

The role of the OECD Commentary in tax treaty interpretation

Michael Lang^{*} and Florian Brugger[†]

Abstract

The role of the OECD Commentary in the interpretation of tax treaties is disputed. According to the OECD Committee on Fiscal Affairs, changes to the OECD Commentary are normally applicable to the interpretation of tax treaties concluded before their adoption. This contribution analyzes how the OECD Commentary and related publications of the OECD Committee on Fiscal Affairs fit within the rules on treaty interpretation contained in the Vienna Convention on the Law of Treaties. Based on these rules, the relevance of amendments to the OECD Commentary for the interpretation of previously concluded tax treaties is discussed.

* Professor Dr Michael Lang is Head of the Institute for Austrian and International Tax Law at the Vienna University of Economics and Business Administration and Director of the LL.M. Program in International Tax Law at this university. He is also Professorial Visiting Fellow at the Australian School of Taxation (Atax), Faculty of Law, and Senior Fellow, Taxation Law and Policy Research Institute, Monash University, Australia.

† Florian Brugger is research assistant at the Institute for Austrian and International Tax Law, Vienna University of Economics and Business Administration.

This paper was accepted for publication 3 April 2008.

I. The OECD model convention, the OECD commentary and related publications of the OECD Committee on Fiscal Affairs

The OECD first published a Draft Double Taxation Convention on Income and Capital in 1963, followed by the Model Tax Convention on Income and Capital in 1977. The OECD Model Convention is accompanied by an extensive commentary, prepared by the OECD Committee on Fiscal Affairs. Since 1992, the OECD Model Convention and the OECD Commentary are updated on a regular basis.¹ Amendments to the OECD Model Convention and the OECD Commentary were made in 1992, 1994, 1995, 1997, 2000, 2003 and 2005. The OECD also publishes various reports, dealing with specific problems in the application of the OECD Model Convention.² Conclusions reached in these reports are often included in later Commentary versions in an abbreviated form. Furthermore, draft versions of various OECD documents are made available for public consideration.

How the OECD Commentary and related publications fit within the rules on treaty interpretation contained in the Vienna Convention on the Law of Treaties (VCLT) is subject to debate.³ This is particularly true for changes to the OECD Commentary made after the conclusion of a double taxation convention. The Australian Taxation Office (ATO) takes the position that “the Commentaries [...] provide important guidance on interpretation and application of the OECD Model and as a matter of practice will often need to be considered in interpretation of DTAs, at least where the wording is ambiguous, which [...] is inherently more likely in treaties than in general domestic legislation”.⁴ “Unless it is apparent that the substance of the OECD Model has itself changed since a DTA was negotiated or the treaty in question does not conform to the OECD Model, or unless the Commentaries make clear that a former interpretation has actually been substantively altered, rather than merely elaborated, the ATO considers it appropriate, as a matter of practice, to consider, at least, the most recently adopted/published OECD Commentaries [...] as well as others which may have been available at the time of negotiation”.⁵ The role of the OECD Commentary and related publications in the interpretation of double taxation conventions is discussed in this contribution.

1 See OECD Commentary 2005, Introduction paras 9-11.

2 See for instance OECD, *The Application of the OECD Model Tax Convention to Partnerships*, Issues in International Taxation 6 (1999).

3 See Ward D et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (2005) pp 4-5 with further references.

4 ATO TR 2001/13, para 104.

5 ATO TR 2001/13, para 108.

II. The rules on the interpretation of treaties in the Vienna Convention on the Law of Treaties

Tax treaties are international agreements under public international law⁶ and thus subject to interpretation according to international law principles. Rules for the interpretation of international agreements are laid down in the Vienna Convention on the Law of Treaties. Articles 31-33 VCLT, dealing with the “interpretation of treaties”, thus provide the framework for assessing the role of the OECD Model Convention and the OECD Commentary in the interpretation process. It is generally recognized that the rules on interpretation contained in the Vienna Convention codify existing international customary law.⁷ They thus apply to all international treaties. Along those lines, the High Court of Australia argued in *Thiel* that the double taxation convention between Australia and Switzerland “is to be interpreted in accordance with the rules of interpretation recognised by international lawyers [...]. Those rules have now been codified by the Vienna Convention on the Law of Treaties to which Australia, but not Switzerland, is a party. Nevertheless, because the interpretation provisions of the Vienna Convention reflect the customary rules for the interpretation of treaties, it is proper to have regard to the terms of the Convention in interpreting the Agreement, even though Switzerland is not a party to that Convention”.⁸

