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This practical reference is the result of a collaboration between the highly regarded Spanish law firm Garrigues and the TAXAND network of global tax advisors.

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In a commercially borderless world it’s increasingly common for sportspersons to change teams and country of residence. Given that reality, deciding what offer to accept often transcends athletics since the tax implications of that choice can have far reaching financial implications.

This insightful work offers a concise description of the tax affect that sportspersons relocating to the most common countries of origin and destination for sportspersons. It takes an essentially descriptive approach, opting to set forth the general personal tax framework the athlete will face. The aim is to create a resource of first reference providing the reader with a practical overview of the key issues they need to consider. Among the topics covered are the rules on inbound expatriates, tax treatment of image rights, exploitation of image rights through corporate vehicles, tax treatment of nonresidents, and the concept of “residence”.

This practical reference is the result of a collaboration between the highly regarded Spanish law firm Garrigues and the TAXAND network of global tax advisors.
Recent Application of the Dynamic Interpretation for Royalties by the Spanish Tax Administration*

Dr Aurora Ribes**

The controversy concerning the static or dynamic interpretation has its origins in the 1963 Organization for Economic Cooperation and Development Model Convention (OECD MC). The author analyses the problems derived from the hermeneutic clause of Article 3.2 OECD MC, as a consequence of the referral to the internal law made by this provision in the absence of a treaty definition. Besides, the non-binding character and practical importance of the Commentaries on the articles of the OECD MC, together with the legal basis for their application should be equally taken into account with regard to the (static or dynamic) interpretation of the Commentaries. Once these problematic questions have been clarified, the author refers to the recent tendency of the Spanish tax authorities in favour of the dynamic interpretation as far as the definition of the term ‘royalties’ is concerned.

I. STATIC INTERPRETATION VERSUS DYNAMIC INTERPRETATION: A DUAL PROBLEM

As it is known, the controversy concerning the static or dynamic interpretation has its origins in the 1963 Organization for Economic Cooperation and Development Model Convention (OECD MC). Indeed, the hermeneutic clause of Article 3.2 OECD MC 1963 gave rise to a heated debate among authors as to whether the dynamic or static interpretation of both internal law, to which this provision makes referral in the absence of a treaty definition, and the Commentaries on the articles of the OECD MC should be applied. Despite the express pronouncement made by the Committee on Fiscal Affairs of the OECD on the occasion of the reform of the OECD MC 1992, there are still numerous unresolved questions regarding this matter. However, in practice, the Spanish tax authorities have recently shown a tendency in favour of the dynamic interpretation as far as the definition of the term ‘royalties’ is concerned.

1.1. Concerning the Internal Law

Article 3.2 OECD MC generated many problematic questions, both in theory and in practice, most of which have been clarified by the OECD itself in subsequent Model Conventions and versions of the Commentaries. One of the most conflictive points, even nowadays due to the reticence of the tax authorities of some States to apply the criterion established by the Committee on Fiscal Affairs in the 1992 reform of the OECD MC, concerns the specific moment in time to be considered by the internal law when determining the meaning of the term in question, once referral has been made to domestic legislation under Article 3.2, in the absence of a definition in the treaty itself.¹

In other words, should the law in force when the double taxation treaty was signed be applied or the law in force when the treaty is actually applied? The subsequent Commentary on this article did little or nothing to clarify the matter and simply repeated the information provided in the article, pointing out that this paragraph lays down a general rule for interpretation of terms used in the treaty but not defined therein.² Thus, the question – which was not resolved by the Commentaries in 1963 – led to a division of the doctrine in two sectors, with some experts in favour of a static interpretation and others in favour of the dynamic or ambulatory interpretation.

As time went by, this lack of precision both in Article 3.2 OECD MC 1977 itself and in the Commentaries meant that these opposing positions as regards the temporal scope of the referral to internal law persisted. In accordance with the static interpretation, the internal law applicable at the time the treaty was signed should be

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¹ Under Art. 3.2 OECD MC: ‘As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.’
² Paragraph 8 of the official Commentaries on Art. 3.2 OECD MC settles the following: ‘This paragraph provides a general rule of interpretation in respect of terms used in the Convention but not defined therein.’
considered, whereas the doctrine in favour of the dynamic interpretation (also called ambulatory or evolutive) advocates recourse to the domestic legislation in force at the time the treaty is applied.

Going back to 1977, we will simply present the arguments for and against such positions, together with our own opinion on the matter, without prejudice to the pronouncement of the Committee on Fiscal Affairs in 1992 in favour of the dynamic interpretation. At first sight, application of the static interpretation may involve certain difficulties when determining the specific law in force at that moment in time and, in particular, lead to absurd situations if the decision is not coherent with reality. Moreover, if this solution is opted for, the exact date to be considered in relation to the referral should be specified, and this may be one of the following: the date the treaty was signed, the date the treaty was ratified, or the date it came into force. Likewise, adopting the static interpretation would undoubtedly necessitate frequent revisions of double taxation treaties.

Leaving aside the arguments based on the principle of contemporaneity – in so far as it concerns the interpretation of substantive provisions of old treaties and likewise it is not absolute in nature – the strongest argument in favour of the static interpretation is, a sensu contrario, the possible negative effect of the dynamic interpretation, which is the latter's main drawback. Although it is true that the philosophy of the dynamic interpretation is more in keeping with the scope and purpose of both internal law and double taxation treaties, such an interpretation, however, grants each State the possibility of revising a treaty unilaterally – and probably in favour of its own interests – by amending its own domestic legislation. All in all, in the opinion of the majority of experts, the static interpretation is too rigid to be adopted, and so with a view to applying the dynamic interpretation, some limitations should be found. As Avery Jones pointed out, there are two limits which explicitly or implicitly moderate this later thesis: the first may be expressed as 'unless the context requires a different interpretation', and the second is that the equilibrium must not be damaged or the essence of the treaty affected.

