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# The OECD Model Tax Convention: was there a grand plan?

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### Introduction

What became the OECD Model Tax Convention was the result of separate working parties set up by the predecessor European body, the OEEC, writing each article and its commentary. This chapter will examine the degree of coordination between the working parties in order to discover whether there was any grand plan or whether the result was a series of separate articles. The question is particularly important in relation to the priority between the articles where income falls within more than one article.

### Pre-OEEC history

The previous model tax treaties were the Mexico (1943) and London (1946) drafts by the League of Nations. Their development during wartime was unsatisfactory, resulting in an over-emphasis on source taxation in the former, and an attempt to correct this in the latter. Starting in 1947 a Fiscal Commission of the United Nations operated but East-West politics and differences of view between developed and developing countries prevented any significant technical progress; and no progress at all was made over model tax treaties, leaving it to states to continue to develop these for themselves, naturally resulting in wide variations between them.[[1]](#footnote-1) The League’s models therefore had limited influence on the OEEC when it started work on what resulted in the OECD 1963 Draft Convention[[2]](#footnote-2); treaties in existence between member states had far greater influence. Of the 15 original working parties, ten referred to actual treaties as their primary source, often quoting them, three referred to both treaties and the League’s drafts,[[3]](#footnote-3) and two did not quote any sources.

### The OEEC’s method of preparing the 1963 Draft

The Fiscal Committee (FC) of the OEEC was set up by its Council[[4]](#footnote-4) in 1956 as a result of urging initially by the International Chamber of Commerce[[5]](#footnote-5) and then by the Dutch, German and Swiss delegations.[[6]](#footnote-6) Perhaps surprisingly the UK had at first argued against setting it up on the ground that it had treaties with nearly all OEEC countries and it doubted whether any practical results would emerge from the theoretical discussions that seemed to be proposed.[[7]](#footnote-7) However, it transpired that other countries were strongly in favour and there was more emphasis on practical results, so the UK gave qualified approval in order to maintain goodwill and to be able to influence any recommendations, which it did.

The terms of reference of the FC were worked out by an ad hoc committee of experts on taxation under the chairmanship of van den Tempel, the Director General of Fiscal Affairs in the Netherlands, who would go on to chair the FC.[[8]](#footnote-8) The FC was given the ambitious, if not impossible, task of dealing with all the following[[9]](#footnote-9) in the period from March 1956 to July 1958 when it would be determined whether the FC should be continued.[[10]](#footnote-10)

A - Direct Taxation

The committee should submit concrete proposals as to which taxes on income, capital, estates and inheritances should be included in double taxation agreements, and which methods should apply in such agreement especially as regards apportionment between commercial profits, taxation or investment income, royalties and similar payments.

B – Indirect Taxation [summary omitted]

C - Standardisation of concepts

The Committee should submit concrete proposals as regards the means or standardisation of the most important concepts to be found in double taxation agreements.

D - Inequalities in taxation on grounds of nationality

The Committee should make concrete proposals concerning the means of removal of such inequalities.[[11]](#footnote-11)

The Fiscal Committee made an interim report in 1957[[12]](#footnote-12) and a further report in 1958[[13]](#footnote-13) by which time it had prepared draft articles and commentaries on taxes covered, the definitions of permanent establishment (PE) and fiscal domicile, and non-discrimination, which became a published recommendation of the Council in September 1958 to be adopted in treaties.[[14]](#footnote-14) This was a very considerable achievement in such a short period. Further Reports followed in July 1959,[[15]](#footnote-15) August 1960[[16]](#footnote-16) and August 1961.[[17]](#footnote-17) The staged setting up of the Working Parties (WPs) over a two-and-a-half year period and the publication of their reports at roughly yearly intervals meant that not all WPs were operating simultaneously because some ceased when a report was issued before others were active but there were times when about six WPs were operating simultaneously.[[18]](#footnote-18) With minor changes the articles included in these reports plus six further articles[[19]](#footnote-19) were joined together to become the OECD (as the OEEC had become in 1961 on the admission of the US and Canada) 1963 Draft Convention.[[20]](#footnote-20) The whole process was therefore completed for the bulk of the articles in about 5 years and 7 years in total.

Of the terms of reference, C (standardisation of treaty concepts) was particularly important at the time. Before the FC started work many member states had their own treaty wording that they tried to impose on other weaker states which resulted in considerable variations between treaties. For example, in 17 treaties between 1945 and 1956 the UK’s preferred definition of residence of being resident for domestic law in one, but not the other, state, thus completely excluding dual residents, was adopted in all but two;[[21]](#footnote-21) and the statement that a company was resident where it was managed and controlled was adopted in all but three[[22]](#footnote-22) even though in some cases the definition was contrary to the other country’s domestic law.[[23]](#footnote-23) There was more variation in the residence definition in the five German treaties between 1952 and 1956: two applied the domestic law meaning of residence, two set out the definition of residence (which may have been similar to domestic law), and one is silent on the definition; one resolved dual residence on the basis of nationality, and two excluded dual residents from treaty benefits completely.[[24]](#footnote-24)

The permanent establishment (PE) definition was subject to greater differences, but the pattern was similar. The UK’s preferred definition was included in eight of those treaties,[[25]](#footnote-25) that it ‘means a branch, management, factory, or other fixed place of business’; agents were dealt with in common form in virtually all the treaties[[26]](#footnote-26); the purchase of goods was excluded; and a subsidiary did not of itself qualify as a PE. Even those eight had some variations, and the other treaties contained more variations.[[27]](#footnote-27) There was even less similarity in the definition in the five German treaties all of which had different definitions of PE.[[28]](#footnote-28) Once the FC had produced drafts these were generally adopted by all states with variations only to suit differences in domestic law.

The drafting of treaty articles and their commentaries was carried out by 16 differently WPs consisting of delegates from generally two countries drawn from the 18 European countries involved in the OEEC meetings (apart from observers), expanded to 20 members when it became the OECD in 1961.[[29]](#footnote-29) We shall concentrate on the overall position but the difficulties faced by members of WPs from different countries with different legal backgrounds in arranging to meet, and then understanding each other when they did meet, and even having a common language for communication, should not be underestimated.[[30]](#footnote-30) After 1957 all OEEC delegates met regularly some 4 to 6 times a year for 2 to 4 day meetings of the FC over a period of 5 years to produce the four reports (May 1956 to June 1961) and 7 years for the 1963 Draft. The delegates for some countries changed fairly often. In the modern world this sounds like an enormous amount of time spent in meetings but it should be noted that meetings were in English and French with consecutive translation.[[31]](#footnote-31)

The Chair throughout this period was van den Tempel (Netherlands) but he was unable to attend meetings for one critical year due to ill health (July 1959 to August 1960 when the Third Report was prepared) when he was replaced by Locher (Switzerland) who seems to have been the one of the few persons to attend nearly all FC meetings in the period[[32]](#footnote-32); Switzerland, which had needed to resolve all the same problems between Cantons which were the primary taxing jurisdictions, was perhaps the most active country in making proposals and influencing outcomes and Locher was also a third Vice-chair 1960 onwards and Acting Chair in 1960-1961. Another important delegate is Öhman (Sweden) who attended nearly all meetings, held one of the FC Vice-chair positions throughout this period (there were two positions until van den Tempel took leave and three thereafter with Locher being the third).[[33]](#footnote-33) Gilmer was the Secretary throughout the period and seems to have been very proactive in the process. Edelmann joined him in the Secretariat early in 1962. The great powers in the OEEC were France, Germany and the UK. While the US only joined when the OECD was created in September 1961 it had associate status before that but was not active until it was a member by which time it was too late to influence most of the work as the 1963 Draft was almost complete.