Article 31 (1) VCLT establishes the “general rule of interpretation”, specifying that “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”. Article 31 (2) VCLT defines the term “context”, which comprises the text of the treaty as well as “any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty” and “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”. According to Article 31 (3) VCLT, “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”, as well as “any relevant rules of international law applicable in the relations between the parties” are to be taken into account, together with the context. Article 31 (4) VCLT provides that a term may have a “special meaning [...] if it is established that the parties so intended”.

6 See Vogel K, *Klaus Vogel on Double Taxation Conventions* (1997) Introduction MN 28; Wassermeyer F, in Debatin H/Wassermeyer F (eds.) *Doppelbesteuerung Kommentar*, Vor Art. 1 MA MN 9.

7 See Vogel K/Prokisch R, *General Report*, in IFA, *Cashiers de droit fiscal international*, Volume LXXVIIIa (1993) pp 66-67; Engelen F, *Interpretation of Tax Treaties under International Law* (2004) p 57; Karl W, *Vertrag und spätere Praxis im Völkerrecht* (1983) p 361; Vann R, *Interpretation of tax treaties in new holland*, in van Arendonk H/Engelen F/Jansen S (eds.) *A Tax Globalist – Essays in honour of Maarten J. Ellis* (2005) p 151; Wassermeyer, n 6, Vor Art. 1 MA MN 37; Ward et al., n 3, p 15; Heinrich J/Moritz H, *Interpretation of Tax Treaties*, ET 2000, p 147.

8 *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 356.

Article 32 VCLT allows “supplementary means of interpretation”, such as “the preparatory work of the treaty” or “the circumstances of its conclusion” to be taken into account. However, recourse to such material may only be had to confirm an interpretation based on Article 31 VCLT or to determine the meaning of terms when an interpretation according to Article 31 VCLT “leaves the meaning ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable”.

III. The use of material existing at the time the treaty was concluded

1. Article 32 VCLT

The OECD Model Convention and the OECD Commentary could qualify as “supplementary means of interpretation” under Article 32 VCLT. The preparatory work of the treaty and the circumstances of its conclusion are referred to in Article 32 VCLT as examples of such material. The use of supplementary means of interpretation is not limited to material expressly mentioned in Article 32 VCLT.⁹ Recourse may be had to any evidence establishing the common intention of the parties.¹⁰ If tax treaty negotiations are based on the OECD Model, the OECD Model Convention and the OECD Commentary may provide guidance in establishing the meaning of treaty provisions. Consequently, the OECD Model Convention and the OECD Commentary qualify as supplementary means of interpretation under Article 32 VCLT, provided that the treaty provision in question is based on the OECD Model.¹¹ This is also recognized by the High Court of Australia in *Thiel*, which held that “the Model Convention and Commentaries [...] are documents which form the basis for the conclusion of bilateral double taxation agreements of the kind in question and [...] provide a guide to the current usage of terms by the parties. They are, therefore, a supplementary means of interpretation to which recourse may be had under Article 32 of the Vienna Convention”.¹²

Material falling under Article 32 VCLT is only accorded a secondary role in the interpretation of treaties. The use of such material is limited to confirming the meaning resulting from the application of Article 31 VCLT or to determine the meaning of terms when the interpretation according to Article 31 VCLT leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable. Therefore, based on Article 32 VCLT, recourse to the OECD Model

9 See Engelen, n 7, pp 336-338; Vogel/Prokisch, n 7, p 74; Ward et al., n 3, p 25.

10 See Engelen, n 7, pp 336-338.

11 See Vogel K, *The Influence of the OECD Commentaries on Treaty Interpretation*, IBCF Bulletin 2000, p 614; Wattel P/Marres O, *The Legal Status of the OECD Commentary and Static or Ambulatory Interpretation of Tax Treaties*, ET 2003, p 228; Engelen, n 7, p 460; Waters M, *The relevance of the OECD Commentaries in the interpretation of Tax Treaties*, in Lang M/ Jirousek H (eds.) *Praxis des internationalen Steuerrechts – Festschrift für Helmut Loukota zum 65. Geburtstag* (2005) p 679.

