in which this third language will prevail in the case of an interpretational conflict.[31]

24. UN, General Assembly, Revised Draft of the Outcome Documents (6 May 2015), para. 25.
25. UN, General Assembly, Resolution 69/313, A/RES/69/313 (2015).
26. Introduction, para. 35 *UN Model* (2001).
27. Introduction, para. 12 *UN Model* (2011).
28. Austria-Germany Income Tax Treaty (2000) ("Done in duplicate in Berlin on 24 August 2000, both in the German language.").
29. L. McNair, *The Law of Treaties*, at 30 (Oxford at the Clarendon Press 1961).
30. France-United Kingdom Income Tax Treaty (2008) ("Done in duplicate at [London] this [19th] day of [June], 200[8], in the English and French languages, both texts being equally authoritative.").
31. Denmark-Italy Income Tax Treaty (1999) ("Done in duplicate at Copenhagen this 5th day of May 1999, in the Danish, Italian and English languages, all texts being equally authentic."); Italy-Spain Income Tax Treaty (1977) ("Done at Rome, the 8th day of September 1977, in two original copies, in the Spanish, Italian and French languages, the three texts being equally authentic, but in case of doubt the French text shall prevail.").

In contrast to the OECD Model itself, the convention establishing the OECD as an international organization is a treaty under international public law, signed in Paris on 14 December 1960 "in the English and the French languages, both texts being equally authentic". Correspondingly, the OECD Model was proclaimed with English and French as official languages.[32] Although there are translations available in other languages, in the interpretation process, more weight must be given to the original languages. Only the consideration of these two languages provides a uniform understanding of the provisions of the OECD Model when incorporated in other tax treaties. In tax treaties where other languages have been established as authentic languages, the consideration of these languages in the interpretation process will not ensure that the content of the OECD Model will be interpreted in an appropriate manner.[33]

Many tax treaties have chosen English or French as the authentic language, especially if one of these languages is the national language of the contracting states, but also in cases where English or French has been made authentic as a *neutral* language. In cases where these are the only authentic languages of the treaty, recourse to the provisions of the OECD Model can be made when the provisions of the treaty does not deviate from the OECD Model. However, contracting states often decide to establish another language besides English or French as authentic. In such instances, it is not ensured that the provision in question will be interpreted in a way that is in accordance with the English or French version of the OECD Model. Uniform interpretation could be assured only if the provisions of the Vienna Convention on the Law of the Treaties (Vienna Convention) would allow the authentic English or French version of the treaty to take precedence over the other authentic language. At first glance, such an approach seems impossible, as article 33(1) of the Vienna Convention states that where "a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail".

32. J. Sasseville, *The OECD Model Convention and Commentaries*, in *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law*, at 130 (G. Maisto ed., IBFD 2005).
33. M. Lang, *Auslegung von Doppelbesteuerungsabkommen und authentische Vertragssprachen*, Internationales Steuerrecht, at 408 (2011).

The International Law Commission contemplated including a provision to specify a legal presumption that would have favoured the text of the treaty in the language in which it was drafted.[34] This plan was rejected, because the International Law Commission felt that such a provision would have gone too far, as much depends on the circumstances of each case and on the evidence of the parties' intentions.[35]

Although there is no explicit rule in the Vienna Convention, not all authentic languages will have the same weight in the interpretation process.[36] If the contracting states negotiated and drafted a treaty in a certain language, an interpretation with reference to the object and purpose of the treaty requires that one take these circumstances into account.[37] Thus, where a treaty has been drafted in English or French and the OECD Model has been taken into account, by incorporating provisions into the treaty in question, one must bear in mind that the provisions of the OECD Model were originally available in English and French versions. By adopting provisions from the OECD Model, the contracting parties had the intention – if in the context not otherwise indicated – to afford the provisions a meaning which is in conformity with the OECD Model.[38] Where a treaty is authenticated in English or French, it is in line with the object and purpose of the treaty to place more emphasis on the interpretation of the English or French version of the text than on a version in another language.[39]

As mentioned, tax treaties based on the OECD Model do not necessarily establish French or English as an authentic language. At first glance, the applicability of languages other than those made authentic seems restricted under article 33(2) of the Vienna Convention. Under that provision, a treaty version in a language other than the authentic language "shall be considered an authentic text only if the treaty so provides or the parties so agree".

