OECD/International - The Signalling Function of Article 29(9) of the OECD Model – The “Principal Purpose Test”

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Article 29(9) of the OECD Model sets out the principal purpose test (PPT) according to the findings of the OECD/G20 Base Erosion and Profit Shifting Project. The PPT does not represent a legal basis for denying treaty benefits but merely emphasizes the necessity for purposive interpretation.

1. The Subjective and Objective Requirements for the Application of Article 29(9) of the OECD Model

Article 29(9) of the OECD Model (2017) [1] reads as follows:

> Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention. [2]

On a superficial consideration, article 29(9) appears to be an independent provision, which must be considered in addition to any other rule of the OECD Model. The provision suggests that it is capable of eliminating benefits, which would result from the application of other treaty rules. According to this view, article 29(9) of the OECD Model can only be used if the relevant requirements are met. The provision appears to distinguish between subjective and objective requirements. With regard to the subjective element, the requirement is that “obtaining that benefit was one of the principal purposes”. Although the Final Report on Action 6 of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project states that it is important to undertake an “objective analysis of the aims and objects of all persons involved”, [3] such an “objective analysis” should draw conclusions as to the intention of the acting individuals. It is possible to draw conclusions regarding subjective criteria only on the basis of external facts, as the true motives can never be verified. [4]

Article 29(9) of the OECD Model also defines an objective requirement. Despite the existence of a subjective requirement, the intended benefit must not be granted "unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention". The fact that this criterion is formulated as an exception is not significant. Although the literature and, alas, sometimes the case law of the Court of Justice of the European Union (ECJ) often contain the highly problematic opinion that exception provisions must be given a narrow interpretation, [5] today this position is evidently obsolete and methodologically untenable. [6] Whether the scope of a provision is initially broadly outlined and then subsequently limited by way of exceptions or is a priori narrowly formulated is often a mere question of legislative technique. In addition, article 29(9) of the OECD Model as a whole is formulated as an exception to the treaty benefits otherwise enjoyed. [7] Consequently, the reference to the objective and purpose of the provision in article 29(9) of the OECD Model would be an exception to the exception and, ultimately, not an exception at all but, rather, a confirmation of the basic rule that treaty benefits must be granted when they are "in accordance with the object and purpose of the relevant provisions of this Convention".

2. Object and Purpose

If there is no room for the application of article 29(9) of the OECD Model when granting the treaty benefit is "in accordance with the object and purpose of the relevant provisions of this Convention", the question arises as to what meaning article 29(9) has altogether. The emphasis on "object and purpose" through a separate provision in the OECD MC seems superfluous. That is to say, the interpretation of legal provisions must always take into account their object and purpose. This situation is confirmed explicitly by article 31(1) of the Vienna Convention on the Law of Treaties (the "Vienna Convention") (1969) [8] with regard to international treaties. It is hence particularly irritating if article 29(9) of the OECD Model may only be applied when the subjective requirement is met. Accordingly, what would be the point of allowing the "object and purpose of the relevant provisions of this Convention" to be taken into account *only* if "obtaining that benefit was one of the principal purposes of any arrangement or transaction"?

As a result, the meaning of article 29(9) of the OECD Model may lie in *excluding* the consideration of object and purpose in all cases not covered by this provision. Outside the scope of article 29(9) of the OECD Model, interpretation would have to limit itself to the mere wording, at most also in consideration of the context and the history of the provision. Object and purpose may then only be included if obtaining the benefit was one of the principal purposes of the taxpayer. According to this opinion, article 29(9) of the OECD Model would declare the meaning of object and purpose for the scope of a tax treaty containing such a provision as obsolete, a meaning otherwise confirmed in article 31(1) of the Vienna Convention (1969).

