THE COMMENTARIES TO THE OECD MTC AND UN MC A CRITICAL ANALYSIS OF THE SPANISH APPROACH

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The tax treaty network of Spain relies extensively on the models for Double Taxation Conventions (DTCs) drafted by both the OECD and UN[1]. Although Spain has negotiated numerous treaties in the last ten years, many of them follow earlier versions of the OECD Model Tax Convention (MTC), such as the 1963 or 1977 OECD MTC. Moreover, the tax administration, courts and legal scholars frequently use the OECD Commentaries to support their decisions or opinions. Nonetheless, the legal status of the Commentaries in the interpretation of DTCs is far from clear in Spanish practice. Taking a closer look at the different Spanish decisions, one has to acknowledge certain confusion about the role and status of the Commentaries. This confusion prompted the necessity to further analyse the extent to which the Commentaries are legally binding. This article examines different approaches to this subject and provides suggestions for possible solutions to address the confusion.

1. OECD Commentaries in Spanish Administrative and Judicial

Practice

The overview of decisions adopted by the tax administration and courts in international tax matters clearly shows that both authorities tend to put a lot of weight on the hermeneutical value of the Commentaries. However, the legal basis for this reliance on the Commentaries in the interpretation of DTCs remains unclear. The reliance on the Commentaries can be demonstrated by several rulings and guidance from the tax administration. In 1996, the Central Economic and Administrative Tribunal (*Tribunal Administrativo Central*, hereinafter TEAC) -an administrative tribunal- held that the OECD Code of Liberalisation of Current Invisible Operations ("CLCIO") is a norm of "supranational character"[2]. In another case in 1993 the TEAC decided that the OECD MTC Commentaries have the value of Compara-

1. Spain is a member state of both the OECD and the UN.

2. In order to define technical assistance, see the TEAC´s ruling from 9-10-1996 (JT 1998\1966), FN 4. The same Code is taken as an example, without attributing interpretative value, in the TEAC´s ruling from 1-07- 1992 (JT 1992\414), motive 4; Also, TEAC ruling from 10-06-1992 (JT 1992\180), motive 4. In addition, TEAC ruling 23-07-1997 (JT 1997\1188), FN 3.

tive law for the purpose of interpreting the definition of royalties provided by a DTC[3]. The official guidance of the General Sub-Direction for the Taxation of Non-Residents (SGTNR)[4] also refers to the OECD MTC.

Commentaries and observations presented by Spain[5]

The same trend is clear in some decisions of the Spanish courts. In a case regarding the German-Spanish DTC, the Spanish Supreme Court (hereinafter SC) stated in 2000 that, in the absence of reservations from any of the contracting States, the OECD Commentaries are the authentic source of interpretation agreed upon by the OECD[6]. Some years earlier, the SC had also found the Commentaries to be an authentic interpretative source for the purpose of defining the term "royalty" in the Spanish-French DTC[7]. The influence of the OECD Commentaries can also be found in another case before the SC regarding royalties approximately issued at the same time[8]. Here the hermeneutic value of the Commentaries was implicitly accepted when the SC found it relevant to point out that the German-Spanish DTC is based on the OECD MTC[9].

Another reference to the methodical framework of the Commentaries was made in a judgment in 2003. In this case, the SC held that the Commentaries are an authentic and necessary tool of interpretation based on the Vienna Convention on the Law of Treaties (VCLT). This decision also demonstrates the uncertainty about the status of the Commentaries, however, since it did not clarify whether the decision was based on article 31 or article 32 of the VCLT. Notwithstanding the above consistent support for the high status of the Commentaries, the SC emphasized that the Commentaries cannot be considered as ground for an appeal based on the infringement of the law itself[10]. Hence, the importance attributed by the Court to the Commentaries seems to be lower than the importance they attribute to the Spanish Law itself.

1.1 DTCs and amendments to the OECD MTC and Commentaries.

At least fifteen of the Spanish DTCs were signed and ratified between 1963 and 1977. From 1977 to 1991, Spain entered into at least fifteen more. A number of other Spanish DTCs entered into force after 1992.

3. TEAC´s ruling from 29-09-1993 (JT 1993\1398), motive 8. Also TEAC´s ruling from 30-04-1996 (JT 1996\566), motive 8.

4. Part of the General Direction of Taxation of the Spanish Ministry of Economy and Finance.

5. E.g. SGTNR, Consultation 0725-02 from 16-05-2002, http://petete.minhac.es; SGTNR, Consultation 0762-03 from 6-06-2003, http://petete.minhac.es.

6. SC, Sentence from 3-06-2000 (RJ 2000\4874), FN 3; SC, Sentence from 8-04-2000 (RJ 2000\3773), dissenting vote, see at.

7. SC, Sentence from 11-06-1997 (RJ 1997\4818), FN 1.

8. SC, Sentence from 13-11-1998 (RJ 1998\7953).

9. Ibid, FN 3.

10. SC, Sentence from 12-02-2003 (RJ 2003\2492), FN 3. In the original version:"elemento interpretativo auténtico y necesario según los Convenios de Viena sobre Interpretación de los Tratados".

From 1963 until 2005 the OECD amended the MC many times. Even more important than the MC amendments are the very significant changes made to the Commentaries during this period. Spanish DTCs, however, do not always follow the updated MC when construing treaty provisions. In fact, several Spanish DTCs take the 1963 OECD MTC as guide. This raises two further issues. First of all, do the new amendments to the Commentaries apply to older DTCs? Secondly, if the newer Commentaries should be followed – which version applies?