Obviously such a large undertaking required a degree of coordination and this was partly driven by the persons and countries just referred to but normally one would expect institutional mechanisms to ensure oversight, continuity and coordination. Three possibilities in this case, apart from the FC, are the Drafting Group; WP14 (which at one point was tasked with the structure of the treaty and had several structural elements within its remit); and (least likely) WP15 on avoidance of double taxation, the substantive treaty article which has interactions with most other substantive articles. We shall examine the coordinating role of each of these, and also WP2 (residence) which tried to deal with different requirements for residence in other articles but were prevented from doing so by the FC.

#### The Drafting Group

The Drafting Group was created at the end of the last meeting in 1957:[[34]](#footnote-34)

The Chairman recalled that the Delegate for Sweden had proposed that a Drafting Group be set up to harmonise the various Draft Articles adopted separately by the Committee. The committee decided that this Group would be composed of the Chairman of the Committee, the Delegates for France, the United Kingdom and Germany and the Secretary of the Committee, and that it would meet as soon as all texts were available after the next Session.

This was therefore a high-powered group. Its membership was changed in relation to the third and fourth OEEC reports to include the Vice-chairs.[[35]](#footnote-35) Later for the preparation of the 1963 Draft the Chair proposed that ‘the Drafting Group should be enlarged so as to include the Delegates for Sweden and Switzerland, in their capacity as Vice-Chairmen of the Committee.’[[36]](#footnote-36) This seems to suggest that structural issues and overall coherence were the province of the Drafting Group.

There are only four reports of the Drafting Group during the period in which the four OEEC reports were produced,[[37]](#footnote-37) relating to the first and second OEEC reports though it is mentioned several times in relation to the preparation of the four reports.

The Third Report went through various stages including the Drafting Group emerging as the draft ‘prepared by the Secretariat in agreement with the Drafting Group of the Fiscal Committee’ that was submitted to the FC for adoption, and adopted by the FC taking into account written amendments proposed by three delegations, of which there is no record, and other unspecified oral amendments made at the meeting.[[38]](#footnote-38)

The Fourth Report went through a similar procedure, being drafted by the Secretariat and passed to the Drafting Committee before submission to the FC for approval.[[39]](#footnote-39) Minor amendments to the double taxation relief article continued in later meetings leading up to the Fourth Report.[[40]](#footnote-40) These included that the general part of the report describing in para 25 that art 23 (the relief article—for ease of understanding we shall refer to articles by their number in the 1963 Draft although initially they had differing numbering) was changed to reflect more accurately the way relief works in credit cases but as published still contains the European/exemption way of thinking that the source state has the exclusive right to tax under distributive rules eg in the case of PEs and immovable property in contradistinction to cases where taxing rights are ‘shared’ (dividends and interest), whereas in fact it is only in a few unusual cases under the distributive rules that the source state has the exclusive right to tax. Similarly para 29 was changed to give a better description of the limit on the credit method, again suggesting some lack of understanding of that method.[[41]](#footnote-41) Several changes were made to the articles and the commentaries, especially for arts 10-12 (dividends, interest and royalties), to try to get uniformity of terminology and drafting.

Immediately following the approval of the Fourth Report, the FC considered its future work programme, and Switzerland proposed that the Drafting Group work on structure and integrating the draft articles into a complete model.

The Group had missed an important opportunity for improving the structure during the preparation for the Second Report. The Chairman of the FC noted in a paper to the Drafting Group that while some articles referred to income (arts 6 (immovable property), 8 (shipping)), others referred to income derived by a resident (arts 14, 15, 17, 19).[[42]](#footnote-42) He posed the question whether to delete ‘derived by a resident of a Contracting State’ in art 15(1) to be on the same lines as arts 6 and 8, or whether to add those words to art 16 which at the time did not contain them.[[43]](#footnote-43) Fortunately the Drafting Committee eventually chose the latter, but without questioning their absence in arts 6 and 8;[[44]](#footnote-44) that would have to wait another 15 years.[[45]](#footnote-45) The difference is significant because, since art 6 in the 1963 Draft did not refer to a resident at all, it therefore applied to immovable property in either the residence state or the other state. If the taxpayer was a resident of the state in which the immovable property was situated,[[46]](#footnote-46) art 6 therefore said nothing about taxation in the other state thus leaving it open for the other state, as the loser state under a dual residence tie-breaker, to tax. This was not prevented by art 21 (other income, which did not then exist as it would not be published until the Third Report) after it was introduced because immovable property in either state had been ‘expressly mentioned’ (later ‘dealt with’) in art 6. Taxation by the state in which the immovable property was not situated was not a problem on the original wording of art 6 under which income ‘shall be taxable only’ in the state where the immovable property was situated. Article 6 had been adopted by the FC containing these words in November 1958, which they had asked WP15, who were responsible for art 23, to review.[[47]](#footnote-47) Presumably WP15 changed this to ‘may be taxed’ in order to suit credit states, although there is no record of their doing this or of the point being referred back to the FC as the FC had requested. On the same day as the Secretary sent the Drafting Group the Chairman’s comments, he submitted a version of art 6 containing ‘may be taxed.’[[48]](#footnote-48) If it had still said ‘shall be taxable only’ the loser state would have been prevented from taxing by these words regardless of the absence of any reference to the taxpayer’s residence. Thus the Drafting Committee were discussing the point raised by the Chairman at the same time as art 6 was changed in a material respect.

The conclusion is that the Drafting Group comprised influential people but they construed their task narrowly as being confined to low-level drafting and translation points. There is also unfortunately little record of the changes they made. The German main delegates (Horst Vogel and Debatin) were technocrats and the UK delegates changed often although they were influential in the early years of the FC.[[49]](#footnote-49)

#### Working Parties 14 [art 21 and others] and 15 [art 23]

The terms of reference of Working Party 14, which was responsible for a number of miscellaneous articles including arts 1 (persons covered), 3 (definitions) and 21 (other income),[[50]](#footnote-50) were changed to include the general structure of the Draft:[[51]](#footnote-51)

On the proposal of the Chairman the Committee decided to widen the Working Party's terms of reference and to instruct it to make proposals as to the general structure of the Convention.