12 *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 350.

Convention and the OECD Commentary is limited. However, Article 31 VCLT may attach more weight to the OECD Model Convention and the OECD Commentary in the interpretation process.

2. Article 31 VCLT

According to Article 31 (1) VCLT, “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”. Article 31 (1) VCLT is based on a “textual” approach to treaty interpretation. The text of the treaty is presumed to be the authentic expression of the intentions of the parties and thus serves as a starting point in the interpretation process.¹³ The reference to the “ordinary meaning” to be given to the terms of the treaty does not, however, entail a purely literal interpretation. On the contrary, the ordinary meaning is to be derived from the context in which a treaty provision occurs and in light of the object and purpose of the provision and the treaty as a whole.¹⁴ The ordinary meaning to be given to a term may well be a technical meaning. Article 31 (4) VCLT provides that “a special meaning shall be given to a term if it is established that the parties so intended”. The “special meaning” is not “any meaning other than the ordinary meaning to be given to a term in the application of Article 31 (1) VCLT”¹⁵ but an “unusual” meaning, distinct from its colloquial meaning, to be applied for treaty purposes.¹⁶ As it was pointed out during the drafting process by a number of members of the International Law Commission, “the technical or special use of the term is normally clear from the context and the ‘technical’ or ‘special’ meaning becomes, as it were, the ‘ordinary’ meaning in that particular context”.¹⁷

If it can be established, by reference to the text of the treaty, that a double taxation convention is, in principle, based on the OECD Model, an interpretation in good faith requires that the OECD Model Convention and the OECD Commentary are consulted in the interpretation process. The principle of good faith “requires, that one party should be able to place confidence in the words of the other, as a reasonable man might be taken to have understood them in the circumstances”.¹⁸ If the contracting states chose to follow the wording of the OECD Model in drafting a certain provision, it is only reasonable to assume that they intended such a provision to have the meaning it has in the OECD Model, as outlined in the version of the OECD Commentary that

13 See Sinclair I, *The Vienna Convention on the Law of Treaties* (1984) p 115; Hummer W, “Ordinary” versus “Special” Meaning, *ÖZÖffR* 1975, p 97.

14 See Prokisch R, *Fragen der Auslegung von Doppelbesteuerungsabkommen*, SWI 1994, p 57; Engelen, n 7, pp 145-147; Gloria C, *Die Doppelbesteuerungsabkommen der Bundesrepublik Deutschland und die Bedeutung der Lex-Fori-Klausel für ihre Auslegung*, RIW 1986, p 974.

15 Engelen, n 7, p 149; see also Sinclair, n 13, p 126; Ward et al., n 3, pp 18-19.

16 See Hummer, n 13, pp 110-112; Vogel, n 6, Introduction MN 70; Gloria, n 14, p 975; Prokisch, n 14, pp 58-59.

17 Hummer, n 13, p 109.

18 Cheng B, *General Principles of Law as applied by International Courts and Tribunals* (1953) p 107, cited in Engelen, n 7, p 134.

existed at the time when the treaty was negotiated.¹⁹ The general rule of interpretation in Article 31 (1) VCLT thus establishes the relevance of the OECD Model Convention and the OECD Commentary in the interpretation process.²⁰ This does not imply, however, that the OECD Model Convention and the OECD Commentary carry similar weight as the text of the treaty itself. It has to be taken into account that the OECD Model Convention and the OECD Commentary do not form part of the treaty. They may nevertheless serve as valuable evidence of the intentions of the negotiators to be considered in the interpretation. However, depending on the circumstances at hand, other arguments may carry more weight. The rules on interpretation contained in the Vienna Convention are not designed to establish a rigid hierarchy between the various interpretative elements.²¹ Consequently, each individual case calls for careful consideration of all relevant aspects.