34. UN, *International Law Commission (ILC)*, Yearbook of the International Law Commission, vol. II, at 226 (United Nations Publication 1966).
35. Id., at 226.
36. S. Rosenne, *The Meaning of "Authentic Text" in Modern Treaty Law*, in *Völkerrecht als Rechtsordnung – Internationale Gerichtsbarkeit – Menschenrechte*, at 782 et seq. (R. Bernhardt, W.K. Geck, G. Jaenicke & H. Steinberger eds., Springer-Verlag 1983).
37. D. Shelton, *Reconcilable Differences? The Interpretation of Multilingual Treaties*, Hastings International & Comparative Law Review, at 636 (1996-1997).
38. M. Lang, *The Interpretation of Tax Treaties and Authentic Languages*, in *Essays on Tax Treaties: A Tribute to David A. Ward*, at 28 (G. Maisto, A. Nikolakakis & J.M. Ulmer eds., IBFD 2013).
39. Lang, *supra* n. 33, at 408.

The applicability of the English and French versions of the OECD Model would therefore be denied if the contracting states chose to establish different languages as authentic. However, such an agreement does not need to be an explicit one.[40] By adopting provisions of the OECD Model, states make an implicit agreement to share the meaning of the convention. In order to find the right interpretation of the treaty provisions, the contracting states must take into account the English and French versions of the OECD Model. Otherwise, the interpretation of a certain provision which is identical to the OECD Model could lead to a different understanding even though the provision is identical in the other language.

Article 33(3) of the Vienna Convention makes a presumption that all authentic versions have the same meaning. The result would be that it is not necessary to take all the authentic language versions of the treaty into account, but rather only one. However, it is nearly inevitable that different language versions will lead to different results, even if the wording is clear in each version.[41] In such cases, articles 31 and 32 of the Vienna Convention are to be taken into account. Under the main premise of the object and purpose of the treaty, differences in the meaning of terms between the authentic language versions can mainly be solved by taking into account the original English and French versions of the OECD Model.

Furthermore, consideration of the OECD Model in its English and French versions is not excluded, because article 33 of the Vienna Convention mentions only one aspect of interpretation, which is to find the ordinary meaning of the terms of the treaty. In addition to the ordinary meaning of terms, other interpretational methods need to be taken into account. Article 31(1) of the Vienna Convention also explicitly requires a consideration of the context in which terms are embedded in light of the object and purpose of the treaty. Under this provision, systematic interpretation is also recognized in international law. Article 31(4) of the Vienna Convention provides for an additional aspect of the interpretation of the ordinary meaning of a term, namely by giving a term a special meaning if it is certain that the parties so intended.[42] Finally, a historical approach is also mentioned in article 32 of the Vienna Convention.[43] In order to examine the intention

40. Lang, *supra* n. 33, at 407.
41. Lang, *supra* n. 33, at 404.
42. H.J. Ault, *The Role of the OECD Commentaries in the Interpretation of Tax Treaties*, 22 Intertax 4, at 146 (1994).
43. M. Lang, *Art. 3 Abs. 2 OECD-MA und die Auslegung von Doppelbesteuerungsabkommen*, Internationale Wirtschaftsbriefe, at 282 et seq. (2011); K. Perrou, *Tax Treaty Interpretation in Greece*, in *Tax Treaty Interpretation*, at 161 (M. Lang ed., Linde 2001).

of the parties, it is necessary to interpret the treaty provision in light of its context, the object and purpose of the treaty and its historical foundation.[44] In this sense, the interpretation of the ordinary meaning as provided under article 33 of the Vienna Convention sets only one isolated aspect of interpretation, which cannot be given sole importance in the overall interpretation process.

The intention of the contracting states is not simply undermined by article 33(1) of the Vienna Convention if neither English nor French is established as an authentic language. Although languages other than English or French may be made authentic, by reproducing provisions of the OECD Model, the contracting states had the intention of affording the terms a meaning which is in line with that Model.[45] As regards a uniform understanding, the original English and French versions must be taken into account within the interpretation process. Therefore, it is possible to give greater priority to the original versions of the OECD Model than to the translated ones if neither English nor French was the authentic language version of the treaty.

1.3.2. The UN Model and the Commentaries thereon

The six official languages of the United Nations are Arabic, Chinese, English, French, Russian and Spanish. Under article 111 of the UN Charter, these languages (with the exception of Arabic) are also authentic languages of the UN Charter.