There is some evidence that WP14 tried to do so but were not helped by the FC. In relation to art 21 their first draft of the Commentary showed that they regarded it as being a general principle:[[52]](#footnote-52)

The aim of the provision, which appears in nearly all Conventions for the avoidance of double taxation, is to give the prior right of taxation to the State of residence, which normally is entitled to tax the whole income and the whole fortune of its residents.

In the FC there was some doubt about whether it was a general principle and whether WP15 should deal with the relief article first.[[53]](#footnote-53) Exemption countries like Germany saw it as a general rule not depending on the method of relieving double taxation, but the Danish delegate could not see the need for such an article and said that countries which used the credit method did not as a rule have it. The FC decided to deal with art 21 first in spite of the Austrian rapporteur of the WP wanting them to deal with art 23 first. In the following meeting the FC considered both arts 21 and 23 seemingly at the same time although they are minuted separately.[[54]](#footnote-54) Art 21 was the article where the importance of the general structure should have been considered separately from art 23 and much earlier in the process, but the opportunity was missed.

The potential overlap with WP15 can be seen in their first draft which came close to recommending a general structure including their own version of art 21 which they produced before WP14 had begun to discuss that article:[[55]](#footnote-55)

Draft A [credit]. (1) The laws of each Contracting State shall continue to govern the taxation of income arising in that State and of income derived by residents of that State from the other Contracting State, except where express provision to the contrary is made in the present Convention.[[56]](#footnote-56)

Draft B [exemption]. (1) Income shall be subject to tax only in that State of which the taxpayer is a resident, except where a provision to the contrary effect is contained in any Article in the present Convention….

One might criticise Draft A(1) for being restricted to income arising in one of the states, an idea that, as we shall see, surprisingly still persisted until 1973;[[57]](#footnote-57) in the FC the delegates from Germany and the UK supported by the Chairman (Locher) suggested it be widened.[[58]](#footnote-58) The Delegate for Switzerland, as was often the case, saw the importance of these to the structure and ‘pointed out that this paragraph contained two principles: firstly, it upheld the application of the law of the State which had the right to tax, and secondly, it provided a general clause applying to income which was not covered by other Articles, though it differed from the clause in Article [21] relating to residuary income which Working Party No. 14 had drawn up.’[[59]](#footnote-59) Draft B(1) was deleted by the FC to remove the duplication.[[60]](#footnote-60)

After the FC had discussed art 21 with the usual range of different views being expressed, including a UK proposal to include a ‘subject to tax’ provision which proved to be controversial even as an alternative in the Commentary, WP14 toned down the suggestion of a general principle, changing the Commentary to say ‘The aim of the provision…is to give *for purposes of simplification* a general rule relating to the residuary field of items of income not expressly mentioned…’.[[61]](#footnote-61) But the FC restored it by deleting the words in italics.[[62]](#footnote-62) When art 21 was discussed it was thought to deal only with income of a different type rather than of a different source and so its full importance was not recognised. During the preparation of the 1977 Model the Working Group then responsible for Art 21 thought as late as 1973 that art 21 did not cover third state source income until the words ‘wherever arising’ were added to art 21 on their recommendation.[[63]](#footnote-63)

An interesting development in connection with the Third Report was that:[[64]](#footnote-64)

The Chairman asked Working Parties Nos. 8, 11, 12 [arts 10-12] and 15 to hold a joint meeting … to discuss the harmonization of the Articles and Commentaries. The Chairman asked each Working Party to examine carefully the Articles drafted by the other Working Parties. He suggested that the commentaries should be drawn up in accordance with a uniform plan: (1) current taxation systems; (2) characteristics of the Article; (3) commentary; (4) reservations.

There does not seem to be any formal record of the joint meeting and the various WPs continued to report separately to the FC but the meeting may have harmonised the drafting of these articles.

The FC then turned to WP14’s unfinished work, specifically the article on definitions, which extraordinarily had been left to this late stage, based on its further report on that topic.[[65]](#footnote-65) The report provided nine definitions for consideration of which the following raised structural issues:

*Contracting State*. As presaged in the territorial extension article, two largely blank definitions in geographical terms (one for each state) were proposed which go to the scope of the treaty and have been an important issue from the 1970s as offshore oil and gas production has increased. At the June meeting the FC relegated the geographical definition to the Commentary and the Chair left over the definition of (other) Contracting State as a drafting matter (presumably to be taken up in the integration stage).[[66]](#footnote-66)

*Person and company*. Another now very topical structural issue, the tax treaty treatment of various kinds of legal entities was also tackled through the two definitions of ‘person’ and ‘company,’ the draft commentary focusing on solving different treatment under national non-tax and tax law.[[67]](#footnote-67) The definition of ‘company’ is important as the dividend article applies to dividends paid by a company.[[68]](#footnote-68) Relatedly and an odd contrast, no definition of ‘enterprise’ was provided on the basis of treaty practice, leaving it to domestic law which was known to differ from one country to another (and common law countries did not use the expression), though an ‘enterprise of a Contracting State’ was the subject of a separate definition.[[69]](#footnote-69) WP14 was asked to consider the definitions of person, company and profits further.[[70]](#footnote-70) The discussions on this issue continued during the preparation of the 1963 Draft as a whole.

The FC then considered the definitions article based on a new report from WP14 dealing with the definitions of person, company and profits, which took up most of the meeting.[[71]](#footnote-71) WP14 in its report looked squarely at the structural issues involving the first two definitions. It looked at all usages of the terms in currently approved articles and using many examples similar to the much later 1999 Partnership Report[[72]](#footnote-72) showed how it was difficult to come up with a solution that produced the right answer in all cases, concluding that it was probably best to have partnerships treated as persons (for agency PE purposes) but not as companies unless they were so treated under domestic law of the state of formation nor as residents (requiring a change to the existing draft of art 4), the difference being driven on the one hand by the need for a broad meaning of person because of its broad usage but a more specific meaning of company primarily driven by its use in art 10. The FC discussion of the person and company definition drafts covered a broad range of views from a narrow meaning of person (Germany) to a broad meaning (UK – both countries considered the commentary should provide for any problems to be solved in bilateral negotiations), and the cross-over with the definition of profits (see next heading) and the PE exception in arts 10-12.[[73]](#footnote-73) The Chair also considered that as a majority treated partnerships as transparent, the drafting should work on that basis and an amendment to the current draft residence definition that had been published in the First Report was required.