3. Deviations from the OECD Model

The OECD Model Convention and the OECD Commentary carry significant weight in the interpretation process if the contracting states chose to follow the wording of the OECD Model in drafting a certain provision. It is then only reasonable to assume that they intended such a provision to have the meaning it has in the OECD Model. This does not necessarily apply, however, if the wording of a provision deviates from the OECD Model. In such an event, two alternatives have to be considered: The difference in wording may also entail a difference in meaning – or the meaning of the provision may be similar to the OECD Model, despite the difference in wording. This problem cannot be solved in general but only through interpretation in each individual case. If the wording of a provision deviates from the OECD Model, it is a matter of interpretation to determine whether the difference in wording also results in a different meaning. Consequently, a difference in wording alone is insufficient to rule out the relevance of the OECD Model Convention and the OECD Commentary. It is, however, also necessary to give reasons why the OECD Commentary should be considered under such circumstances.

19 See Vogel, n 6, Introduction MN 80; Ault H, *The Role of the OECD Commentaries in the Interpretation of Tax Treaties*, Intertax 1994, pp 146-147; Wassermeyer, n 6, Vor Art. 1 MA MN 44; Ward D, *The Role of the Commentaries on the OECD Model in the Tax Treaty Interpretation Process*, IBFD Bulletin 2006, p 99; Waters, n 11, pp 677-678.

20 See also Vogel, n 6, Introduction MN 80; Ault, n 19, pp 146-147; Prokisch, n 14, pp 57-59; Prokisch R, *Does it Make Sense if We Speak of an "International Tax Language"?*, in Vogel (ed.) *Interpretation of Tax Law and Treaties and Transfer Pricing in Japan and Germany* (1998) pp 105-106; Waters, n 11, pp 677-678; a different approach is taken by Ward, n 19, pp 98-99; Ward et al., n 3, pp 29-31; Engelen, n 7, pp 459-460; Vann, n 7, pp 150-151; Wattel/Marres, n 11, pp 226-227; Vogel/Prokisch, n 7, p 30; Calderón J/Dolores Piña M, *Interpretation of Tax Treaties*, ET 1999, pp 383-384.

21 See Karl, n 7, p 187; Sinclair, n 13, p 117; Ward, n 19, p 98; Vann, n 7, pp 150-151.

4. Reservations and observations to the Commentary

OECD member countries may enter reservations on provisions of the OECD Model Convention, which are recorded in the OECD Commentary.²² By entering a reservation, a member country indicates that it does not intend to follow the OECD Model with regard to a certain provision when concluding double taxation conventions. Member countries entering reservations will thus try to include such modified provisions when negotiating double taxation conventions. If the wording of a provision suggests that a reservation was indeed taken into account, the reservation in the OECD Commentary is relevant for interpretation purposes. Consequently, the OECD Commentary has to be disregarded to the extent that the adopted provision deviates from the OECD Model. If, however, the wording follows the OECD Model despite the fact that a reservation has been entered by a contracting state, it may be assumed that the OECD Model Convention and the OECD Commentary are still relevant.

Member countries may also enter observations on the OECD Commentary.²³ An observation indicates that a member country does not agree with the interpretation given in the OECD Commentary on a certain provision. Unlike a reservation, an observation does not express disagreement with the text of the OECD Model. Consequently, the text of a double taxation convention provides no indication as to whether the contracting states intended a provision to have the meaning expressed in the observation or the OECD Commentary. In such an event, the paragraph of the OECD Commentary commented on by the contracting states loses relevance. Unless the contracting states have made similar observations, one has to rely on additional material (eg from the negotiation of the treaty) to determine the content of the treaty provision in question. Like the text of the OECD Commentary itself, only those reservations and observations existing upon conclusion of a double taxation convention may be taken into account.

IV. The relevance of amendments to the OECD Commentary for the interpretation of previously concluded treaties

1. The position of the OECD Committee on Fiscal Affairs

Since 1992, amendments to the OECD Model Convention and to the OECD Commentary are made on an ongoing basis. The practise of frequently amending the OECD Model raises the question whether such amendments affect the interpretation

22 See OECD Commentary 2005, Introduction para 31-32.

23 See OECD Commentary 2005, Introduction para 30; regarding the role of observations in treaty interpretation, see also Maisto G, *The Observations on the OECD Commentaries in the Interpretation of Tax Treaties*, IBFD Bulletin 2005, pp 14-19; Ward et al., n 3, pp 64-78; Ward, n 19, pp 100-101.

