Policy Forum: The History of Tax Treaty Provisions—And Why It Is Important To Know About It

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ABSTRACT

International, and largely bilateral, income tax treaties perform the significant function of coordinating the interaction of otherwise separate income tax regimes to allocate shared tax bases between nations otherwise able to assert legitimate claims to tax income that is somehow connected to each of them. Inevitably, treaties are compromises between disparate national tax and legal systems and between the tax policy objectives underlying national tax systems. The increasing importance of tax treaties is reflected by, among other things, the importance attached to refining the "permanent establishment" notion and how to attribute profits to a permanent establishment, which are continuing preoccupations of the Organisation for Economic Co-operation and Development and its member nations. There is a rich history underlying the development of modern tax treaties, dating back to the early work sponsored by the League of Nations in the 1920s. Even if some of this work has been eclipsed by modern model income tax conventions and the terms of specific bilateral income tax treaties, it is still important to know the kind of debate that has taken place and the intellectual struggles that have accompanied the adoption of the treaty conventions that play an increasingly important role in allocating international income, particularly where tangible national associations of that income may be difficult to establish. In this article, the authors reflect on the importance of tax treaty history and comment on international developments aimed at making that history accessible.

KEYWORDS: TREATIES ■ INTERPRETATIONS ■ HISTORY ■ INTERNATIONAL TAXATION

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International tax developments bring to mind a paraphrase of a well-known Chinese saying—we do indeed "live in interesting times." The "internationalization" of business, the multiplicity of taxpayers' contacts with different countries, and the functional, organizational, and economic complexities associated with modern commerce have challenged the basic significance of tax treaties generally and the interpretation of their provisions to achieve some measure of international tax order. In this environment, how are we to parse the concept of a tax base that is shared between countries that can establish some legitimate claim to it, when tax jurisdiction is based upon how income is earned and the connections that income earners are considered to have with each of those countries?

Indeed, there is an ongoing and fundamental reconsideration of a number of important tax treaty concepts. This is reflected, for example, in the work of the Organisation for Economic Co-operation and Development (OECD) and, in particular, its continuing study of the attribution of profits to permanent establishments.[1] The OECD's series of reports on this study raise important questions about the significance and scope of the "permanent establishment" concept; the manner in which business is conducted "within" multinational organizations; the resolution of classification and qualification conflicts with respect to the legal nature of income earners and the instrumentalities and legal devices by which income is earned; and, fundamentally, the recognition of another country's legitimate tax claims through the foreign tax credit mechanism. At the same time, courts and income tax tribunals around the world are increasingly being confronted with difficult questions relating to tax jurisdiction. It seems to be the case, particularly for developing economies, that the importance of getting some of these jurisdictional issues "right" the first time is inspiring an unvarnished review of certain international concepts that we have long taken for granted, sometimes producing interesting outcomes. For example, Indian courts and tax tribunals are, apparently routinely, addressing issues of tax jurisdiction, including the nature of a permanent establishment and the extent to which business may be considered to be conducted through an agency. As well, courts in the United Kingdom have recently considered basic questions of corporate residence and have commented on the effects of complex multinational activity on the determination of where business contacts are located.[2] The UK High Court and Court of Appeal have shown themselves ready to adopt a practical and even enlightened view of whether the integrated activities of a corporate group and its use of limited function entities should give rise to tax presence where none is intended. They have understood that it is reasonable to expect that, despite the legal integrity of members of a multinational corporate group, a superior member of the group (that is, the parent corporation) will exercise considerable and in some cases supervening

1 New versions of parts I, II, and III of the OECD study were most recently released on December 21, 2006: Organisation for Economic Co-operation and Development, *Report on the Attribution of Profits to Permanent Establishments: Parts I (General Considerations), II (Banks) and III (Global Trading)* (Paris: OECD, December 2006).

2 *Wood v. Holden (Inspector of Taxes)*, [2005] EWHC 547; aff'd. [2006] EWCA Civ 26.

influence over important aspects of the conduct of the group's business. They have also understood that, inevitably in modern business, much international corporate activity is conducted on functional rather than legal entity lines across political borders.