For the next FC meeting in January 1962 there was a fresh report from WP14 on definitions.[[74]](#footnote-74) It maintained the existing drafting for the definitions of person and company and elaborated its September report to argue for the same position (with significant similarities to the Partnership Report). The FC settled the definition of person in its current form and the definition of company was not discussed. It was decided to change art 4(3) to refer to ‘a person other than an individual’ rather than ‘legal person’ and to delete its second sentence on partnerships.[[75]](#footnote-75)

*Profits*. The definition of ‘profits’ proposed a wide meaning to include the letting and alienation of an enterprise. Although coming from another direction, one of the critical interactions among treaty distributive rules already discussed earlier in the meeting on the Fourth Report – what happens when income covered by a specific articles apart from art 7 also constitutes profits of an enterprise (the priority issue) – was proposed to be solved by a definition along the lines of the League of Nations’ model giving profits a broad meaning and excluding income by type if there is another article on that type of income. The WP14 draft, predating the resolution of this issue in arts 10-12 which the draft commentary mentions, had proposed the narrowest possible definition.[[76]](#footnote-76) In the end WP14 agreed that a generally drafted definition was not very helpful and that it could be left to domestic law through art 3(2) (domestic law meaning of undefined terms).

On priority the FC discussed a bank resident in A with no PE in B which received dividends from B, so that potentially both arts 7 and 10 applied. It was agreed that art 10 should solely apply. The discussion become confused when considering if there was a PE in B which received dividends from A where it was thought that art 10 also applied, although under the priority rule the dividends remained in art 7 because this situation was not dealt with by art 10.[[77]](#footnote-77) WP14 considered whether the priority rule should be in art 3, art 7 or a separate article but seemed to prefer art 7. Its new draft, to the same effect as 2017 art 7(4), was adopted by the FC.[[78]](#footnote-78)

These definitions raise the kind of structural issues that seemed now to have been directed to the Drafting Group even though WP14 had been asked to look at structure a few years earlier. It is evident from the WP14 report and the discussion that WP14 was mainly trying to fit into earlier decisions made by the FC on other articles and its mandate rather than presenting any grand plan for the overall model but on the other hand the FC seemed unwilling to allow WP14 to avoid structural issues.

WP14 was given this task but it did not take it up explicitly. When its work across a variety of articles inevitably threw up particular structural issues such as conflicts of entity characterisation or the priority rule between art 7 and other more specific provisions, WP14 conscientiously addressed the issues but the FC effectively buried them in the too-hard basket.

#### Working Party 2 [residence]

We should also mention the work of WP2 which tried to produce a plan dealing with the different uses of residence[[79]](#footnote-79) in treaties but its efforts were foiled by the FC. The first paper by WP2 set out an excellent framework dealing with the distinction between residence for (a) the scope of the treaty, (b) dual residence conflicts, and (c) source-residence conflicts, each requiring different approaches, the first and third requiring domestic law (with a possible limitation for the third) and the second a treaty definition.[[80]](#footnote-80) Article 1 (which also included a definition of ‘person’) was originally their proposal for (a) above but they were told not to pursue it (or anything other than art 4),[[81]](#footnote-81) although art 1 was later resuscitated by WP14 in 1959.[[82]](#footnote-82) This explains why oddly it refers to residents of one or both states, when the latter possibility should have been eliminated by the tie-breaker; WP2’s original draft referred to a person fully liable to tax (meaning under domestic law, as they made clear in their Commentary[[83]](#footnote-83)) in one of the states. Another important WP2 proposal that was never adopted was to put its equivalent to art 21 at the beginning of the distributive rules.[[84]](#footnote-84) A little of WP2’s work generally survives in the Preliminary Remarks in the Commentary to art 4.

Had WP2 been allowed to pursue these matters the Model would have had a far better framework. Later, WP14 was given a mandate to look at the structure even though the FC again prevented this from working properly; WP2 came too early in the process for the importance of this issue to be appreciated.

#### The preparation of the 1963 Draft

Before the September 1961 FC meeting, Switzerland with the agreement of the Chair produced a full draft convention of 32 articles for consideration by the Drafting Group at a meeting in advance of the FC meeting.[[85]](#footnote-85) This draft put the 25 articles in the four OEEC reports more or less into the current order, added some further articles (WP14 articles still to be finalised by the FC, capital gains which Switzerland had proposed in early 1961[[86]](#footnote-86) but only got underway with the establishment of WP19 in late 1961, and a new article on the competent authorities making regulations to carry out the treaty), and made suggestions for drafting changes and posed questions. The capital gains article raised structural issues but was completed so late in the integration process it had little impact on the overall structuring of the Draft.[[87]](#footnote-87) For the first time the outcome of the OEEC work was given concrete shape in the form of a complete model. The changes were mainly for consistency though one type of change trying to get consistency in the usage of terms to describe different kinds of law may have been intended as more substantive. On the first day of the two-day meeting of the Drafting Group a draft summary of the model, with slight reordering of the Swiss version, was created[[88]](#footnote-88) establishing the ordering (and numbering except that relief was in arts 23 and 24 rather than 23A and 23B) that prevailed until the introduction of assistance in collection in 2003, together with the breakdown into chapters.

#### The change from the OEEC to the OECD

The OEEC became the OECD on 30 September 1961 which meant that Canada and the US were now full members of the FC and not just associates. The timing was unfortunate. The January and March 1963 FC meetings saw the effective finalisation of the outstanding two articles and commentaries.[[89]](#footnote-89) At the May 1963 meeting the US tabled a lengthy letter from US Treasury Assistant Secretary Stanley Surrey putting many US concerns about the draft and emphasising its provisional nature (Canada and the US had earlier indicated that as they had only come late to the process as OECD members there were many issues they wanted to canvass further[[90]](#footnote-90)).[[91]](#footnote-91) The US tabled extensive proposals for amendments to the draft Report to the Council.[[92]](#footnote-92) As the group of documents were due to go to the Council by mid-year, there was very little time for the FC to consider them. The FC agreed to amend the report to indicate ‘the preliminary character of the draft Convention and the additions and improvements which might be made to it’ along with other unspecified changes. In response to comments that the EEC and EFTA were proposing to examine the use of the draft as the basis for multilateral treaties among their members the FC agreed to add this to the discussion of multilateral treaties in the report. The secretariat was asked to revise the report as agreed for the meeting of the Drafting Group at the end of May which it did,[[93]](#footnote-93) highlighting with ‘X’s where changes were made, including incorporation of the US comments ‘either in their original form or in a shortened or slightly amended version.’[[94]](#footnote-94) On the articles and commentaries, the FC made some formal amendments, agreed to incorporate Canada’s list of reservations on the draft articles, asked the Drafting Group to consider some commentary amendments proposed by Belgium on arts 5 and 7, and made some factual corrections.

But as partly demonstrated by the late US intervention in the process when it joined the OECD through Stanley Surrey who is well-known as a policy and structural person, the achievement of the OECD draft model on the policy and integration front was very modest. Although the US initially considered that the issues could be addressed within a year, the influence of the structure in place by the time the US joined the OECD persists still. Just one of the US policy objectives of dealing with treaty abuse took over 50 years to achieve in the BEPS project.

