E/C.18/2013/CRP.18

Distr.: General
11 October 2013

Original: English

Committee of Experts on International Cooperation in Tax Matters
Ninth session
Geneva, 21-25 October 2013

Results from research carried out by the International Bureau for Fiscal Documentation on the practical implementation of the UN Model

Summary

[draft]

The UN Model in Practice

1997 – 2013

Research carried out by

The International Bureau of Fiscal Documentation

October 2013

The UN Model in Practice
1997 - 2013

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The UN Model in Practice 1997 - 2013

1 Introduction

1.1 The objective and approach of the research

The aim of this research is to assess the impact of the UN Model Double Taxation Convention between Developed and Developing Countries (the UN Model) in its various versions on current tax treaty practice. This research is a continuation of the research carried out by the IBFD in 1997[1] and in 2011.[2] The 1997 research dealt with the effect of 22 distinctive provisions of the UN Model 1980 on treaty practice, which research covered the 811 comprehensive tax treaties and amending protocols concluded from 1 January 1980 to 1 April 1997. The 2011 research had a more limited scope. It dealt with the 16 provisions relevant in the context of the treatment of services from both the 1980 and 2001 UN Models, as well as the OECD Model 2010, in the 1586 comprehensive tax treaties and amending protocols concluded from 1 April 1997 to 1 January 2011.

The current research,[3] which covers the period from 1 April 1997 to 1 January 2013, can be regarded as a follow-up to the 1997 research. Similar to the 1997 research, treaties dealing with shipping and air transport containing a tax provision are not included in the research because it is uncertain whether the standard provisions of the UN/OECD Models always serve as guidance in concluding these non-tax treaties. The limited number of tax treaties concluded in this period on the exchange of information (TIEAs) are not taken into account, as it has been decided not to analyse the provisions on the exchange of information contained in Article 26 of the UN Model (*see* Section 1.2). In the period from 1 April 1997 to 1 January 2013, 2,036 comprehensive tax treaties and amending protocols were concluded worldwide. However, for various reasons, not all of these treaties are included in the research. In particular, the text was not available for 23 of the tax treaties, the language of 20 tax treaties was not accessible to the members of the research team, 28 treaties dealing with the promotion of economic relations were out of scope, 67 only covered the taxation of individuals and 87 amending protocols only dealt with the exchange of information (*see* Section 1.2). Thus the total number of 2,036 was reduced by the 225 excluded treaties and protocols.

Consequently, out of the 2,036 tax treaties, 1,811 were further scrutinized in order to ascertain whether the 30 current UN provisions, as recommended by the UN Models and Commentaries of 1980, 2001 and 2011, have been wholly or partly adopted. These UN

[1] W.Wijnen & M.Magenta, *The UN Model in Practice*, 51 Bull. Int. Fiscal Docn. 12 (1997), Journals IBFD.
[2] W.Wijnen, J. de Goede & A. Alessi, *The Treatment of Services in Tax Treaties*, 66 Bull. Intl. Taxn. 1 (2012), Journals IBFD.
[3] The research was carried out using the IBFD Tax Treaty Database.

provisions were selected by comparing these UN Models with the OECD Model 2010. In respect of the service related provisions of Article 5(3)(b) and Article 14 of the UN Model, the results of the 2011 research were used and combined with the results of the current research on those provisions regarding the 1 January 2011 to 1 January 2013 period.

The current research covered more treaties and amending protocols, as well as more provisions, than the 1997 research. The initial research and the analysis of the results was co-ordinated and carried out by Ziemek Kukulsky and Matteo Cataldi and by a multilingual team consisting of the following IBFD tax researchers: Giulia Gallo (co-ordinator of the team), Noah Gaoua, Carlos Gutierrez Puente, Ridha Hamzaoui, Katja Jacobs, Ivana Kireta, Lydia Ogazon, Andreas Perdelwitz and Anapaula Trindade. The language skills of the members of this team allowed for the inclusion of almost all of the identified treaties in the current research. Equally indispensable was the support of Jaap van der Meulen of the IBFD IT Team, who developed the tools to manage the research and the results of this extensive project.

1.2 The scope of the research

In consultation with the UN secretariat, the following provisions specific to the UN Models 1980/2001/2011 were scrutinized:

Article 5(3)(a) UN Model 1980	construction activities
Article 5(3)(a) UN Model 1980	period 6 months
Article 5(3)(b) UN Model 1980	furnishing of services
Article 5(4)(a) and (b) UN Model 1980	delivery of goods
Article 5(5)(b) UN Model 1980	stock agents
Article 5(6) UN Model 1980	insurance activities
Article 5(7) UN Model 1980/2001	agents with one principal
Article 5(7) UN Model 1980/2001	agents with one principle with arm’s length limitation
Article 7(1) UN Model 1980	limited force of attraction

developing countries with emerging economies that have become significant capital

Section 2 of this report sets out the detailed results of the research, including a comparison with the results of the 1997 and 2011 research projects, section 3 summarizes the findings and section 4 contains some concluding remarks.

2 Analysis of the application of the UN Model in practice

2.1 Article 5(3)(a) of the UN Model: construction activities

2.1.1 The UN Model

Article 5(3)(a) of the UN Model 1980 reads as follows:

> (3) The term "permanent establishment" likewise encompasses:
>
> (a) A building site, a construction, assembly or installation project or *supervisory activities in connexion therewith*, but only where such site, project or activities continue for a period of more than *six months*;

Article 5(3)(a) of the UN Model 2001/2011 reads as follows:

> (3) The term "permanent establishment" ***also*** encompasses:
>
> (a) A building site, a construction, assembly or installation project or *supervisory activities in connexion therewith*, but only ***if*** such site, project or activities ***last*** more than *six months*;

For the purposes of this research, any difference in the wording of this provision between the UN Model 1980 and 2001/2011 has been ignored.

The provisions are examined in terms of whetheittf

2.1.2 Supervisory activities

2.1.2.1 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 tax treaties included in the research, 1,162 (64%) contain a specific provision for supervisory activities. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 629 of 762 tax treaties (83%);
(2) Group B: 455 of 825 tax treaties (55%); and
(3) Group C: 78 of 224 tax treaties (35%).

Of the 1,162 treaties in which supervisory activi

2.1.3 Minimum period

2.1.3.1 Tax treaties: 1 April 1997 – 1 January 2013

For the purposes of this research, it is assumed that the thresholds lower than 12 months found in the tax treaties included in the research were inspired by the 6-month threshold of the UN Model.

Of these 1,811 tax treaties, 1,116 (62%) prescribe a minimum period shorter than the 12 months recommended by the OECD Model. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 559 of 762 tax treaties (73%);
(2) Group B: 485 of 825 tax treaties (59%); and
(3) Group C: 72 of 224 tax treaties (32%).