An analysis of Spanish case law reveals the courts' tendency to apply new versions of the Commentaries to DTCs formed under earlier versions (hereinafter referred to as "later-in-time Commentaries"), rejecting the Commentaries as they existed when the DTC was concluded. In 2000, for example, two SC verdicts concerning the application of the 1966 Spanish-German DTC relied on the OECD Commentaries of 1977[11]. This trend followed by the courts is also noticed in administrative decisions. When construing article 18 of the Dutch-Spanish DTC, the TEAC also applied later-in-time Commentaries, rejecting the Commentaries existing when the treaty was concluded[12]. The SGTNR has also favoured the application of later-in-time Commentaries when construing the language of the German-Spanish DTC[13].

However, the tendency toward later-in-time Commentaries as an interpretative source is just that – a tendency. It is not the general rule. For example, the *Audiencia Nacional* (AN), a judicial Tribunal, has upheld decisions of the TEAC refusing later-in-time Commentaries[14]. The TEAC rejected later-in-time Commentaries in cases dealing with artists' income. In this case the TEAC held that the Commentaries not only added an additional shade of meaning to the DTC between the Netherlands and Spain, but they also introduce an anti-avoidance rule that the DTC itself does not provide for[15].

Apart from case law, some Spanish DTCs explicitly restrict the application of prior and later-in-time Commentaries in the interpretation, *e.g.* the treaty with Costa Rica (not in force yet). According to its Protocol, the treaty provisions have to be interpreted according to the 2003 version of the OECD MTC Commentaries[16].

1.2 Observations and reservations

OECD Member States have made *observations* about and *reservations* to the Commentaries of the OECD MTC. Non OECD Member States have also expressed *positions* on the Commentaries. The problems resulting from such positions are just as grave as those posed by the observations and

11. SC, RJ 2000\4874, FN 3; also, SC, RJ 2000\3773, dissenting vote, FN 7. Both in supra note 6.

12. TEAC´s Ruling from 8-09-2000 (JT 2000\1847), FN 5.

13. SGTNR, Consultation 0762-03, supranote 5.

14. AN, Sentence from 3-10-2003 (JT 2003\230), FN 3.

15. TEAC´s Ruling from 20-10-1992 (JT 1992\577), motive 6. Also, TEAC´s Ruling from 6-11-1996 (JT 1996\1666), FN 5. In addition, TEAC´s Ruling from 26-05-2000 (JT 2000\1238), FN 5.

16. According to the first proviso of the Protocol to the DTC signed by both countries in 2003.

reservations. The effects of observations and reservations are different from the positions, however. For this reason it is also important to determine the status of those observations and reservations in the interpretation of tax treaties.

Spain has made some observations and reservations to the articles of the OECD MTC and its Commentaries[17]. Observations about the 2003 OECD Commentaries include articles 4, 5 and 12. Reservations cover articles 5, 6, 7, 10, 11, 12, 13, 22, 25. Despite the importance of these observations and reservations, there are few references to them in Spanish practice. In cases where Spain has made reservations to specific Commentaries, not only has the SC ignored them, but it has actually reasoned in direct contravention thereof. In 2000, in two cases involving the DTC between Spain and Germany, both the majority and the dissenting opinions found that the Commentaries bind the conduct of the OECD Member State unless that state has made a reservation to the contrary in the Commentaries. Because neither Spain nor Germany had made a reservation on the specific issue at bar, the courts reasoned that the Commentaries applied[18].

2. Academic Writing

2.1 International Tax Literature

Taking a closer look at international tax literature, one can only conclude that there is consensus about the importance of the Commentaries in the interpretation of a DTC. However, the still unresolved issue is how to determine the meaning and basis of this "unique juridical source"[19]. Some legal scholars simply argue that the MC and its Commentaries are not legally binding[20]. However, for several years the international debate has focused primarily on whether the MC and its Commentary come under the interpretative rules of the international law of treaties as set forth in the VCLT.

At present there are other new approaches. Van der Bruggen attributes a possibly independent hermeneutic value to the Commentaries[21].Engelen, on the other hand, puts forth a different argument asserting a tacit agreement on the role of the Commentaries among OECD Member States, under certain circumstances. He affirms that the principles of acquiescence and estoppel, as well as the principle of the protection of legitimate ex-

17. See: Organisation for Economic Co-operation and Development, Committee on Fiscal Affairs: Model Tax Convention on Income and on Capital, Paris: 28 January, 2003. Organisation for Economic Co-operation and Development, Committee on Fiscal Affairs:Model Tax Convention on Income and on Capital, Paris: 15 July, 2005.

18. SC: RJ 2000\4874, FN 3. SC: RJ 2000\3773, dissenting vote, motive 7. Both in supra note 6.

19. As it is called by Vogel, Klaus: Der Kommentar der OECD zum Doppelbesteuerungs-Musterabkommen, in In einem vereinten Europa dem Frieden der Welt zu dienen... Liber amicorum Thomas Oppermann, Ducker & Humblot: Berlin, 2001, p. 477.

