Departures from the OECD Model and Commentaries

Reservations, observations and positions in EU law and tax treaties

edited by Prof. Guglielmo Maisto

1



Vol. 11 EC and International Tax Law Series

Acknowledgements

Forew	ord
-------	-----

Part One "Reservations", "Observations" and "Positions" to the OECD Model

Chapter 1: The Role and Evolution of Reservations, Observations, Positions and Alternative Provisions in the OECD Model Jacques Sasseville

1.1.	Introduction	3
1 .2.	Reservations	4
1.2.1.	Evolution	4
1.2.2.	Role of reservations	8
1.3.	Observations	10
1.3.1.	Evolution	10
1.3.2.	Role of observations	14
1.4.	Positions of non-OECD economies	15
1.4.1.	Evolution	15
1.4.2.	Role of positions	16
1.5.	Alternative provisions	17
1.5.1.	Evolution	17
1.5.2.	Role and form of alternative provisions	19
Chapter 2:	The Legal Status and Effects of Reservations, Observations and Positions to the OECD Model Alberto Vega	23
2.1.	Introduction	23
2.2.	The legal status of reservations, observations and positions to the OECD Model	24
2.2.1.	The legal status of the OECD Model and	
	Commentaries: Brief remark	24
2.2.2.	Reservations to the OECD Model	25
2.2.2.1.	Reservations to the OECD Model and reservations	
	Reservations to the OECD woder and reservations	

Vll

2.2.2.2.	Reservations to the OECD Model as an example	
	of reservations to non-binding instruments	27
2.2.3.	Observations to the Commentaries *	30
2.2.3.1.	Observations to the Commentaries and unilateral	
	interpretative declarations to treaties	31
2.2.3.2.	Observations to the Commentaries as unilateral	
	interpretative declarations to non-binding	
	instruments	33
2.2.4.	Positions to the OECD Model	34
2.3.	Legal effects of reservations, observations and	
	positions, especially for the interpretation of tax	
	treaties	35
2.3.1.	Introduction to the role of the Commentaries in the	
	framework of the rules of interpretation of the	
	VCLT ·	36
2.3.2.	Explicit agreements on the relevance of reservations,	
	observations and positions for the interpretation of	
	tax treaties	40
2.3.3.	Interpretative relevance of reservations, observations	
	and positions in the absence of specific references	
	tothfem	41
2.3.3.1.	Reservations	41
2.3.3.2.	Observations	42
2.3.3.2.1.	Effects of interpretative declarations to a treaty	43
2.3.3.2.2.	Effects of observations to the Commentaries on the	
	OECD Model	46
2.3.3.3.	Positions	48
2.3.3.4.	Reservations, observations and positions to the	
	OECD Model and their relationship with the	
	UN Model	48
2.3.4.	Estoppel and acquiescence	50
2.3.5.	Inter-temporal problems	54
2.3.6.	Other possible effects of reservations, observations	
	and positions	56
2.3.6.1.	Reference for future negotiations of tax treaties	56
2.3.6.2.	Influence on customary norms	57
2.3.7.	Reservations, observations and positions in case law	58
2.4.	Conclusions	61

Chapter 3:	"Reservations" and "Observations" to the OECD Model: Are They Necessary?	63
	LiseLott Margareta Kana	
3.1.	Introduction	63
3.2.	The practicalities of reservations	64
3.3.	The "positions" of non-OECD economies	64
3.4.	- Observations: Their impact and the difficulties	
	thereof	65
3.5.	Concluding remarks	68

Part Two OECD Model and EU Law

t

Chapter 4:	Union Law and OECD Model Concepts: What Can We Learn from the Comparison? <i>Michael Lang</i>	73
4.1.	Similarities and differences	73
4.2.	Interpretation and application	76
4.2.1.	Relevance of domestic law	76
4.2.2.	Authentic languages	77
4.2.3.	Equivalence and effectiveness	78
4.2.4.	Anti-abuse-concepts	83
4.3.	Dispute settlement	86
4.3.1.	Mutual agreements	86
4.3.2.	Arbitration Convention	87
4.3.3.	ECJ competence	89
4.3.4.	Combining ECJ competence and MAP?	90
4.4.	Conclusion	95
Chapter 5:	Relevance of (Deviations from) the OECD Model and Commentary in ECJ Income Tax Case Law <i>Peter Wattel</i>	97
5.1.	Preliminary constitutional observations	97
5.2.	Primary EU law is a one huge deviation from incompatible OECD soft law; but secondary EU	
	law often – more or less – conforms	- 99