Yet, this opinion is not convincing. It would be very surprising if one were to see the meaning of article 29(9) of the OECD Model exclusively *outside the scope of this provision* – as a prohibition of the purposive interpretation for all cases not covered by this provision. Above all, however, it is not possible to separate the relevant aspects in interpretation from each other. The objective of interpretation is to determine the meaning of a provision. [9] The relevant aspects merge into one another. In order to understand the literal sense of a provision, it is necessary to consider object and purpose as well as context from the very start. It is not possible to omit individual aspects. Interpretation is a holistic exercise. [10]

The meaning of article 29(9) of the OECD Model may also be to consider the wording of a provision as the limit of interpretation in treaty law and to give priority to interpretation according to object and purpose merely within the scope of article 29(9) and, if need be, even go beyond the limit of interpretation otherwise drawn by the wording. Article 29(9) of the OECD Model would then cover cases where, though the wording of the treaty provision does grant a benefit, this does not conform to the object and purpose of this provision. This article would help object and purpose achieve a breakthrough against the wording. [11]

What also contradicts this interpretation of article 29(9) of the OECD Model is that this provision would have its meaning outside its scope, as it would cause treaty law in general to attribute greater importance to the wording than it would have otherwise. [12] The interpretation of international law treaties as such is far from being dominated by the wording, as proven by a quick glance at the interpretation provisions of the Vienna Convention (1969). Though article 31(1) of the Vienna Convention (1969) emphasizes the “ordinary meaning” of the terms used in a treaty, at the same time article 31(4) refers to the “special meaning” that may be given to a term if it is established that the parties so intended. Evidently, interpretation can go beyond the ordinary meaning of a term. [13] According to article 32 of the Vienna Convention (1969), the interpreters of a treaty must even resort to supplementary means if interpretation according to article 31 leads to a result which is manifestly absurd or unreasonable. Especially with regard to treaty law, it would make little sense to focus on the wording and regard it as an insurmountable limitation in interpretation. First, it would be peculiar if taxpayers were entitled to a treaty benefit resulting only from the wording of the rule, the granting of which is completely incompatible with the object and purpose of the provision, provided that the taxpayer merely succeeded in averting the accusation that obtaining the benefit was one of the principal purposes of the transaction. Moreover, the wording only becomes clear after consideration of the object and purpose and of the other criteria to be taken into account in interpretation, so that an interpretation resulting only from the wording of a provision while, disregarding all other aspects, is virtually inconceivable. Above all, however, tax treaties are often concluded in two or even three authentic treaty languages that, in most cases, must be equally taken into account in interpretation. [14] If this situation is taken seriously, it often becomes evident that the wording of a rule is more ambiguous than is the case in national law. For tax treaties modelled on the OECD Model, using the English and French version of the OECD Model is necessary, even if these languages are not authentic. The reason is that, by incorporating these provisions, it is assumed that they must be attributed the same meaning in the tax treaty as that given to them in the OECD Model. [15] Doing so requires the analysis of the tax treaty in the two aforementioned languages, which often opens the door to additional interpretations of the wording. When a provision of the UN Model [16] is incorporated, it is necessary to consider versions in as many as six different languages that are relevant for the interpretation of these documents. [17] As a result, the wording becomes so ambiguous that it becomes almost impossible to put any limits on its interpretation. Accordingly, it cannot be assumed that paramount importance should be attached generally to the wording, especially in treaty law, as a result of article 29(9) of the OECD Model, and that this should be different only in the special cases covered by the provision.

Consequently, a different reading of article 29(9) of the OECD Model seems more convincing. The provision emphasizes the need for purposive interpretation, without limiting it to the cases covered by the provision. [18] Object and purpose must be considered if “obtaining that benefit was one of the principal purposes of any arrangement or transaction”, and also in all other cases of the application of the tax treaty. [19] Accordingly, on the face of it, this subjective requirement for the application of article 29(9) of the OECD Model would become meaningless. [20] However, especially in those cases where