Many other authors joined Avery Jones in demanding that such a stance be taken, either expressly in the Model Convention or in its Commentaries. The ground gained by the dynamic thesis was especially evident in Canada where, after an important judgment issued by the Supreme Court clearly in favour of the static interpretation (The Queen v. Melford Developments Inc.), the Canadian Congress enacted the Income Tax Conventions Act in 1984. This was a clear legislative reaction against the thesis underlying this judgment, thus once and for all settling the question by declaring the dynamic interpretation the most appropriate. In summary, despite the opportunity for contracting States to avoid their international obligations by reforming their internal law, implicit in the dynamic interpretation, this was the thesis finally adopted by the Committee on Fiscal Affairs of the OECD in the 1992 reform of the OECD MC.

### 1.2. Concerning the Commentaries and the Model Convention

#### 1.2.1. Non-binding Character and Practical Importance of the Commentaries

The status and purpose of the Commentaries have been defined by the OECD itself which in the introduction to the Model Convention expressly recommends, after acknowledging their total lack of binding nature, that they be used to interpret and apply double taxation treaties, and in particular to resolve any controversy. In our opinion, the Commentaries are extremely useful since they eminate from the Committee on Fiscal Affairs, and so reveal the intention of the representatives of the Member States.

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**Notes**

1. Obviously, application of a treaty is simpler and more agile when it is not necessary to investigate what law was in force at a certain time when the treaty was created.
5. 1982 DTC 6281 (Supreme Court of Canada). Briefly, the issue at stake concerned whether the expenses of a bank guarantee (German bank) should be classified as interest (since the 1956 double taxation treaty between Canada and Germany did not envisage a definition of the term ‘interest’) as subsequent legislation allowed (according to the amendment made to the Income Tax Act in 1976), but not the legislation in force when the treaty was concluded. See M. Duval, ‘Interpretation des conventions fiscales’, *Canadian Tax Journal* (1991): 1227–1229; N. Boidman, ‘Canada. Supreme Court interprets Canada-Germany Treaty’, *Inter taxes*, no. 1 (1983): 17 et seq.
7. In defence of the Decision of the Canadian Supreme Court, it may however be said that in the 1956 Canada/Germany Tax Treaty, the provision corresponding to Art. 3(2) of the OECD MC was similar in structure to that in the 1965 Model Convention but with the addition: ‘the meaning it has in the internal law in force in the territory of the contracting State’, which could have led to the understanding that the law in force in 1956 should be adhered by Avery Jones et al., supra n. 6, 42.
8. Reference to the Commentaries as an interpretative instrument goes back, according to Vogel, to 1954, when the then German tax minister referred to the Models and to the explanations provided by the Association of Nations at the Congress on International Law in 1928, for the purpose of providing grounds for the interpretation of the Reichsminist. K. Vogel, ‘Double Tax Treaties and Their Interpretation’, *International Tax and Business Lawyer* 4, no. 1 (1986): 39 and 40.
9. Indeed, Ellis remembers how the primitive versions of the Commentaries simply attempted to explain why this provision had been adopted. Thus, their purpose was not to act as an aid to interpretation as such but to provide the background explaining why each clause in the model had been drafted. M. Ellis, ‘The Influence of the OECD Commentaries on Treaty Interpretation – Response to Prof. Klaus Vogel’, *Bulletin for International Fiscal Documentation* 54, no. 12 (1999): 618.
when drawing up the Model, that is, the interpretation to be given to each of its provisions. The Commentaries are an important hermeneutic tool for settling cases in which there is confusion or obscurity as to interpretation. They also provide the rule in question with the most appropriate interpretation in cases in which various alternative interpretations may be possible.

In this respect, the international consensus on the great practical relevance of the Commentaries should be mentioned. Despite the fact that they are not binding, they have been shown to be the most valuable sources for interpreting not only double taxation treaties signed by Member States of the OECD but also, on some occasions, those signed by OECD Member States with non-Member States, or even those concluded between non-Member States. Their importance is demonstrated, on the one hand, by the Recommendations of the OECD Council advising the governments of the Member States to abide as far as possible by the provisions of the Model Convention – pursuant to the interpretation provided in the Commentaries – when signing new treaties or revising existing ones. Despite the fact that as everyone knows the Recommendations are not binding, it is no less certain that if the Model Convention is to be observed by Member States, unless they have expressed their reservations or are prevented from doing so by material reasons (e.g., certain peculiarities of the domestic law of an individual contracting State), its consideration as a framework treaty should always be in accordance with the interpretation envisaged in the Commentaries.

In addition, comparative jurisprudence provides convincing evidence of their interpretative importance, and the courts of the Member States have made increasing use of the Commentaries for many years. In this respect, far from limiting their influence to the scope of the OECD, the Commentaries are also of great use in interpreting treaties signed by Member States of this organization with non-Member States, as well as those signed between two non-Member States, especially when the OECD MC was used as an example when the treaties were drafted. Examples of the latter are the treaties between developed and developing countries, in that the UN model treaty, which is usually followed in these cases, reproduces a large part of the articles and Commentaries of the OECD MC.

In conclusion, the Commentaries represent an agreement on a common interpretation, given their acceptance by the Member States of the OECD, and this is the reason why the States faithfully follow them in their bilateral negotiations. In other words, observance of the Commentaries undoubtedly guarantees the principle of common interpretation of the articles and consequently of the Convention as a whole.

1.2.2. Legal Basis for Their Application

In contrast to the almost unanimity of the doctrine as regards the above point, controversy arises once again when defining the status to be accorded the Commentaries and the Model Convention pursuant to the provisions of the 1969 Vienna Convention on the Law of Treaties. This question, which at first sight may appear to bear no connection to the decision concerning which interpretation of the Commentaries – dynamic or static – should be adopted, does in fact bear a close relationship to this decision as explained below.