20. See, Serrano Antón: La modificación del Modelo de Convenio de la OCDE para evitar la doble imposición internacional y prevenir la evasión fiscal. Interpretación y novedades de la versión del año 2000: la eliminación del artículo 14 sobre la tributación de los servicios profesionales independientes y el remozado trato fiscal a las partnerships, en Documentos, n.º 5, 2002, p. 10.

21. See, Van der Bruggen: The power of persuasion: notes on the sources of international law and the OECD commentary, in International Tax Review «Intertax», vol. 31, n.º 8-9, 2003, p. 270.

pectations apply to the Commentaries[22]. The importance and consequences of his approach, relying on the principle of good faith in international law, are huge. The main issue, however, is whether these principles are also in accordance with the rules to determine the ordinary meaning of the terms under article 31(1) of the VCLT. This specific topic will not be further discussed in this article.

The rules of interpretation of the VCLT are found in articles 31 to 33. Article 31 provides the general rule, under which "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"[23]. In addition it provides that "a special meaning shall be given to a term if it is established that the parties so intended"[24]. The VCLT establishes what shall constitute the treaty context and what shall be taken into account, together with the context, in interpreting treaty terms.

The general rule of interpretation of article 31 VCLT is supplemented by article 32 VCLT. This article provides that "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable".

At issue primarily is whether the Commentaries fall under the general rule of interpretation (as provided by article 31 VCLT), or are part of its supplementary means (under article 32 of the VCLT)[25]. It is unclear whether the Commentaries determine the ordinary meaning[26], or instead construe special meaning pursuant to paragraphs 1 and 4 of article 31 of the VCLT[27].

22. Engelen, Frank: Interpretation of tax treaties under international law. IBFD Doctoral series, n.º 7, 2004, p. 460ff.

23. VCLT, Article 31, paragraph 1.

24. VCLT Article 31, paragraph 4.

25. In this vein, Avery Jones: The effect of changes in the OECD Commentaries after a treaty is concluded, in Bulletin - Tax Treaty Monitor, n.º 3, March, 2002, p. 102. Also, for linkages to art. 31 or 32 VCLT, Oliver J.: The OECD Model and Non-Member Countries, in International Tax Review «Intertax»; Kluwer, vol. XXV, n.º 5, May, 1997, p. 179. See the controversy inVogel, Klaus/Lehner, Moris: Doppelbesteuerungsabkommen: DBA der Bundesrepublik Deutschland auf dem Gebiet der Steuern vom Einkommen und Vermögen. Kommentar auf der Grundlage der Musterabkommen, 4.ª ed., C. H. Beck: München, 2003, intro., marginal number 125 y 126, p. 157ff.

26. As is defended by Prokisch, Rainer: Does it make sense if we speak of an 'International Tax Language'?, in Interpretation of tax law and treaties and transfer pricing in Japan and Germany, Kluwer Law International: The Hague, 1998, p. 105ff. Waters also argues that "the Commentaries should be taking into account when searching for the object and purpose of a treaty, and of a particular provision in it, under article 31(1) VCLT". However, Waters does not accept that the Commentaries determine the ordinary meaning. Waters, Mike:The relevance of the OECD Commentaries in the interpretation of tax treaties, in Praxis des Internationalen Steuerrechts, Linde: Wien, 2005, p. 678.

27. According to Ault: The role of the OECD Commentaries in the interpretation of tax treaties, in Intertax,; Kluwer, No. 4, April, 1994. Maisto also seems to attribute this character to the Commentaries and observations on the OECD Commentaries. Maisto, Guglielmo: The observations on the OECD Commentaries in the interpretation of tax treaties, Bulletin, 2005, vol 59, n.º 1, p. 18.

2.2 Academic Writing in Spain

Spanish legal scholars have expressed different opinions regarding the hermeneutical weight of the Commentaries. Some of them argue that the Commentaries are part of the context of every DTC. However, they do not cite the VCLT article on which they base their claim. Even more importantly, these authors affirm that the VCLT is insufficient to address the hermeneutic value of the OECD Commentaries in interpreting DTCs. For this reason they even dispute the legitimacy of a reform of the VCLT (*i.e.* to include them under the rules of interpretation of the VCLT[28]). However, others insist that the OECD Commentaries embody the intention of the contracting parties, thereby construing the DTCs in accordance with the VCLT[29]. It is also recognized that the Commentaries could play a clarifying role in judicial decision- making[30], and that they constitute a privileged interpretation of the DTC based on the MC[31]. Therefore, the decisions by the Spanish courts are often criticized for paying little attention to the OECD Commentaries, "by themselves, or because they play the role assigned to them, or by application –or not– of the Vienna Convention"[32].

The Spanish Association of Tax Advisers is contemplating an independent hermeneutic value to the OECD Commentaries, which breaks all ties with the VCLT[33]. In the international debate, *van der Bruggen*[34] seems to support this construction.

3. Critical Remarks

3.1 The hermeneutical value of the Commentaries

Based on the abovementioned views of legal scholars, the tax administration, and judges, it seems that three different positions can be taken regarding the legal status of the Commentaries: 1) the confirmation of a hermeneutical role of the OECD Commentaries based on the VCLT or the DTC itself; 2) the recognition of a soft-law obligation arising under the recommendations made by international organisations under international law; or 3) the attribution of a stand-alone

28. Ribes Ribes, Aurora: Convenios para Evitar la Doble Imposición Internacional: Interpretación, Procedimiento Amistoso y Arbitraje, Editoriales de Derecho Reunidas S.A.: Madrid, 2003, p. 80; Soler Roch, Maria Teresa/Ribes Ribes, Aurora: Tax Treaty Interpretation in Spain, in Tax Treaty Interpretation, edit. Lang, vol. XIII, Linde: Wien, 2001, p. 307ff.