Most UN documents are issued in all six official languages, requiring translation from the original document. This is also the case for the updated versions of the UN Model. The UN Committee of Experts on International Cooperation in Tax Matters aims at translating the original document, which is in English, into all six official languages.[46]

The UN Model is updated and published on a regular basis by the Committee of Experts on International Cooperation in Tax Matters, which was founded by the ECOSOC as an expert body composed of members serving

44. F. Engelen, *Interpretation of Tax Treaties under International Law*, at 111 and 145 et seq. (IBFD 2004).
45. Lang, *supra* n. 33, at 407.
46. UN, Committee of Experts on International Cooperation in Tax Matters, *Report on the seventh session*, E/C.18/2011/6 (2011), para. 84.

in their personal capacity.[47] As English is one of the three working languages (in addition to French and Spanish) and translations into the official languages are made on the basis of the English documents, it is particularly important to place more emphasis on the original English version of the UN Model.

In situations in which English has not been declared to be authentic in a specific treaty, an interpretation in line with the UN Model cannot be ensured. A first glance at article 33(3) of the Vienna Convention seems to indicate that one would not need to decide which authentic language version has precedence, as, under this rule, the terms of the treaty have the same weight in both authentic texts. Nevertheless, an interpretation that is in line with the object and purpose of the treaty requires that one take into account the English version of the UN Model. By reproducing provisions without deviation, both contracting states intended to afford the terms a meaning which is in conformity with the meaning stated in the UN Model.

This approach is also in line with the Vienna Convention on the Law of Treaties. Article 33 of the Vienna Convention implies that recourse to the authentic versions of a text may be had, but it does not answer the question as to how authentic versions are to be used within the interpretation process.[48] Divergences in the text of a treaty can mainly be resolved by applying articles 31 and 32 of the Vienna Convention. The inclusion of the English text of the UN Model within the interpretation process leads to a result which is most appropriate in light of the object and purpose of the treaty. As states implicitly agree to share the meaning of the UN Model by adopting its provisions into their treaties, one must take into account that the UN Model was originally available in an English version and not in the other official language versions.

Furthermore, the English and French versions of the OECD Model must also be taken into account in cases where the UN Model copied provisions of the OECD Model without deviation.[49] In order ensure uniformity in the interpretation of a certain provision that is identical to the OECD Model, it is obvious that more emphasis should be placed on the working languages of the OECD Model.

47. B.J. Arnold, *Tax Treaty News – The United Nations: Recent Tax Developments*, 67 Bulletin for International Taxation 12, at 630 (2013).
48. Rosenne, *supra* n. 36, at 784.
49. Lang, *supra* n. 33, at 409.

1.4. Possibilities for the articulation of dissenting opinions on a model convention

1.4.1. The OECD Model and the Commentaries thereon

Under article 2(1)(d) of the Vienna Convention, reservations are unilateral statements made by states or international organizations with the purpose of excluding or modifying the legal effect of a certain provision in relation to the other state or international organization. As the OECD Model is not a treaty, reservations made to one or more of its provisions cannot be subsumed under this provision. Although not related to a treaty, reservations to particular provisions of the OECD Model are not totally unrelated to the definition stated in article 2(1)(d) of the Vienna Convention. The term "reservation", in the sense of a disagreement concerning a provision included in the OECD Model, was first used by the OEEC in its fourth report in order to express dissenting opinions on specific aspects of draft articles on dividends, interest and royalties by Austria, Belgium, France, Germany, Italy, the Netherlands, Portugal, Spain and Turkey.[50] As the aim was initially to transform these draft articles, as well as the articles of the 1963 draft convention, into a multilateral convention, the understanding of the term "reservation" was in line with the common understanding under treaty law.

The plan to transform draft provisions into a multilateral convention was ultimately rejected in the course of the preparation of the 1977 revised version of the OECD Model.[51] The Committee on Fiscal Affairs determined that the conclusion of a multilateral convention would not be feasible.[52] However, states are free to conclude such an instrument among themselves on the basis of the proposed OECD Model.[53]

Dissenting views of member countries on provisions of the OECD Model are recorded in the Commentaries on the OECD Model. While these views can be seen as a guideline on what to expect in treaty negotiations with another state, this does not mean that a contracting state is not free to deviate from the view stated in the Commentaries.[54] As mentioned, the OECD Model is a non-binding recommendation that its members take as a basis for their treaty negotiations. Members are also free to deviate from the suggested provisions when they have made a reservation on a particular article of the OECD Model.

The interpretative relevance of these dissenting views stated in the Commentaries on the OECD Model is rather modest. As states are free to deviate from the Model Convention, it is essential to look at the text of the tax treaty itself. In cases where the contracting states chose to include an article on which a reservation has been made, the reservation itself has no interpretative value for the treaty in question. However, there are situations in which a reservation made to an article of the OECD Model is of a certain interpretative value. These are usually cases in which the contracting states chose to depart from an article of the OECD Model on which a reservation has been made and decided to adopt in their treaty the alternative provision mentioned in the reservation. In such cases, the reservation can be of assistance in establishing what the contracting states had in mind when they agreed to include the alternative provision instead of the wording of the provision of the OECD Model.