#### Conclusion on the plan for the 1963 Draft

Our conclusion is that there never was a grand plan at least in the OEEC/OECD written records for the policy and structure for the OECD 1963 draft convention and no one was ever formally charged with and carried out that task. In all cases the people who might have achieved a grand plan failed. We have already summarised our views on the Drafting Committee and WPs14, 15 and 2, and we turn to the other possible parties.

The FC, as its meetings demonstrate, had the collective expertise to identify policy and structural problems but not to solve them as delegates and countries tended to persist with their preferred solution to a particular problem rather than look at them from a collective standpoint. Time and again WPs are told to go away and produce a new version of a report based on the conflicting views expressed by delegates until exhaustion meant that an issue is buried, or some kind of ad hoc compromise is struck. It is not evident that the secretariat had the resources, skills or power to drive the agenda. They perform an excellent secretariat function of producing documents, keeping work moving and reminding the FC delegates of the wider OEEC objectives. The US would have been a good influence in this respect but they came on the scene only when the 1963 Draft was almost complete.

So far as the delegates are concerned there are only two real possibilities, the Chair van den Tempel and the Swiss delegate Locher. It is obvious in various ways that France, Germany and the UK were viewed as the most powerful countries and the ones which may need to be accommodated but they did not take the formal positions (except the French Vice-chair who also seems to miss quite a few meetings) leaving those positions to the Netherlands, Sweden and Switzerland. Much like the secretariat, van den Tempel was a good chair but it is not clear that he had thought beyond process and performance.

Almost by default, one is driven to Locher as the main person responsible for policy and integration in relation to the 1963 draft model. It is surprising how often throughout the process Switzerland takes the lead in suggesting solutions to problems, proposing new issues for consideration, or coming up with a draft or idea during FC meetings. Switzerland had the great advantage that they had already solved many of the problems because the same ones existed in the relations between the Cantons which were the important taxing bodies. It also seems to be the greatest contributor of written documents in the TFD/FC and FC series out of OEEC/OECD member countries. Switzerland produced the outline for the 1963 draft as the end of the process neared. Yet for most of the time Locher was not in a position of influence – not from a great power and not a Vice-chair for the early OEEC years. Yet in 1959 he became both an additional Vice-chair and Acting Chair when van den Tempel was unavailable due to ill health, even though there were two other Vice-chairs who had been in office from the beginning. Even so his influence seems to have been limited.

Apart from the people concerned, a major failing of the whole procedure was that at the start no thought was given to the ordering of the work. Three of the most important structural articles, arts 1, 3 and 21, were the responsibility of WP14 which was not even set up until September 1958 by which time the process had been going for over two years. Articles 1 and 21 did not appear until the Third Report, and art 3 did not appear until the 1963 Draft. One is left with unfortunate conclusion that the 1963 Draft was a succession of separate articles drafted by different Working Parties without proper coordination in what could not be described as a plan.

### Changes made after 1963 in preparation for the 1977 Model

In spite of the lack of a grand plan in the 1963 Draft there was an opportunity to address some of its weaknesses in the preparation for the 1977 Model, although of course there would have been a reluctance to make major changes given the number of existing treaties based on the 1963 Draft. There were two major changes that need to be considered to see whether these made more of a grand plan. The first of these was made in 1973 in preparation for the 1977 Model and concerned art 21 which in the 1963 Draft read: ‘Items of income of a resident of a Contracting State which are not expressly mentioned in the foregoing Articles of this Convention shall be taxable only in that State.’ Again, if there was a grand plan this would be an important part of it as its effect would have been to prevent the loser state under the dual residence tie-breaker, which would tax worldwide income of a domestic law resident, from taxing ‘items of income’ of a resident of a Contracting State which were not expressly mentioned. At the time this was understood to mean kinds of income, such as alimony, that had not been mentioned, and not, for example, income arising in a third state.

They thought this for historical reasons. When the League of Nations started work on a model treaty in the 1920s most European states had *impôts réels* or source taxes without any taxation on account of residence. The four economists spent most of their report on these taxes and only at the end did they turn to income taxes ‘as found in Great Britain, the United States and the German Empire.’[[95]](#footnote-95) Their proposal for different taxation of categories of income was based on *impôts reels* and they proposed that taxation should be in the residence state only for states that were in a position to adopt it, otherwise to have tax at source only on a limited class of income. Following their report officials from first a small number and then a larger number of countries constructed a model or rather by 1928 three models. One of these kept the economists’ distinction between *impôts* *réels* and income taxes, and another treated them the same so that the various categories of income designed for the former also applied to the latter.[[96]](#footnote-96) Unfortunately it was this one that became the basis of actual treaties, resulting in thought processes that were based on *impôts réels* continuing to apply to treaties when they applied to income taxes. One of these was that the treaty regulated only income arising in one or other state and had no relevance to third state income. This meant that they thought that not only did art 21 not relate to third state income but the tie-breaker did not resolve dual residence in relation to third state income either, thus leaving both treaty states free to tax it. Those are extraordinary propositions for anyone to think in 1973[[97]](#footnote-97)—less than 50 years ago—but the new Working Party 1 (WP1) in charge of treaties (not to be confused with the pre-1971 one that dealt with PEs) on which all 20 OECD member states were represented agreed with them.[[98]](#footnote-98) The UK is not recorded as dissenting but it had previously changed the equivalent of art 21 to include ‘income of a class or from sources not expressly mentioned’ in at least ten treaties thus making it clear that, whatever was the interpretation of the 1963 Draft, they wanted third country income to be covered by art 21.[[99]](#footnote-99)

It was now generally realised that this interpretation of the 1963 Draft was undesirable and art 21 was changed to clarify that it applied to third country source income by adding the words ‘Items of income of a resident of a Contracting State, *wherever arising*,…’. It was now clear that the tie-breaker was also applicable to such income. At the same time income… ‘not expressly mentioned’ was changed to ‘not expressly dealt with’ so that art 21 applied to sources of income that were not within the territorial scope of the other articles.[[100]](#footnote-100)

The second major change, made in 1975, was to change several articles, particularly art 6 (immovable property),[[101]](#footnote-101) that surprisingly made no reference to a residence state, although art 1 means that the person must be a resident of one or other state for the treaty to apply. The problem caused by not referring to a residence state was that these articles made no distinction between the treaty residence state after application of the dual residence tie-breaker and the other state, which might be the loser state of the tie-breaker which in domestic law still considered the taxpayer as a resident and potentially taxable on worldwide income. This is a prime candidate for the treaty to prevent but which the 1963 Draft did nothing about in those articles that did not refer to a residence state. This topic came within the ambit of Working Group (as Working Parties had become) 15 which looked at three possible solutions to the loser state problem. The first solution was to have a general statement in either arts 21 or 23 that ‘income derived or capital owned by a resident of a Contracting State shall be exempt from tax in the other Contracting State, except where another Article of the Convention expressly provides for taxation of such capital or income in the State which is not the State of residence.’[[102]](#footnote-102) That this was not adopted was a lost opportunity which would have meant that the Model had some semblance of a grand plan. It would still, however, have required that all treaty articles referred to a residence state.[[103]](#footnote-103)

The second solution was to make the tie-breaker apply for domestic law as well as the treaty. This was opposed by the UK, Canada and Germany on the basis that it would deprive the taxpayer of benefits accorded to a domestic law resident, and accordingly was not adopted. Amusingly both the UK (but only for companies) and Canada later introduced this solution into their domestic law. It might be said that it was an unusual solution because the OECD does not tell states what they can tax but accepts this as the starting point for the Model making reliefs.