obtaining the benefit was one of the principal purposes of the transaction, it is important to remind taxpayers, tax authorities and courts of the necessity of a purposive interpretation. In these cases, it should be asked whether an apparent entitlement to a treaty benefit on the basis of wording, context, or the history of the provision must be granted. This also explains why article 29(9) of the OECD Model refers to "having regard to all relevant facts and circumstances". If there is reason to fear that a taxpayer's objective is to fall into the scope of a provision favourable to them, the relevant tax authority must pay particular attention when establishing the facts and during interpretation. By carefully establishing the facts, the tax authority must clarify whether the transaction did take place as presented by the taxpayer. Equal attention must be given to the interpretation to avoid the situation that a treaty provision favourable for the taxpayer is applied to the facts, even if this position is not in conformity with the object and purpose of the applicable provision. Although the same principles must be followed in all other cases, the risk that a taxpayer obtains benefits to which he is not entitled is otherwise not so severe. According to the foregoing, the "signalling function" of article 29(9) of the OECD Model is to remind those who are applying the law of the need for a careful establishing of facts and a purposive interpretation, especially in those cases in which one of the principal purposes of the taxpayer's transaction is to obtain the benefit. However, the denial of a treaty benefit can never be based on article 29(9) of the OECD Model. If, ultimately, the treaty benefit is not granted, as it would be incompatible with the object and purpose of the relevant treaty provision, this is the result of the interpretation of this *particular* treaty provision – and not of the application of article 29(9) of the OECD Model. [21]

3. One of the Principal Purposes

Any other reading of article 29(9) of the OECD Model, in which the content of the subjective requirement is the relevant factor, would be very problematic, as the criterion "one of the principal purposes of any arrangement or transaction" provides authorities extensive room for manoeuvre. [22] The version chosen by the OECD differs from formulations previously found in the case law of the ECJ or in earlier drafts for EU rules: [23] In contrast to other options discussed, it does not require that the "sole purpose" of the arrangement must consist in obtaining a tax benefit. It does not even have to be the essential, principal, or main purpose. Instead, it suffices when one of the "principal purposes" of a transaction aims at obtaining the benefit. The rule assumes that there can be not just one principal purpose, but two or even several principal purposes. As a result, if the taxpayer manages to prove that the arrangement they chose also has other motives than tax ones, the tax authority can argue that it suffices for the application of the article 29(9) of the OECD Model if the taxpayer was also aiming for the tax benefit. [24] Even if the taxpayer can present the motive as being outside tax law, this does not have to suffice. According to this provision, there can be several principal purposes for an arrangement. The subjective requirement of article 29(9) of the OECD Model also applies when, in addition to one or even several non-tax-related principal purposes, the taxpayer was also pursuing the principal purpose of obtaining a tax benefit. It remains unclear as to which criteria apply between principal purposes and secondary purposes, on the one hand, and between different principal purposes, on the other. [25]

If everything depended on whether the subjective requirement is met, the predicament would be further aggravated by the fact that simply being "reasonable to conclude" suffices for the assumption of a principal purpose. The treaty provision, therefore, creates the impression of also addressing issues of burden of proof and of the lowering of the evidentiary requirements for the tax authority in the process.

[26] As a result, the taxpayer would hardly have any chance of averting the accusation that one of their principal purposes was to obtain the benefit. [27] This situation would put the application of article 29(9) of the OECD Model largely at the discretion of the tax authority.

The reading of article 29(9) of the OECD Model proposed here avoids these difficulties, as it does not matter whether the subjective requirement is met in a specific case. Though the reference to the importance of object and purpose in the interpretation of treaty provisions is particularly significant if obtaining that benefit was one of the purposes of the transaction, a purposive interpretation is equally required in all other cases. The fact that the subjective requirements are only vaguely outlined is not particularly disturbing if a signalling function is attributed merely to article 29(9) of the OECD Model. [28] Accordingly, the fact that "reasonable to conclude" already suffices for not granting the benefit, is equally less problematic.

4. Discretionary Relief

The Commentary on Article 29 of the OECD Model even provides States with the opportunity of adding a paragraph 10 to article 29(9) of the OECD Model, as follows:

> Where a benefit under this Convention is denied to a person under paragraph 9, the competent authority of the Contracting State that would otherwise have granted this benefit shall nevertheless treat that person as being entitled to this benefit, or to different benefits with respect to a specific item of income or capital, if such competent authority, upon request from that person and after consideration of the relevant facts and circumstances, determines that such benefits would have been granted to that person in the absence of the transaction or arrangement referred to in paragraph 9. The competent authority of the Contracting State to which the request has been made will consult with the competent authority of the other State before rejecting a request made under this paragraph by a resident of that other State. [29]

On the face of it, this provision may seem to argue against the interpretation of article 29(9) of the OECD Model advanced in this article, as the rule in article 29(10) proposed in the OECD Commentary on Article 29 appears to require that article 29(9) deprives the taxpayer of benefits, which can then be granted again in part or in full on the basis of article 29(9). In the light of article 29(10) of the OECD Model, article 29(9) may yet have an independent significance and thus more than just a mere signalling function.