Interpretation of EU law terms and concepts drawn from OECD soft law and bilateral tax treaty	
practice	102
The ECJ seems to reward OECD conformity, but	
does not condemn treaty overrides	104
Conclusion	108
Relevance of the OECD Model and Its	
Commentaries in European VAT	111
Andrea Parolini	
Introduction	111
Relevance of the OECD Model for the	
interpretation of concepts/notions laid down in	
VAT legislation	• 112
Permanent establishment vs fixed establishment	112
Arm's length principle vs open market value	114
Conclusions	116
	from OECD soft law and bilateral tax treaty practice The ECJ seems to reward OECD conformity, but does not condemn treaty overrides Conclusion Relevance of the OECD Model and Its Commentaries in European VAT <i>Andrea Parolini</i> Introduction Relevance of the OECD Model for the interpretation of concepts/notions laid down in VAT legislation Permanent establishment vs fixed establishment Arm's length principle vs open market value

Part Three

Revisiting and Reviewing "Reservations", "Observations" and "Positions" to the OECD Model – Selected Provisions

Chapter 7:	National Model Conventions Developed by OECD Member Countries <i>Claudine Devillet</i>	121
7.1.	Almost all OECD member countries are likely to	
	develop a national model convention	121
7.2.	Status of public national models	122
7.3.	Why make a national model public?	123
7.3.1.	Requests for greater transparency of the country's	
	tax treaty policy	123
7.3.2.	Information of all interested parties about the	
	country's basic treaty policy	124
7.3.3.	Assurance that negotiators conform to the model or	-
	explain and justify divergences	126
7.3.4. –	To give more weight to specific positions of the	
	country	128
7.4.	Departures from the OECD Model	130
7.5.	Necessity to periodically revise a national model \mathbb{R} .n'	131

7.6. 7.7.	Withdrawal of a public national model Why do many countries decide not to publish their	132
	model?	133
Chapter 8:	Revisiting and Reviewing "Reservations", "Observations" and "Positions" to the OECD Model – Selected Provisions: OECD Member Countries	135
	Paolo Arginelli and Michael Dirkis	
8.1.	Introduction	135
8.2.	Historical evolution of reservations and observations in the Commentary to the OECD	
	Model	137
8.3. i	General considerations	138
8.4.	Statistical data analysis	141
8.4.1.	Analysis by country	142
8.4.2.	Analysis by article	143
8.4.3.	Analysis by subject matter	144
8.4.4.	Reservations and other model conventions	145
8.5.	Selected topics	146
8.5.1.	Reservations and observations concerning shipping	,
	inland waterways transport and air transport	146
8.5.2.	Reservations and observations on the qualification	
	of certain items of income as dividends, interest, or	
	capital gains	150
8.5.3.	Reservations concerning certain offshore activities	-155
8.5.4.	Reservations on the taxation of royalties at source	157
8.5.5.	Reservation on the definition of royalties: Inclusion	l
	of income from industrial, commercial and	
	scientific equipment (ICS)	159
8.5.6.	Reservations and observations concerning the	
	mutual agreement procedure	161
8.5.7.	Observations concerning the application of tax	
	treaties to partnerships	162
8.5.8.	Observations concerning the interaction between	
	domestic anti-avoidance rules (including CFC	
	provisions) and tax treaties	165
8.6.	Issues arising from the existence of observations	
	and reservations	168
8.7.	Conclusions	176
8.8.	Annex	176

Part Four Country Reports

Chapter 9:	Australia	187
-	Michael Dirkis and Micah Burch	
9.1.	Tetroduction	187
9.1. 9.2.	Introduction	187
	Treaty practice and national tax treaty model	
9.2.1.	National models	189
9.2.2.	Treaty practice	190
9.2.2.1.	Article 1 (persons covered)	190
9.2.2.2.	Article 2 (taxes covered)	191
9.2.2.3.	Article 3 (general definitions)	192
9.2.2.4.	Article 4 (resident)	192
9.2.2.5.	Article 5 (permanent establishment)	¹ 194
9.2.2.6.	Article 6 (immovable property)	198
9.2.2.7.	Article 7 (business profits)	199
9.2.2.8.	Article 8 (ships and air transport)	201
9.2.2.9.	Article 9 (associated enterprise)	203
9.2.2.10.	Article 10 (dividends)	204
9.2.2.11.	Article 11 (interest)	206
9.2.2.12.	Article 12 (royalties)	207
9.2.2.13.	Article 13 (alienation of property)	208
9.2.2.14.	Former article 14 (independent personal services)	210
9.2.2.15.	Article 15 (income from employment)	211
9.2.2.16.	Article 16 (directors'fees)	213
9.2.2.17.	Article 17 (artistes and sportsmen)	213
9.2.2.18.	Article 18 (pensions)	213
9.2.2.19.	Article 19 (government service)	215
9.2.2.20.	Article 20 (students)	215
9.2.2.21.	Teachers and academics articles	216
9.2.2.22.	Fringe benefits articles	216
9.2.2.23.	Article 21 (other income)	217
9.2.2.24.	Source of income article	218
9.2.2.25.	Article 22 (capital)	218
9.2.2.26.	Article 24 (non-discrimination)	218
9.2.2.27.	Article 25 (mutual agreement procedure)	219
9.2.2.28.	Article 26 (exchange of information)	220
9.2.2.29.""	Article 27 (assistance in the collection of taxes)	220
9.2.2.30.	Article 28 (members of diplomatic missions	
	and consular posts) ,	221
9.2.2.31.	Limitation on benefits article	221