The third solution, which was the one adopted (and which would still have been required if the first solution had been adopted), added a reference to a residence state and permitted taxation in the other state to the articles concerned.[[104]](#footnote-104) Thus art 6 was changed as follows:

|  |  |
| --- | --- |
| 1963 Draft | 1977 Model |
| 6(1). Income from immovable property may be taxed in the Contracting State in which such property is situated. | 6(1). Income derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other State. |

Taken together the two major changes meant that there was no doubt that art 21 dealt with immovable property situated in the residence state or a third state. It was no longer necessary to say, as many other articles did, that income of a particular type ‘shall be taxable only’ in the residence state unless a condition was satisfied, such as, in relation to profits of an enterprise, there was a PE in the other state. It was now clear after art 21 applied to income ‘wherever arising,’ that income from immovable property situated in the residence state or a third state ‘shall be taxable only’ in the residence state by virtue of art 21 rather than art 6.[[105]](#footnote-105) The changes were an improvement by correcting odd features that had surprisingly survived in the 1963 Draft rather than major changes to the whole structure.

One ostensibly more minor change, which turned out to have some importance, should be mentioned. In the 1963 Draft both the dividend and interest articles included a reference to domestic law following a general definition. In 1971 the reference to domestic law was removed from the interest article only.[[106]](#footnote-106) The combination of a general definition plus domestic law for dividends and a general definition for interest may have made matters worse. What is really needed is a priority rule which several countries now do, because otherwise it is possible for both articles to apply.[[107]](#footnote-107)

### A better framework

The 1977 Model was an improvement on the 1963 Draft so far as having more consistency but it still consisted of a number of independently written articles without much cohesion. We turn to consider what would be a better framework.

In setting a framework there are two overriding points to bear in mind; first, that (in general[[108]](#footnote-108)) treaties relieve from tax and so unless a provision relieves from tax it does not need saying. And secondly, both credit and exemption states exist and think differently; exemption states would like treaty articles to allocate income to one or other state, making the double taxation relief article of lesser importance, while tax credit states expect both states in many cases potentially to tax and the relief article to provide for the relief. With those in mind there could be two general rules which would then be subject to exceptions: Rule (1) having established a single treaty residence state, R, after application of the tie-breaker if necessary, everything is taxable in R[[109]](#footnote-109); and Rule (2) nothing is taxable in the other state, OS. Interestingly both rules had previously been considered separately on different occasions and both had been rejected.[[110]](#footnote-110) The main exception to Rule (1) is that R gives double taxation relief but there are other exceptions in arts 19 and 20. Relief needs to be provided in a separate article to suit credit states, and even exemption states are better off if they rely on a relief article (necessarily drafted differently from the one for credit states) rather than try to provide in all the other articles that one or other state can tax because matters such as exemption with progression cannot be dealt with by separate articles.

Rule (2) is probably the most fundamental rule because after application of the dual residence tie-breaker in art 4 to establish R, the loser state, OS, will still potentially tax worldwide income, which must be a prime consideration for the treaty to prevent. Rule (2) stops such taxation before we have even looked at the separate articles, unlike art 21 which applies only where other articles do not. That article was not published until the Third (1960) OEEC Report. Once rule (2) has established a prohibition on taxation in OS a natural way of providing an exception would be to say that something ‘may be taxed’ in OS, there being no need to say anything if it may not be taxed in OS because that is covered by the general rule. It would also not be natural to say that something ‘shall be taxable only in R’ because one has to turn it on its head to see that the real meaning (because treaties relieve from tax) is that the income may not be taxed in OS, which is what Rule (2) says. Many early tax treaties in the 1920s and 1930s had the equivalent of Rule (2) as the first provision in the treaty.[[111]](#footnote-111) Theoretically the result should be the same whether there is a general rule followed by exceptions or whether there are a series of rules followed by a residuary rule (art 21), but neither deals with an overlap between the provisions.

### Conclusion

This chapter demonstrates that the method of working with separate WPs, while necessary to achieve results in a short time-frame, was less than ideal as it did not start with a framework dealing with topics in a logical order, failed to have the necessary coordination, and the FC stopped WPs taking a wider view. The response from the majority of the OEEC/OECD delegates of the period probably would be that such an approach would have put theory ahead of concrete results, which was the driving force of the FC. Another issue was that the US and Canada came on the scene too late to influence it fundamentally resulting in a Eurocentric bias, which has only been gradually eliminated.[[112]](#footnote-112)

But in spite of these drawbacks the OECD Model was an amazing achievement that has been adopted as the basis for most of the world’s tax treaties even between non-members of the OECD. The widespread national representation on the small Working Parties, out of necessity in the FC’s early days, gave a democratic feel to the process especially when combined with the generally *laissez faire* approach of the chair and the FC to their reports, and particularly with France, Germany, the UK and later the US, not seeking to dominate the process. The greater concentration of OECD work in its secretariat, particularly in relation to the Base Erosion and Profit Shifting project of recent years, may have lost that democratic element.