29. De Juan y Ledesma et al.: Spain. The tax treatment of software, in European Taxation, July, 2000, p. 279.

30. Asociación Española de Asesores Fiscales, Sección de Fiscalidad Internacional:Fiscalidad Internacional Convenios de Doble Imposición. Doctrina y Jurisprudencia de los Tribunales Españoles (Años 1998-1999-2000), Aranzadi: Navarra, 2002, p. 173.

31. In this vein: Asociación Española de Asesores Fiscales, Sección de Fiscalidad Internacional:Fiscalidad Internacional Convenios de Doble Imposición. Doctrina y Jurisprudencia de los Tribunales Españoles (Años 1996 - 1997), Aranzadi - Asociación Española de Asesores Fiscales: Navarra, 2000. According to this work, other means of interpretation have to give way to the MC OECD, p. 187.

32. Asociación Española de Asesores Fiscales, Sección de Fiscalidad Internacional:Fiscalidad Internacional Convenios de Doble Imposición. Doctrina y Jurisprudencia de los Tribunales Españoles, Aranzadi - Asociación Española de Asesores Fiscales: Navarra, 1998, p. 12.

33. Asociación Española de Asesores Fiscales, p. 12, supra note 30.

34. Van der Bruggen, p. 270, supra note 21.

legal value to the Commentaries. In the unlikely event that this last "stand alone" view were adopted, the Commentaries would have the force of binding law.

Binding force of Recommendations

Under a systematic approach, we need to recognize that the weight attributed to the documents issued by an International Organisation (hereinafter IO) depends on the specific rules and procedures of each and every IO[35]. Even more specifically, the legal status granted to their Decisions and Recommendations under their own statutes will control. Obviously this also applies to the OECD MTC and its Commentaries, adopted through Recommendations of the OECD Council. The most recent Recommendation of the Council is from October 23, 1997[36]. This repeals two previous Recommendations from 1994 and 1995. Prior Recommendations date back to 1963, 1977 and 1992.

The 1997 OECD Recommendation was addressed to the Governments of the Member States urging them to conform to the OECD MTC as interpreted by the Commentaries when concluding new bilateral conventions or revising the existing ones. This *vœu* also recommends that Member State tax administrations follow the Commentaries on the articles of the OECD MTC, as modified from time to time, when applying and interpreting the provisions of their bilateral tax conventions that are based on these Articles. The Recommendation does not indicate the status of the reservations and observations introduced by OECD Member States in the Commentaries itself[37].

The legal status of the OECD Recommendations should be interpreted in light of the Convention on the Organisation for Economic Co-operation and Development (hereinafter OECD Convention)[38] and the Rules of Procedure of the Organisation (hereinafter OECD RP)[39]. These norms allow the OECD to take Decisions and Recommendations and to enter into agreements with Member States, non member States and IO[40]. Whilst the OECD Convention attributes binding legal character to Decisions, except as otherwise provided, it does not expressly bind parties to the Recommendations[41]. Hence, from the perspective of the OECD Convention, the binding legal force of Recommendations is *per se* dubious.

35. Virally, Michel:La valeur juridique des Recommandations des Organisations Internationales, in Annuaire Français De Droit International, vol II, 1956, p. 69ss.

36. "Recommendation of the OECD Council concerning the OECD Model Tax Convention on Income and on Capital". The text was published in the Condensed versions of the 2003 and 2005 OECD Model Tax Convention on Income and on Capital. See supra note 17.

37. See, Recommendations I and II, 2003 OECD Model Tax Convention on Income and Capital, p. 342; see supra note 17.

38. Convention on the Organisation for Economic Co-operation and Development, 14th December 1960, http://www.OECD.org/ art. 5 (a,b) and art. 6(3). The Treaty is also published in Peaslee, Amos J.: International Governmental Organizations. Constitutional Documents, 3.ª ed., Part I, vol. II, Martinus Nijhoff: The Hague, 1974, p. 1151ff.

39. The OECD Rules of Procedure were adopted by the Council on 30 September 1961. Subsequent reforms are found in Resolutions of 24 July 1962, 24 July 1965 and, 29 September 1970. Rules of procedure of the Organisation, 1992, OCDE-OECD, (14+Annex+Appendix), webmaster@OECD.org.

40. OECD Convention, art. 5, supra note 38.

41. Compare article 5 (a) and (b), OECD Convention, supra note 38.

Some tax scholars have pointed out that Recommendations create a kind of soft law.

This refers to the obligation of Member States to consider the possible implementation of the Commentaries, but more often to the substantive contents of the Recommendation[42]. Be that as it may, formalistically speaking, neither the OECD Convention nor the OECD RP actually obligate the Members States to follow Recommendations. The OECD MTC and Commentaries were issued pursuant to a Recommendation of the Council based on article 5(b) of the OECD Convention.

According to the OECD RP such Recommendations shall be submitted to the Members for consideration, *i.e.* for them to decide whether or not they want to implement them[43].