of previously concluded double taxation conventions. The OECD Committee on Fiscal Affairs takes the following position on this issue:

“Needless to say, amendments to the Articles of the Model Convention and changes to the Commentaries that are a direct result of these amendments are not relevant to the interpretation or application of previously concluded conventions where the provisions of those conventions are different in substance from the amended Articles. However, other changes or additions to the Commentaries are normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD member countries as to the proper interpretation of existing provisions and their application to specific situations.”²⁴

Clearly, no relevance may be attached to a statement on the interpretative value of the OECD Commentary made in the OECD Commentary itself, as it is done in para 35 of the Introduction to the OECD Commentary. As Maarten Ellis put it, “it seems to me that the OECD Fiscal Committee and the Commentary making a statement that new versions of the Model and new versions of the Commentary should be used as proper means of interpretation of older treaties remind me of Baron of Münchhausen pulling himself out of a morass by his own hair. I find it very surprising that such a group of – be it authoritative – people can determine how authoritative they themselves shall be, and I do not think, therefore, that that is a very significant statement.”²⁵

Reference has to be made to Articles 31 and 32 VCLT to determine whether the position taken by the OECD Committee on Fiscal Affairs is in fact in accordance with the rules on interpretation contained in the Vienna Convention. Later Commentary amendments shed no light on the intentions of the contracting states upon conclusion of the treaty.²⁶ Later Commentary amendments are also not part of the context as defined in Article 31 (2) VCLT,²⁷ since, for one, such amendments are not made “in connection with the conclusion of the treaty”. They may, however, play a role under Article 31 (3) VCLT, which refers to “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” and “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.

24 OECD Commentary 2005, Introduction para 35.

25 Ellis M, *The Influence of the OECD Commentaries on Treaty Interpretation – Response to Prof Dr Klaus Vogel*, IBFD Bulletin 2000, p 618.

26 See Vogel, n 11, p 615; Avery Jones J, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, IBFD Bulletin 2002, p 103; Wassermeyer, n 6, Vor Art. 1 MA MN 60; according to Wattel/Marres, n 11, p 228, later Commentary versions do qualify under Article 32 VCLT.

27 See Vogel, n 11, p 614; Prokisch, n 14, p 53; Avery Jones, n 26, p 103; Ault, n 19, p 145; Wassermeyer, n 6, Vor Art. 1 MA MN 60; Reimer E, *Interpretation of Tax Treaties*, ET 1999, p 468.

2. Amendments to the OECD Commentary as “subsequent practice” under Article 31 (3) (b) VCLT?

The OECD Commentary observes that “the tax administrations of Member countries routinely consult the Commentaries in their interpretation of bilateral tax treaties”. It goes on to say that “tax officials give great weight to the guidance contained in the Commentaries”.²⁸ If the tax administrations of both contracting states consistently apply an interpretation introduced through a Commentary amendment, as suggested by the OECD Commentary, such a Commentary amendment may become relevant through “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” under Article 31 (3) (b) VCLT.

Article 31 (3) (b) VCLT introduces a dynamic element to the interpretation process: Subsequent practice is not only considered to the extent it reflects the parties’ intention upon conclusion of a treaty. Separate from the original intentions of the parties, their current understanding of the treaty, as established through subsequent practice, is held to be relevant.²⁹ While extrinsic to the text, subsequent practice has to be taken into account “together with the context”. Consequently, subsequent practice forms an integral part of the general rule of interpretation.³⁰ Subsequent practice entails a sequence of facts or acts related to the treaty, which may be attributed to a party.³¹ It need not be directed at establishing a legally binding agreement. A common understanding about the meaning of the treaty, evident through subsequent practice, is sufficient to constitute an “agreement” within the meaning of Article 31 (3) (b) VCLT.³²

The relevance of Article 31 (3) (b) VCLT in the interpretation process is limited. The application of double taxation conventions takes place at the level of local tax offices and tax courts. It thus seems difficult to establish a sufficient degree of consistency in treaty application,³³ especially considering that the relevant practice is also shaped by independent courts.³⁴ At least, evidence is required that the local tax offices in both contracting states follow a certain interpretation. However, even if the practice in the application of a treaty provision can be said to establish a common understanding of the contracting states, such practice is not necessarily decisive. Evidence falling under Article 31 (3) (b) VCLT may only be taken into account together with the