Of these 1,116 treaties, 559 (50%) were concluded between UN countries (Group A), 485 (43%) between UN and OECD countries (Group B) and 72 (32%) between OECD countries (Group C). It is striking that so many OECD/OECD treaties (32%) include a minimum period of less than the 12 months recommended by the OECD Model.
In respect of the other treaties, it should be noted that there is one treaty concluded between UN countries (Group A)[15] and one treaty concluded between a UN and OECD country (Group B)[16] without a time threshold. Further, in two group A treaties[17] and five Group B treaties[18]

periods of 90 and 91 days are counted as three months and those of 180, 182 and 183 days as six months.

Of the 1,811 treaties included in this research, 686 treaties prescribe a minimum period of 12 months or longer. These are divided over the thr

2.2 Article 5(3)(b) of the UN Model 1980: furnishing of services

2.2.1 The UN Model

Article 5(3)(b) of the UN Model 1980 reads as follows:

(3) The term “permanent establishment” likewise encompasses:

(a) ... ;
(b) The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than ***six months*** *within any twelve-month period.*

Article 5(3)(b) of the UN Model 2011 reads as follows:

(3) The term “permanent establishment” likewise encompasses:

(a) ... ;
(b) The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than ***183 days in*** *any 12-month-period* ***commencing or ending in the fiscal year concerned****.*

For the purposes of this research, the difference in wording of this provision between the UN Models 1980 and 2011 is ignored.

2.2.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 tax treaties included in the research, 769 (42%) contain a specific provision for the furnishing of services. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 440 of 762 tax treaties (58%);
(2) Group B: 290 of 825 tax treaties (35%); and
(3) Group C: 39 of 224 tax treaties (17%).

Of these 769 tax treaties, 440 were concluded between two UN countries (Group A), 290 between a UN and an OECD country (Group B) and 39 between two OECD countries (Group C). The following periods are found in these 769 treaties:

Table 3: Furnishing of services periods			
	Group A	**Group B**	**Group C**
1 m	5	1	-
2 m	11	2	-
3 m	64	24	-
4 m	8	7	1
5 m	1	-	-
6 m	289	207	36
8 m	1	1	-
9 m	34	21	2
10 m	-	1	-
12 m	22	26	1
15 m	1	-	-

shorter minimum period of 30 days within any 12-month period to services performed for related enterprises.[21] One other treaty has a similar provision but without a minimum period for services performed for related enterprises.[22]

Finally, 11 tax treaties contain in whole or in part the optional provisions included in paragraph 42.23 of the OECD Commentary on Article 5 of the OECD Model 2008.[23] These are divided into the three groups as follows:

(1) Group A: 0 of 762 tax treaties (0.00%);
(2) Group B: 6 of 825 tax treaties (0.7%);[24] and
(3) Group C: 5 of 224 tax treaties (2.2%).[25]

The percentages are low, but this optional provision has only recently been included in the OECD Commentary. Not surprisingly, it has not, to date, been used in tax treaties between UN countries.

2.2.3 Comparison with the 1997 research

The results of the current research are considerably higher than those of the earlier 1997 research. The combined result of the UN countries in Groups A and B amounted to 31% in

(4) Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

(a) The use of facilities solely for the purpose of storage

The results of the current research are practically identical to the earlier 1997 research.

According to both the 1997 research and the current research, the combined result of Groups A and B amounts to 24%. The result of Group C dealing with treaties between OECD countries slightly differs, i.e. 0% in 1997 versus 6% in 2013.

2.4 Article 5(5)(b) of the UN Model 1980: stock agents

2.4.1 The UN Model

Article 5(5)(b) of the UN Model reads as follows:

> (5) Notwithstanding the provisions of paragraphs 1 and 2, where a person – other than an agent of an independent status to whom paragraph 7 applies – is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such a person:
>
> > (a) Has and habitually exercises in that State an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 whichnti Sof pfCt arehh4.7(o4(pa

In addition to the provision relating to stock agents, 8 of these treaties[31] (4 of Group A and 4 of Group B) include a specific provision for agents who habitually secure orders for the sale of goods or merchandise. An example of this type of provision is:

These activities qualify as a PE only if they are not performed through an agent of an independent status.

2.5.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 tax treaties included in the research, 543 treaties (30%) contain a specific provision for insurance activities. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 299 of 762 tax treaties (39%);
(2) Group B: 185 of 825 tax treaties (22%); and
(3) Group C: 59 of 224 tax treaties (26%).

Of the 543 tax treaties included in the research, 299 were concluded between two UN countries (Group A), 185 between a UN and an OECD country (Group B) and 59 between two OECD countries (Group C).

Of the 543 tax treaties, 64 tax treaties (12%) do not contain a specific PE provision for

The results of the current research are not much different from the 1997 results. However, the figures with regard to the OECD/OECD treaties are, with respect to both research projects, remarkably high.

The combined result of UN countries in Groups A and B amounted to 26% in 1997, whereas this figure, according to the current research, now amounts to 30%. In respect of the treaties concluded between OECD countries, there was a slight increase from 23% in 1997 to 26% in 2013.

2.6 Article 5(7) of the UN Model: in(dependent) agents

2.6.1 UN Model 1980: agents with one principal

2.6.1.1 The UN Model

Article 5(7) of the UN Model reads as follows:

> (7) An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an

2.6.1.3 Comparison with the 1997 research

The results of the current research slightly increased. The 1997 research indicated that the combined results of the treaties concluded by UN countries in Groups A and B amounted to 35%, while the results according to the current research amount to 39%. In 1997, no such provision was found in the treaties concluded between OECD countries while the current research indicates that this provision appeared in 2% of those treaties.

2.6.2 UN Model 2001: arm's length limitation

2.6.2.1 The UN Model

Article 5(7) of the UN Model 2001 reads as follows:

> (7) An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, *and conditions are made or imposed between that enterprise and the agent in their commercial and financial relations which differ from those which would have been made between independent enterprises*, he will not be considered an agent of an independent status within the meaning of this paragraph.

This 2001 amendment limits the scope of this UN provision for an (independent) agent with one principal to cases in which the transactions between the agent and the principal are not on an arm's length basis.

2.6.2.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 tax treaties included in the research, 293 treaties (16%) contain a specific provision for agents with an arm's length requirement for agents with only one principal. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 131 of 762 tax treaties (17%);

(2) Group B: 145 of 825 tax treaties (18%); and

(3) Group C: 17 of 224 tax treaties (8%).

Of the 293 treaties included in the research, 131 were concluded between two UN countries

In 4 treaties, the arm’s length requirement is not limited to independent agents with only one

2.7.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 treaties included in the research, 250 treaties (14%) include a limited force of attraction provision. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 138 of 762 tax treaties (18%);
(2) Group B: 89 of 825 tax treaties (11%); and
(3) Group C: 23 of 224 tax treaties (10%).