The OECD RP envisages a dual obligation. The first is the Organisation's obligation to submit the Recommendation to the Members States for their consideration.

Accordingly, the mere adoption of a Recommendation by the Council *per se* does not create an obligation for the OECD Members to carry out the Recommendation. The second commitment is addressed to the OECD Member States themselves. Pursuant to this provision of the OECD RP, each member state is under a legal duty to consider whether or not to implement the Recommendation. Therefore, one can only conclude that the implementation of the OECD Recommendations depends not only on the OECD, but also on the individual Members States. No further duties or legitimate expectations arise under an OECD Recommendation. This also seems to be the view of the OECD itself, attributing moral force, but no legally binding power to Recommendations[44].

Whilst the OECD Members States seem to bear the burden of conferring legal status on Recommendations, parties' legal duty to follow Decisions arises under the OECD constitutional provisions themselves[45]. With regard to Decisions, the extent to which a Decision binds a member state depends upon that member's own national constitutional requirements and procedures[46]. The difficulties of knowing each member state's domestic legal system must have induced the adoption of the OECD RP whereby each member state must indicate, at the time when a Decision is adopted, whether its acceptance, in part or in whole, is contingent upon the requirements of that member's own constitutional procedures[47]. Beyond that, the OECD Convention and the OECD RP state that the other Members may agree that

42. See Vogel, p. 479, supranote 19. Engelen, p. 457ff, supra note 22.

43. OECD Rules of procedure, rule 18 (b), supra note 39.

44. As mentioned on the Oecd web site: "Recommendations are not legally binding, but practice accords them great moral force as representing the political will of Member countries and there is an expectation that Member countries will do their utmost to fully implement a Recommendation. Thus, Member countries which do not intend to do so usually abstain when a Recommendation is adopted, although this is not required in legal terms".http://www.oecd.org/document/46/0,2340,en_2649_34483_1925230_1_1_1_1,00.html.

45. OECD Convention, art. 5 (a), supra note 38.

46. Ibid, art. 6 (3).º

47. OECD Rules of procedure, rule 19 (b), supra note 39.

such a Decision shall apply provisionally to them[48].

Certainly, the binding legal force of the MC and its Commentaries would be better understood, and greater harmonization in the application of DTCs would be achieved, if both the OECD and Commentaries were issued through a Decision rather than through a Recommendation. This was the case of the CLCIO, for example[49]. Seemingly, therefore, one can not really attribute an independent hermeneutic value to the OECD Recommendations regarding the OECD MTC and its Commentaries, as suggested by some authors[50]. Nonetheless, binding force may still be attributed to them. The OECD RP include a factor that would strengthen the legal force of Recommendations: their implementation by the Member States.

The implementation of Recommendations by OECD Member States by means of a formal acceptance, for example, would create a legal obligation[51]. Unfortunately, unlike Decisions, neither the OECD Convention nor the OECD RP establish a method for implementing a Recommendation. Apart from this, the legal status of Recommendations after their acceptance is not clear at all. Authors such as Schermers and Blokker affirm that a formally accepted Recommendation is substantively identical to a Convention[52]. Even if one rejects this view, one could not deny that Decisions and Recommendations adopted as provided by the constitutional treaty of an IO are part of both, the internal order of the IO, and the international order of its members states.

Decisions and Recommendations only have binding force on the internal order of the IO[53]. This implies that these rules shall bind the international relations of the OECD Members States. As consequence, and to the extent that those acts fulfill the conditions to be legally binding within the IO, they can not be considered an independent source of international law. It is reasonable to assert that Decisions and Recommendations would be considered as relevant rules of international law applicable in the relations between the parties if all requirements of both the country concerned and the IO are satisfied and the Decision or Recommendation has binding force[54]. Consequently, acts of IO should be understood under article 31(3c) VCLT[55].

Notwithstanding all we have just discussed, the MC and the Commentaries provide

48. OECD Convention, art. 6 (3), supra note 38. OECD Rules of procedure, rule 19 (b), supra note 39.

49. See OECD-OCDE, Direction des Affaires Financières, Fiscales et des Entreprises: Code de libération des opérations invisibles courantes, OECD: Paris, 2002, p. 3. See also, Decision of the Council adopting the Code of liberalization of Current Invisible Operations, OECD/C(61)95, http://www. OECD.org/dataoecd/41/21/2030182.pdf. (Updated to September 26, 2005).

50. Van der Bruggen, p. 270, supra note 21. Asociación Española de Asesores Fiscales, p. 12, supra note 30.

51. Schermers, Henry G./Blokker, Niels: International institutional law: unity within diversity, 3a ed., M. Nijhoff:

52. Ibid, p. 762ff, § 1231-§1232.

53. Ibid, p. 755 §.1218.

54. Art. 31(3). Rosenne, Shabtai: The Law of Treaties. A Guide to the Legislative History of the Vienna.

55. In contrast see Engelen, p. 460, supra note 22.

very little information about how OECD Recommendations should actually be implemented. Probably the only relevant case is a Resolution issued in Mexico under the title "Resolución Miscelánea Fiscal de México". This resolution explicitly adopts the 1995 and future OECD Recommendation on the MC and Commentaries. It states that the OECD Commentaries are applicable in the interpretation of the Mexican DTCs as far as the Commentaries are consistent with the text of such treaties. The Resolution also indicates that the applicable versions are the 1995 OECD Commentaries or its future modifications[56]. This Resolution was issued after Mexico deposited its instrument of ratification of the OECD on May 18, 1994.