28 OECD Commentary 2005, Introduction para 29.1.

29 See Ress G, *Die Bedeutung der nachfolgenden Praxis für die Vertragsinterpretation nach der Wiener Vertragsrechtskonvention (WVRK)*, in Bieber R/Ress G (eds.) *Die Dynamik des Europäischen Gemeinschaftsrechts* (1987) p 53; Karl W, *Die spätere Praxis im Rahmen eines dynamischen Vertragsbegriffs*, in Bieber R/Ress G (eds.) *Die Dynamik des Europäischen Gemeinschaftsrechts* (1987) p 89; Karl, n 7, p 189-190.

30 See Engelen, n 7, pp 218-219; Karl, n 7, p 188; Karl, n 29, p 88.

31 See Karl, n 7, p 188; Ress, n 29, pp 55-56; Sinclair, n 13, p 137.

32 See Karl, n 7, pp 190-194; Karl, n 29, p 89; Ress, n 29, pp 55-56.

33 See Karl, n 7, p 118.

34 However, according to Karl, practice established by independent courts only falls under Article 32 VCLT (see Karl, n 7, p 188; Karl n 29, p 88). This view is not shared by Ress, n 29, pp 56-57.

other means of interpretation referred to under Article 31 VCLT. It is evident that tax administrations may not, through concordant subsequent practice, attach an arbitrary meaning to treaty provisions. Such an interpretation of Article 31 (3) (b) VCLT would conflict with constitutional law in many national legal orders.³⁵ It would also accord undue relevance to dynamic elements in the interpretation process, considering that double taxation conventions – unlike some other international agreements – directly affect not only the parties to the convention but individual taxpayers as well.³⁶ Since international law also allows for the modification of a treaty through subsequent practice,³⁷ it is necessary to distinguish between subsequent practice of an interpretative character falling under Article 31 (3) (b) VCLT and subsequent practice which modifies the underlying treaty.³⁸ It is held that subsequent practice is of an interpretative nature if it can “reasonably be reconciled with the terms of the treaty”.³⁹ However, reference to the text of the treaty alone is insufficient to distinguish between interpretation and modification. A practice which may be reconciled with the wording of the treaty may still constitute a treaty amendment if such practice is contrary to a better-founded interpretation reached on the basis of the original treaty text, taking into account all other means of interpretation referred to under Article 31 VCLT. Thus, recourse to subsequent practice under Article 31 (3) (b) VCLT may only be had to clarify an otherwise ambiguous interpretation result.

3. Amendments to the OECD Commentary as a “subsequent agreement” under Article 31 (3) (a) VCLT?

Article 31 (3) (a) VCLT provides that “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” is to be taken into account, “together with the context”. Such an agreement has to be binding on the parties under international law. However, neither the OECD Model Convention nor the OECD Commentary are legally binding instruments.⁴⁰ Pursuant to Article 5 (b) of the Convention on the Organisation for Economic Cooperation and Development (OECD Convention), the OECD Council has issued a non-binding recommendation (as opposed to a binding decision according to Article 5 (a) OECD Convention), suggesting that governments of member countries should “conform to the Model Tax Convention, as interpreted by the Commentaries thereon” “when concluding new bilateral conventions or revision existing bilateral conventions”. In addition, tax administrations of member countries should “follow the Commentaries on the

35 See Lang M, *Die Bedeutung des Musterabkommens und des Kommentars des OECD-Steuerausschusses für die Auslegung von Doppelbesteuerungsabkommen*, in Gassner W/Lang M/Lechner E (eds.) *Aktuelle Entwicklungen im Internationalen Steuerrecht* (1994) pp 26-27.

36 See Lang M, *Doppelbesteuerungsabkommen und innerstaatliches Recht* (1992) p 90.

37 See Karl, n 7, pp 373-374; Sinclair, n 13, p 138; Ress, n 29, p 61.

38 See Ress, n 29, p 62.

39 See Engelen, n 7, p 240.

40 See Engelen F, *Some Observations on the Legal Status of the Commentaries on the OECD Model*, IBFD Bulletin 2006, pp 105-106; Engelen, n 7, pp 459-460; Ward et al., n 3, p 36; Ward, n 19, p 99; Wassermeyer, n 6, Vor Art. 1 MA MN 34.