A first look at Articles 51 to 35 of the Convention, which should contain the theoretical support for application of the OECD MC Commentaries – in that they are tools

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13 Focusing on the Spanish case, it may be seen that the Commentaries are used by both tax authorities and courts of law when interpreting double taxation treaties. In general, recourse to the Commentaries is made when there are doubts as to how the treaty should be interpreted (there are even cases in which domestic law has been ignored or not applied, and the competent authorities have adopted the interpretation provided in the Model Convention and its Commentaries), but also to confirm the interpretation reached by other means (see, e.g., the Decisions of the Central Economic-Administrative Court issued on 29 Sep. 1993 and 30 Apr. 1996). Finally, the Commentaries have been proved useful for the purpose of interpreting certain provision of Spanish domestic law on, for example, transfer pricing, outside the scope of double taxation treaties (Decisions of the Central Economic-Administrative Court issued on 23 Mar. 1988 and 18 Jul. 1990), J.M. Calderón Carrero & M.D. Pila Garro, ‘Interpretation of Tax Treaties’, Europäische Steuerrecht, 39, no. 10 (1999): 385.


15 Korea, Indonesia, Italy (instances of double taxation treaties with developing countries), Singapore, and South Africa are some examples of States in which the usefulness of the Commentaries on the OECD MC is obvious. See Case of SIR v. Drawing 1975 SA 518(A) 37 SATC 249, in which one of the parties based his case on a passage of the Commentaries on the OECD which were, in turn, taken into consideration by the South African Court, although subsequently, the competent authority in the appeal did not base its decision on the same. R. Eskinazi, ‘Interpretation of Double Taxation Agreements. A South Africa Perspective’, South African Tax Review, no. 6 (1996): 129.

for the interpretation of specific international treaties – reveals that it is extremely difficult if not impossible to incorporate the Commentaries in the list of hermeneutic instruments envisaged in these articles. However, according to the opinions of the different authors, with which we do not personally agree, the Commentaries may be classified in four categories.

First, some experts justify using the Commentaries by considering them part of the context of the treaty itself, within the meaning of paragraph (a) or (b) of Article 31.2 of the Vienna Convention. Others advocate their inclusion in Article 31.3, paragraph (c), in so far as both the Model Convention and the Commentaries form, according to this sector of the doctrine, a body of ‘general international taxation rules’ due to the harmonizing and unifying effect they exercise on the tax legislations of the States. A third sector justifies their use in accordance with Article 31.4 of the Vienna Convention since the Commentaries imply a special meaning in relation to the terms used in the treaty. Finally, the thesis whose legal basis is grounded in Article 32 of the treaty and considers the Commentaries to be supplementary means of interpretations is perhaps the one that has the greatest number of followers nowadays.

Although these doctrinal proposals have their merits and we share the concern to find the legal basis necessary for application of the Commentaries as an essential element for interpretation of double taxation treaties, we do not however agree with them since none of the proposals offer a satisfactory solution to the problem. Therefore, we can only conclude that in this respect the Vienna Convention is not adequate, and a future reform of the articles mentioned is necessary in order to confer on the Commentaries the status that their high interpretive value requires.

Looking at the different proposals in more detail, we disagree that the Commentaries on the OECD MC are covered by Article 31.2 of the Vienna Convention, bearing in mind the strict sense of ‘context’ envisaged therein. As is obvious, the Commentaries do not constitute an agreement to be adopted in relation to a particular double taxation treaty signed at a later date. Quite the opposite, the Commentaries are general in nature and an essential reference for the purpose of interpretation of all double taxation treaties signed within the OECD.

There is no contradiction, however, in saying that the Commentaries are included in the notion of ‘context’ used in Article 3.2 of the Model Convention since we understand that the term is used in its broadest sense. If we consider that Article 31.2 of the Vienna Convention is non-specific in nature, in the sense that it puts no limits on the list of contents, then it would be possible to include the Commentaries on the Model Convention. Nevertheless, we are still reluctant to accept that a viable solution would be to consider the Commentaries as part of the ‘context’ to which, under the Vienna Convention (‘A treaty shall be interpreted (…)’), it would be compulsory to refer when, as mentioned above, the Commentaries are a non-binding interpretive tool. Therefore, we rule out this solution and thus maintain the necessary coherence any interpretation requires.

The Commentaries are undoubtedly of notable interpretive relevance, which together with their nature, purpose, and structure, endows them with the sufficient entity to form part of the ‘context’ of the treaty, provided that this term is understood in its broadest sense and the freedom to choose whether or not to have recourse to the Commentaries for the purpose of interpretation is respected.

With regard to the opinion that the Commentaries are supplementary means of interpretation, a position held by the majority doctrine, the following comments should be made. In contrast to the opinion that the value of the Commentaries is the same as that of simple preparatory work, Vogel has stressed not only that this rule refers to the documents used when preparing an individual treaty, but also that the Commentaries are generally known and easily accessible, which cannot be said of the preparatory work itself.

From our point of view, such reasoning makes it possible to reject the idea that these two types of material are identical. The only remaining option is to argue that, as may be inferred from the ratio of the rule, Article 32 of the Vienna Convention simply enumerates some examples – note

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20 For arguments against, see A. Borrás Rodríguez, ‘El problema de las calificaciones en Derecho Tributario Internacional’, *Revista de Derecho Financiero y Hacienda Pública*, no. 242 (1996): 896 and 897. In our opinion, the subsequent definition of the word ‘context’ in the 1995 version of the Model Convention does not imply a narrowerphanso; instead, it includes a word ‘especially’ in use. Also in this sense, see J.M. Tovillas Morán, ‘La interpretación de los convenios de doble imposición y la cláusula general de interpretación del modelo de Convenio de la OCDE’, *Revista Latinoamericana de Derecho Tributario*, no. 0 (1996): 124; Vogel & Prokish, supra n. 16, 153 and 154, since it is pointed out that the term ‘context’ as used in the Vienna Convention and in the OECD MC is totally different.