Apart from the abovementioned, other factors diminish the legal importance of Recommendations as well. In the first place, there is the method of enactment. The last Recommendation adopted by Resolution of the Council dates back to 1997. For almost nine years since, the tax administrations of OECD members states have been expected to follow the Commentaries of the MC as modified from time to time, when applying and interpreting the provisions of their DTCs that are based on these articles[57]. This seems to be applicable to the updates and amendments made by the Committee on Fiscal Affairs (CFA) in 2000, 2003 and 2005[58]. However, according to the OECD Convention, the Council shall be the body from which all acts of the Organisation derive[59]. What's more, the OECD Convention does not empower the Council to delegate its functions. The authority of the CFA on tax matters is insufficient to replace the competence of the Council[60].

A second factor that weakens the "force" of "soft law" attributed to the Commentaries concerns the many disagreements on their interpretation. The reservations and observations of Member States exemplify these disagreements. Unfortunately, as I will demonstrate in a further section of this article, the status of reservations and observations included in the text of the Commentaries is not clear under the OECD Convention and the OECD RP. Apart from this, it is worthwhile to point out again that on a number of occasions the Commentaries are evidently inconsistent with the text of the treaty[61]. In addition, and sometimes as a result thereof, the Commentaries often do not contribute to

56. "Cuarta Resolución de modificaciones a la Resolución Miscelánea Fiscal para 1998 y sus anexos 2, 5, 7, 9, 11 y 14". Secretaría de Hacienda y Crédito Público, 7 de agosto, 1998, México, Diario Oficial de la Federación, rule 2.1.1. Text available in: www.shcp.gob.mx

57. According to the 1997 OECD Recommendation on the MC and Commentaries. See Recommendation I(3), supra note 17.

58. The 2005 up date of the OECD MTC and Commentaries refer to the 1997 Recommendation.

59. OECD Convention, art. 7, supra note 38.

60. The competence of the Council is neither modified by article 9 of the OECD Convention –which allows the establishment of an Executive Committee and such subsidiary bodies as may be required for the achievement of the OECD aims-, nor by the Resolution of the OECD Council [C(71)41]. This Resolution defined the terms of reference of the CFA. The resolution is available at http://webnet3.oecd.org/OECDgroups/ (updated to October 24, 2005).

61. As it happens with the limitation upon «information related to the industrial, commercial or scientific experiences» and the assimilation to the Know-How in the Commentaries to article 12 MC OECD.

achieving the desired harmony of decisions nor do they result in an interpretation with broader international acceptance. These are two objectives that should be reached in the hermeneutical process as some legal scholars propose[62].

Consequences under the Vienna Convention

Taking into account all the points set forth above, it is difficult to believe that an interpretation under the VCLT rules would provide greater binding force to the Commentaries than was agreed upon by the OECD Member States. This also makes it difficult to conclude that the Commentaries define the ordinary or the special meaning of the terms under the VCLT absent member state implementation of the Recommendation. Even more, this obliges to question whether other principles of international law, especially those based on the good faith, would lead to a different conclusion.

Establishing both, the ordinary and special meaning of the terms used by a DTC is a difficult task. Some authors claim that the OECD Commentaries provide the ordinary meaning of DTC terms. For example, Prokisch argues that the OECD Commentaries qualify as ordinary meaning under article 31(1) of the VCLT, due to the creation of a professional tax language: an *international tax language*[63]. However, one should acknowledge that establishing the ordinary meaning requires the analysis of each and all elements covered under article 31 (1 to 3) VCLT.

According to the VCLT general rule of interpretation the ordinary meaning is not necessarily predetermined by a single source of interpretation. The interpreter has to establish the meaning of the terms in the context and in the light of the object and purpose of the DTC. As the literature of international law has acknowledged, this is an objective interpretation based in the intention of the contracting parties as reflected in the text, context, objective and purpose of the DTC[64]. Subjective intent and party expectations do not come under this rule, unless those are part of the treaty text or context. The approach taken by the Committee on Fiscal Affairs on this issue seems to be different, however[65].

On the other hand, a special meaning would be attributable only if it is established that both contracting States so intended. This can be easily determined when the DTC regulates the role to be played by the commentaries. In other cases, however, this can hardly be concluded if one considers the lack of binding force of the Recommendation as well as all other factors that diminish its

62. As proposed by Klaus Vogel and followed by other authors, including Reiner Prokish, amongst others.

63. See in Vogel, p. 485ff, supra note 19.

64. See, Institut de Droit International: Annuaire de l'institut de Droit International; Session de Sienne, vol. XLIV-I, 1952, p. 199. In a similar vein see: Brownlie, Ian: Principles of Public International Law, Clarendon Press: Oxford, 1966, p. 503. Also Sinclair, I. M.: The Vienna Convention on the Law of treaties, Manchester University Press; Oceana Publications: Manchester, Eng. Dobbs Ferry, N.Y., 1973, p. 71.

65. See, 2005 OECD Model Tax Convention, commentaries to article 3(2), num 12, p. 76, supra note 17.

pretended soft law character. As a result of this approach, unlike Ault, I do not think that the OECD Commentaries have the authority to provide special meaning as stipulated by article 31(4) of the VCLT[66], unless the DTC otherwise requires. Instead, the Recommendation is a supplementary source of legal interpretation (its value is thereby persuasive, rather than legally binding).