Such difficult jurisdictional questions cannot be addressed without knowing something about the legal and economic pedigree of tax treaties as instruments of international tax order. Why do tax treaties exist? What did their developers intend to accomplish? What business and political imperatives were the early treaties meant to address? How do they compare to the present imperatives of modern "globalization"? Does an understanding of this background help in developing a more insightful and creative response to contemporary treaty issues?

On the one hand, the relevance of old archival material may be peremptorily dismissed by some on the basis that any significance it might have had has long been eclipsed by the development of modern model income tax conventions and of the legal systems to which those models, and particular income tax treaties patterned on them, apply. However, this response may be much too simple and pessimistic. Income tax rules generally, and tax treaties in particular, have no intrinsic reason to exist except to provide tools—in the case of income tax rules, principally for funding public expenditures and encouraging or discouraging domestic economic activity; and in the case of treaties, for providing some measure of organization about how these rules coexist internationally without impairing business activity and the mobility of capital and persons. Experience in other legal disciplines readily establishes the importance of history and precedent in understanding contemporary legal issues and the administration of legal systems. Indeed, there is such a history even in the tax area with respect to domestic tax law. But the significance of the history of tax treaties in understanding their contemporary role and application is, in a sense, unique.

Tax treaties originated in late 19th and early 20th century "friendship, commerce, and navigation" treaties. The formative work on international tax issues sponsored by the League of Nations in the early part of the 20th century drew on the use of the old treaties to avoid gratuitous impediments to trade attributable to the regulation of business activities. These early model income tax treaties and the work of the League of Nations were significantly influenced by a basic recognition that countries have an interest, both for themselves as nations and on behalf of their nationals, in avoiding impediments to trading relationships and commercial activity occasioned by uncoordinated multiple taxation of the same income and the same taxpayers. At the same time, it must be recognized that each country may nevertheless have a legitimate claim to a shared tax base associated with international commerce; a reliable means of sharing is critical. Countries recognize as well that their national interests are well served, for example, in attracting capital investment, by recognizing their reciprocal tax interests.

It seems possible, if not indeed likely, that understanding how countries came to establish normative rules or guidelines to define primary and secondary tax jurisdiction with respect to income of various kinds on the basis of how the income is earned, should be useful in inferring the meaning and the scope of application of contemporary tax treaty provisions, even if modern treaties have long since surpassed their formative antecedents. For example, basic jurisdictional notions associated with the differences between active and passive income, the identification of business presence with which income-earning activities might be associated, and other like concepts are enduring in modern tax treaties, even if modern tax treaty terms and explanatory commentaries about them have gone beyond the original treaty studies and models. Furthermore, much of the complexity of tax treaty interpretation arises from the complexities of business and commerce. Business, commercial, capital, and personal mobility considerations were influential in determining how the early tax treaties should deal with a shared tax base. The same considerations prevail today and may even be compounded. Increasingly, important elements of income-earning activities are associated with "financial" transactions, the transfer of "intangibles" (manifestations of knowhow, knowledge, efficiency, and synergy), the performance of services across borders, and the delivery of all of these things, in some cases, in a composite form. All of these are not easily accommodated by treaty concepts that seemingly rely on tangible manifestations of connection to a jurisdiction. It is often difficult to determine how to apply tax treaty notions such as "permanent establishment" and how to attribute business profits among competing jurisdictions to these elements of business, and this is only made more difficult where multinational business activity is highly integrated. Yet these are extremely important practical considerations for businesses, which need to understand, on a predictable and reliable basis, not only how the tax systems of particular countries will apply to income-earning activities, but also how, through the framework established by international and largely bilateral tax treaties, countries may be expected to resolve their competing interests with respect to a shared tax base.

There is only a limited body of readily available precedent or history that can help to inform interpretive decisions on the intent and application of tax treaties, to ensure that they reflect the legal and economic decisions taken to outline and define countries' reciprocal tax accommodations. Common-law practitioners are used to having recourse to hundreds of years of precedent to assist them in drawing inferences about the development of the general law in order to understand the significance of contemporary legal concepts, even if the "old law" is arcane and possibly of limited direct relevance to sophisticated modern legal notions. Often, the reasons underlying legal provisions and the way in which the law has sought to understand the circumstances in which they should apply yield rich opportunities to confidently understand and advance contemporary law. The same tradition, although of a different sort, exists in the civil law.