Of these 250 treaties, 138 were concluded between two UN countries (Group A), 89 between a UN and an OECD country (Group B) and 23 between two OECD countries (Group C).

> With reference to paragraph 1 of Article 7, profits derived from the alienation of goods or merchandise of the same or similar kind as those sold by the permanent establishment may be regarded as attributable to that permanent establishment, *if it is proved that the permanent establishment has been involved in any manner in that operation.*[45]

2.7.3 Comparison with the 1997 research

The results of the current research demonstrate that, among UN countries, the interest in including a limited force of attraction provision is declining, whereas the interest among OECD countries is slightly on the increase.

The combined result of UN countries in Groups A and B amounted to 22% in 1997, whereas the current research indicates an amount of 14%. In respect of the treaties concluded between OECD countries, there is a slight increase from 8% in 1997 to 10% in 2013.

2.8 Article 7(3) of the UN Model 1980: management fees, interest and royalty payments

2.8.1 The UN Model

Article 7(3) of the UN Model reads as follows:

> (3) In *the determination* of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business 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. *However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for management, or, except in the case of a banking enterprise by way of interest on moneys lent to the head office of the enterprise or any of its other offices.*

[45] For example, Art. 8(a) of the protocol to the tax treaty between *Austria and Mexico* of 2004/2009.

In this paragraph the principles laid down in the first sentence are defined and clarified in the second and third sentences. The wording of these sentences is generally in conformity with the OECD Commentary as it read until the 2010 revision. As from 2010, the OECD approach

2.8.3 Comparison with the 1997 research

The results of the current research are not much different from the results in 1997. The combined result of UN countries in Groups A and B amounted in 1997 to 28%, while this result according to the current research amounts to 29%. In respect of the treaties concluded between OECD countries, there is a slight increase from 5% in 1997 to 10% in 2013.

However, this picture changes drastically when the domestic law limitation clause is taken into account. As this clause was not part of the previous research, no comparison can be made.

2.9 Article 7(-) of the UN Model 2001: purchase of goods

2.9.1 The UN Model

The UN Model 1980 does not include the provision that the OECD Model contained in Article 7(5) until 2010. The UN Model 2001 clarifies, in a note to Article 7, that the question of whether profits should be attributed to a PE by reason of the mere purchase by that PE of goods and merchandise for the enterprise was not resolved and that it, therefore, should be

> No portion of any profits arising from the sale of goods or merchandise by an enterprise of one of the territories shall be attributed to a permanent establishment situated in the other territory by reason of the mere purchase of the goods or merchandise within that other territory.[47]

In two treaties, the expenses related to the purchase of goods are also expressly excluded:

> Likewise, no charge shall be allowed from the profits of the permanent establishment in respect of the purchase of goods or merchandise for the enterprise.[48]

2.9.3 Comparison with the 1997 research

In respect of the treaties concluded by the UN countries, the results of the current research are equivalent to the 1997 results. The combined result of UN countries in Groups A and B also amounted to 6% in 1997. However, in respect of the treaties concluded between OECD countries, the situation changed slightly. The 1997 research indicated that all treaties between OECD countries included the purchase provision in Article 7. With regard to the current research, it appears that this provision has been omitted in 7% of these treaties.

2.10 Article 8B of the UN Model 1980: shipping profits

2.10.1 The UN Model

Article 8B of the UN Model reads as follows:

> (2) Profits from the operation of ships in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated *unless the shipping activities arising from such operation in the other Contracting State are more than casual. If such activities are more than casual, such profits may be taxed in that other State. The profits to be taxed in that other State shall be determined on the basis of an appropriate allocation of the over-all net profits derived by the enterprise from its shipping operations. The tax computed in accordance with such allocation shall then be reduced by ... percent. (The percentage is to be established through bilateral negotiations.)*

This provision attributes to the source state a limited right to tax shipping profits, if the shipping activities in the source state are more than casual.

2.10.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 treaties included in the research, 100 treaties (6%) contain a specific provision dealing with source state taxation for shipping profits. These are divided over the three groups noted in section 1.2 as follows:

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[47] For example, Art. 3(4) of the tax treaty between *Guernsey and the United Kingdom* of 1952/2009.
[48] For example, Art. 7(5) of the tax treaty between *Belgium and Tunisia* of 2004 and Art. 7(5) of the tax treaty between *Oman and Tunisia* of 1997.

2.11.1 The UN Model

Article 9(3) of the UN Model 2001 reads as follows:

The provisions of paragraph 2 shall not app

2.11.3 Comparison with the 1997 research

As the pertinent provision was not included in the UN Model 1980, it was not part of the 1997 research.

2.12 Article 12(1) and (2) of the UN Model 1980: shared taxation right

2.12.1 The UN Model

Article 12(1) and (2) of the UN Model reads as follows:

> (1) Royalties arising in a Contracting State and paid to a resident of the other Contracting State *may be taxed* in that other State.
>
> (2) However, such royalties *may also be taxed* in the Contracting State in which they arise and according to the laws of that State, but if the recipient is the beneficial owner of the royalties, the tax so charged shall not exceed ... per cent (the percentage is to be established through bilateral negotiations) of the gross amount of the royalties. The competent authorities.....

The OECD Model attributes the right to tax royalties exclusively to the residence state. As the UN Model provides, in this respect, for a shared taxation right, the current research was limited to that aspect of the provision only. However, for certain categories of royalties many treaties with a shared taxation right provide for exceptions in the form of a zero withholding rate or even an exclusive taxation right in the residence state. Such exceptions to the general "may be taxed" rule in the treaties do not form part of this research.

2.12.2 The tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 treaties included in the research, 1,579 treaties (87%) grant the source state a limited right to tax. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 714 of 762 tax treaties (94%);
(2) Group B: 703 of 825 tax treaties (85%); and
(3) Group C: 162 of 224 tax treaties (72%).

Of these 1,579 treaties, 714 were concluded between UN countries (Group A), 703 between a UN and OECD country (Group B) and 162 between OECD countries (Group C).

It is striking that so many treaties concluded between OECD countries provide for a shared taxation right for royalties.

2.12.3 Comparison with the 1997 research

51

The pertinent provision was not part of the research in 1997.

2.13 Article 12(3) of the UN Model 1980: royalty definition

2.13.1 The UN Model

Article 12(3) of the UN Model reads as follows:

> The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, *or films or tapes used for radio or television broadcasting*, any patent, trademark, design or model, plan, secret formula or process, or *for the use of, or the right to use, industrial, commercial or scientific equipment* or for information concerning industrial, commercial or scientific experience.