9.3.	Observations, reservations and positions recorded	
	in the OECD Commentaries	221
.9.3.1.	The relevance of observations, reservations and	
	positions recorded in the OECD Commentaries for	
	the purpose of applying tax treaties	221
9.3.1.1.	Legal status of tax treaties	222
9.3.1.2.	Tax treaty interpretation and legal status	
	of OECD Commentaries	223
9.3.1.3.	Inter-temporal application of OECD	
	Commentaries	228
9.3.2.	Observations, reservations and positions recorded	
	by Australia in the OECD Commentaries	229
9.4.	Conclusion –	229
Chapter 10:	Austria	231
•	Michael Wenzl	
10.1.	Treaty practice and national tax treaty model	231
10.1.1.	Austrian treaty policy in a nutshell	231
10.1.2.	The Austrian Model	233
10.1.2.1.	The Austrian Model as a starting point for	
	treaty negotiation	233
10.1.2.2.	Important departures of the Austrian Model	
	from the OECD Model	234
10.1.2.2.1.	Personal and material scope of application	
	(arts. 1-4 OECD Model)	234
10.1.2.2.2.	Passive income (arts. 10-12 OECD Model)	235
10.1.2.2.3.	Income from employment (arts. 15-16 and	
	18-20 OECD Model)	240
10.1.2.2.4.	Other income (art. 21)	242
10.1.2.2.5.	Mutual agreement procedure (art. 25 OECD	
	Model)	243
10.1.2.2.6.	Assistance in the collection of taxes (art. 27	
	OECD Model)	243
10.1.2.3.	Treaty practice – Most common departures from	
	the OECD Model in the Austrian treaty network	244
10.1.2.3.1.	Personal and material scope of application	
	(arts. 1-4)	244
10.1.2.3.2.	Business income (arts. 5-9)	245
10.1.2.3.3.	Passive income (arts. 10-12)	247
10.1.2.3.4.	Capital gains (art. 13)	248
10.1.2.3.5.	Income from employment (arts. 15-16 and 18-20)	249

10.1.2.3.6.	Artistes and athletes (art. 17)	249
10.1.2.3.7.	Methods for elimination of double taxation	
	(art. 23)	250
10.1.2.3.8.	Non-discrimination and mutual agreement	
	procedure (arts. 24-25)	250
10.1.2.3.9.	Exchange of information (art. 26)	251
10.2.	Observations, reservations and positions recorded	
	in the OECD Commentaries	251
10.2.1.	The relevance of observations, reservations and	
	positions recorded in the OECD Commentaries	
	for the purpose of applying tax treaties	251
10.2.1.1.	Legal status of the OECD Commentaries	251
10.2.1.2.	Changes in the OECD Commentaries	253
10.2.1.3.	Legal status of observations, reservations and	
	positions	»255
10.2.2.	Observations, reservations and positions recorded	
	by Austria in the OECD Commentaries	257
10.2.2.1.	Current observations, reservations and positions	257
10.2.2.2.	Historical evolution of observations, reservations	
	and positions	258
10.2.2.2.1.	Reservation regarding article 12 of the OECD	
	Model – Royalties	258
10.2.2.2.2.	Reservation regarding article 26 of the OECD	
	Model – Exchange of information	259
10.3.	Differences between the OECD Model and its	
	Commentaries and EU law	263
10.3.1.	Differences between OECD Model concepts and	
	EU law concepts	263
10.3.1.1.	Beneficial owner	263
10.3.1.2.	Permanent establishments	265
10.3.1.3.	Non-discrimination	266
10.3.2.	Derivations of the Austrian treaty network caused	
	by EU law	268
10.3.2.1.	Passive income and withholding tax	268
10.3.2.2.	Tax Recovery Directive	269
10.3.2.3.	The ECJ as arbitrator	269
Chapter 11:	Belgium	271
	Jasper Bossuyt and Filip Debelva	
11.1.	Introduction	271
11.2.	Departures from the OECD Model in the	
	Belgian Kfodel	274

•'