21 In this respect, see Borrás Rodríguez, supra n. 20, 897; A. Borrás Rodríguez, ‘Los convenios para evitar la doble imposición desde el punto de vista de la teoría general de los tratados internacionales’, in VVAA: ‘Estudios de doble imposición internacional’ (Madrid: Instituto de Estudios Fiscales, 1980), 36; Tovillas Morán, supra n. 20, 121 and 122, and *Estudios del Modelo de Convenio sobre la renta y patrimonio de la OCDE* de 1992 (Madrid: Marcial Pons, 1996), 77 and 78.

22 Vogel, supra n. 17, 44.
the term ‘in particular’ – of auxiliary hermeneutic instru-
ments, which justifies inclusion of the Commentaries as
a separate category.\(^23\) Only in this way is it possible
to reconcile Article 32 of the Vienna Convention with an
interpretive tool like the Commentaries. Nevertheless,
certain doubts remain since the simple auxiliary, supple-
mentary, or, in other words, secondary nature attributed
to the Commentaries by this rule is considered insuf-
ficient. The potentiality of the commentaries, in our opin-
ion, far exceeds their mere classification as second class
hermeneutic instruments. They should be included in the
elements making up the context, in the broad sense of the
term, of all double taxation treaties within the sphere of
the OECD.

Finally, of the remaining opinions,\(^24\) held by
minorities,\(^25\) that of Avery Jones should be mentioned.
According to this author, the connection between the
Commentaries and the Vienna Convention resides in
Article 31.4, which sets out that the special meaning of a
term shall prevail if it may be established that this was the
intention of the parties to the treaty.\(^26\) Acceptance of this
reasoning however would imply limiting the applicability
of the Commentaries to the case in which a special mean-
ing\(^27\) is envisaged for a term, when obviously there is no
treason to limit the contents of the Commentaries to this
extreme. The validity of this thesis is thus only partial and
obviously not entirely satisfactory.

Another argument against both this position and
that defended by Prokish,\(^28\) consisting in identifying the
Commentaries, not with the ‘special meaning’ but with the ‘ordinary meaning’, referred to in Article 31.1
of the Vienna Convention, is based on the way in which
the Commentaries have recently been amended and pub-
lished in the form of interchangeable pages and, more
importantly, on the extended period of time that elapses
between when the Commentaries are modified and when
they are made public and generally accessible. In other
words, such formal aspects clearly make it impossible, in
Vogel’s opinion,\(^29\) to consider the Commentaries to have
any of the meanings envisaged in Articles 31.1 and 4 of
the Vienna Convention.

Likewise, the possibility envisaged by Vogel\(^30\) of con-
sidering the Model Convention and the Commentaries as ‘general international taxation rules’ within the meaning
of Article 31.3, paragraph (c) of the Vienna Convention as
legal grounds for using them, in our opinion, is hardly in
keeping with the ratio of the rule. Indeed, it would appear
exaggerated to attempt to ground application of the Com-
mentaries in this rule, especially if we consider that the
rule only makes a general reference to the main principles
in force in the international legal setting. In addition, since
the Commentaries are not binding in nature they cannot
be considered international rules in the strict sense.

Bearing in mind the above and in the absence of any
pronouncement by the Committee on Fiscal Affairs,
we repeat that there is a need for clarification in order
to answer the numerous questions that to-date remain
unresolved.

1.2.3. Interpretation of the Commentaries

The problems described above include another aspect, no
less relevant and certainly of greater practical importance
than that commented on in relation to referral to domes-
tic law, which is whether or not double taxation treaties
should be interpreted in accordance with the spirit of the
new Commentaries on the OECD MC.

The Commentaries on the 1977 Model Convention
are indeed more comprehensive than those on the 1963
Model, and very often imply a meaning that may differ
from the interpretation in force in 1963. The same may

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\(^{22}\) Likewise, Reimer’s opinion should be mentioned. According to this author, the Commentaries may be understood as being a ‘subsequent practice in the application of
the treaty which establishes the agreement of the parties regarding its interpretation’ within the meaning of Art. 31.3, para. (b) of the Vienna Convention. Reimer, supra
n. 19, 546. Against this opinion, see M. Lang, ‘Later Commentaries of the OECD Committee on Fiscal Affairs, Not to Affect the Interpretation of Previously Concluded Tax Treaties’, Inter-tax 25, no. 3 (1997): 8. In our opinion, it is obvious that this paragraph was drafted with the subsequent conduct or commitment of the parties in mind, in
which respect the Commentaries on the OECD MC, are quite another matter.
\(^{23}\) Baker proposes the practical solution of considering the Commentaries in accordance with any of the possibilities envisaged in the Vienna Convention, depending on
the case in question. Hence, if the Commentaries prior to the double taxation treaties may be applied considering them as preparatory work, later Commentaries may be
considered subsequent agreements between the parties and, from the point of view of non-Member States of the OECD, would be instruments related to the treaty. Baker, supra
n. 14, 30.

\(^{24}\) Avery Jones, supra n. 5, 285. In an earlier article, this author envisaged the possibility of classifying the Commentaries within the meaning of Art. 31.3, para. (a) of the
Vienna Convention. Avery Jones et al., supra n. 6, 96. Numerous experts have rejected this option, since they consider that the wording of this precept refers to treaties
undergoing an identical adoption procedure, and so forth, as the text to be interpreted, which obviously rules out the possibility of including the Commentaries in this
provision. In this respect see Vogel, supra n. 25; Edwardes-Ket, supra n. 12; Ellis, supra n. 11; 617 and 618; Lang, ‘Doppelbesteuerungsabkommen und innerstaatliches Recht’ (1992): 21 et seq.