As the OECD Model does not include, in the definition of the term "royalties", payments made as a consideration for the use of, or the right to use, films or tapes used for radio or television broadcasting, the UN Model deviates in this respect from the OECD Model.

Until 1992, payments for the use of equipment formed part of the definition of royalties in the OECD Model. As the UN Model did not follow the example of the OECD Model and delete these payments from the royalty definition, they belong to the list of differences between the two Models and are, consequently, included in the current research.

2.13.2 Radio or television broadcasting

2.13.2.1 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 treaties included in the research, 1,419 treaties (78%) grant the source state a limited right to tax. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 661 of 762 tax treaties (87%);
(2) Group B: 616 of 825 tax treaties (75%); and
(3) Group C: 142 of 224 tax treaties (63%).

Of these 1,579 tax treaties, 661 were concluded between UN countries (Group A), 616 between a UN and OECD country (Group B) and 142 between OECD countries (Group C).

In 14 tax treaties (1 treaty of Group A, 8 treaties of Group B and 5 treaties of Group C), only payments as a consideration for the use of or the right to use films or tapes used for television broadcasting are covered, not payments for radio broadcasting.[52]

In 6 tax treaties (1 treaty of Group A, 4 treaties of Group B and 1 treaty of Group C), a generic reference to data or images, films, tapes, as well as to any other visual or sound

[52] For example, Art. 12(3) of the tax treaty between *Argentina and Russia* of 2001.

received as consideration for finance leasing and operating leasing of equipment are covered in the royalty definition.[57]

2.13.3.2 Comparison with the 1997 research

As the 1997 research covered the period 1 January 1980 to 1 April 1997 and payments for the use of equipment were only deleted from the definition of royalties in the OECD Model in 1992, these payments did not form part of the research in 1997.

2.14 Article 13 of the UN Model: capital gains on real property shares

2.14.1 Article 13(4) of the UN Model 1980: real property shares

2.14.1.1 The UN Model

Article 13(4) of the UN Model reads as follows:

> *4. Gains from the alienation of shares of the capital stock of a company the property of which consists directly or indirectly prin*

E

ahead of the adoption of a provision for capital gains on real property shares in Article 13 in 2003.

2.14.2 Article 13(4) of the UN Model 2001: real property shares and extension

2.14.2.1 The UN Model

Article 13(4) of the UN Model 2001 reads as follows:

> *(4) Gains from the alienation of shares of the capital stock of a company**, or of an interest in a partnership, trust or estate,** the property of which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that State. (...)*

This provision deviates from the OECD Model in that it not only covers gains from the alienation of real property shares but also gains from the alienation of interests in real property partnerships, trusts or estates.

2.14.2.2 The tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 tax treaties included in the research, 357 specifically include interests in real property partnerships, trusts, estates or other entities. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 80 of 762 tax treaties (10%);
(2) Group B: 194 of 825 tax treaties (24%); and
(3) Group C: 83 of 224 tax treaties (37%).

Of these 357 treaties, 80 were concluded between UN countries (Group A), 194 between a UN and an OECD country (Group B) and 83 between OECD countries (Group C). What is remarkable is the high figure with regard to the OECD/OECD treaties.

A number of these 357 treaties deviate from the recommendation of the UN Model in that they cover only "*partnerships*",[65] "*trusts*"[66] or "*partnerships and trusts*".[67] Further, 29 treaties in Group A,[68] 63 in Group B[69] and 24 in Group C[70] do not explicitly refer to a "*partnership, trust or estate*" but adopt more general wording, such as, for example, "*shares or comparable*

[65] For example, Art. 13(2)(b) of the tax treaty between *Cuba and Ukraine* of 2003 and Art. 13(2)(b) of the tax treaty between *Belgium and Kazakhstan* of 1998.
[66] For example, Art. 14(4) of the tax treaty between *Bangladesh and Vietnam*

interests of any kind”, “*any shares or comparable interests in an entity*”, “*shares, similar interests or other rights*” and others.

2.14.2.3 Comparison with the 1997 research

The pertinent provision was not part of the 1997 research.

2.14.3 Article 13(4) of the UN Model 2001: real property shares and exclusion

2.14.3.1 The UN Model

Article 13(4) of the UN Model 2001 reads as follows:

> (4) Gains from the alienation of shares of the capital stock of a company, or of an interest in a partnership, trust or estate, the property of which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that State. In particular:
>
> *(a) Nothing contained in this paragraph shall apply to a company, partnership, trust or estate, other than a company, partnership, trust or estate engaged in the business of management of immovable properties, the property of which consists directly or indirectly principally of immovable property used by such company, partnership, trust or estate in its business activities.*
>
> *(b) For the purposes of this paragraph, "principally" in relation to ownership of immovable property means the value of such immovable property exceeding 50 per cent of the aggregate value of all assets owned by the company, partnership, trust or estate.*

These additional subparagraphs exclude real property shares from the application of this provision, if the property directly or indirectly principally consists of real property in use by the company, partnership, trust or estate.

2.14.3.2 The tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 tax treaties included in the research, only 4 treaties in Group A and 5 in Group B follow the literal wording recommended by the UN Model. Nevertheless, many treaties do contain one or both of the elements indicated at letters (a) and (b) above, despite a difference in wording.

a) Immovable properties used in business activities

There are 106 tax treaties (6%) that exclude from the scope of the provision immovable property used in the company’s own business activities. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 16 of 762 tax treaties (2%);
(2) Group B: 65 of 825 tax treaties (8%); and
(3) Group C: 25 of 224 tax treaties (11%).

In three treaties in Group A,[71] the exclusion applies only if the immovable property has been used in the company's own business activities for a continuous period of at least five years.

b) Percentage of value derived from immovable properties

There are 417 tax treaties (23%) that include a specific percentage of the value of the assets that must be derived from immovable property for the provision to apply. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 128 of 762 tax treaties (17%);
(2) Group B: 236 of 825 tax treaties (29%); and
(3) Group C: 53 of 224 tax treaties (24%).

The thresholds found in the tax treaties are as follows:

[71] Art. 13(4) of the tax treaty between *Cyprus and Qatar* of 2008, Art. 13(4) of the tax treaty between *Malta and Qatar* of 2009 and Art. 13(5) of the tax treaty between *Panama and Qatar* of 2010.

Table 5: Value derived from immovable property			
Percentage	**Group A**	**Group B**	**Group C**
25%	1	-	-
30%	2	-	-
40%	-	1	-
50%	112	219	51
75%	11	13	2
80%	-	1	-
90%	1	2	-
100%	1	-	-
Total	**128**	**236**	**53**

Finally, 2 treaties in Group A,[72] 20 in Group B[73] and 19 in Group C[74]

during the 12 month period preceding such alienation, held directly or indirectly at least ... per cent *(the percentage is to be established through bilateral negotiations) of the capital of that company.*

Under the OECD Model, the right to tax capital gains on the alienation of shares, other than immovable property shares, is exclusively attributed to the state in which the alienator is resident, whereas under the UN Model, with regard to a substantial shareholding as defined in the treaty, a shared taxation right is attributed to the state in which the company is resident (the source state).