In contrast to reservations, *observations* are made on the Commentaries on the OECD Model in order to express a dissenting view on the interpretation of a certain article of the OECD Model.[55] As observations to the Commentaries on the OECD Model are interpretative statements formulated in relation to a non-binding instrument, they should not be confused with interpretative declarations that are made in connection to a binding treaty. OECD member countries do not want to cause a legally binding effect by the formulation of an observation.

The legal relevance of observations differs from that of reservations, especially where contracting states decide to incorporate provisions of the OECD Model into a particular tax treaty. Situations can arise in which both contracting states share a common understanding by establishing the same observation on a certain article. This shared view – different than that stated in the Commentaries on the OECD Model – can be seen as a special meaning in the sense of article 31(4) of the Vienna Convention in

50. OEEC, *The Elimination of Double Taxation: Fourth Report of the Fiscal Committee*, at 7, 15, 48 et seq., 58 et seq. and 66 (1961).
51. J. Sasseville, *The Role and Evolution of Reservations, Observations, Positions and Alternative Provisions in the OECD Model*, in *Departures from the OECD Model and Commentaries*, at 7 (G. Maisto ed., IBFD 2014).
52. Presentation of the 1977 Model Convention, para. 32 *OECD Model* (1977).
53. Presentation of the 1977 Model Convention, para. 32 *OECD Model* (1977).
54. D.A. Ward, *Is There an Obligation in International Law of OECD Member Countries to Follow the Commentaries on the Model?*, in *The Legal Status of the OECD Commentaries*, at 92 et seq. (S. Douma & F. Engelen eds., IBFD 2008).
55. M. Lang & F. Brugger, *The Role of the OECD Commentary in Tax Treaty Interpretation*, Australian Tax Forum, at 101 (2008).

contrast to the meaning given by the Commentary on a certain article of the OECD Model.[56] It is clear in such cases that the intention of the contracting states was to establish a meaning different than the meaning described in the Commentaries, and, although made to a legally non-binding instrument, these shared observations are of critical relevance in the interpretation process.

Cases arise where one contracting state makes an observation on the interpretation of an article of the OECD Model and the other state does not, or where both states make an observation but state different views. In such cases, it is not certain whether the intention of the contracting states was to follow the Commentary on the OECD Model or the view that is stated in the observations. In order to ascertain the relevant meaning for the treaty in question, the context, as well as the object and purpose of the treaty provision, must be taken into account.[57] To investigate the meaning of the terms of the treaty, the Commentaries on the OECD Model can provide helpful guidance, but where observations have been made stating views different than those of the Commentaries on the OECD Model, additional materials (e.g. accompanying documents to the treaty) will be needed in order to ascertain the common intention of the contracting states.[58]

As noted, reservations and observations are instruments which are made in connection with the OECD Model or in connection with the Commentaries on the OECD Model. Both instruments are available to OECD member countries. However, countries that are not OECD members are also able to express disagreement on the articles of the OECD Model and the interpretation stated in the Commentaries.[59] These dissenting views are called *positions*. Interestingly, the term "positions" is used to express both disagreement with a particular article of the OECD Model and disagreement with a particular interpretation given by the Commentaries. One reason might be to emphasize that reservations and observations are reserved only for OECD member countries. Actually, positions often have the same wording

56. A. Vega, *The Legal Status and Effects of Reservations, Observations and Positions to the OECD Model*, in *Departures from the OECD Model and Commentaries*, at 46 (G. Maisto ed., IBFD 2014).
57. M. Lang, *Die Bedeutung des OECD-Kommentars und der Reservations, Observations und Positions für die DBA-Auslegung*, in *Nationale und internationale Unternehmensbesteuerung in der Rechtsordnung: Festschrift für Dietmar Gosch zum Ausscheiden aus dem Richteramt*, at 247 (J. Lüdicke, R. Mellinghoff & T. Rödder eds., C.H. Beck 2016).
58. Lang & Brugger, *supra* n. 55, at 101.
59. Introduction, para. 2 *OECD Model: Non-OECD Economies' Positions on the OECD Model Tax Convention* (2014).

as reservations made by OECD member countries.[60] In addition, the wording of disagreements on a particular interpretation stated in the Commentaries is similar to that of "observations".[61] Therefore, positions taken by countries that are not OECD members should also be interpreted in light of the above-mentioned deliberations. However, as countries that are not OECD members are not addressees of the OECD recommendations, and therefore cannot necessarily be expected to articulate their disagreement with a certain view expressed in the Commentaries, one must be more careful about drawing conclusions from the absence of positions.