Persons covered	274
Taxes covered	275
General definitions	276
Resident	276
Permanent establishment	277
Business profits	278
Shipping and air transport	278
Associated enterprises	279
Dividend	281
Interest	283
Royalty	285
Capital gains	286
Income from employment	287
Directors'fees	288
Artists and sportsmen	289
Pensions	289
Other income	290
Elimination of double taxation	292
Non-discrimination	295
Mutual agreement procedure (MAP)	295
	296
Miscellaneous	296
Observations, reservations and positions recorded	
in the OECD Commentaries	297
General	297
Current and former reservations to the OECD	
Model	298
Current and former observations to the	
Commentary of the OECD Model	309
Case law	311
Legal status of reservations and observations under	
Belgian law	314
Tax treaty does not confirm use of the	
	315
•	316
Differences between the OECD Model and its	
Commentaries and EU law	320
Permanent establishment	320
Dividend	320
Interest	321
Royalty	322
	Taxes coveredGeneral definitionsResidentPermanent establishmentBusiness profitsShipping and air transportAssociated enterprisesDividendInterestRoyaltyCapital gainsIncome from employmentDirectors'feesArtists and sportsmenPensionsOther incomeOther incomeNon-discriminationMutual agreement procedure (MAP)Exchange of informationMiscellaneousObservations, reservations and positions recordedin the OECD CommentariesGeneralCurrent and former reservations to the OECDModelCurrent and former observations to theCommentary of the OECD ModelCase lawLegal status of reservations and observations underBelgian lawTax treaty does not confirm use of theCommentary for interpretation purposesTax treaty confirms use of the Commentaryfor interpretation purposesDifferences between the OECD Model and itsCommentary for interpretation purposesDifferences between the OECD Model and itsCommentaries and EU lawPermanent establishmentDividendInterest

.

11.4.5.	Beneficial owner	322
11.4.6.	Discrimination	324
11.5.	Deviations from OECD Model of bilateral tax	
	treaties inspired by EU law	325
Chapter 12:	China (People 's Rep.) <i>Yimin Kou</i>	327
12.1.	Introduction to China's tax treaties	327.
12.2.	Departures from the OECD Model and	
	Commentaries	330
12.2.1.	Difference between the China-Singapore Tax	
	Treaty and the OECD Model	330
12.2.2.	Departures from the OECD Model in terms of	
	Chinese tax treaties	<334
12.2.2.1.	Departures regarding definitions	334
12.2.2.1.1.	Departures regarding "enterprises" and "business"	334
12.2.2.2.	Departures regarding "Resident of a Contracting	
	State"	335
12.2.2.3.	Departures from the second sentence of article 4	336
12.2.2.4.	Departures on "permanent establishment" (PE)	338
12.2.2.4.1.	Departures on project PE	338
12.2.2.4.2.	Departures on service PE	339
12.2.2.5.	Departures on "international transportation"	340
12.2.2.6.	Departures on "dividend"	340
12.2.2.7.	Departures regarding "royalty"	341
12.2.2.8.	Departures on "capital gain"	341
12.2.2.9.	Departures on tax sparing credit	342
12.2.2.10.	Departures on mutual assistance in the collection	
	on taxes	342
12.2.3.	Departures in the OECD Commentary	343
12.2.3.1.	Departures on the interpretation of the terms	
	"enterprises of a Contracting State" and	
	"enterprise of the other Contracting State"	343
12.2.3.2.	Departures from the second sentence of article 4	344
12.2.3.3.	Departures on "permanent establishment"	345
12.2.3.3.1.	Departures on "delivery of spare parts"	345
12.2.3.3.2.	Departures on treatment of a mixed contract	346
12.2.3.3.3".	Departures regarding the profit allocated to a PE	347
12.2.3.3.4.	Departures on non-discrimination on PE	349
12.2.3.3.4.1.	Departures on indirect tax credit	349
12.2.3.3.4.2.	Departures on the deemed profit ratio s.i'	350

12.2.3.4.	Departures on international transportation	352
12.2.3.5.	Departures on "royalty"	353
12.2.3.6.	Departures on "beneficial ownership"	357
12.3.	Observations, reservations and positions recorded	
	in the OECD Commentaries	360
12.4.	The tendency of norm maker and possibility of a	
	future national model	363
Chapter 13:	Germany	369
	Christian J. Schmidt	
13.1.	Summary	369
13.2.	The German Model (2013)	370
13.2.1.	Structure	372
13.2.2!	Title and preamble	372
13.2.3.	Scope of the Model and definitions	373
13.2.3.1.	Contracting state $-$ Article $3(1)(1)$ of the German	
	Model (2013)	373
13.2.3.2.	Competent authority – Article $3(1)(8)$ of the	
	German Model (2013)	373
13.2.3.3.	Permanent establishment - Article 5 of the	
	German Model (2013)	374
13.2.4.	Distributive rules	375
13.2.4.1.	PE taxation – Article 7 of the German	
	Model (2013)	375
13.2.4.1.1.	Functionally separated entity approach as the	
	authorized OECD approach (AOA)	375
13.2.4.1.2.	Corresponding adjustment – Article 7(3) of the	
	German Model (2013)	375
13.2.4.2.	Sondervergiitungen	376
13.2.4.3.	Transfer pricing – Article 9 of the German	
	Model (2013)	376
13.2.4.4.	Dividends – Article 10 of the German	
	Model (2013)	376
13.2.4.4.1.	Definitions	376
13.2.4.4.2.	Participation exemption	377
13.2.4.4.3.	Procedural rules for taxation	
	at source	379
13.2.4.5.	Interest – Article 11 of the German Model (2013)	379
13.2.4.6.	PE sandwich	381
13.2.4.7.	Royalties – Article 12 of the German Model (2013)	381
13.2.4.8.	Capital gains	382