2.15.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 tax treaties included in the research, 302 treaties (17%) include a provision that attributes to the source state a right to tax capital gains on shares other than immovable property shares. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 154 of 762 tax treaties (20%);
(2) Group B: 118 of 825 tax treaties (14%); and
(3) Group C: 30 of 224 tax treaties (13%).

Of these 302 tax treaties, 99 specifically include an anti-abuse provision. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 22 of 762 tax treaties (3%);
(2) Group B: 54 of 825 tax treaties (7%); and
(3) Group C: 23 of 224 tax treaties (10 %).

Furthermore, of these 302 tax treaties that attribute to the source state a right to tax capital gains on shares other than immovable property shares, 84 treaties in Group A, 44 in Group B and 9 in Group C do not contain a minimum participation requirement. The remaining 165 tax treaties can be analysed as follows:

75 tax treaties[75]

E

Further, with specific reference to time thresholds:

15 tax treaties[80] attribute the right to tax capital gains on shares to the source state on the basis of a minimum holding period. The minimum holding periods found in these treaties are the following:

Table 8: Minimum holding period			
Holding period	**Group A**	**Group B**	**Group C**
1 year	4	7	3
2 years	-	-	1
Total	**4**	**7**	**4**

64 tax treaties[81] contain an "examination period", i.e. a period during which the minimum participation requirement must be reached at any time in that period for the provision to apply. The examination periods found in the tax treaties are the following:

Table 9: Examination period			
Percentage	**Group A**	**Group B**	**Group C**
1 year	11	37	15
2 years	1	-	1
Total	**12**	**37**	**16**

In a number of the 302 tax treaties that attribute to the source state a right to tax, the right to tax is limited:

in 8 treaties in Group A,[82] 19 in Group B[83] and 5 in Group C[84] the tax that the source state may levy on capital gains on shares is explicitly limited to a certain percentage varying from 5% to 25%;
in one treaty in Group B[85] and 2 in Group C[86] the taxation right of the source state is limited by the exclusion of capital gains realized in the course of a corporate organization, reorganization, amalgamation, division or similar transaction;

[80] For example, Art. 13(4) of the tax treaty between *Panama and Qatar* of 2010, Art. 13(5) of the tax treaty between *Slovenia and Turkey* of 2001 and Art. 13(4) of the tax treaty between *Czech Republic and Turkey* of 1999.
[81] For example, Art. 13(4) of the tax treaty between *Saudi Arabia and Singapore* of 2010, Art. 14(5) of the tax treaty between *Austria and Pakistan* of 2005 and Art. 13(3)(a) of the tax treaty between *Australia and Japan* of 31 January 2008. Most of these treaties follow the wording recommended by the UN Model 2011: "if the alienator, *at any time during the 12 month period preceding such alienation*, held directly or indirectly at least ... per cent (…) of the capital of the company".
[82] For example, Art. 13(4) of the tax treaty between *Belarus and Saudi Arabia* of 2009 and Art. 13(4) of the tax treaty between *Chile and Croatia* of 2003.
[83] For example, Art. 13(5) of the tax treaty between *Colombia and Portugal* of 2010 and Art. 13(5) of the tax treaty between *Mexico and Uruguay* of 2009.
[84] For example, Art. 13(3) of the tax treaty between

in 5 treaties in Group A,[87] 35 in Group B[88] and 18 in Group C[89] (not included in the above-mentioned figures) the source state only has the right to tax capital gains on shares derived by individuals who emigrated to the treaty partner state. In most of these treaties this taxation right is limited to a certain period after emigration.

2.15.3 Comparison with the 1997 research

The percentage of countries adopting a specific provision for shares other than real property shares is lower than in the earlier 1997 research. The combined result of Groups A and B amounted to 46% in 1997, whereas the current research indicates a figure of only 17%. The same applies to Group C: the 1997 research indicated that this provision has been adopted in 54% of the tax treaties between OECD countries, whereas this percentage, according to the current research, now amounts to 13%. This result is surprising, in particular in view of the growing interest in the last decade in attributing to the source state the right to tax capital gains derived from the sale of substantial shareholdings. Unfortunately, there is no satisfactory explanation available for the large variance between the 1997 and 2013 research. The fact that, already in the 1980-97 period of research, quite a number of Western European countries wanted to preserve their taxation rights in respect of the fiscal emigration of individuals cannot account for these large differences. It does not appear to be possible to further analyse the results of the 1997 research to gain more clarity on this matter.

2.16

*(a) If he has a **fixed base** regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other Contracting State;*

2.16.1.1 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 tax treaties included in the research, 1402 treaties (77%) include a provision for professional services. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 679 of 762 tax treaties (89%);
(2) Group B: 624 of 825 tax treaties (76%); and
(3) Group C: 99 of 224 tax treaties (44%).

Of these 1,402 treaties, 679 were concluded between UN countries (Group A), 624 between a UN and OECD country (Group B) and 99 between OECD countries (Group C). The 89% figure with regard to treaties between UN countries is significantly higher than the 76% figure applicable to UN and OECD countries and even double the 44% applicable to treaties between OECD countries. The differences in these figures are apparently influenced by the deletion of Article 14 from the OECD Model in 2000.

In some treaties, it is explicitly stated that the provision for professional services applies to individuals but not to enterprises.[90] In one tax treaty in Group B, in determining the income attributable to professional services, there shall be allowed as deductions all expenses which

(1) Income derived by a resident of a Contracting State in respect of professional services or other activities

135 days	2	-	-
183 days	495	380	57
270 days	1	5	-
300 days	-	1	-
365 days	2	2	-
Total	518	409	57
Note: Following Article 14 of the UN Model (2001), the periods are counted in days.			

This table indicates that, in respect of the length of stay criterion, UN and OECD countries usually follow the period of 183 days recommended in Article 14(1)(b) of the UN Model.

In the tax treaties included in the research, numerous provisions can be found that deviate, to a greater or lesser extent, from the UN provisions. In order to provide an overall impression and without purporting to be comprehensive, the following selection of deviations can be noted.