In any event, all these deliberations hold true only for observations and positions that are made before a bilateral treaty is concluded. Observations and positions made after the conclusion of a tax treaty share the fate of later changes to the Commentaries: they cannot be seen as an indication of the view of the countries when they negotiated the treaty, and they are therefore irrelevant to the interpretation of a tax treaty.[62]

1.4.2. The UN Model and the Commentaries thereon

The UN Model reproduces, to a great extent, the articles of the OECD Model and the Commentaries thereon. Therefore, the Group of Experts took a decision in 1999 to note the reservations and observations made by OECD member countries where necessary.[63] The Tax Committee noted that, by quoting the Commentaries on the OECD Model, in order to get a full understanding of the acceptance of certain parts of the Commentaries, observations made by OECD member countries also must be taken into account.[64]

60. Para. 1 *OECD Model: Non-OECD Economies' Positions on the OECD Model Tax Convention on Art 1* (2014) ("The Philippines reserves the right to tax its citizens in accordance with its domestic law.").
61. Para. 3 *OECD Model: Non-OECD Economies' Positions on the OECD Model Tax Convention on Art 1* (2014) ("Gabon, India, Ivory Coast, Morocco and Tunisia do not agree with the interpretation put forward in paragraphs 5 and 6 of the Commentary on Article 1 (and in the case of India, the corresponding interpretation in paragraph 8.7 of the Commentary on Article 4) according to which if a partnership is denied the benefits of a tax convention, its members are entitled to the benefits of the tax conventions entered into by their State of residence. They believe that this result is only possible, to a certain extent, if provisions to that effect are included in the convention entered into with the State where the partnership is situated.").
62. Lang, *supra* n. 57, at 245.
63. Introduction, para. 37 *UN Model* (2001).
64. UN, Committee of Experts on International Cooperation in Tax Matters, *Note by the Secretariat on "Country Observations, Reservations and Positions: Relevance to the United Nations Model Tax Convention"*, E/C.18/2011/4 (2011), para. 6.

As pointed out in a note of the Secretariat of the Committee of Experts on International Cooperation in Tax Matters at its seventh session in Geneva, it is questionable whether there is a need for observations, reservations and positions on the UN Model, as contracting states are free to deviate from the UN Model in their negotiations with each other.[65] As further pointed out, members of the Tax Committee act in their personal capacity and do not represent the formal views of their governments. It would not be appropriate for these members to make such reservations and observations, and no mechanisms have been established to make these kinds of reservations or observations.[66]

Different views of UN Member States on the interpretation of particular articles of the UN Model are stated in the Commentaries on the UN Model as so-called *minority views*.[67] These views are related to discussions on which consensus could not be reached.[68]

In contrast to reservations, observations and positions, in which it is clear which country has expressed a specific view on an article of the Commentaries on the OECD Model, in the case of a minority view in connection with the UN Model, it is not clear which Member State has made a particular statement.[69] Views that are stated in the Commentaries on the UN Model without attribution to a particular provision weaken the relevance of the Commentaries. If contradicting points of view are taken, and if it is not clear to which countries they are to be ascribed, that part of the Commentaries is not of much relevance. In such a case, the Commentaries can be seen as an indication that countries did not have in mind a possible third, differing view, which they did not mention at all in the Commentaries. But

65. UN, *supra* n. 64, at para. 9.
66. Arnold, *supra* n. 23, at 120.
67. UN, Committee of Experts on International Cooperation in Tax Matters, *Report on the eleventh session*, E/2015/45-E/C.18/2015/6 (2015), para. 108; Introduction, para. 23 *UN Model* (2011).
68. Introduction, para. 23 *UN Model* (2011).
69. Para. 11 *UN Model: Commentary on Article 12* (2011) ("Some members of the former Group of Experts expressed the view that because copyright royalties represent cultural efforts, they should be exempted from taxation by the source country. Other members, however, argued that tax would be levied by the residence country, and the reduction at source would not benefit the author."); para. 23 *UN Model: Commentary on Art 11* (2011) ("When this issue was last considered, some members of the former Group of Experts pointed out that there are many artificial devices entered into by persons to take advantage of the provisions of Article 11 through, inter alia, creation or assignment of debt claims in respect of which interest is charged."); para. 7 *UN Model: Commentary on Art 12* (2011) ("Members from developed countries responded that it would be unrealistic to assume that enterprises selected the oldest patents for licensing to developing countries.").

one cannot automatically understand the treaty provision in line with the majority view if it is not clear from other publicly available documents that none of the contracting states shared the minority view. Consequently, UN Member States' views do not play an important role in the interpretation process, as the aim of that process is actually to ascertain what the intention of the contracting states was at the time of conclusion of the treaty, which is not facilitated by majority or minority views.