From the above one can conclude that the Commentaries can be considered a source of DTC interpretation under the general rule of interpretation of the VCLT in only two circumstances. First, if the OECD Member States implemented the Recommendations.

Secondly, if recommendations are explicitly referred to in the text of the DTC or in any document related to such DTC. This second possibility can be illustrated by the Protocol to the 1994 Spanish-Mexican DTC. It explicitly states that some articles of the Treaty have to be interpreted in accordance with the OECD Commentaries to the MC drafted in 1977. The Protocol to the DTC between Spain and Costa Rica[67] has a similar provision, but makes reference to the Commentaries of 2003[68].

It is necessary, therefore, to determine the consequences of implementing the Commentaries. Three clear statements need to be made upfront about the consequences of a possible implementation. First of all, note that implementing the Commentaries does not by itself bestow an independent value upon them. The role of the Commentaries should be determined in accordance with the VCLT and the DTC provisions. Under the VCLT, the Commentaries would be just another element to study together with the context, as provided by article 31(3). Secondly, as previously demonstrated, the OECD Convention and the OECD RP do not support the attribution of an independent legal value to the commentaries. Thirdly, implementing the Recommendation does not confer authentic interpretative character on the Commentaries[69].

3.2 Reservations, observations and positions of third States

The conditions necessary to acknowledge the binding force of the Commentaries cannot be met without addressing the consequences of the reservations and observations made by OECD Member States to the OECD Commentaries, as well as the positions put forth by non-member States. Moreover there are two factors that determine the binding force of these reservations and observations. The first is the role played by the OECD Recommendation[70]. The second

66. Ault, supra note 27.

67. The Treaty is not yet in force.

68. In response to Calderón Carrero, the express reference to the Commentaries would turn the force of hard law to the classic instrument of soft law. Calderón Carrero: Spain's first tax treaty with Costa Rica, in Tax Notes International; vol. 35, n.º 4, 26 July, 2004, p. 349.

69. It has never been accepted by legal scholars, see Vogel, p. 481, supra note 19.

70. Maisto puts forth a similar argument but reaches the opposite conclusion. It is his claim that "observations may be considered as becoming unilateral interpretative declarations at the time a bilateral treaty is concluded". In his opinion observations also fall under the special meaning referred to in article 31(4) of the VCLT. Maisto, p. 18, supra note 27.

corresponds to the rules provided by the IO on this subject.

Under the OECD RP, the OECD itself shall, except as otherwise agreed, indicate the Members to which a Decision or a Recommendation, or part of either of them does not apply. In addition, the OECD shall indicate the conditions under which the Decision or Recommendation may apply to these otherwise exempted Members should the occasion arise[71]. The 1997 Recommendation of the OECD Council, however, does not indicate the status of the reservations and observations transcribed at the end of the Commentaries to each article of the OECD MTC[72]. This Recommendation provides that the Council invites the Governments of OECD Member States to continue to notify the Committee on Fiscal Affairs of their reservations on the Articles and observations on the Commentaries[73].

At present, no one knows whether any OECD Member State has issued notifications of either reservations or observations different from the ones expressed in the Commentaries itself. In any case, however, reservations are expected to have an effect. This point has been recently addressed by the Committee on Fiscal Affairs in the 2005 OECD Commentaries. According to the Committee: "It is understood that insofar as a Member country has entered reservations, the other Member countries, in negotiating bilateral conventions with the former, will retain their freedom of action in accordance with the principle of reciprocity[74].

Furthermore, reservations, observations and positions regarding the OECD Commentaries do not conform to the VCLT definition of "reservation", unless the DTC otherwise provides. If the reservations, observations and/or positions accurately reflect the countries' intention, it seems clear that they must be able to satisfy the requirements of the VCLT[75] and be taken into account as such. Non-OECD member countries are not bound by the Commentaries since they are only addressed to the Member States. This being the case, it is difficult to envisage how positions expressed by Non-OECD member countries in the Commentaries could be binding.

3.3 DTCs and amendments to the OECD MTC and Commentaries

The different versions of the MC and their respective Commentaries also pose significant problems. One issue is whether DTCs are bound to Commentaries issued after their ratification ("later in time"). Again there is no consensus. Some tribunals have recently rejected the legally binding effect of later-in-time Commentaries the way the

71. As stated by the OECD Rules of Procedure, rule 19 (a), supra note 39.

72. 2003 OECD Model Tax Convention on Income and on Capital, see Recommendations I and II, p. 342, supra note 17.

73 2003 OECD Model Tax Convention on Income and on Capital, see Recommendation II, p. 342, supra note 17.

74. 2005 OECD Model Tax Convention on Income and Capital, see Introduction, num 31, p. 15ff, supra note 17.

75. See, VCLT, article 2, paragraph 1d, as well as article 19ff.

U.S. Federal Court of Claims did in *National Westminster Bank PLC v. United States*[76]. Like courts and tribunals, legal scholars are split[77]. Vogel argues that later-in-time Commentaries apply unless they contradict previous Commentaries. If and when they do apply, Vogel asserts, the Commentaries carry the same persuasive weight as expert documents, which express the opinion of the Committee on Fiscal Affairs[78].