In some tax treaties, the 183-days rule applies both to the length of stay and the fixed base criterion.[92] Other tax treaties have a length of stay and remuneration criterion without a fixed base criterion.[93] Some tax treaties have, apart from a 183-days rule in any 12-month period, a 122-days rule in each of the two preceding years.[94] In a number of tax treaties, the regime for professional services is incorporated into the regime for employment income, which means that the 183-days rule applies to professional services.[95] In other treaties, the 183-days rule for employment income is adopted in the regime for professional services.[96] Some tax treaties provide for a fixed tax rate of, for example, 10% of the gross amount, unless the professional has a fixed base regularly available in the source state.[97] In one tax treaty, the fixed rate of 10% applies only to one of the two treaty partners.[98]

2.16.2.3 Comparison with the 1997 research

The percentage of countries adopting a length of stay criterion for professional services significantly increased compared to the earlier 1997 research. The combined result of the UN countries in Groups A and B amounted to 38% in 1997, whereas this result according to the

2.16.3.1 The UN Model

In Article 14(1)(c) of the UN Model (1980), the source state's right to tax is extended by a provision that the source state may tax any remuneration for independent personal services that exceeds a certain amount. This provision reads as follows:

> (1) Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State except in the following circumstances, when such income may also be taxed in the other Contracting State:
>
> (a)

state, any payment for professional activities is taxable in the source state.[100] Consequently, the source state's right to tax in these treaties is even more far-reaching than under the remuneration criterion, which was deleted from Article 14 of the UN Model in 2001. In a number of other treaties, the “paid by”/ “borne by a PE” criteria of the employment income regime were adopted in the regime for professional services. In such tax treaties, professional services are taxable in the source state if the remuneration is paid by a person who is a resident of the source state or is borne by a PE or fixed base in the source state, which has the same far-reaching effect as the incorporation of professional services into the regime for employment income.[101]

2.16.3.3 Comparison with the 1997 research

In the research carried out by the IBFD in 1997, only 6% of the tax treaties concluded by UN countries in Groups A and B in the 1980 to 1997 period contained this provision. As the interest of these countries in adopting this provision has fallen to 3%, the conclusion is that the popularity of this treaty provision has not increased since 1997. This apparently is due to the fact that this provision is no longer part of the UN cabinet of instruments. However, it should be noted that there are provisions in a limited number of treaties that go even beyond the deleted remuneration criterion (*see* under 2.17.3.2).

2.17

Of these 167 treaties, 95 were concluded between UN countries (Group A), 54 with a UN and an OECD country (Group B) and 18 between developed countries (Group C).

In these tax treaties, no definition of the term “top-level managerial function” is included.

In 11 treaties of Group A, 18 treaties of Group B and 5 treaties of Group C, remuneration for the discharge of day-to-day functions of these officials is excluded from the scope of Article 16. In these treaties, such remuneration is covered by Article 15 (Dependent Personal Services).

2.17.3 Comparison with the 1997 research

The results of the current research are practically identical to the earlier 1997 research. The combined result of the UN countries in Groups A and B amounted, in 1997 and in the current period of research, to 9%. In respect of treaties concluded between OECD countries, there is a slight increase from 6% in 1997 to 8% in 2013. It is striking that while this provision is not often included in UN/UN and UN/OECD treaties, the amount with regard to OECD/OECD treaties is relatively high, representing a slight increase over the 1997 figure.

2.18

2.17.3

Most of these 479 treaties provide the source state with a non-exclusive taxation right. However, in 48 treaties in Group A,[102] 44 in Group B[103] and 7 in Group C[104] an exclusive taxation right is attributed to the source state.

Of the 479 tax treaties, in 109 treaties in Group A,[105] 102 treaties in Group B[106] and 37 treaties in Group C[107] the taxation right of the source state also applies to annuities.

Of the 479 tax treaties, in 14 treaties in Group B[108] and 12 treaties in Group C,[109] a non-exclusive taxation right of the source state applies to pension payments that are not of a periodical nature and lump-sum payments paid instead of a right to annuities.

However, in 22 treaties in Group B[110] and 10 treaties in Group C[111] the taxation right of the source state is limited to lump-sum payments, while all other pension payments are only taxable in the residence state of the recipient. In 14 treaties in Group B[112] and 2 treaties in Group C,[113] lump-sum pension payments made to a former resident and payments made to a former resident as a result of the termination of his employment (e.g. severance payments) are exclusively taxable in the source state. Further, in 6 treaties in Group B[114] and in 5 treaties in Group C,[115] the exclusive taxation right of the source state is limited to lump-sum payments derived from a pension scheme established in the source state.

Of the 479 tax treaties, in 5 treaties in Group A,[116] 31 treaties in Group B[117] and 25 treaties in Group C[118] the taxation right of the source state is limited to a certain percentage varying from 10% to 25%. In 9 of those treaties in Group B[119] and 12 of those in Group C,[120] pensions are subject to a limited taxation right or, if lower, the tax that would be due by a resident of the source state on the pension payments and/or annuities. There are also treaties providing for different percentages for pension payments and annuities[121] and in some

[102] For example, Art. 17(1) of the tax treaty between *Qatar and Sri Lanka* of 2004.
[103] For example, Art. 18(1) of the tax treaty between *Slovak Republic and Taiwan* of 2001.
[104] For example, Art. 17 of the tax treaty between *Hungary and Iceland* of 2005.
[105] For example, Art. 18(1) of the tax treaty between *Brazil and South Africa* of 2003.
[106] For example, Art. 18(1) of the tax treaty between *Albania and Sweden* of 1998.
[107] For example, Art. 17(1) of the tax treaty between the *Czech Republic and Norway* of 2004.
[108] For example, Art. 18(3) of the tax treaty between *Kuwait and the Netherlands* of 2001.
[109] For example, Art. 18(3) of the tax treaty between the *Netherlands and Portugal* of 1999.
[110] For example, Art. 17(2) of the tax treaty between *Barbados and the United Kingdom* of 2012.
[111] For example, Art. 18(3) of the tax treaty between *Australia and Turkey* of 2010.
[112]

treaties[122] there is a limited flat rate that applies only to periodic payments, while lump-sum payments are subject to ordinary taxation.

With regard to the possible conditions prescribed for the application of the taxation right of the source state, in 10 treaties in Group B[123] and 7 treaties in Group C[124] the taxation right of the source state is limited to payments that ex

2.19.1 The UN Model

Article 18A(2) and (3) of the UN Model reads as follows:

> *(2) Notwithstanding the provisions of paragraph[s] 1[and 2], pensions paid and other payments made under a public scheme which is part of the social security system of a Contracting State or a political subdivision or a local authority thereof shall be taxable only in that State.*

This provision is not specifically included in the OECD Model. It attributes an exclusive taxation right to the source state.

2.19.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 tax treaties included in the research, 700 treaties (39%) provide for a separate provision for social security payments attributing the right to tax to the source state. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 318 of 762 tax treaties (42%);
(2) Group B: 296 of 825 tax treaties (36%); and
(3) Group C: 86 of 224 tax treaties (38%).