\(^{25}\) A similar approach is offered by Ault, who considers that Arts 31 and 32 of the Vienna Convention – in which the Commentaries would be included – are connected under
para. 4 of Art. 31, in cases in which the Commentaries imply a special meaning of a certain term in the treaty. H. Ault, ‘Die Rolle des OECD Kommentars in der Interpretation von


\(^{27}\) Vogel, supra n. 23, 615 and 616.

\(^{28}\) According to this maximalist position, both the Model Convention and the Commentaries would have a supra-interpretative value.
be said about practically all later versions of the Commentaries that, in one way or another, modify, amplify, or define the contents of the Commentaries on the preceding Model Convention in order to perfect it and clarify its interpretation and application. In this context, the OECD already stated in the Introduction to the Model Convention 1977 that it would be advisable to interpret existing treaties as far as possible in the light of the new Commentaries, even if the provisions of such treaties lacked the clarifications introduced in the latest version of the Commentaries.

In accordance with this statement of the OECD, some authors believed they had found support for a dynamic interpretation of the Commentaries in the absolute sense and independently of the nature of the modifications made. Another sector of the doctrine, on the other hand, favoured the dynamic interpretation indicated by the OECD, but without ruling out the possibility of a static interpretation when the changes in the Commentaries made it advisable. Consider, for these purposes, the varied nature of the up-dates to the Commentaries. It is necessary to differentiate between simple explanations, additions, or amplifications and substantial changes as compared with the provisions of earlier Commentaries which, depending on their nature, would sometimes recommend a dynamic interpretation and other times a static interpretation. In our opinion, the term used by the Committee on Fiscal Affairs, ‘as far as possible’ lends support to this latter thesis, to which we adhere.

Before resolving this controversy, on which the Committee on Fiscal Affairs made a pronouncement during the 1994–1995 up-date of the OECD MC, mention should be made of the difficult justification, based on the Vienna Convention, of application of later Commentaries, or in other words, modifications made to the Commentaries in order to interpret double taxation treaties already concluded. The stances adopted by experts reflect the different opinions concerning the position occupied by the Commentaries among the hermeneutic instruments of the Vienna Convention. Hence, Avery Jones has stressed that only by considering the Commentaries (or, rather, their modifications) as ‘subsequent agreements’ between the parties concerning interpretation of the treaties would it be feasible to apply the new Commentaries in the framework of the Vienna Convention. Another sector of the doctrine opposes this point of view, since having defended equating the Commentaries with preparatory work, they reject any dynamic interpretation of the Commentaries and their consideration as either a subsequent agreement between the parties or a subsequent practice in application of the treaty, within the meaning of Article 31.3, paragraph (c) of the Vienna Convention. In our opinion, there is no category in which this specific type of hermeneutic material may be included in the Vienna Convention, as we have already mentioned, and so the Convention should be amended accordingly.

Meanwhile, classifying the Commentaries on the Model Convention as either part of the context or supplementary interpretive instruments, as a provisional solution to be adopted in the last instance, would not prevent amendments to the Commentaries from being classified in accordance with Article 31.3, paragraph (a) or (b), of the Vienna Convention.

Avery Jones’ alternative proposal should also be mentioned. This consists in the OECD itself attributing a higher value to the Commentaries by considering them a part of the Model Conventions and even of the double taxation treaties between Member States.

In summary, there appear to be two positions taken by the experts on this matter: some advocate a dynamic interpretation of the Commentaries on the OECD MC in all cases, while others consider it advisable to moderate the dynamic interpretation since they understand that there are certain cases in which such an interpretation would be inappropriate.

We agree with the latter position, whose main advocate is Vogel, and concur with the reasoning that the dynamic or static interpretation of the Commentaries depends to a large extent on the nature of the contents of the new Commentaries. In other words, a new version of the Commentaries may provide simple clarifications or more detailed explanations concerning one or more questions.

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33 And in any case, not necessarily always, as advocated by supporters of a dynamic interpretation.
34 Avery Jones, supra n. 5, 285; Avery Jones et al., supra n. 6, 96.
36 According to Avery Jones, whereas the original Commentaries drawn up by the League of Nations were merely ‘commentaries’ in the strict sense of the word, those emanating from the OECD may be said to be inseparable from the Model Convention. Avery Jones, supra n. 5, 285.
37 In relation to this subject, we would like to make clear that we disagree with the maxim ‘amendment of the Commentaries is preferable to amendment of the Model Convention’ which at a Seminar on interpretation of double taxation treaties during the International Fiscal Association Congress held in Eilat (Israel) in 1998, was defended by Prof. Helmut Loukota. His arguments centred in particular on the fact – which we agree with – that the changes in the Commentaries become effective immediately after they are adopted, whereas any changes in the Model Convention require subsequent modifications in the bilateral treaties already concluded or the conclusion of new agreements reflecting these changes, which is necessarily a more complex and longer procedure. We agree with Vogel, in the sense that such a statement can only be true under the following two conditions: First, the amendment made to the Commentaries is formal in nature since it explains or amplifies what was already implicit in the Model and therefore in the bilateral agreements based on the Model. Second, we accept as a premise the prevalence of the Commentaries as hermeneutic guidelines over any other possible interpretation that may be derived from the text of the Model and consequently of the double taxation treaties between the States. Vogel, supra n. 23, 612; Ellis, on the other hand, has expressed his scepticism concerning this question since in his opinion, any formal change (a comma, word order, etc.) in this type of treaties necessarily implies a substantial change therein. Ellis, supra n. 11, 618.
or amplifications, additions, or even substantial changes in relation to the provisions of earlier Commentaries, as already pointed out. According to Vogel and Lang, among others, the best solution is to opt for an up-dated interpretation in the first case – otherwise, the new Commentaries would be of little use –, while adopting the static interpretation in the case of a double taxation treaty concluded under the aegis of a Model Convention whose Commentaries, in certain aspects transcendental for the two contracting States, have been substantially amended, unless the contracting States themselves expressly manifest the opposite. This undoubtedly is the only possible solution capable of generating the legal certainty that both the Member States and taxpayers demand.