13.2.4.9.	Independent personal services	384
13.2.4.10.	Income from employment-Article 14 of the (2012)	204
12 2 4 11	German Model (2013)	384
13.2.4.11.	Income of artistes and sportsmen – Article 16of	205
12 2 4 12	the German Model (2013)	385
13.2.4.12.	Maintenance payments	386
13.2.5.	Method for elimination of double taxation	387
13.2.5.1.	Exemption	387
13.2.5.2.	Switch-over clause	391
13.2.5.3.	Subject-to-tax clause	394
13.2.6.	Anti-abuse clause – Article 28 of the German	
	Model (2013)	395
13.2.7.	Treaty benefits for investment funds	396
13.2.8.	Arbitration procedure – Article 24(5) of the	
	German Model (2013)	«397
13.2.9.	Exchange of information – Article 25 of the	
	German Model (2013)	398
13.3.	Treaty practice	398
13.3.1.	Residence	398
13.3.2.	Saving clause	399
13.3.3.	Partnership provision , .	399
13.3.4.	Income from immovable property	400
13.3.5.	Sohdervergutungen	400
13.3.6.	Dividends	401
13.3.7.	Interest	402
13.3.8.	Royalties	403
13.3.9.	Professional hiring-out of labour	404
13.3.10.	Remittance base clause	405
13.3.11.	GAAR	405
13.4.	Observations, reservations and positions recorded	
	in the OECD Commentaries	405
13.4.1.	The relevance of observations and reservations	
	recorded	405
13.4.2.	Observations, reservations and positions recorded	
	by the relevant country in the OECD	
	Commentaries	409
13.4.2.1.	Paragraph 32 of the Commentary on Article 4 of	.07
10.1.2.1.	the OECD Model (2010)	409
13.4.2.2.""	Paragraph 43 of the Commentary on Article 5 of	107
10.1.4.4.	the OECD Model (2010)	409
13.4.2.3.	Paragraph 45.7-9 of the Commentary pn Article 5	707
19.7.4.9.	of the OECD Model (2010)	410
	iV	410

13.4.2.4.	Paragraph 29 of the Commentary on Article 8 of the OECD Model (2010)	411
13.4.2.5.	Paragraph 17 of the Commentary on Article 9 of	
12.4.2.6	the OECD Model (2010)	411
13.4.2.6.	Paragraph 32 of the Commentary on Article 12 of the OECD Model (2010)	412
13.4.2.7.	Paragraph 13.1 of the Commentary on Article 15	
	of the OECD Model (2010)	412
13.4.2.8.	Paragraph 16 of the Commentary on Article 15 of the OECD Model (2010)	413
13.4.2.9.	Paragraph 15 of the Commentary on Article 17 of	
	the OECD Model (2010)	413
13.4.2.10.	Paragraph 82 of the Commentary on Article 24 of	
	the OECD Model (2010)	413
13.5. '	EU law	414
13.5.1.	Residence	414
13.5.2.	PE losses	415
13.5.3.	Dividends	415
13.5.4.	Interest and Royalties Directive and beneficial	
	ownership	416
13.5.5.	Discrimination and most-favoured-nation clauses	418
13.5.6.	EU Arbitration Convention	420
apter 14:	Italy	421
	Giorgia Zanetti	
14.1.	Treaty practice and national tax treaty model	421
14.1.1.	Treaty practice	421
14.1.1.1.	Deviations related to reservations made	
	by Italy to the Commentary to the OECD Model	422
14.1.1.2	Deviations related to alternative provisions	
	suggested in the OECD Commentaries	425
14.1.1.3.	Other deviations	433
14.1.1.4.	Application of tax treaties by tax authorities and	
	judiciary not in line with the Commentaries of the	
	OECD Model	434
14.2.	Observations, reservations and positions recorded	
1 4 9 1	in the OECD Commentaries	438
14.2.1.	The relevance of observations, reservations and	
	positions recorded in the OECD Commentaries for	
	the purpose of applying tax treaties	438