1.5. The OECD Model and the Commentaries thereon as the basis for the UN Model and the Commentaries thereon

1.5.1. Adoption of passages from the Commentaries on the OECD Model and the partially autonomous formulation of the Commentaries on the UN Model

As mentioned, the Commentaries on the OECD and UN Models are non-binding recommendations. Nevertheless, as countries often take parts of the model conventions as the basis for drawing up a tax treaty, countries often also refer to the Commentaries on the two conventions. When both contracting states adopt articles of the conventions on which the Commentaries differ, problems in the interpretation of these articles may arise. It often remains unclear which model convention is used as the basis for the drafting process for a particular tax treaty, and therefore on which Commentaries the contracting states rely for interpretation purposes.

Tax treaties between developing and industrialized countries are most often concluded on the basis of the UN Model. However, for the most part, the UN Model follows the OECD Model. The primary differences are found in the rules on withholding tax rates on dividends, royalties, and interest, as well as regarding the rules on permanent establishments.[70]

The Commentaries on the UN and the OECD Models generally have no binding effect in international law. However, when negotiating a treaty, countries most often decide to adopt parts of the OECD/UN Model into their treaties. By doing so, the wording of the specific provision in the tax treaty goes hand in hand with the wording of the OECD/UN Model. A specific wording can have various meanings. To investigate the ordinary

70. Turcan, *supra* n. 3, at 209.

meaning of the terms of the treaty, the Commentaries on the OECD/UN Model can provide helpful guidance. Interpretational problems can occur if the wording of the article in question is the same in both model conventions, as in such case, the question arises as to which Commentary is mainly to be taken into account.

The wording of the Commentaries on the OECD Model is quoted by the Commentaries on the UN Model, in certain cases, with amendments reflecting any relevant differences. Usually, these amendments and additions are placed in square brackets.[71] One example of such an amendment and addition is the retention of the "fixed base" concept.[72] Additions other than those in square brackets are also common in the Commentaries on the UN Model. These amendments and additions do not necessarily reflect a relevant difference with the Commentaries on the OECD Model; they can also have a merely declarative meaning.

One example is the text of the Commentary on article 19 of the UN Model. Although both Models use the same wording for article 19, additional text was added to the Commentary on the UN Model. The purpose of this addition was to clarify that public service pensions of a social security system paid in respect of services rendered to a contracting state, local authority or political subdivision by one contracting state will be taxed in the other contracting state where the recipient is a resident and a national.[73] This is an exception to the state-of-the-fund principle, under which no taxing rights are allocated to the residence state.

As a general rule, payments made under a social security system by a contracting state, local authority or political subdivision of one contracting state in respect of government services will be taxed in the state of the fund. Article 19(2)(b) of both Model Conventions constitutes an exception to this rule. Under this provision, the taxation right is allocated exclusively to the residence state. The residence state has the exclusive taxation right if the recipient of the aforementioned payment is not only a resident, but also a national of that state. This rule also applies to payments that are made by social security systems falling under the scope of article 19 of the Models. The wording of article 19(2)(a) requires that such systems be created by a contracting state, local authority or political subdivision of one contracting state. If the payment is not made by a governmental body, article 19(2) is

71. Introduction, para. 21 *UN Model* (2011); para. 3 *UN Model: Commentary on Article 15* (2011); para. 2 *UN Model: Commentary on Article 17* (2011).
72. Introduction, para. 21 *UN Model* (2011).
73. Para. 3 *UN Model: Commentary on Article 19* (2011).

not applicable, regardless of any former government employment.[74] As a result, article 18 would be applicable.[75]

Public service pensions paid under the social security system of one contracting state are subject to tax under article 19(2) if the social security system is created by a public body. This is also the case when the recipient of the payment is a national and resident of the other contracting state. Accordingly, the payment will be taxed solely in the residence state under article 19(2)(b).[76] The statement which had been included in the Commentary on article 19 of the UN Model is a clarifying addition to the general rule that public service pensions fall under the scope of article 19(2) if the body paying out this type of pension is created either by a contracting state or a local authority or political subdivision of a contracting state.