1. This period (1940-1950) in the League and UN’s history is examined in Dr Nikki Teo, *The United Nations in Global Tax Coordination: Hidden History and Politics,* Cambridge University Press [2022]. See also Richard Vann, ‘International Tax Policy and International Tax Institutions: Never the Twain?’ in *Current Tax Treaty Issues* ed G Maisto, IBFD 2020, 41, 52. [↑](#footnote-ref-1)
2. Draft Convention for the avoidance of double taxation with respect to taxes on income and capital, OECD 1963. [↑](#footnote-ref-2)
3. The articles were immovable property, dividends, and relief of double taxation. [↑](#footnote-ref-3)
4. C(56)49 (meeting on 16 March 1956). This and other similar references are to [www.taxtreatieshistory.org](http://www.taxtreatieshistory.org), a joint project of the OECD, Institute for Austrian and International Tax Law Vienna, Università Cattolica del Sacro Cuore Italy, IFA Canadian Branch and University of Sydney Law School. The background to the setting up of the FC and its operations until the end of 1957 is dealt with in the accompanying paper, Vann, ‘Origins of the OEEC Work on Tax Treaties: Continuity or Fresh Start?’, which considers whether there was a grand plan in the conception and initial setup of the OEEC with a negative answer. [↑](#footnote-ref-4)
5. C(54)294 (12 November 1954). [↑](#footnote-ref-5)
6. C(55)307 (9 December 1955). [↑](#footnote-ref-6)
7. The internal discussions in the UK are in The National Archives IR 40/17035, particularly the Brief for the UK delegation (undated but likely to be February 1956). [↑](#footnote-ref-7)
8. C(56)1 (13 January 1956). [↑](#footnote-ref-8)
9. Note by the Secretary-General, FC(56)1 (16 May 1956). [↑](#footnote-ref-9)
10. C(56)49(Final) (19 March 1956). [↑](#footnote-ref-10)
11. This had been identified as a topic by the ad-hoc group of experts, see C(56)49 (24 February 1956). [↑](#footnote-ref-11)
12. C(57)145 (3 July 1957). [↑](#footnote-ref-12)
13. C(58)118 (28 May 1958). [↑](#footnote-ref-13)
14. C(58)118(Final) (15 July 1958), published as the Fiscal Committee’s First Report in September 1958. [↑](#footnote-ref-14)
15. Covering shipping and air transport, dependent and independent personal services, immovable property, and capital. [↑](#footnote-ref-15)
16. Covering allocation of profits to a PE, other income, personal scope, and territorial extension. [↑](#footnote-ref-16)
17. Covering dividends, interest, royalties, avoidance of double taxation and mutual agreement procedure. [↑](#footnote-ref-17)
18. See n 12 for the dates of operation of the WPs. [↑](#footnote-ref-18)
19. The articles on general definitions, capital gains, exchange of information, diplomatic and consular officials, entry into force, and termination. [↑](#footnote-ref-19)
20. It was a ‘Draft’ rather than a ‘Model’ because the US and Canada joined in 1961 (see the heading below *The change from the OEEC to the OECD*) when it became the OECD and they had not been involved otherwise as observers in most of the preparation and did not agree with everything. It did not become a ‘Model’ until 1977. [↑](#footnote-ref-20)
21. The treaty with Belgium (1953) defined residence for Belgium as his fiscal domicile or as having a house available for his use in Belgium. The treaty with the US (1945) contained no residence definition. [↑](#footnote-ref-21)
22. The treaties with the US, Sweden and Switzerland defined company residence for those countries as incorporated there and not managed and controlled (or in the US treaty, resident) in the UK. [↑](#footnote-ref-22)
23. For example, the Dutch domestic residence rule for companies was incorporated or managed there so they gave away residence by virtue of incorporation. [↑](#footnote-ref-23)
24. The treaty with Greece resolves dual residence on the basis of nationality; the Canada and UK treaties apply to people who are resident under domestic law in one, but not the other, state thus excluding dual residents; those with Austria and Greece define residence for the treaty as having a dwelling under circumstances justifying the assumption that he will retain and use it or, if not, in the place or in the country where he resides in circumstances that are not merely temporary; the US treaty is silent about the meaning of residence. [↑](#footnote-ref-24)
25. Canada (1946) which excluded ‘management, factory,’ Denmark (1950), France (1950), the Netherlands (1948), New Zealand (1947), Norway (1951), Pakistan (1955), and US (1945). [↑](#footnote-ref-25)
26. Possession by the agent of a stock of goods did not constitute a PE in the treaty with Switzerland. [↑](#footnote-ref-26)
27. Two treaties (Austria (1956), Germany (1954)) continued ‘such as’ and listed a number of items, while a number of others added further items to the initial list such as workshops and warehouses, and most included a mine or other place for exploitation of natural resources, and a few construction projects lasting a year (France (1950), Finland (1951), Sweden (1949), Switzerland (1954)). One (France (1950)) did not exclude a subsidiary; and three (Finland (1951), France (1950), Pakistan (1955)) did not exclude purchasing offices; the New Zealand treaty (1947) required normal remuneration for brokers and general commission agents. [↑](#footnote-ref-27)
28. The variations include having separate agency provisions with their own terminology for each party (UK (1954)); the exclusion of a subsidiary in three of them (Canada (1956), US (1954), UK); storage of goods excluded only if used for limited periods (Austria (1954)); an agent with a stock of goods not included if they are held for execution of occasional urgent orders (Greece (1952)); and a purchasing office not excluded (Greece). [↑](#footnote-ref-28)
29. The following is a list of all the Working Parties and the dates when they operated: 1 permanent establishment (Germany, the UK, May 1956-January 1958); 2 fiscal domicile (Denmark, Luxembourg, May 1956-January 1958); 3 listing of taxes (Italy, Switzerland, May 1956-January 1958); 4 discrimination (Netherlands, France, May 1956-February 1958); 5 shipping and air transport (Sweden, Belgium, May 1956-June 1959); 6 inland waterways (France, Germany, date of creation unclear-February 1958); 7 apportionment of profit (UK, Netherlands, June 1957-March 1960); 8 royalties (Germany, Luxembourg, June 1957-June 1961); 9 immovable property (Italy, Austria, June 1957-November 1958); and 10 dependent and independent services (Sweden, June 1957-December 1958); 11 interest (France, Belgium, February 1958-June 1961); 12 dividends (Germany, Italy, Switzerland, February 1958-June 1961); 13 capital (Switzerland, May 1958-|My 1959); 14 territorial scope, definitions, mutual agreement, exchange of information, diplomatic privileges, entry into force (Austria, Sweden, September 1958-March 1963); 15 avoidance of double taxation (Denmark, Ireland, November 1958-June 1961), and 19 capital gains (Switzerland, US, September 1961-February 1963). (16 and 18 do not seem to exist; 17 dealt with inheritance taxes which we are not including.) [↑](#footnote-ref-29)