Most of these treaties grant an exclusive taxation right to the source state. However, in 15 treaties in Group A,[136] 115 in Group B[137] and 37 in Group C[138] a non-exclusive taxation right is attributed to the source state.

In 6 treaties in Group B[139]

Finally, in one treaty in Group A,[146] 9 treaties in Group B[147] and 8 treaties in Group C[148] the taxation right of the source state is limited to a certain percentage that varies from 5% to 25% of the gross amount of the payment.

2.19.3 Comparison with the 1997 research

The results show an increasing interest in source state taxation among UN countries and a slight decrease among OECD countries.

The combined result of Groups A and B amounted to 30% in 1997, whereas this result according to the current research amounts to 39%. The result of the treaties concluded between the OECD countries decreased slightly from 42% in 1997 to 38% in 2013.

2.20 Article 21(3) of the UN Model 1980: source state other income

2.20.1 The UN Model

Article 21(3) of the UN Model reads as follows:

> (3) *Notwithstanding the provisions of paragraphs 1 and 2*, [i]tems of income of a resident of a Contracting State [ ] not dealt with in the foregoing Articles of this Convention *and arising in the other Contracting State may also be taxed in that other State*.

This provision deviates from the OECD Model in that the source state may tax “other income” that arises in the source state.

2.20.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 treaties included in the research, 658 treaties (36%) grant a shared taxation right as recommended by the UN Model. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 313 of 762 tax treaties (41%);
(2) Group B: 277 of 825 tax treaties (34%); and
(3) Group C: 68 of 224 tax treaties (30%).

Of these 658 treaties, 313 were concluded between two UN countries (Group A), 277 between a UN and an OECD country (Group B) and 68 between two OECD countries (Group C).

In 25 of these treaties[149]

from Group B and 11 from Group C) the withholding tax relates only to income from a trust. The withholding rates are typically 5%, 10%, 15% or 25%.

In Group A, 6 treaties[151] attribute an exclusive taxing right to the source state rather than the non-exclusive taxing right recommended by the UN Model.

In respect of winnings from gambling and lotteries arising in the source state, 34 treaties[152] (16 from Group A, 16 from Group B and 2 from Group C) provide for taxation in the source state.

In 9 treaties[153] (1 from Group A and 8 from Group B), a source taxation right is granted in respect of other income that is not subject to tax in the residence state.

2.20.3 Comparison with the 1997 research

The results of the current research indicate a downward trend. The combined result of Groups A and B amounted to 44% in 1997, whereas this figure according to the current research now amounts to 37%. In respect of treaties concluded between OECD countries, there was only a slight decrease from 32% in 1997 to 30% in 2013.

2.21 Paragraph 19 UN Commentary 2011 on Article 23A: unintended double exemption

2.21.1 The UN Model

Following the example of Article 23A(4) of the OECD Model 2008, the UN Commentary 2011 recommends, in Paragraph 19 of Article 23, a specific provision for the avoidance of unintended double non-taxation with regard to countries wishing to avoid such a situation, which provision reads as follows:

> *(4) The provisions of paragraph 1 shall not apply to income derived or capital owned by a resident of a Contracting State where the other Contracting State applies the provisions of this Convention to exempt such income or capital from tax or applies the provisions of paragraph 2 of Article 10, 11, or 11 to such income; in the latter case, the first-mentioned State shall allow the deduction of tax provided for by paragraph 2.*

This provision refers to unintended double exemption as a result of disagreements between the residence state and the source state on the facts of a case or on the interpretation of the provisions of the convention. A state that generally adopts the exemption method may consider that such a method should not apply where the source state interprets the facts of a

[149] For example, Art. 21(4) of the tax treaty between *Peru and Korea* of 2012.
[150] For example, Art. 20(2) of the tax treaty between *Canada and Finland* of 2007.
[151] For example, Art. 22(1) of the tax treaty between *Namibia and South Africa* of 1998.
[152] For example, Art. 23 of the tax treaty between *Estonia and Russia* of 2002.
[153] For example, Art. 21(3) of the tax treaty between *Bahrain and Belgium* of 2007.

case or the provisions of the tax treaty in such a way that an item of income or capital falls under a provision of the tax treaty that does not allow that state to tax such income or capital while the residence state adopts a different interpretation under which such income or capital falls under a provision of the tax treaty that allows the source state to tax and obliges the residence state to give an exemption.

2.21.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 treaties included in the research, 54 treaties (3%) have a provision for unintended double exemption. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 1 of 762 tax treaties (0%);
(2) Group B: 45 of 825 tax treaties (5%); and
(3) Group C: 8 of 224 tax treaties (4%).

Of these 54 treaties, one was concluded between two UN countries (Group A), 45 between a UN and an OECD country (Group B) and 8 between two OECD countries (Group C). The results seem to indicate that this provision is, in particular, favoured by certain OECD countries that apply the exemption method.

2.21.3 Comparison with the 1997 research

This provision did not form part of the 1997 research.

2.22 Article 25(5) of the UN Model 2011: arbitration

2.22.1 The UN Model

Article 25(5) of the UN Model 2011 reads as follows:

(5) Where,

(a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and

(b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within three years from the presentation of the case to the competent authority of the other Contracting State,

any unresolved issues arising from the case shall be submitted to arbitration if *either competent authority* so requests. *The person who has presented the case shall be notified* *of the request*. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. The arbitration decision shall be binding on both States and shall be implemented notwithstanding any time limits in the domestic laws of these States *unless both competent authorities agree on a different solution within six months after the decision has been communicated to them* or unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

This UN provision deviates in various ways from the equivalent OECD provisions of Article 25(5). However, the current research was limited to the mere appearance of an arbitration provision in the treaties in the period of research.

2.22.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 tax treaties included in the research, 127 contain a specific provision on arbitration. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 10 of 762 tax treaties (1%);
(2) Group B: 71 of 825 tax treaties (9%); and
(3) Group C: 46 of 224 tax treaties (21%).

As this provision has been part of the OECD Model since 2003, it is clear that the figure with regard to the OECD/OECD treaties is significantly higher than that of the UN/UN and UN/OECD treaties.

2.22.3 Comparison with the 1997 research

This arbitration provision did not form part of the 1997 research.

2.23 Article 27 of the UN Model 2011: assistance in tax collection

2.23.1 The UN Model

Article 27 of the UN Model 2011 reads as follows:

(1) The Contracting States shall lend assistance to each other in the collection of revenue claims. This assistance is not restricted by Articles 1 and 2. The competent authorities of the

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(a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
(b) to carry out measures which would be contrary to public policy (ordre public);
(c) to provide assistance if the other Contracting State has not pursued all reasonable measures of collection or conservancy, as the case may be, available under its laws or administrative practice;
(d) to provide assistance in those cases where the administrative burden for that State is clearly disproportionate to the benefit to be derived by the other Contracting State.