14.2.2.	Observations, reservations and positions recorded	
	by Italy in the OECD Commentaries	443
14.3.	Differences between the OECD Model and its	
	Commentaries and EU law	450
Chapter 15:	Netherlands	459
	Lucas J. de Heer	
15.1.	Tax treaty practice in the Netherlands	460
15.1.1.	Introduction	460
15.1.2.	Residency for tax treaty purposes	460
15.1.3.	The so-called KLM provision	464
15.1.4.	Taxation of offshore activities	466
15.1.5.	Pensions	468
15.1.6.	Readmission clause immigrants	470
15.2.	Observations, reservations and positions recorded	
	in OECD Commentaries	470
15.2.1.	Relevance of observations, reservations and	
	positions recorded in OECD Commentaries for the	
	purpose of applying tax treaties	470
15.2.1.1.	Introduction	470
15.2.1.2.	Observations vs reservations	471
15.2.1.3.	Observations determinative for legal nature of	
	OECD Commentary	472
15.2.1.4.	Treaty policy regarding observations and	
	reservations in the Netherlands	474
15.2.1.5.	Dynamic application of the Commentary and	
	inter-temporal application of observations	474
15.2.2.	Observations and reservations made by the	
	Netherlands	477
15.2.2.1.	Articles 1 and 23A/B: Application of the OECD	
	Partnership Report	477
15.2.2.2.	Article 1: Domestic anti-avoidance rules	480
15.2.2.3.	Article 13: Capital gains on real estate investment	
	entities	481
15.2.2.4.	Article 19: Apportionment of pension payments	482
15.3.	Impact of EU law on Dutch tax treaties	484
15.3.1.	Introduction	484
15.3.2. •*	Triangular cases	485
15.3.3.	Withholding taxes	485

Chapter 16: Spain		487	
	Ignacio Gordillo F. Villavicencio		
16.1.	Treaty practice and national tax treaty model	487	
16.1.1.	Spanish treaty practice		
16.1.1.1.	The most recurrent deviations from the		
	OECD Model of the tax treaties concluded by		
	Spain and the policy reasons thereof	487	
16.1.1.1.1.	Deviations stemming from Spain's reservations		
	and observations	489	
16.1.1.1.1.1.	Deviations as regards income and gains from, and		
	capital represented by, immovable property	489	
16.1.1.1.1.2.	Deviations as regards royalty income	490	
16.1.1.1.1.3.	Deviations regarding business profits and income		
'	from independent professional services	491	
16.1.1.1.1.4.	Deviations regarding dividend and interest income	492	
16.1.1.1.1.5.	Deviations as regards taxation of substantial		
	participations in resident companies	493	
16.1.1.1.2.	Deviations stemming from alternative provisions		
	suggested in the Commentaries of the OECD		
	Model	493	
16.1.1.1.2.1.	Deviations consisting in the inclusion of anti-abuse		
	clauses	493	
16.1.1.1.2.2.	Deviations regarding interest income	494	
16.1.1.1.2.3.	Deviations as regards taxation of income from		
	international traffic		
16.1.1.1.2.4.	. Deviations as regards taxation of income derived		
	from artistic and sports events supported by		
	public funds	494	
16.1.1.1.2.5.	Deviations regarding the definition of the		
	geographical scope	495	
16.1.1.1.3.	Other deviations	495	
16.1.1.1.3.1.	Deviations regarding dividend and interest income	495	
16.1.1.1.3.2.	Deviations related to the methods to avoid double		
	taxation	496	
16.1.1.1.3.3.	Deviations as regards taxation of income derived by		
	students, visiting scholars and researchers	496	
16.1.1.1.3.4.	Deviations as regards taxation of profits from		
	international transport	497	
16.1.1.1.3.5.	Deviations regarding the objective scope of the		
	convention	497	
16.1.1.1.3.6.	Other recurrent and relevant deviations	497	

16.1.1.2.	Cases where the application of Spain's tax treaties	
	by its tax authorities and judiciary is not in line	
	with the interpretation of the OECD Model	
	included in the Commentaries	498
16.1.1.2.1.	A too far-reaching ambulatory interpretation of	
	the Commentaries	498
16.1.1.2.2.	Permanent establishment issues	499
16.1.1.2.2.1.	Contract manufacturers and distributor agents	
	resulting from business restructurings	500
16.1.1.2.2.2.	Restrictive interpretation of the auxiliary or	
	preparatory character of certain activities	501
16.1.1.2.2.3.	A Spanish website may be a PE under article 5(1)	
	of the OECD Model	501
16.1.1.2.3.	Royalty income	501
16.1.1.2.3.1.	Partial alienation of IP rights	502
16.1.1.2.3.2.	Software and computer programs	502
16.1.1.2.3.3.	Alienation of know-how not possible	503
16.1.1.2.3.4.	Income from technical assistance regarded as	
	royalties	503
16.1.1.2.3.5.	Image rights	503
,16.1.1.2.4.	Other relevant deviations,	504
16.1.1.2.4.1.	Capital gains other than those arising from the	
	alienation of property	504
16.2.	Observations, reservations and positions recorded	
	in the OECD Commentaries	504
16.2.1.	The relevance of observations, reservations and	
	positions recorded in the OECD Commentaries for	
	the purpose of applying tax treaties	504
16.2.1.1.	The legal status of observations, reservations and	
	positions recorded in the OECD Model under	
	Spanish law	504
16.2.1.2.	The relevance of observations, reservations and	
	positions for the purpose of interpreting tax	
	treaties	507
16.2.1.2.1.	Spanish case law	508
16.2.1.2.2.	Spanish tax authorities' position	511
16.2.1.2.3.	Spanish academic writings	513
16.2.1.3.	Inter-temporal application of observations and	010
· · · 2 · 1 · 2 ·	positions in tax treaty interpretation	516
16.2.1.3.1.	Spanish case law	517
16.2.1.3.2.	Spanish tax authorities' position .	518
10.2.1.2.2.	opunion un autionnos position .	510