In the tax treaty context, issues of interpretation are generally restricted to a multiplicity of specific tax treaties and a number of model tax treaties on which, typically, they are patterned. Each tax treaty exists to deal with the particular circumstances of the signatories, though the interpretation of tax treaties is generally framed by the basic guidance found in the Vienna Convention on the Law of Treaties.[3]

3 Vienna Convention on the Law of Treaties, signed at Vienna on May 23, 1969, UN Doc. A/Conf. 39/27, fourth annex, UNTS 1155/331 (herein referred to as "the Vienna convention").

It seems that some understanding of the circumstances in which treaties arose, and the considerations underlying the development of particular tax treaty terms, should at least be relevant in provoking insightful examinations of contemporary treaties even if, more directly, that history is of declining relevance. This is particularly the case where the demands of "globalization" challenge the significance and utility of basic tax treaty concepts associated with, for example, the definition of "permanent establishment" to establish business presence and the attribution of income on the basis of business presence in a particular country. A recent example of the relevance of treaty history can be found in David Ward's book *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model*,[4] which includes a discussion of the relatively little-known history of the Vienna convention (a seminal source on matters of treaty interpretation). Ward's study is an illustration of how an awareness of tax history and a comparison of present tax concepts with that history provides insight into the resolution of interpretation questions that might not otherwise be available. However, in the context of tax treaty interpretation, the crucial question is: Where is the history of tax treaties to be found?

This is indeed a difficult question. It is generally well known that in the early part of the 20th century, the League of Nations sponsored formative work underlying the development of modern tax treaties, and that this work was significantly advanced by Mitchell B. Carroll.[5] It is also well known that the OECD and its predecessor have been responsible for the development of various model treaties, culminating, in the second half of the 20th century, with the widely recognized OECD model tax convention and its commentary (recently updated). These model treaties, together with similar models developed by the United Nations and some countries (such as the United States), have provided the basic framework for international taxation through bilateral and multilateral treaties. The OECD has some information about these developments in its archives; however, there is no central repository for such historical material, and no systematic way of knowing what information exists or how it can be accessed. Although a number of scholars have attempted to delve into this potentially rich history, much of it remains unknown and inaccessible.

THE IFA CONFERENCE ON TAX TREATY HISTORY

On November 5, 2004, the Canadian Branch of the International Fiscal Association (IFA), in cooperation with the OECD's Centre for Tax Policy and Administration, sponsored a one-day conference in Toronto. The conference brought together many distinguished scholars and practitioners to explore two basic themes and discuss two basic questions. First, to what extent is it important to understand the history of tax

4 David A. Ward, *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (Kingston, ON: International Fiscal Association (Canadian branch), 2005).

5 Mitchell B. Carroll, *Taxation of Foreign and National Enterprises*, vol. 4, *Methods of Allocating Taxable Income*, League of Nations document no. C.425(b).M.2176(b).1933.II.A (Geneva: League of Nations, 1933).

treaty provisions? Second, if such an understanding is important, how does one go about obtaining access to that history?

The Question of Relevance

The first question was initially addressed in the form of a debate between David Ward (of Davies Ward Phillips & Vineberg LLP, Toronto) and Joel Nitikman (of Fraser Milner Casgrain LLP, Vancouver), on a panel chaired by Scott Wilkie. Other conference participants responded with their own views on the issue.

David Ward expressed the view that the history of tax treaties is of current relevance only when it relates directly to particular treaty provisions in issue in a particular piece of tax litigation. He argued that a tax treaty is akin to a contract between two parties.[6] Accordingly, in interpreting a tax treaty, it is only the intentions of the negotiators of the treaty that are relevant in determining the meaning of terms or phrases contained in the treaty. Since the particular treaty in question would likely be based on an OECD (or predecessor) model, that model and, presumably, the commentary and travaux preparatoires could be relevant to divining the intentions of the negotiators. On this point, none of the conference participants expressed disagreement.