This important question – an importance that increased when the OECD started using interchangeable pages in 1992, which has favoured a greater frequency of modifications – not entirely clarified in 1977, was again the subject of attention during the 1992 revision. However, this latter revision did not specify in detail the scope to be given to the dynamic interpretation in general either. The choice of the dynamic interpretation with certain qualifications – which we have defended – was reflected in the Introduction to the OECD MC 1995, confirmed by the OECD MC 2000, and seconded by subsequent versions, including the July 2008 Model currently in force. Consequently, the Committee on Fiscal Affairs encourages Member States to bear in mind the innovations reflected in the new Model Convention and in the Commentaries, but under no condition is it possible to force them to do so.

There are various examples to be found in practice. There are countries like Australia in which a double taxation treaty has been interpreted in accordance with a new Model (and therefore new or revised Commentaries) not yet published. In Germany, however, automatic recourse to the dynamic interpretation is the subject of debate, with both the doctrine and German case law holding opposing views. The conclusion reached by Reimer, bearing in mind not only the express prohibition in Article 59.2 of the German Constitution of any substantial change in international agreements without Parliament’s consent but also the obligation of the Member States of the OECD to abide by the new Commentaries as far as possible, is that this is a case of ‘dynamic reference’ which is not anti-constitutional unless it alters the substance of the treaty itself.

A special mention should be made of the Austrian practice since, contravening the explicit provisions of the Decree issued on 27 October 1995 concerning the obligation to also apply subsequent Commentaries when interpreting double taxation treaties concluded previously, the decision of the Supreme Administrative Court of Austria issued on 31 July 1996 (92/13/0172) specified that it was necessary to give a special significance to the hermeneutic task of the Commentaries on the Model Convention in force when the treaty in question was concluded. Although some experts are in favour of this idea, and clearly oppose the regime created by the above Decree, the Australian Ministry of Finance, on the other hand, maintains its doubts as to whether this is the meaning that should be attributed to the words of the Court, and also insists on the advisability of the contracting States including in future double taxation treaties a specific clause dealing with the need to interpret the treaty in the light of the latest Commentaries. Examples against may also be found in the

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38 Vogel & Pörtsch, supra n. 16, 154 and 153.

39 See Reimer, supra n. 19, 408. It is another question whether the contracting States reach an express agreement to adopt the guidelines set out in the Commentaries when interpreting an earlier double taxation treaty, which they are entirely free to do.

40 See Reimer, supra n. 19, 409.


42 Likewise, rejecting the dynamic interpretation from the perspective of comparative case law: The Canadian Supreme Court in The Queen v. Crown Forest Industries Ltd. (95 DTC 5389 – SCC). In favour of this interpretation however: The US Court of Appeals, 22 Oct. 1975, US v. Barkley & Co. (525 F2d. 9, 2nd Circuit 1975) and the Norwegian Supreme Court in its decisions issued on 10 Jun. 1994 and 29 Apr. 1997. See F.A. Engleman & F.P.G. Pitigors, Report on ‘The Application of the OECD Model Tax Convention to Partnerships’ and the Interpretation of Tax Treaties’, European Taxation 40, no. 7 (2000): 267. Both authors are opposed to a dynamic interpretation of the Commentaries basically for two reasons: first, because the contracting States gave their consent when they signed a treaty adopted bearing in mind the Model Convention and its Commentaries in force on a particular date, and their rights may be violated by a substantial change in the Commentaries obliging them to interpret the treaty in a different way to that in which it was original conceived; and second, because it is in no way reasonable for the OECD to impose on the Member States changes made to the Commentaries when they substantially affect earlier treaties that required the approval of the parliament of each State before their adoption.

43 Lang, supra n. 24, 7 et seq.

Dutch jurisprudential doctrine, which demonstrates that far from being a closed question, this is a subject that still today requires definitive clarification.

2. Change in the Traditional Position of Spain Regarding the Scope of ‘Royalties’

Focusing on the case of Spain, it should be noted that despite the fact that the Committee on Fiscal Affairs recommends adopting the dynamic interpretation — with certain qualifications —, Spanish tax authorities have traditionally maintained a position in favour of the static interpretation, abiding by the provisions of the OECD MC and Commentaries in force when the treaty in question was concluded.

This position was a result of the predictable characteristics of the Spanish tax authorities at that time, in particular the slowness with which problems of interpretation and application of treaties were dealt with by the administrative sector and the courts, together with the latter’s ignorance or reluctance to recognize that international treaties had precedence over domestic legislation. Fortunately, this is no longer the case. Indeed, great advances have been made by the Directorate-General for Taxation of the Spanish Ministry of Finance (DGT) and the Economic-Administrative courts which, although with some exceptions, have begun to adopt the dynamic interpretation (with qualifications) when interpreting double taxation treaties.

