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The UN Model Convention and Its Relevance for the Global Tax Treaty Network

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The UN Model Convention and Its Relevance for the Global Tax Treaty Network

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Preface

The increased mobility of individuals has brought undeniable economic benefits, while also giving rise to various problems regarding taxation at an international level. Cross-border direct taxation is facilitated by the use of income tax treaties. The OECD and the UN have each established a Model Convention that serves as a template and starting point in tax treaty negotiations. Although the OECD and UN Models may appear highly similar at first glance, some of their provisions deviate significantly from each other in their wording, as well as in their purpose and historical background.

In order to examine the differences between the OECD and UN Models, the 23rd Viennese Symposium on International Tax Law was held on 17 June 2016 at the Vienna University of Economics and Business (WU). Renowned professors from Austrian and foreign universities, tax researchers from the WU and tax experts from various countries participated in this symposium. In the presence of Jacques Sasseville, Head of the Tax Treaty Unit of the Fiscal Affairs Division at the OECD, the speakers presented their findings, including a detailed analysis of the relevance and impact of the Models, as well as an examination of the provisions included in the Models. The authors completed their papers using the input received during the symposium, and those papers have become the chapters of this book. They offer an in-depth analysis along with the most recent scientific research on their topics.

The editors would like to thank Renée Pestuka and Stephanie Zolles, who were mainly responsible for the organization of the symposium and made essential contributions to the preparation and publication of this book. The editors would also like to thank the authors, all of whom patiently revised their contributions in order to enhance the quality of this book, and Constance McCarthy, who contributed greatly by linguistically editing the authors' texts.

Above all, sincere thanks to the publishing house IBFD, which agreed to include this publication in its catalogue.

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Vienna, August 2017

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

David Orzechowski

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 be-

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”.

ing 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.”).

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.

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