It must be pointed out, however, that article 29(10) is not part of the OECD Model, but is only proposed in the Commentary on Article 29 of the OECD Model as a possible addition to article 29(9). Consequently, the legal meaning of article 29(9) of the OECD Model cannot result from article 29(10). Above all, it should not be ignored that article 29(10) of the OECD Model explicitly provides for the responsibility of the competent authority. In contrast, most other treaty rules do not govern the responsibility of the authorities. Responsibility lies with the national authorities, which are otherwise responsible for the application of tax laws. In many states, the competent authority, i.e. according to article 3(1)(f) of the OECD Model, usually the respective finance ministry or an authority delegated by the same, does not have any influence at all on the decisions of local authorities. As a result, a local authority may have gone too far in the interpretation of a treaty rule allegedly based on the object and purpose, and may have, for

example, enforced its own fiscal interests without these being attributable to the object and purpose of the applicable rule. The competent authority, which must fear that the interpretation carried out by the local authority may give rise to a mutual agreement procedure (MAP) that it must then conduct, still has the possibility of taking corrective action on the basis of article 29(10) of the OECD Model. Otherwise, in a subsequent MAP, the competent authority may feel constrained in agreeing with the arguments advanced by the taxpayer or the competent authority of the other Contracting State. Although it cannot remove or amend the incorrect decision of the local authority to deny the treaty benefit, the competent authority, by way of discretionary relief on the basis of article 29(10) of the OECD Model, can place the taxpayer in a position as if they had not been denied the benefit in the first place. Against this background, the responsibility vested in the competent authority under article 29(10) of the OECD Model to take a substantive decision definitely makes sense. Otherwise, it would be nothing more than an alien element. As a rule, procedural issues are a matter of national law, and it would not make any sense to decide in a tax treaty which of the various national tax authorities may take action.

5. Conclusions

Article 29(9) of the OECD Model does not represent a legal basis for denying treaty benefits. The provision merely emphasizes the necessity for an interpretation based on object and purpose in those cases in which one of the principal purposes of a transaction was to obtain a benefit. Legal practitioners must be particularly reminded of this in these cases. Taxpayers must not enjoy treaty benefits to which they are not entitled as a result of a treaty interpretation merely based on an allegedly clear wording. However, purposive interpretation is also required in all other cases. Treaty interpretation is always performed on the basis of object and purpose of the respective applicable provision, irrespective of whether the taxpayer seeks a given treaty benefit or the focus is on other motives. [30] Against this background, the subjective requirement addressed in article 29(9) of the OECD Model – obtaining the benefit as one of the principal purposes of the transaction – loses its significance. [31] The mere task of article 29(9) of the OECD Model is to remind taxpayers, tax authorities and courts of the necessity of purposive interpretation in those situations in which it must be assumed that the intention is to explore treaty provisions favourable for the taxpayer to their limits. Consequently, the meaning of article 29(9) of the OECD Model lies in its signalling function.

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1.

OECD Model Tax Convention on Income and on Capital (21 Nov. 2017), Treaties & Models IBFD.

2.
OECD, *Action 6 Final Report 2015 – Preventing the Granting of Treaty Benefits in Inappropriate Circumstances* (OECD 2015), Primary Sources IBFD.

3.
Id., at p. 57 et seq.

4.
Critical, *see* M. Lang, *Die Überlegungen der OECD zur Aufnahme einer Missbrauchsvorschrift in Doppelbesteuerungsabkommen*, in *Privatstiftung und Umgründung – GS Franz Helbich* p. 9 (E. König, E. Wallentin & W. Wiesner eds., LexisNexis 2014) and *Neue Instrumente zur Bekämpfung von Steuerumgehung im Internationalen Steuerrecht*, in *Nobody is perfect – Fehlverhalten in Bilanz- und Steuerrecht* p. 180 (E. Bertl et al. eds., Linde 2016).