Articles 31 and 32 of the Vienna convention state as follows:

> **Article 31**
>
> 1. 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.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties in an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

6 Ward has consistently maintained this view; see, for example, David A. Ward, "Principles To Be Applied in Interpreting Tax Treaties" (1977) vol. 25, no. 3 *Canadian Tax Journal* 263-70.

Article 32

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.

Many courts seem to be quite willing to consider the applicable model convention in interpreting the provisions of a bilateral income tax treaty; for example, Ward cited the *Cudd Pressure* case, where he had presented evidence relating to the League of Nations' work in the 1920s in order to help interpret the 1942 Canada-US tax convention.[7] However, conference participants did express some disagreement with Ward's position on any further reliance on the history of tax treaties. In Ward's view, any previous model treaty or materials relating thereto would be of very little, if any, value. He suggested that the same position could be taken in respect of subsequent models and supporting materials, but also noted that this question is slightly different and may result in a slightly different response.

Ward's view has some support. He noted that, at the time of the conference, only four cases had considered material from the League of Nations.[8] He also noted that textbook authors do not typically review the history of particular provisions. For example, *Klaus Vogel on Double Taxation Conventions*[9] does not discuss the League of Nations' work in developing tax treaties.

Taking the opposing position in the debate, Joel Nitikman argued that the history of tax treaties has a much broader importance, ranging from use in tax planning to informing the tax treaty negotiation process. Indeed, Nitikman argued that even in the tax litigation context, historical evidence might be considered even though it is not strictly relevant, on the basis that anything that might be relevant could be allowed into evidence and then assigned weight by the trial judge.

Richard Vann (of the University of Sydney) was also very supportive of the view that historical materials can be of significant use in interpreting tax treaties. He provided a specific example of the way in which the historical context of a particular provision can inform the current interpretation, citing paragraph 3 of article 7 of the

7 *Cudd Pressure Control Inc. v. The Queen*, [1999] 1 CTC 1 (FCA). See also *The Queen v. Crown Forest Industries Ltd.*, [1995] 2 CTC 64 (SCC), where the court considered the applicable OECD model convention.

8 *Cudd Pressure*, supra note 7; a Swiss decision of May 28, 1936, Bundesgericht; and two US cases, *The Taisei Fire and Marine Ins. Co., Ltd.*, 104 TC 535 (1995), and *Kimball v. CIR*, 157 F. 2d 816 (1st Cir. 1946).

9 Klaus Vogel et al., *Klaus Vogel on Double Taxation Conventions : A Commentary to the OECD-, UN- and US Model Conventions for the Avoidance of Double Taxation on Income and Capital with Particular Reference to German Treaty Practice*, 3d ed. (London: Kluwer Law International, 1997).

OECD model.[10] He argued that the view that paragraph 3 is a qualification of paragraph 2, evidencing the position that notional payments made by a branch to head office should not be deductible in calculating the profits attributable to a permanent establishment, may be misplaced in light of the relevant historical context. Paragraphs 2 and 3 state:

> 2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.
>
> 3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere.

Vann argued that in order to interpret paragraph 3, one must refer back to the 1945 model convention of the League of Nations, which states, "In determining the net income on the basis of the separate accounting of a permanent establishment, a properly apportioned part of the general expenses of the head office of the enterprise may be deducted."[11] He explained that this provision was necessary because the domestic legislation of a number of countries at that time (and a few currently) prevented the deduction of actual head office expenses, generally because of concern about tax avoidance[12] or because the structure of the domestic legislation in question did not allow the deduction of expenses that were not exclusively related to the earning of income in the particular jurisdiction.[13] (Given that most countries no longer have these rules, Vann suggested that paragraph 3 should be struck from the commentary on the OECD model.) Indeed, Vann argued that the commentary on the 1946 model indicated that the purpose of the income allocation provision was to "place branches of foreign enterprises on the same footing as domestic enterprises,"

10 Organisation for Economic Co-operation and Development, *Model Tax Convention on Income and on Capital: Condensed Version* (Paris: OECD, July 2005) (herein referred to as "the OECD model").