* v'

16.2.1.3.3.	Spanish academic writings	519
16.2.2.	Observations and reservations recorded by Spain	
	in the OECD Commentaries	520
16.2.2.1.	Reservations and observations currently recorded	
	by Spain and the policy reasons thereof	520
16.2.2.1.1.	Current Spanish reservations	520
16.2.2.1.2.	Current Spanish observations	523
16.2.2.2.	Reservations and observations recorded in the past	
	and now deleted by Spain, and the policy reasons	
	thereof	524
16.2.2.2.1.	Old Spanish reservations	524
16.2.2.2.2.	Old Spanish observations	529
16.3.	Differences between the OECD Model and its	
	Commentaries and EU law	530
16.3.1!	The influence of the OECD Model and its	
	Commentaries on the construction of EU legal	
	concepts and the existing differences between	
	comparable concepts	530
16.3.2.	Deviations from the OECD Model related to	
	EU law in Spain's treaty network	535
Chapter 17:	United States	537
Chapter 17:	United States Omri Marian and Yariv Brauner	537
-	Omri Marian and Yariv Brauner	
17.1.	<i>Omri Marian and Yariv Brauner</i> Introduction	537 537
-	<i>Omri Marian and Yariv Brauner</i> Introduction US Tax Treaty Model and deviations from OECD	537
17.1. 17.2.	<i>Omri Marian and Yariv Brauner</i> Introduction US Tax Treaty Model and deviations from OECD Model: Current policies and developing trends	537 538
17.1. 17.2. 17.2.1.	<i>Omri Marian and Yariv Brauner</i> Introduction US Tax Treaty Model and deviations from OECD Model: Current policies and developing trends The US Model	537 538 538
17.1. 17.2. 17.2.1. 17.2.2.	<i>Omri Marian and Yariv Brauner</i> Introduction US Tax Treaty Model and deviations from OECD Model: Current policies and developing trends The US Model Current key US deviations from the OECD Model	537 538 538 540
17.1. 17.2. 17.2.1. 17.2.2. 17.2.2.1.	<i>Omri Marian and Yariv Brauner</i> Introduction US Tax Treaty Model and deviations from OECD Model: Current policies and developing trends The US Model Current key US deviations from the OECD Model The saving clause	537 538 538 540 541
17.1. 17.2. 17.2.1. 17.2.2. 17.2.2.1. 17.2.2.2.	<i>Omri Marian and Yariv Brauner</i> Introduction US Tax Treaty Model and deviations from OECD Model: Current policies and developing trends The US Model Current key US deviations from the OECD Model The saving clause The omission of state and local taxes	537 538 538 540 541 542
17.1. 17.2. 17.2.1. 17.2.2. 17.2.2.1. 17.2.2.2. 17.2.2.3.	<i>Omri Marian and Yariv Brauner</i> Introduction US Tax Treaty Model and deviations from OECD Model: Current policies and developing trends The US Model Current key US deviations from the OECD Model The saving clause The omission of state and local taxes No territorial extension	537 538 538 540 541 542 545
17.1. 17.2. 17.2.1. 17.2.2. 17.2.2.1. 17.2.2.2. 17.2.2.3. 17.2.2.4.	<i>Omri Marian and Yariv Brauner</i> Introduction US Tax Treaty Model and deviations from OECD Model: Current policies and developing trends The US Model Current key US deviations from the OECD Model The saving clause The omission of state and local taxes No territorial extension Corporate residence – Place of incorporation	537 538 538 540 541 542 545 546
17.1. 17.2. 17.2.1. 17.2.2. 17.2.2.1. 17.2.2.2. 17.2.2.3. 17.2.2.4. 17.2.2.5.	Omri Marian and Yariv Brauner Introduction US Tax Treaty Model and deviations from OECD Model: Current policies and developing trends The US Model Current key US deviations from the OECD Model The saving clause The omission of state and local taxes No territorial extension Corporate residence – Place of incorporation Branch taxes	537 538 538 540 541 542 545
17.1. 17.2. 17.2.1. 17.2.2. 17.2.2.1. 17.2.2.2. 17.2.2.3. 17.2.2.4.	Omri Marian and Yariv Brauner Introduction US Tax Treaty Model and deviations from OECD Model: Current policies and developing trends The US Model Current key US deviations from the OECD Model The saving clause The omission of state and local taxes No territorial extension Corporate residence – Place of incorporation Branch taxes FIRPTA and gains from the alienation of real	537 538 538 540 541 542 545 546 549
17.1. 17.2. 17.2.1. 17.2.2. 17.2.2.1. 17.2.2.2. 17.2.2.3. 17.2.2.4. 17.2.2.5. 17.2.2.6.	<i>Omri Marian and Yariv Brauner</i> Introduction US Tax Treaty Model and deviations from OECD Model: Current policies and developing trends The US Model Current key US deviations from the OECD Model The saving clause The omission of state and local taxes No territorial extension Corporate residence – Place of incorporation Branch taxes FIRPTA and gains from the alienation of real property	537 538 538 540 541 542 545 546
17.1. 17.2. 17.2.1. 17.2.2. 17.2.2.1. 17.2.2.2. 17.2.2.3. 17.2.2.4. 17.2.2.5.	Omri Marian and Yariv Brauner Introduction US Tax Treaty Model and deviations from OECD Model: Current policies and developing trends The US Model Current key US deviations from the OECD Model The saving clause The omission of state and local taxes No territorial extension Corporate residence – Place of incorporation Branch taxes FIRPTA and gains from the alienation of real property Non-discrimination and interest stripping –	537 538 538 540 541 542 545 546 549 552
17.1. 17.2. 17.2.1. 17.2.2. 17.2.2.1. 17.2.2.2. 17.2.2.3. 17.2.2.4. 17.2.2.5. 17.2.2.6. 17.2.2.7.	Omri Marian and Yariv Brauner Introduction US Tax Treaty Model and deviations from OECD Model: Current policies and developing trends The US Model Current key US deviations from the OECD Model The saving clause The omission of state and local taxes No territorial extension Corporate residence – Place of incorporation Branch taxes FIRPTA and gains from the alienation of real property Non-discrimination and interest stripping – Section 163(j)	537 538 538 540 541 542 545 546 549
17.1. 17.2. 17.2.1. 17.2.2. 17.2.2.1. 17.2.2.2. 17.2.2.3. 17.2.2.4. 17.2.2.5. 17.2.2.6.	Omri Marian and Yariv Brauner Introduction US Tax Treaty Model and deviations from OECD Model: Current policies and developing trends The US Model Current key US deviations from the OECD Model The saving clause The omission of state and local taxes No territorial extension Corporate residence – Place of incorporation Branch taxes FIRPTA and gains from the alienation of real property Non-discrimination and interest stripping – Section 163(j) Comprehensive exchange of information and the	537 538 538 540 541 542 545 546 549 552 554
17.1. 17.2. 17.2.1. 17.2.2. 17.2.2.1. 17.2.2.2. 17.2.2.3. 17.2.2.4. 17.2.2.5. 17.2.2.6. 17.2.2.7.	Omri Marian and Yariv Brauner Introduction US Tax Treaty Model and deviations from OECD Model: Current policies and developing trends The US Model Current key US deviations from the OECD Model The saving clause The omission of state and local taxes No territorial extension Corporate residence – Place of incorporation Branch taxes FIRPTA and gains from the alienation of real property Non-discrimination and interest stripping – Section 163(j)	537 538 538 540 541 542 545 546 549 552