Accepting later-in-time modifications of the Commentaries causes many difficulties.

Legal scholars have already noted the apparent lack of legal basis for accepting them[79]. In addition, the OECD itself has created several substantial obstacles, such as its own rigid copyright policy over its own documents. As a result of this policy, it is difficult to access some OECD documents. The OECD created two more obstacles.

First, the OECD allows countries little time to introduce the relevant changes implemented since 1992. Secondly, the OECD sometimes makes it (virtually) impossible to track previous versions. This is due to the widespread use of loose-leaf publications and the absence of annual condensed versions for certain years. The OECD tried to rectify this by including a section on the history in the Commentaries in the loose leaf version of the Commentaries. Unfortunately, this section is not fully reliable[80].

In any case, if the conditions to accept the relevance of the OECD Commentaries in the DTC's interpretation are fulfilled, the controversy would be very similar to the one for the introduction of reforms in domestic law[81]. DTC contracting states parties could explicitly accept or reject the relevant Commentaries in their treaty or in the documents related thereto. This would effectively solve the problem. Germany and Switzerland did just this in their 1971 DTC. Germany and Austria did the same in their 2003 DTC. In the absence of such explicit statements, I agree with Vogel that the relevant inquiry is whether the later-in-time Commentaries clarify or modify a previous DTC. Another option would be to resolve this issue when implementing the OECD Commentaries.

3.4 UN MC Commentaries

The Introduction to the UN MC clearly states that "as all model conventions", the

76. See National Westminster Bank, PLC, v. United States, 44 Fed. Cl. 190 (1999), rep. In Tax Analysts 2003 WTD 245-17 (Dec. 22, 2003). See also comments in Hersey et al.: National Westminster Bank Case and the Ambulatory Nature of the OECD Commentary, in Tax Planning International Review; vol. 31, No. 2, February, 2004, pp. 9-10. See further, Waters, p. 679ff, supra note 26.

77. As far as the Commentaries help to remove the ambiguities; the autonomous interpretation does not invalidate later-in-time Commentaries; they are subject to the Recommendation of the OECD and, as the tribunals do with legal reforms, they could consider the changes to the Commentaries, see Avery Jones, p. 103ff, supra note 25.

78. Vogel, p. 486ff, supra note 19. Considering that, since 1997, the Council recommended that the Committee on Fiscal Affairs should continue the revision of the OECD MTC and propose the periodic up dates, OECD, Model Tax Convention..., 2003, recommendation III, p. 342, supra note 17.

79. Vogel, p. 484, supra note 19.

80. Ibid, p. 487.

81. In a similar vein, see Wattel, Peter J./Marres, Otto: The legal status of the Oecd Commentary and static or ambulatory interpretation of tax treaties, in European Taxation, July/August 2003, p. 224ff. Also, Avery Jones, p. 104, supra note 25.

UN MC is not mandatory; its provisions are not binding and it cannot be construed as a formal recommendation[82]. The Commentaries to the UN MC have not been the subject of a Recommendation or Decision of the UN. However, the introduction to the MC also asserts a "presumption" in favor of the UN Department of International Economic and Social Affairs. Under this presumption, parties are expected to use the UN MC as a source of legal interpretation when construing DTC provisions. Rather than repeating what I have discussed earlier, let point out that virtually all the statements made above regarding Decisions and Recommendations apply equally to other international organisations, including the UN. As such, the "presumption" should not be legally binding.

4. Summary and Conclusions

This article presents a formal approach to the hermeneutic function of the OECD Commentaries. The analysis is based on the legal value attributed to Recommendations under the OECD Convention and the OECD RP. The result of this approach deeply influences the understanding of the 1997 OECD Recommendation under the VCLT. Some factors strengthen the soft binding force of Recommendations, whereas others diminish it. These circumstances determine the application of article 31 or 32 VCLT and, in particular, the establishment of the ordinary and special meaning of the treaty terms.

An overview of all circumstances involved shows that in some cases, the Commentaries can and should contribute to understand the ordinary meaning of the terms agreed in a DTC under the rules provided by the VCLT and the DTC. If an OECD Member State implements the OECD Recommendation, the role of the Commentaries should be studied under Article 31(3c). If a DTC explicitly accepts the value of the Commentaries in the interpretation, the role of the Commentaries has to be quantified in accordance with the text, context, objective and purpose of the DTC.

The importance of the OECD Commentaries to the development of international law is irrefutable. However, some measures should be taken to further increase its great value. This includes some clarification on the means necessary to implement OECD Recommendations by Member States, the method of enactment as well as the ways in which the disagreements on the interpretation expressed through reservations and observations are established. These factors should also be taken into account in the analysis of the role to be played by some principles on international law based in the good faith.

The discussions regarding the role of the Commentaries in interpreting DTCs have also drawn the attention of the tax administration, judges, and legal scholars in Spain. Moreover, in the Spanish context, the role and status of the Commentaries in the interpretation of DTCs are far from clear. Taking all arguments in consideration, I conclude that although careful consideration should be given to the Commentaries when interpreting

82. United Nations, Department of Economic and Social Affairs: United Nations Model Double Taxation Convention between Developed and Developing Countries, UN: New York, 2001, intro, num. 35.

DTCs, the OECD MTC and its Commentaries are far from being considered as expressions of comparative or supranational law, nor are they an authentic interpretation of a DTC.