In the OECD Model, the equivalent provision was included in 2003. The current research was limited to the mere appearance of any specific provision for assistance in the collection of taxes in the treaties in the period of research.

2.23.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 tax treaties included in the research, 286 contain a specific provision concerning assistance in the collection of taxes. These are divided over the three groups noted in section

In Table 12 the results of the current research are compared with the results of the 1997 research. As the results regarding UN/UN treaties and UN/OECD treaties in the 1997 research were included in one group (Group A), the results of the current research pertaining to the UN/UN treaties of Group A and the UN/OECD treaties of Group B are combined in order to make the data comparable.

Table 12 Comparison of 1997 and 2013 research	UN/UN and UN/OECD				OECD/OECD			
	1997		**2013**		**1997**		**2013**	
Number of tax treaties	**697**		**1587**		**114**		**224**	
UN provisions	**Number**	**%**	**Number**	**%**	**Number**	**%**	**Number**	**%**
Art. 5(3)(a) supervisory activities	410	59	1084	68	39	34	78	35
Art. 5(3)(a) period < 12 months	484	69	1062	67	29	25	72	32
Art. 5(3)(b) furnishing of services	219	31	730	46	2	2	39	17
Art. 5(4)(a) and (b) delivery of goods	167	24	371	24	0	0	13	6
Art. 5(5)(b) stock agents	[redacted]	[redacted]						11
Art. 5(6) insurance activities	184	26	484	30	26	23234		34

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4 Generalconclusions

In general, it can be noted that the overall results of the 2013 research more or less correspond to the overall results of the 1997 research. Despite the significantly greater number of treaties, the current research did not reveal any spectacular differences or dramatic developments.

Treaty practice indicates that the standard provisions of the models have a strong influence on the inclusion of these provisions in tax treaties. A number of the provisions included in the research were adopted in the UN Model no earlier than 2001 and 2011. Generally, it takes a number of years before a newly introduced model provision finds its place in the treaty practice. As the period of research runs from 1997 to 2013, the 2001 and 2011 UN provision figures are not representative of the potential interest in these provisions. For example, the relatively low figure regarding the arbitration provision is merely due to its later adoption in the UN Model, in contrast to the position of the limited force of attraction provision, which has been in the UN Model since 1980. Therefore, the UN pro5.3(thn(h)-5O0tgg)-4.5nfhures(i)6.4(n)0(clud)-5.3(

r(fn)-6.6((m)89.4( )-10.6a few except i)7.3(ns,t)-5.3(the(figures)-5.3efol)]TJ1901538 0 TD.0003 Tc1743 Tw[ralipr

The use of the various UN provisions in these treaties varies significantly. The percentages in Table 12 vary from 3% to 89%. In listing the highest and lowest figures, 40% is taken as the mark for the higher and 15% for the lower figures.

4.1.1 Provisions with a high figure

The 2013 research found that 9 of the 30 UN provisions were adopted in more than 40% of the UN/UN and UN/OECD treaties:

Table 13	
UN provisions	**2013**
Art. 5(3)(a) supervisory activities	68%
Art. 5(3)(a) period < 12 months	67%

This data is in line with the 1997 research. Also, that research appeared to reveal a rather low interest in the UN provisions on limited force of attraction in Article 7(1), non-exclusion of the purchase of goods and merchandise in Article 7, the taxation of shipping profits in the source state in Article 8B(2), the remuneration amount in Article 14(1)(c) and top-level managerial officials in Article 16(2).

The UN provisions dealing with adjustments and penalties in Article 9(3), the exclusion of real business property in Article 13(4), unintended double exemption in Article 23A, arbitration in Article 25(5) and assistance in tax collection in Article 27 were adopted in the UN Model no earlier than 2001. As the effects of the adoption of these provisions in the UN Model only become visible in tax treaties after some years, interest in these provisions has the potential to grow in the near future. This applies, in particular, to the last three of these provisions, as they were only adopted in the UN Model and Commentary in 2011.

4.2 Trends in the UN/UN and UN/OECD treaties: 1997 v. 2013

Of the 30 provisions covered by the 2013 research, 20 also formed part of the 1997 research. Of these 20 provisions, the findings regarding 9 provisions do not differ by more than 5 percentage points. In respect of the other 11 provisions, this is different. Of these 11 provisions, 6 provisions indicate a downward trend that varies from 7 to 11 percentage points, one provision indicates a downward trend of 29 percentage points and 5 provisions show an upward trend that varies from 9% to 20 percentage points**.**

4.2.1 Downward trends

Table 15		
UN provisions	**1997**	**2013**
Art. 7(1) limited force of attraction	22%	14%
Art. 8B(2) shipping profits	15%	6%
Art. 12(3) radio/TV broadcasting	88%	80%
Art. 13(5) UN 1980 other shares	46%	17%
Art. 18B(1)(2) pensions	37%	26%
Art. 21(3) other income	44%	37%

countries that concluded tax treaties in the period of the current research. The interest in adopting radio and television broadcasting in the definition of royalties in Article 12(3) was

	UN/OECD	
Art. 7(-) no exclusion purchase of goods	6%	7%
Art. 9(3) adjustment and penalties	12%	20%
Art. 12(3) use of equipment	68%	69%
Art. 13(4) real property shares	59%	67%

Art. 5(3)(a) period < 12 months	67%	32%
Art. 5(3)(b) furnishing of services	46%	17%
Art. 5(4)(a)(b) delivery of goods	24%	6%
Art. 5(5)(b) stock agents	30%	11%
Art. 5(7) agents with one principle	39%	2%
Art. 5(7) agent arm's-length limitation	17%	8%
Art. 7(3) management fees, etc.	29%	10%
Art. 12(1)(2) shared taxation right	89%	72%
Art. 12(3) radio/TV broadcasting	80%	63%
Art. 14(1)(a) professional services	82%	44%
Art. 14(b) length of stay criterion	58%	25%

Unlike in the OECD countries, there is apparently a much more solid basis for these traditional UN provisions in the tax policy of UN countries. As these provisions have been in use for a long period, they have gradually been incorporated into their tax policy. The fact that these provisions attribute more taxation rights to the source state is apparently the decisive factor in this respect.

4.5 Closing remarks

The intriguing question that remains is why 19 of the 30 UN provisions of the current research have an overall figure of lower than 40%, 12 of which are even lower than 20%. This question is all the more intriguing if it is taken into account that the vast majority (1,587) of the treaties included in the current research (1,811) have been concluded by UN countries (UN/UN and UN/OECD treaties), which amounts to 88%, while the OECD/OECD treaties, at 12%, are only a minor factor in this context. In support of the specific UN provisions, the UN Commentary can play an important role. The promotional value of elaborate and unambiguous Commentaries on the various UN provisions cannot be overestimated.