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”.⁴¹ According to Rule 18 (b) of the Rules of Procedure of the OECD, “recommendations [...] shall be submitted to the Members for consideration in order that they may, if they consider it opportune, provide for their implementation”.⁴² The non-binding character of the OECD Commentary is also emphasized in the Commentary itself, stating that “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”.⁴³ Clearly, the OECD member countries do not intend to create internationally binding obligations by amending the OECD Commentary. Consequently, an amendment to the OECD Commentary does not constitute an agreement under international law and thus falls outside the scope of Article 31 (3) (a) VCLT.

4. Relevance of Commentary amendments through Mutual Agreement under Article 25 (3) OECD Model Convention?

The OECD Commentary suggests that „existing conventions should, as far as possible, be interpreted in the spirit of the revised Commentaries. [...] Member countries wishing to clarify their positions in this respect could do so by means of an exchange of letters between competent authorities in accordance with the mutual agreement procedure and, [...] even in the absence of such an exchange of letters, these authorities could use mutual agreement procedures to confirm this interpretation in particular cases”.⁴⁴ Apparently, the OECD Committee on Fiscal Affairs assumes that the interpretative value of later Commentary versions can be increased through mutual agreement under Article 25 (3) OECD Model Convention.

According to Article 25 (3) first sentence OECD Model Convention, “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”. Such an agreement reached under Article 25 (3) first sentence OECD Model Convention is regarded as a treaty under international law⁴⁵ and may thus fall under Article 31 (3) (a) VCLT as a “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”.⁴⁶ Similar to subsequent practice under Article 31 (3) (b) VCLT, the scope of interpretative agreements is confined to the leeway remaining after consideration of all other means of interpretation provided under Article 31 VCLT.⁴⁷ An interpretative agreement may thus be a source of interpretation if the meaning of a treaty provision remains

41 See Recommendation of the Council concerning the Model Tax Convention on Income and on Capital, 23 October 1997 – C(97)195/Final.

42 The Rules of Procedure of the OECD are printed in Ward et al., n 3, pp 127-144.

43 OECD Commentary 2005, Introduction para 29.

44 OECD Commentary 2005, Introduction para 33.

45 See Lang, n 36, pp 46-47 with further references.

46 See Ward et al., n 3, pp 36-37.

47 See s IV.2.

otherwise ambiguous, even if all other aspects are taken into account. However, the interpretative agreement is never the only source of interpretation. Whether it is the most convincing source of interpretation has to be decided by the authorities applying the treaty, and finally by the courts. An agreement outside the scope of Article 31 (3) (a) VCLT constitutes a treaty amendment. It is a matter of constitutional law whether and under which circumstances such a treaty amendment has binding effect for domestic law purposes.⁴⁸

The conclusions drawn by the late Justice Graham Hill “from the point of view of a judge of a common law system” can thus be shared by authors coming from a civil law background.⁴⁹ “I would afford the same status to the commentary on a provision in a model convention as I would to the opinion of textbook writers. Both are informative, but neither is binding. But it would seem a difficult matter, absent any consensus of the contracting states, to regard a commentary after ratification in the same way as a commentary before, if only because the changed commentary was not taken into account by the parties to the treaty before adopting the particular provision.”⁵⁰

V. Drawing a borderline – which Commentary version is relevant?

The relevance of the OECD Commentary in the interpretation of tax treaties is based on the assumption that the contracting states, by following the wording of the OECD Model in drafting a certain provision, intended such a provision to have the meaning it has in the OECD Model, as outlined in the OECD Commentary. The relevance of a particular Commentary version thus depends on whether this assumption can be maintained. Commentary sections remaining unchanged throughout the negotiation and ratification process have to be considered in the interpretation of a double taxation convention. Commentary amendments adopted after the ratification of