In this sense, for example, the binding ruling of the DGT of October 1994 in relation to a Spanish national who resides in Spain and works in a German consulate in Spain may be mentioned. In the reply to the request for information made by this individual as to his tax obligations in Spain, the DGT informed him that under Article 18 of the Spain-Germany treaty, he should pay tax in Germany on his worldwide income and may also be liable to pay tax in Germany as a result of the remuneration received from the German State. In this case, under Article 23.2(b) of the treaty the taxpayer may deduct in Spain the tax paid in Germany, up to the amount of tax that he would have paid in our country on such income considered on its own. Nevertheless, the DGT advised that since the treaty between these two States followed the OECD MC 1963, a dynamic interpretation should be made in this respect and pursuant to the Commentaries and new OECD MC concluded that remuneration paid to persons who render their services to a contracting State, provided that they are nationals and residents of the other contracting State, may only be liable to taxation in the latter.

In recent years, the Spanish tax authorities have tended to opt for the dynamic interpretation as a general rule, unless there are good reasons for adopting the opposite solution, as the Committee on Fiscal Affairs specified and is explicitly envisaged in the Introduction to the OECD MC 2008, currently in force. A good example of this is the decision of the Central Economic-Administrative Court issued on 20 October 1992. After rejecting a prospective interpretation of the treaty between Spain and the Netherlands in relation to amounts paid by an entity resident in Spain to another resident in the Netherlands as sponsorship of a group of artists, the court held that such amounts are not liable to the corresponding Spanish tax. However, the court states that this would not have been the case if the applicable treaty, signed in 1971, had contained the subsequent provision in Article 17.2 OECD MC 1977, which introduced an express anti-avoidance clause.

We agree with the criterion used by the Central Economic-Administrative Court in this instance, and consider it impossible to adopt a dynamic interpretation, especially bearing in mind that the said provision does not simply imply a mere clarification of the existing treaty regulation, but rather a substantial modification compared with the provisions of the OECD MC 1965 reflected in the treaty between Spain and the Netherlands. The importance of the change made a posteriori justifies the decision of the Court, since it would not be possible to demand that this anti-avoidance clause be implied in international agreements signed by the States in which the clause was not included, and would undoubtedly be contrary to the principle of good faith reigning in the international treaty context.

However, focusing on the administrative doctrine in matters of royalties in Spain, we should mention the innovative application of the dynamic interpretation of the Commentaries on Article 12 OECD MC 2008, regarding specific cases of royalties included in the scope of bilateral treaties signed by Spain when the earlier Model Conventions and Commentaries were in force. We consider this change in criterion made by the DGT to be positive. The DGT has abandoned the static interpretation maintained on other occasions in relation to royalties, and widened the scope of application of the concept of royalties by using a dynamic interpretation, in keeping with the changes made in the sections relating to assignment of the rights in software applications in the current version of the OECD MC and Commentaries.

A good example of the U-turn made by the Spanish tax authorities in favour of a dynamic interpretation in

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matters of royalties are the replies of the DGT issued on 10 November 2008, 17 March 2009, and 20 March 2009. The first deals with the case of a company resident in Spain whose function is the wholesale commercialization in Spanish territory of software from non-resident suppliers. Its activities include supplying standard software in a closed box that also contains the manufacturer’s license to use agreement in electronic form. In other words, the company commercializes the package in the format in which it receives it, and the manufacturer directly grants the license. In addition, the company also handles the standard software license agreements as an intermediary. The manufacture receives the order from the company and issues the licenses. The company simply performs a commercial task and the manufacturer is the only holder of the copyright in the software and the only one authorized to grant licenses to use.

The enquiry concerned whether or not a withholding should be applied and the tax rate on payments made to a supplier resident in Ireland considered royalties from the commercialization of standard software packaged as described above. The DGT begins by pointing out that the double taxation treaty between Spain and Ireland concluded on 10 February 1994 is applicable to this case and in fact reproduces the actual wording of Article 12, which includes in the definition of royalties the use of or right to use copyright. This concept is completed by making reference to the Commentaries (paragraph 13.1) of the OECD MC where software programs are expressly mentioned:

Examples of such arrangements include licenses to reproduce and distribute to the public software incorporating the copyrighted program, or to modify and publicly display the program. In these circumstances, the payments are for the right to use the copyright in the program (i.e., to exploit the rights that would otherwise be the sole prerogative of the copyright holder).

It is no less true however that in the scope of international taxation the OECD has made changes in the sections relating to transfer of rights in software applications when the latest version of the Model Convention was adopted in 2008. Pursuant to the new paragraph 14.4 of the Commentaries on Article 12 OECD MC, payments made in virtue of contracts between the holder of the copyright in the software and an intermediary distributor are not royalties if the rights acquired by the distributor are limited to those necessary to distribute copies through a commercial intermediary. It is considered that distributors only pay for the acquisition of copies of the software and not to exploit any rights in the software (not including the right to reproduce). Payments under this type of contracts are classified as business profits and fall within Article 7 OECD MC. Such income should be classified as such, regardless of whether the distributed copies are supplied in physical or digital form (with the distributor not having the right to produce copies), or whether a minor personalization is needed to install the software.

At this point, it should be mentioned that Spain has always maintained a broader concept of royalties that is defined by the OECD. Therefore, despite the change in the Commentaries, Spain has maintained the existing Observation, although modified, in order to extend it to the new paragraph 14.4 of the current Commentaries on the OECD MC. Hence, although up to now payments made for the distribution of software were classified as royalties, in view of the interpretation made by countries of the OECD, Spain has modified the Observation, which reads as follows:

Mexico, Spain and Portugal do not adhere to the interpretation envisaged in paragraphs 14, 14.4, 15, 16 and 17.1 to 17.4. Mexico, Spain and Portugal hold that payments relating to software fall within the scope of application of the article when only a part of the rights in the software is transferred, both if the payments are made in consideration of the use of the copyright in the software for its commercial exploitation (except payments made for the right to distribute copies of standard software, without the right to adapt or reproduce) and if they correspond to software acquired for the professional or business use of the buyer, in which case the software would not be completely standard but adapted in some way for the buyer.