11 Article VI(2) of the protocol to League of Nations, *Model Bilateral Convention for the Prevention of Double Taxation of Income*, League of Nations document no. C.2.M.2.1945.II.A (Geneva: League of Nations, 1945).

12 This concern arose, for example, for many South American countries, presumably because of the relative difficulty of proving expenses incurred abroad.

13 The United Kingdom still applies this rule: see section 74(1)(a) of the Income and Corporations Tax Act 1988 (UK), 1988, c. 1. Canada had a similar rule until the enactment of the Income Tax Act in 1948 (replacing the Income War Tax Act).

suggesting that the deduction of notional expenses is consistent with the development of the model.

In a similar vein, McDonald J in a partially dissenting judgment in *Cudd Pressure* accepted the proposition that notional payments could be deducted in calculating the profits of a permanent establishment (albeit not on the facts in question).[14] He reached this conclusion in part on the basis of the deliberations of the Fiscal Committee of the League of Nations in the 1930s and Mitchell Carroll's report.[15] Nevertheless, judgments such as that of McDonald J in *Cudd Pressure* are the exception to the rule, suggested above, that generally courts do not seem to consider the historical development of tax treaties.

The Question of Accessibility

There may be a very practical explanation for the apparent absence of reference to the early history of tax treaties: a lack of knowledge of and access to organized material. Indeed, one of the underlying themes of the conference was the need to publicize the existence of historical tax treaty materials and encourage scholarly work in the area.

Historical material can generally be divided into two categories: material relating to multilateral agreements such as the various iterations of the OECD model, and material relating to specific tax treaties. In fact, as Richard Vann noted, these two categories are not entirely separate. Just as particular tax treaties are often greatly influenced by model treaties, model treaties are often a reflection of current treaty practice. While Vann observed that, "there is an ongoing interaction between actual treaties and the models," he also noted that treaty negotiators may ignore model treaties or resist changes in their application; for example, the United States' treaty practice has not varied significantly through the years despite changes to the commentary on the OECD model.

Another example of the divergence between treaty practice and model treaties was presented by Peter Harris (of the University of Cambridge). He noted that on the accession of the United States and Canada to the OECD in 1961, negotiations ensued because the model conventions of the Organisation for European Economic Co-operation (OEEC) did not reflect their views; although both countries had been observers in some cases, they had not been involved in the negotiation of the OEEC conventions. The same point can be made in respect of Japan's accession to the OECD in 1964. Accordingly, the study of individual treaties is important, given that the OECD model may not fully reflect treaty practice.

In respect of specific tax treaties, although some background material may be published by the parties (for example, there are technical notes published in respect of the Canada-US income tax convention), publication seems to be the exception rather than the rule. Some material may be made available by the relevant parties in

14 *Cudd Pressure*, supra note 7.

15 Supra note 5.

response to access to information requests; however; comprehensive requests have not been made (or at least have not resulted in comprehensive published materials) for many, if any, treaties, and much of this information may be kept confidential by the relevant governmental party. Indeed, merely locating older tax treaties can be a difficult task. As noted by Richard Vann, the League of Nations general treaty series, which contains some tax treaties, has only recently been made available on the United Nations Web site (for a fee). Fortunately, the Tax Analysts Worldwide Tax Treaties database now contains nearly all the early tax treaties.

However, materials regarding multilateral agreements are more plentiful. Indeed, perhaps the most important message of the conference was that such materials do exist, albeit in a relatively disorganized form that is difficult to access.

Speakers at the conference introduced a variety of historical materials to conference participants. The earliest set of materials dates from the 1920s and includes work done by the International Chamber of Commerce and the League of Nations. Probably the best-known work from this period is the report of four economists (Edwin Seligman of the United States, Sir Josiah Stamp of Great Britain, Professor G.W.J. Bruins of the Netherlands, and Professor Luigi Einaudi of Italy) submitted to the Financial Committee of the League of Nations in 1923,[16] and Carroll's 1933 study for the League of Nations.[17] However, even this work is not easily accessible and possibly not utilized appropriately. (As Peter Harris noted, it appeared that he was the first person in 80 years to read the copy of the report of the four economists kept by Cambridge University.) Michael Graetz of Yale University argued that earlier work done by the Double Taxation Committee of the International Chamber of Commerce in the early 1920s had considerable influence on the League's model treaty of 1928, the bilateral treaties concluded between the world wars, and ultimately the model treaties developed by the OECD.[18] He also noted that while the report of the four economists set out three key principles—that specific categories of income should be classified and assigned to source or residence by objective tests of "economic allegiance"; that residence should not be underestimated as a contribution; and that progressive taxes on income should be the unique province of residence-based taxation—it was the work of T.S. Adams that led to the concepts of source taxation of business income and foreign tax credits.