1.5.2. Absence of passages of the Commentaries on the OECD Model in the Commentaries on the UN Model

In quoting the Commentaries on the OECD Model, the UN Model sometimes places entire paragraphs or parts of paragraphs in ellipses. This is to indicate that such paragraphs are not applicable in the interpretation of the UN Model.[77] There could be various reasons why certain parts of the Commentaries on the OECD Model are identified as being inapplicable in the interpretation process. The non-inclusion of certain paragraphs does not necessarily represent any disagreement with the text of the Commentaries on the OECD Model. The Introduction to the UN Model suggests that one consider the context of the omission in order to ascertain whether the omitted words are irrelevant for the interpretation of the UN Model or are a prospective topic of future considerations.[78]

There are also cases where certain parts of the Commentaries on the OECD Model are not included in the Commentaries on the UN Model without being quoted in a specific way, as for example in article 5(1) of the UN Model.

The UN and the OECD Models do not differ in respect to their wording of article 5(1). Most parts of the Commentaries on the Models are

74. R. Ismer & A. Blank, *Article 19*, in *Klaus Vogel on Double Taxation Conventions*, para. 63 (E. Reimer & A. Rust eds., 4th edition, Kluwer 2015).
75. Para. 5.4 *UN Model: Commentary on Article 19* (2011).
76. Para. 3 *UN Model: Commentary on Article 19* (2011).
77. Introduction, para. 21 *UN Model* (2011).
78. Introduction, para. 21 *UN Model* (2011).

identical. However, there are some paragraphs that are not included in the Commentary on the UN Model. These paragraphs include the question as to whether a satellite,[79] a telecommunication operator entering into a roaming agreement[80] and the leasing of containers[81] can constitute a permanent establishment. What these payments have in common is that they are depicted as scenarios in which the existence of a PE is denied. In order to constitute a permanent establishment, the business must be wholly or partly carried out through the place of business.[82] The definition of a place of business does not differ in the Commentaries on the UN and OECD Models. To constitute a permanent establishment, a "fixed" element (in the sense of a fixed geographic place) is necessary.[83] In addition, the enterprise must have control over that place.[84] In the above-mentioned examples, the Commentary on the OECD Model makes clear that the requirements for establishing a permanent establishment are not met, either because of the lack of control (as in the case of the roaming agreement) or because of the absence of a fixed place (as in the leasing of containers). The issue of a satellite not constituting a permanent establishment was added in 2010 to the Commentary on article 5 of the OECD Model, but it was not a matter of issue for the UN up to now because of its minor priority.[85]

The non-inclusion of certain paragraphs of the Commentary on the OECD Model in the Commentary on article 5(1) of the UN Model is an example of a topic which is obviously left for future consideration. The UN Committee avoided taking a view on these issues. This allows neither the conclusion that it shares the view of the OECD Committee nor that it differs.

Another example of the Commentaries on the UN Model remaining silent on a certain issue can be found by looking at the interpretation of article 7(6) of the UN Model. Article 7(6) of the UN Model has the same wording as article 7(4) of the OECD Model, but the two versions of the Commentary on these articles differ completely. Most of the paragraphs included in the Commentary on the OECD Model are not part of the Commentary on the UN Model. This fact is a result of the evolution of the Commentary between 2008 and 2014. Article 7(6) of the UN Model was basically a reproduction of article 7(7) of the 2008 OECD Model. In contrast to the latest versions of the Commentary, these two Commentaries do not differ in most parts. The main difference lies in the treatment of payments "for the use of, or the right to use, industrial, commercial or scientific equipment".[86] These payments are treated differently under the OECD Model. The Commentary on article 7 of the OECD Model (2014) then made additions to the previous version of the Commentary. The purpose was to make clear that income derived from professional services, as well as from other activities of an independent character, which fell under the scope of article 14 before its deletion are now taxable under article 7.[87]

As emission trading programmes have become more important due to global climate change, the update to the OECD Model included an additional paragraph to the Commentary on article 7(4) in order to address these potential tax treaty issues.[88] Trading of emission permits and credits was also an issue at the eighth and ninth session of the Committee, where the potential text for a Commentary version was finalized and will be published with an expected content similar to its counterpart in the Commentary on the OECD Model.[89] In its report "Tax Treaty Issues Related to Emissions Permits/Credits", the OECD Fiscal Committee generally recommends the classification of income from trading of emission permits and credits as income derived from business profits, capital gains or – in certain cases – income from immovable property, shipping, inland waterways transport and air transport or other income.[90] If the contracting states adopted article 7(4) of the OECD Model into a particular treaty, it can be assumed that they had the intention of giving this provision a meaning which is recommended in the Commentary on the OECD Model. In the case of article 7(6) of the UN Model (which is a reproduction of article 7(4) of the OECD Model), it is not clear which Commentary version is to prevail in the interpretation process, as the wording of the articles does not differ. In order to examine which Commentary version is to prevail, additional materials (e.g. accompanying documents to the treaty) will be needed.