Bearing in mind this modification of both the Commentaries and the Observation made by Spain, on which the dynamic interpretation of the treaties signed by Spain should be based, the DGT concludes in this case that since publication of the OECD MC 2008 payments made by the Spanish company would not be considered royalties but rather that the transaction is included in Article 7 relating to business profits and under this article, the payments are not subject to withholding.

The replies of the DGT issued on 17 and 20 March 2009 (the double taxation treaty between Spain and the United Arab Emirates of 28 March 2007 is applicable to the latter) are similar in content and merely confirm this interpretive criterion favourable to the dynamic interpretation of the Commentaries on the OECD MC. Hence, although up to now payments relating to software fall within the scope of application of the article when only a part of the rights in the software is transferred, both if the payments are made in consideration of the use of the copyright in the software for its commercial exploitation (except payments made for the right to distribute copies of standard software, without the right to adapt or reproduce) and if they correspond to software acquired for the professional or business use of the buyer, in which case the software would not be completely standard but adapted in some way for the buyer.

However, we should insist that it is not always correct to opt for the dynamic interpretation, as we have already mentioned, since such an interpretation should not be systematically applied but only when possible depending on the nature of the changes introduced in the new Commentaries and/or OECD MC. We therefore disagree with the decision of the Spanish Supreme Court in its judgment issued on 11 June 2008 in which, although it does not concern royalties but rather income received by artists, the court indiscriminately applies the theory of the dynamic interpretation, taking it to its ultimate consequences, in
a case in which there was not even a liability clause on which to base taxation in Spain of the income obtained.

With this judgment, the Supreme Court allowed the appeal brought by the Spanish General State Administration and annulled the judgment of the lower court, emphasizing that paragraph 2 of Article 17, not included in the double taxation treaty of 16 June 1971 between Spain and Holland applicable to the case, should be understood to be included in the treaty following adoption of the OECD MC 1992 and its Commentaries, which incorporate this anti-avoidance clause.49

It hardly needs to be said that the solutions adopted in the two cases are radically different since whereas if Article 17.2 of the OECD MC 1992 is not considered applicable, the income obtained in consideration of the right to use the artist’s image rights would fall within Article 7 of the Spain-Netherlands treaty and would be taxed only in the State of residence (Holland) since the Dutch entity did not have a permanent establishment in Spain. If on the other hand the dynamic interpretation is applied with no qualification and paragraph 2 of Article 17 is considered included in the text of the treaty in the light of the provisions of the OECD MC and its Commentaries since 1992, as held by the Spanish Supreme Court, such income is subject to tax in Spain provided that it derives from artistic performances in Spain, even though it may be attributed to an entity other than the artist himself.

Three points may be made regarding this ruling of the Spanish Supreme Court:

(1) The first has already been mentioned and refers to the need to clarify that the intention of the Committee on Fiscal Affairs of the OECD with its pronouncement expressly in favour of the dynamic interpretation was not absolute and unconditional in nature – as would appear to be the case from the decision of our Supreme Court – but rather recommends a ‘qualified’ application of this hermeneutic criterion when it points out that it should be used ‘as far as possible’. Therefore, a categorical prohibition of the static interpretation may not be inferred, and such an interpretation may be applied in situations in which the dynamic interpretation should not be used due to the importance of the changes made. It should be borne in mind that the addition we refer to is not a mere qualification of the provision in Article 17.1, but rather an express anti-avoidance clause which includes an exception to the provision in this article and which in our opinion may not be taken as implied by only one of the contracting States in treaties in which it has not been expressly included.

(2) The justification used by the Supreme Court to provide grounds for attempting to add a second paragraph – that did not exist when the treaty was concluded and does not exist at present – to Article 17 of the Spain-Holland treaty is likewise incorrect since, showing a clear ignorance of the system of sources in tax matters, it refers to provisions of Spanish domestic law, based on which it understands that such an anti-avoidance clause is included in Article 17 of the treaty, thus making a unilateral modification in what was agreed by the contracting States in an international agreement which, as is well known, has supraregional status.

(3) We likewise agree with the warning given by Martín Jiménez,50 regarding potential problems that from the perspective of the Constitution and taxpayers’ rights may arise in this respect. This author underlines that bearing in mind the practical importance that the Commentaries on the OECD MC have acquired for the authorities and courts, together with the new way of working of the OECD and publication of the Commentaries, it gets easier and easier for a subsequent Commentary to become ‘hard-law’ and change the original meaning of earlier treaties by means of administrative and judicial decisions. Therefore, it should be remembered that the courts50 may also oppose the effects of this dynamic interpretation which, as has been repeatedly stated, is not binding and should not be imposed in all cases.

In conclusion, we positively evaluate the change in criterion used by the Spanish tax authorities which in recent decisions have shown they are in favour of a dynamic interpretation of the Commentaries on the OECD MC in relation to application of earlier treaties signed by Spain, while definitely abandoning the traditional tendency to always favour the static interpretation. However, the position in favour of the dynamic interpretation should not imply, as unfortunately is occurring in Spanish legal circles, that the Spanish tax authorities will rigidly and automatically apply the dynamic interpretation in all cases without considering the nature of the changes made in the OECD MC and in the Commentaries. This would contravene the spirit and purpose of the statements made by the Committee on Fiscal Affairs of the OECD and clearly violate the intentions of the contracting States when signing a double taxation treaty, thereby generating serious situations of doubt and legal uncertainty for taxpayers.

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49 Pursuant to Art. 17.2, drafted by the OECD MC 1992 and also in force in the current Model Convention, ‘where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues to him other than to another person, that income may, notwithstanding the provisions of Articles 7, 14 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportman are exercised’.


51 In this sense, see Judgement of the National Court of Spain issued on 3 Oct. 2002.