48 See Vogel, n 6, Introduction MN 82d.

49 Hill G, *The Interpretation of Double Taxation Agreements – the Australian Experience*, IBFD Bulletin 2003, p 325; a similar conclusion is reached by Vogel, n 6, Introduction MN 82a; Vogel, n 11, p 615; doubts on the use of later Commentary versions are also expressed by Ault, n 19, pp 147-148; Ward et al., n 3, pp 110-111; Ward, n 19, pp 101-102; Avery Jones J, *Article 3(2) of the OECD Model Convention and the Commentary to It: Treaty Interpretation*, ET 1993, pp 255-256; Wattel/Marres, n 11, p 235; Martín Jiménez A, *The 2003 Revision of the OECD Commentaries on the Improper Use of Tax Treaties: A Case for the Declining Effect of the OECD Commentaries*, IBFD Bulletin 2004, p 28; a different conclusion is reached by Vann, n 7, pp 151-156; Engelen, n 7, pp 439-473; Engelen, n 40, pp 106-109; Waters, n 11, pp 679-685.

50 In *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* (2005) 142 FCR 134 at 144, the court takes the following position on this issue: “Certainly the commentary has been used to assist in the interpretation of double tax agreements based upon it, although there may be a theoretical difficulty in using commentary published after the adoption of a double taxation agreement as relevant to the construction of that agreement. [...] Whether there may be a different result in taking into account commentary published after ratification of an agreement is not a matter that need concern us here”.

a double taxation convention may only be taken into account in exceptional cases as described above. In other cases, it is more difficult to assess the weight to be attributed to the Commentary.

Such an issue is raised in *Lamesa* by the judge at first instance, considering whether the 1977 version of the Commentary is relevant for the interpretation of the double taxation convention concluded between Australia and the Netherlands in 1976. First, it is pointed out that “the OECD model and commentaries are only applicable to those bilateral treaties subsequently concluded”. However, since “the text of the 1977 OECD Model and the Official Commentary thereto had been largely formulated and published before the conclusion of the Netherlands DTA in 1974”, it is held that “the Official Commentary to the 1977 OECD Model is relevant to the interpretation of the Netherlands DTA. Furthermore, the relevant paragraphs from the 1977 OECD Model are the same or substantially the same as the corresponding paragraphs of the 1963 OECD Model”.⁵¹

The *Lamesa* judgment points to the role of other OECD publications in the interpretation process. While it would not be convincing to use the 1977 version of the Commentary for the interpretation of the 1976 Australia/Netherlands convention, other material, such as reports or even draft versions of OECD documents may, in principle, be relevant. However, the relevance of such material, as well as the relevance of a certain Commentary version, can only be assessed on a case-by-case basis.⁵² It is decisive whether one may assume that the documents had already been available to the treaty negotiators and that they had understood the provisions in the light of these documents. In light of the ongoing revision of the OECD Model, more borderline cases are bound to occur.

VI. Conclusion

The OECD Model Convention and the OECD Commentary carry significant weight in the interpretation of double taxation conventions. If a double taxation convention is, in principle, based on the OECD Model and a certain provision follows the wording of the OECD Model, it is then only reasonable to assume that the contracting states intended such a provision to have the meaning it has in the OECD Model, as outlined in the OECD Commentary. Amendments to the OECD Model Convention and to the OECD Commentary made after the conclusion of a double taxation convention have to be seen in a different light. Later Commentary amendments cannot serve to establish the parties’ intentions upon conclusion of a double taxation convention. Such amendments may only play a limited role in the interpretation of previously

51 *Lamesa Holdings BV v Commissioner of Taxation* (1997) 35 ATR 239 at 247; see also Vann, n 7, pp 151-157.

52 See for instance Lang M, *Die Besonderheiten der Auslegung des DBA Österreich-USA*, in Gassner W/Lang M/Lechner E (eds.) *Das neue Doppelbesteuerungsabkommen Österreich-USA* (1997) p 38, regarding the double taxation convention concluded between Austria and the United States.

concluded double taxation conventions if recourse to other means of interpretation remains inconclusive.

In 1992, the OECD Committee on Fiscal Affairs started an ongoing revision of the OECD Model. Changes to the OECD Model Convention and the OECD Commentary are made more frequently than in the past. This practice is questionable. Such changes are, for the most part, only relevant for the interpretation of double taxation conventions concluded afterwards. Frequent changes also undermine the authority of the OECD Commentary for interpretation purposes,⁵³ since it may be unclear on which Commentary version a certain double taxation convention is based.

53 See also Vogel, n 11, pp 615-616; Ault, n 19, p 148.