The absence of passages can sometimes also be explained by structural differences within articles of the Models themselves. This is the case for

79. Para. 5.5 *OECD Model: Commentary on Article 5* (2014).
80. Para. 9.1 *OECD Model: Commentary on Article 5* (2014).
81. Para. 9 *OECD Model: Commentary on Article 5* (2014).
82. Para. 7 *OECD Model: Commentary on Article 5* (2014).
83. Para. 5 *OECD Model: Commentary on Article 5* (2014).
84. Para. 4.6 *OECD Model: Commentary on Article 5* (2014).
85. M. Lennard, *Update on the United Nations Tax Committee Developments*, 20 Asia-Pacific Tax Bulletin 1, at 18 (2014).
86. Para. 22 *UN Model: Commentary on Article 7* (2011); para. 64 *OECD Model: Commentary on Article 7* (2008).
87. Para. 77 *OECD Model: Commentary on Article 7* (2014).
88. Para. 75.1 *OECD Model: Commentary on Article 7* (2014).
89. Lennard, *supra* n. 85, at 20 et seq.
90. Para. 75.1 *OECD Model: Commentary on Article 7* (2014).

article 21(1) of the UN Model. Whereas the wording of article 21(1) of the UN and the OECD Models is the same, the two Commentary versions are not. The Commentary on article 21(1) of the UN Model states less than its counterpart under the OECD Model. According to the Commentary on article 21(1) of the OECD Model, the exclusive taxation right of the residence state is to apply, regardless of whether the state of residence has exercised the right to tax.[91] The result is that the other contracting state has no taxation right. A reason for this difference between the two Commentaries can be found in article 21(3) of the UN Model. Article 21(3) grants a primary taxing right for income arising in the other contracting state to that other state. Under this article, the state of residence has no exclusive taxation right. The Commentary on article 21(1) of the UN Model differs from the Commentary on the OECD Model because article 21 of the UN Model and article 21 of the OECD Model themselves differ.

1.6. Conclusion

Even though it was the League of Nations that initially began to tackle double taxation, the OECD has since taken the lead in this field. As most OECD member countries are developed countries, the OECD Model was designed to meet the needs of developed countries. From the perspective of developing countries, the application of the OECD Model to treaties between developed and developing countries is not seen as appropriate, as the imbalance in income flows between countries is not taken into account.

Today, the OECD Model is still the prevailing model, but the UN Model is becoming increasingly important, as investment flows between developed and developing countries are growing significantly and more and more developing countries are attempting to build a tax treaty network. In particular, clauses that seek to preserve greater sovereignty for the source state can be found in many tax treaties concluded between an OECD member country and a UN Member State in order to foster the economic development of developing countries.

For the most part, the UN Model follows the structure of the OECD Model. Nevertheless, there are certain differences that take into account the dissimilarities between developed and developing countries. Although legally not binding, most developing countries rely on the UN Model as the basis for tax treaty negotiations. By not departing from the UN Model, the

91. Para. 3 *OECD Model: Commentary on Article 21* (2014).

contracting states decide to afford provisions of the tax treaty a meaning that is in conformity with the Commentaries on the UN Model. In cases where provisions of the UN Model have the same wording as in the OECD Model, the Commentaries on the OECD Model must also be taken into account for interpretation purposes. This also relates to dissenting views expressed under the Commentaries on the OECD Model, as they are of supplementary guidance in the interpretation process to ascertain the common intention of the contracting states.

The Commentaries on the UN Model often quote the wording of the Commentaries on the OECD Model, with amendments reflecting a substantive difference. Furthermore, certain provisions were adopted and autonomous formulations were added with either a relevant or a merely declarative meaning. The same applies to the absence of passages in the Commentaries on the UN Model. An omission of certain passages does not necessarily mean that there is any disagreement with the interpretation given in the Commentaries on the OECD Model. Under the main premise of ascertaining the intention of the contracting states, the Commentaries on the OECD and UN Models can offer helpful guidance. Nevertheless, it is also critical to interpret the provision in question together with the context in which it is embedded and in light of the object and purpose of the treaty. In certain ambiguous circumstances, it is also reasonable to have recourse to supplementary means of interpretation.