Aside from the relatively well-known works referred to above, speakers at the conference identified other historical materials relating to the period prior to the end of the Second World War. As mentioned, Michael Graetz highlighted the work of

16 League of Nations, Economic and Financial Commission, *Report on Double Taxation Submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp*, League of Nations document no. E.F.S.73.F.19 (Geneva: League of Nations, 1923) (reprinted in United States, Joint Committee on Internal Revenue Taxation, *Legislative History of United States Tax Conventions*, vol. 4 (Washington, DC: US Government Printing Office, 1962), 4003-55).

17 Supra note 5.

18 See Michael J. Graetz and Michael M. O'Hear, "The 'Original Intent' of U.S. International Taxation" (1997) vol. 46, no. 5 *Duke Law Journal* 1021-1109, for a full review of these issues.

T.S. Adams, such as certain domestic US tax legislation, leading up to the work of the Fiscal Committee of the League of Nations. Graetz also emphasized the somewhat neglected work of that committee in the early 1920s. Philip Baker (of the University of London) and Kees van Raad (of Leiden University) introduced the conference participants to the League of Nations Archive in the United Nations Library in Geneva. Baker highlighted the previous lack of information about these materials by explaining that he first discovered the archive by accident when attending a human rights convention in Geneva. He and van Raad visited the archive on separate occasions and found materials stored in a somewhat unorganized fashion in a number of boxes. They have both attempted to catalogue at least some of these materials, and to make some copies. However, the lack of organization and of scanning or even appropriate photocopying facilities has made the compilation and ultimate publication of these materials very difficult. Among the materials found in the boxes are records relating to sessions of the Fiscal Committee of the League of Nations, questionnaires, background materials, and drafts relating to Carroll's permanent establishment profit allocation study.

As Peter Harris explained, materials relating to the period between 1956 and 1977 are much more accessible. These materials can generally be found in the OECD Archives. Although they may not be very well organized, they are at least available on microfilm and, in later years, on microfiche. Harris led the conference participants through some background to the OECD structure and the history of the various working parties struck to discuss various aspects of international taxation, many of which are still in existence today.[19] Although somewhat familiar to many participants, the material that Harris presented was sufficiently novel (with respect to both content and organization) as to underline the relative obscurity of quite recent history, even to those in the tax community with an interest in tax treaties.

Accessibility and organization of more recent OECD documents are far better than for previous periods. Jacques Sasseville (of the OECD Centre for Tax Policy and Administration), Michael Lang and Friederike Oberascher (of the Vienna University of Economics and Business Administration), and Andrea Parolini (of the law firm of Maisto e Associati and Catholic University in Italy) reviewed the accessibility and organization of the OECD's work since 1977. Sasseville explained that under the OECD's document classification system, some documents are not available to the public; indeed, the vast majority of documents currently produced by the OECD are classified as "confidential," the most secret of the three categories of classification (the other two being "official use" and "unclassified"). Currently, documents are automatically downgraded by one category (from "confidential" to "official use" and from "official use" to "unclassified") after three years, subject to objections from the member countries or the secretary general, but this process has been in place only

19 See Peter Andrew Harris, "Origins of the 1963 OECD Model Series: Working Party Twelve and Article 10" (1999/2000) vol. 15, no. 1 *Australian Tax Forum* 3-72 and "Origins of the 1963 OECD Model Series: Working Party Twelve and Article 10, Annexes 1-9" (1999/2000) vol. 15, no. 2 *Australian Tax Forum* 75-224.

since 1997. Even when a document has been categorized as "unclassified," it may not be published. Since 1997, documents must be published after 10 years (although it is unclear when the 10-year period begins); between 1991 and 1997, the period was 30 years. Sasseville also explained how OECD documents are coded, which was a useful exercise given the complexity of the coding system.