5.
See NL: ECJ, 12 Dec. 1995, Case C-399/93, *Oude Luttikhuis and Others v. Verenigde Coöperatieve Melkindustrie Coberco*, [1995] EU:C:1995:434, para. 23; FR: ECJ, 8 May 2003, Case C-384/01, *Commission of the European Communities v. the French Republic* para. 28 Case Law IBFD; FR: ECJ, 6 May 2010, Case C-94/09, *Commission of the European Communities v. French Republic* para. 29, Case Law IBFD; and FR: ECJ, 17 June 2010, Case C-492/08, *Commission of the European Communities v. French Republic* para. 35, Case Law IBFD.

6.
See H. Ruppe, *Die Ausnahmebestimmung des Einkommensteuergesetzes* p. 28 et seq. (Orac 1971); G. Stoll, *Das Steuerschuldverhältnis in seiner grundlegenden Bedeutung für die steuerliche Rechtsfindung* p. 104 (Orac 1972); and M. Lang, *Doppelbesteuerungsabkommen und innerstaatliches Recht* p. 75 et seq. (Orac 1992).

7.
See Lang, *Die Überlegungen der OECD zur Aufnahme einer Missbrauchsvorschrift in Doppelbesteuerungsabkommen*, *supra* n. 4, at p. 12 et seq. and *Neue Instrumente zur Bekämpfung von Steuerumgehung im Internationalen Steuerrecht*, *supra* n. 4, at p. 184.

8.

UN Vienna Convention on the Law of Treaties (23 May 1969), Treaties & Models IBFD [hereinafter the "*Vienna Convention* (1969)"].

9.
See M. Lang, *Die Neuregelung des Missbrauchs in § 22 BAO*, 40 ÖStZ 13-14, p. 431 (2018).

10.
Compare World Trade Organization (WTO) Appellate Body, *China – Publications and Audiovisual* WT/DS363/AB/R (2009), para. 399.

11.
See Lang, *Die Überlegungen der OECD zur Aufnahme einer Missbrauchsvorschrift in Doppelbesteuerungsabkommen, supra* n. 4, at p. 12 et seq.

12.
An interpretation that remains with the bare wording of a provision would probably not be in line with the state of legal methodology; *see* Lang, *supra* n. 9, at p. 427 et seq.

13.
Compare Lang, *Die Überlegungen der OECD zur Aufnahme einer Missbrauchsvorschrift in Doppelbesteuerungsabkommen*, *supra* n. 4, at p. 13.

14.
See M. Lang, *Auslegung von Doppelbesteuerungsabkommen und authentische Vertragssprachen*, 16 IStR 11, p. 406 et seq. (2011).

15.
See, for more details, M. Lang, *The Interpretation of Tax Treaties and Authentic Language* in Guglielmo Maisto (ed.), *Essays on Tax Treaties: A Tribute to David A. Ward* p. 15 et seq. (A. Nikolakakis & J. Ulmer eds., Can. Tax Found. & IBFD, 2012).

16.
UN Model Double Taxation Convention between Developed and Developing Countries (1 Jan. 2017), Treaties& Models IBFD.

17.

See Lang, *supra* n. 15, at p. 15 et seq.

18.
See Lang, *Die Überlegungen der OECD zur Aufnahme einer Missbrauchsvorschrift in Doppelbesteuerungsabkommen, supra* n. 4, at p. 12 et seq.

19.
See article 29(9) of the *OECD Model* (2017).

20.
See also R. Kok, *The Principal Purpose Test in Tax Treaties under BEPS 6*, 44 Intertax 5, p. 408 (2016).

21.
See W. Gassner, *Interpretation und Anwendung der Steuergesetze* p. 115 et seq. (Orac 1972); *Der Gestaltungsmissbrauch im Steuerrecht - Änderungen der Rechtsprechung?*, 3 ÖStZ 22, p. 263 et seq. (1981); and *Der Stand der Umgehungslehre des Steuerrechts*, 1 WBl, p. 5 et seq. (1987). *See also* M. Lang, *Der Gestaltungsmissbrauch (§ 22 BAO) in der jüngeren Rechtsprechung des VwGH*, 16 ÖStZ 8, p. 178 et seq. (1994) and M. Lang & C. Massoner, *Die Grenzen steuerlicher Gestaltung in der österreichischen Rechtsprechung*, in *Die Grenzen der Gestaltungsmöglichkeiten im internationalen Steuerrecht* p. 15 (M. Lang, J. Schuch & C. Staringer eds., Linde 2009).