17.2.2.10.	Conduit financing arrangements	562
17.2.2.11.	No tax sparing	564
17.2.2.12.	Other deviations	565
17.2.3.	Developing treaty policies	565
17.2.3.1.	New article 7	565
17.2.3.2.	Mandatory arbitration	567
17.3.	US reservations on OECD Commentaries	572
17.3.1.	Relevance of observations, reservations and	
	positions recorded in the OECD Commentaries	
	for the purpose of applying US tax treaties	572
17.3.2.	Observations, reservations and positions recorded	
	in the OECD Commentaries	577
17.3.2.1.	Article 1	577
17.3.2.2.	Article 2	578
17.3.2.3.	Article 3	'578
17.3.2.4.	Article 4	578
17.3.2.5.	Article 5	579
17.3.2.6.	Article 6	579
17.3.2.7.	Article 7	580
17.3.2.7.1.	New article 7 (2010)	580
17.3.2.7.2.	Article 7-Old (2008)	581
17.3.2.8.	Article 8	582
17.3.2.9.	Article 9	583
17.3.2.10.	Article 10	584
17.3.2.11.	Article 11	585
17.3.2.12.	Article 12(2)	585
17.3.2.13.	Article 13	586
17.3.2.14.	Article 16	586
17.3.2.15.	Article 17	587
17.3.2.16.	Article 19	588
17.3.2.17.	Article 21	589
17.3.2.18.	Article 24	589

Part Five Conclusions

Chapter 18:	Concluding Remarks – A Coordination on the Interpretation and Application of International	
	Tax Law	593
	Augusto Fantozzi	
	Ŭ	

18.1. Introduction

593

18.2.	Legislation or interpretation?	594
1-8.3.	The outcome – A new trend	595
Contributors		597
2		