Documents relating to the OEEC and the OECD can be found in two locations. Lang and Oberascher described the OEEC and OECD holdings in the Historical Archives of the European Union in Florence, Italy. The archives, which were established in the mid-1980s, contain materials such as minutes, agendas, notes, and working papers of the OEEC Fiscal Committee and other committees. Parolini described the OEEC and OECD holdings in the OECD Archives in Paris, which include materials relating to minutes of the Committee on Fiscal Affairs, analyses of annual trends in taxation, and work relating to specific amendments to the model convention. The materials at both archives are available in paper form and can be made available on microfilm or microfiche; however, they are not available in digitized form, nor are they organized in user-friendly fashion.

Using History

Richard Vann argued that there might be a negative development in recent years in respect of access to historical materials. Specifically, there is a trend toward including alternative approaches in the commentary on the OECD model; as a result, there are fewer reservations to the commentary and it is more difficult to identify the dynamic between and the attitude of individual countries on particular issues.

Another view is that those who are in the best position to utilize the history of tax treaties have not done so, at least publicly, on a consistent basis (if at all). For example, conference participants noted that for some countries there is a high turnover of treaty negotiators or country representatives to the OECD because government personnel are not encouraged to remain in the civil service for long periods of time. Thus, Nitikman cited the maxim "Those who don't know history are doomed to repeat it." Another example was presented by Guglielmo Maisto (of Maisto e Associati) in describing the evolution of article 8 of the 1977 OECD model.[20] Although article 8 and its predecessors were the subject of much discussion from the mid-1920s, a 1956 working party that studied issues presented by that article was unable either to justify the reference to "place of effective management" or to reject it in favour of residence or domicile on any principled basis. Indeed, David Ward may have found a supporter in Dr. Maisto, who suggested that his own work to date on article 8 was of only limited relevance in interpreting its current incarnation.

In some cases, historical context is ignored entirely. As stated above, Vann noted the frequent deviations between model treaties and treaty practice. He cited another example of a disregard of historical materials, namely, that Carroll's study of the allocation of profits to permanent establishments seemed to have been largely or entirely

20 Organisation for Economic Co-operation and Development, *Model Double Taxation Convention on Income and on Capital* (Paris: OECD, 1977).

ignored by negotiators of treaties concluded in the 1930s and early 1940s, most or all of which were concluded between European states.

Perhaps another example of a possible disregard of the historical development of treaties is the group of recent changes to the commentary on the OECD model dealing with tax avoidance and treaties. As noted by Brian Arnold (of Goodmans LLP, Toronto), until recently, the commentary said little about tax avoidance. The preamble to the model refers to the prevention of tax evasion (as opposed to avoidance) and the previous commentary was somewhat confused on the point; for example, paragraph 7 of the commentary on article 1 stated that treaties "should not . . . help tax avoidance or evasion." The statements in the commentary (prior to January 2003) were incorporated in 1992 and reflected the 1987 OECD reports on the use of base companies and conduit companies.[21] As indicated in paragraph 24 of the commentary on article 1, a "wide majority" of members considered that domestic anti-abuse rules "do not have to be confirmed in the text of the convention to be applicable." Arnold contrasted these statements to the changes made to the commentary in January 2003. Now, according to the commentary, one of the purposes of the OECD model is "to prevent avoidance and evasion." Arnold questioned whether this statement was justified, noting the absence of provisions in the model itself dealing with tax avoidance. This new statement seemed to be "coming out of thin air," in Arnold's view. The same could be said about paragraph 9.3 of the commentary on article 1, which now states that "a proper construction of tax conventions allows them to disregard abusive transactions." Arnold's interpretation of these changes to the commentary recalled an earlier comment by Nitikman that deliberate departures from the historical development of a convention may be acceptable but should be disclosed.