22.
See Kok, *supra* n. 20, at p. 408; A.B. Moreno, *GAARs and Treaties: From the Guiding Principle to the Principal Purpose Test. What Have We Gained from BEPS Action 6* 45 Intertax 6/7, p. 436 (2017); and M.L. Gomes, *The DNA of the Principal Purpose Test in the Multilateral Instrument*, 47 Intertax 1, p. 79 (2019).

23.
See, for example, the term “essential aim” in UK: ECJ, 21 Feb. 2006, Case C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd v. Commissioners of Customs & Excise*, *BUPA Hospitals Ltd, Goldsborough Developments Ltd v. Commissioners of Customs and Excise* and *University of Huddersfield Higher Education Corporation v. Commissioners of Customs and Excise* , Case Law IBFD or the term “principal aim” in IT: ECJ, 21 Feb. 2008, Case C-425/06, *Part Service, Ministero dell’Economia e delle Finanze, formerly Ministero delle Finanze v. Part Service Srl, company in liquidation, formerly Italservice Srl*, Case Law IBFD. *See also* Opinion of the European Economic and Social Committee on the Proposal for a Council Directive – implementing enhanced cooperation in the area of financial transaction tax, COM (2013) 71, p. 30 et seq., Primary Sources IBFD and European Commission, Proposal for a Council Directive amending Directive 2011/96/EU on the common system of

taxation applicable in the case of parent companies and subsidiaries of different Member States, COM (2013) 814, p. 10, Primary Sources IBFD. For more details, *see again* Lang, *Die Überlegungen der OECD zur Aufnahme einer Missbrauchsvorschrift in Doppelbesteuerungsabkommen, supra* n. 4, at p. 10 et seq.

24.

See D. Weber, *The Reasonableness Test of the Principal Purpose Test Rule in OECD BEPS Action 6 (Tax Treaty Abuse) versus the EU Principle of Legal Certainty and the EU Abuse of Law Case Law*, 10 Erasmus. L. Rev. 1, p. 49 (2017).

25.

See Lang, *Neue Instrumente zur Bekämpfung von Steuerumgehung im Internationalen Steuerrecht*, *supra* n. 4, at p. 182 et seq.

26.

See S. van Weeghel, *A Deconstruction of the Principal Purposes Test* , 11 World Tax J. (2019) 1, sec. 3. Journal Articles & Papers IBFD; D.G. Duff, *Tax Treaty Abuse and the Principal Purpose Test: Part II*, 66 Can. Tax J. 4, p. 976 (2018); and V. Chand, *The Principal Purpose Test in the Multilateral Convention: An In-Depth Analysis*, 46 Intertax 1, p. 21 (2018).

27.

Compare I. Zahra, *The Principal Purpose Test: A Critical Analysis of Its Substantive and Procedural Aspects – Part 1* , 73 Bull. Intl. Taxn. 11, sec. 3.2. (2019), Journal Articles & Papers IBFD.

28.

For criticism on the subjective element, *see also* L. De Broe, *International Tax Planning and Prevention of Abuse* (IBFD 2008), Books IBFD; Kok, *supra* n. 20, at p. 404 et seq.; and H.D. Rosenbloom, *Derivative Benefits: Emerging US Treaty Policy*, 22 Intertax 2, p. 83 (1994).

29.

OECD Model Tax Convention on Income and on Capital: Commentary on Article 29 para. 184 (21 Nov. 2017), Treaties & Models IBFD.

30.

See Lang, *Die Überlegungen der OECD zur Aufnahme einer Missbrauchsvorschrift in Doppelbesteuerungsabkommen*, *supra* n. 4, at p. 12 et seq.

31.

See M. Lang, *BEPS Action 6: Introducing an Antiabuse Rule in Tax Treaties*, 74 Tax Notes Intl., p. 662 (2014) and Kok, *supra* n. 20, at p. 48.