As noted by Arnold, whether or not these changes have "come out of thin air," they give rise to another oft-posed question regarding the significance of historical materials, and that is whether commentary or other interpretive aids that are produced at a certain point in time may inform tax treaties that were concluded prior to that time. To the extent that comments are "new," arguably they are irrelevant to a determination of the intentions of the negotiators of a tax treaty where those negotiations were concluded prior to the comments in question. In contrast, to the extent that later comments merely "clarify" the existing state of affairs, possibly those comments should be relevant. Indeed, Ward argued that commentary on a multilateral model is not relevant to a bilateral treaty entered into prior to the date of the commentary and cited *Natl. Westminster Bank, PLC v. US*[22] and *Cudd Pressure*[23] in support

21 Organisation for Economic Co-operation and Development, "Double Taxation Conventions and the Use of Base Companies" and "Double Taxation Conventions and the Use of Conduit Companies," included as reports R5 and R6, respectively, in the full version of the OECD model.

22 2004-1 USTC 50,105 (Ct. Fed. Cl.).

23 Ward noted that in *Cudd Pressure* the court questioned whether commentary written in the 1970s could be relevant to the interpretation of a treaty concluded in 1942 (see supra note 7, at paragraph 28), but nevertheless considered the commentary on the 1977 OECD model.

of this point. Whether comments are "new" or just "clarify" the existing situation is a particularly difficult point with regard to the changes identified by Arnold, highlighting one of the many issues relating to the use of historical materials to interpret tax treaties.

RECENT EVIDENCE OF THE UTILITY OF HISTORICAL MATERIAL

The utility of historical material with respect to the development of tax treaties is, as a recent example shows, hardly theoretical. The OECD has been engaged for some time in studying the attribution of profits to permanent establishments. In December 2006, the OECD released Parts I, II, and III of its report on the attribution of profits to permanent establishments. This report, particularly in Part I, addresses a number of very difficult issues concerning the assimilation of permanent establishments to legal entity status for purposes of determining profits that should be attributed to them. One question concerns the interaction of paragraphs 2 and 3 of article 7 of the OECD model. In particular, does paragraph 3 simply protect the deductibility of expenses that should otherwise be deductible in computing the attributed profits of a permanent establishment? Or are its implications more extensive, such that it leads to a potential conflict with the "arm's-length principle" that is expressed in the report, and is more generally thought to condition the measurement of permanent establishment profits? In providing guidance on the resolution of the competing interpretations of paragraph 3 in relation to paragraph 2 of article 7, and possibly reflecting Richard Vann's analysis noted earlier in these comments,[24] the December 2006 report refers to the historical origin of paragraph 3.[25] In particular, reference is made to the 1946 League of Nations London Model Tax Convention and history concerning the drafting of the 1963 OECD Double Taxation Convention on Income and Capital. This historical review culminates with changes made in March 1994. Without debating the substantive merits of either interpretation of article 7, it is interesting to observe that, in some of the most immediate and compelling work currently being conducted by the OECD, which concerns provisions of general application in many existing bilateral treaties, the historical development of tax treaties has played a role.

NEXT STEPS

The Toronto conference, which brought together many distinguished scholars and practitioners interested in tax treaties, has become the platform for a much more ambitious project. With the guidance and support of the Canadian Branch of the IFA and the Canadian Tax Foundation (CTF), the continuing cooperation of the OECD through its Centre for Tax Policy and Administration, and the participation of the International Bureau of Fiscal Documentation (IBFD), the Vienna University of

24 See the discussion accompanying note 10 above.

25 Supra note 1, *Part I*, paragraphs 284-290.

Economics and Business Administration, and the Catholic University of Piacenza, the initial gathering in Toronto in 2004 has developed into a project that envisages, in 2007, the establishment of general access to tax treaty materials through searchable Internet access. This group recognizes that the historical background of tax treaty provisions is indeed important to the interpretation of tax treaties. Even though this information is not always well known, it should be identified and preserved, and made available in a fashion that allows it not only to be shared, but also to be debated and studied. The outcome of that debate and study should also be made available. The objective of this project is to provide Web site access (through the facilities of the IBFD, the Canadian Branch of the IFA, and the CTF, among others) to historical material with respect to the development and interpretation of tax treaties and, in this way, to facilitate continuing exchanges of views about this material.