30. For an example, see JFAJ and Jürgen Lüdicke, ‘The Origins of Article 5(5) and 5(6) of the OECD Model,’ (2014) *World Tax Journal*, vol 6, issue 3 p 203. WP1 dealing with the PE article comprised representatives from the UK and Germany. To meet in Paris meant that the UK delegate had to spend two days travelling and spend two nights in Paris, and the German delegate (from Bonn) would need to spend one night in Paris to have a full day’s meeting. Even if they met the day after an FC meeting the UK delegate would have to leave to cross Paris and catch a train at 12.15 pm. Some meetings may have been held during a FC meeting during an afternoon set aside for this purpose. It is therefore likely that much was dealt with in correspondence (p 236). The original language of the minutes of WP1 is English (the French being a translation) indicating that they were communicating in English; Mr Mersmann was fluent in English as appears from the archive documents for the earlier UK-Germany treaty (1954) of which he was the chief negotiator (p 203) (TNA IR 40/9629A). In other circumstances they might both have needed to work in French. The common law and civil law view of agency is very different which the delegates cannot have fully appreciated, and to this day there is an example in para 38.7 of the OECD Commentary to art 5 that was originally written by WP1 that makes sense in German law but not in the UK. [↑](#footnote-ref-30)
31. Sweden’s suggestion to move to simultaneous interpretation in 1962 was rejected FC/M(62)2 Part I p 10 (11 April 1962). [↑](#footnote-ref-31)
32. He had a UN assignment in 1960 and missed one meeting: FC/M(60)6 pp 2, 10, as well as one meeting in 1956: FC/M(56)2 pp 1, 3. Switzerland was one of the members of WP3 on art 2 and WP12 on art 10 for which Switzerland seems to be the Rapporteur (though whether Locher is not clear). [↑](#footnote-ref-32)
33. He also did most of the work on arts 8 (one of the most contentious provisions) and 14-20 (as the sole member of WP10). [↑](#footnote-ref-33)
34. FC/M(58)1 (6 January 1958) p 8. There is an earlier reference in those minutes by way of correction to the minutes at the next FC meeting: ‘The Chairman, in reply to the Delegate for Austria, stated that the presentation of the various draft Articles would be co-ordinated later by a Drafting Group.’ FC/M(58)2 (29 March 1958) p 2. The reference here is to a comment by Sweden in a note on the aims of the FC: TFD/FC22 (18 September 1957) pp 2-3. [↑](#footnote-ref-34)
35. Third Report FC/M(60)2 (28 April 1960) p 16-17 (comprising the Chairman [Locher], the two Vice-Chairmen [Serre (France) and Öhman (Sweden) who had been Deputy Chairs from the beginning of the FC and continued through to 1962 when Lebouef from France replaced Serre (FC/M(62)2 Part I page 2 under item I) but Öhman and Locher continued] and the Delegates for Germany and the United Kingdom. [↑](#footnote-ref-35)
36. FC/M(61)4 (8 July 1961) p 4. This indicates that the Vice-chairs had not been part of the Group (apart from the third report when Locher was Acting Chair, see n 35) and in not mentioning the other Vice-chair from France that France had been a member throughout along with Germany and the UK. It may have been thought that the previous report making this change (see previous note) was intended to apply only while van den Temple was away through illness. [↑](#footnote-ref-36)
37. TFD/FC/32rev (10 March 1958), TFD/FC/62, TFD/FC/63 and TDF/FC/64 (all 11 April 1959). Also TFD/FC/63rev1 (21 April 1959), TDF/FC/64rev1 (5 May 1959) (draft Report FC(59)2 (21 May 1959)) [↑](#footnote-ref-37)
38. Originally contained in FC(60)1 (14 March 1960), Chairman’s amendments TDF/FC/87bis (29 March 1960), adopted in the March FC meeting with minor amendments FC/M(60)2 (28 April 1960)) p 17, document for review by the drafting group TFD/FC/89 [not on the website but summary contained in TEF/FC/89corr (26 April 1960) and TEF/FC/89corrbis (10 May 1960)], draft Recommendation to the Council by the Drafting Group TEF/FC/92 (9 May 1960), adopted FC/M(60)4 (20 July 1960) p 4. [↑](#footnote-ref-38)
39. Considered by the FC FC/M(61)1 (17 February 1961), Original drafts TFD/FC/126 (6 May 1961) (Report), TFD/FC/126Ann (4 May 1961) (articles 10, 11, 12, 23, 25 and Commentaries), draft Report to the Council FC(61) and FC(61)1ann (both 23 May 1961), amendment to art 23 TDF/FC/127 (7 June 1961) and TDF/FC/128 (8 June 1961), amendments to Commentaries TDF/FC/129 (8 June 1962) including further changes to drafting on the much debated issue of rejection of force of attraction in relation to the PE exception to arts 10-12, considered by the FC FC/M(61)4 (8 July 1961). [↑](#footnote-ref-39)
40. FC/M(60)6 (23 December 1960) p 10, FC/M(61)3 (25 May 1961) p 7-8. [↑](#footnote-ref-40)
41. See amendments in TFD/FC/128 (8 June 1961) compared to FC(61)1 (23 May 1961). [↑](#footnote-ref-41)
42. Independent personal services, employment, entertainers, government service articles. TDF/FC/62 (11 April 1959); the Drafting Committee had noted the point earlier in TDF/FC/32rev (10 March 1958). [↑](#footnote-ref-42)
43. At the time art 16 referred only to the residence of the company, not the director. This was changed in TFD/FC/63rev1 (21 April 1959). [↑](#footnote-ref-43)
44. This had not been done by the draft in FC(58)7 (30 December 1958) and was not mentioned when the FC discussed it in FC/M(59)1 (28 February 1959). The first reference to the residence of the individual in art 16 is in the draft of the Second Report prepared by the Drafting Committee FC(59)2 (21 May 1959) so the change must have been made by the Drafting Committee. [↑](#footnote-ref-44)
45. See n 101. [↑](#footnote-ref-45)
46. Art 1, requiring that the taxpayer had to be resident in one of the states, did not then exist; it was included in the Third Report. [↑](#footnote-ref-46)
47. FC/M(58)5 (16 December 1958). The draft contained a footnote: ‘The expression “shall be taxable only” does not prejudge the method to be used by the other Contracting State in order to avoid double taxation (method of exemption or tax credit method), this question being reserved.’ [↑](#footnote-ref-47)
48. TDF/FC/63 (11 April 1959) p 6. [↑](#footnote-ref-48)
49. Senior civil servants did not then stay very long in any one post on the basis that really intelligent people could do any job, so there was no tradition of specialisation in say international tax. [↑](#footnote-ref-49)
50. See text at n 80 for WP2’s earlier proposal for on art 1. Other articles for which they were responsible were arts 25, 26, 28, 30, 31, and 32. [↑](#footnote-ref-50)
51. FC/M(59)2 (20 October 1959) p 10. [↑](#footnote-ref-51)
52. FC/WP14(59)1 (3 March 1959). [↑](#footnote-ref-52)
53. FC/M(59)4 (20 October 1959) at III. [↑](#footnote-ref-53)
54. ‘After discussing Article [21] on the taxation of residuary income, proposed by working Party No. 14 (see Item III below)…’(p 7) and ‘The Committee continued its examination of Article [21] concerning the taxation of residuary income as proposed by Working Party No. 14.’ (p 10) FC/M(59)5 (30 December 1959). [↑](#footnote-ref-54)
55. FC/WP15(59)1 Pt 1 (2 March 1959) p 18, revised FC/WP15(59)2 (13 May 1959). [↑](#footnote-ref-55)
56. The WP said that the last phrase ‘provides the necessary elasticity for ensuring that the exemption system may be used to the extent desired by the Contracting States’: p 19. In its subsequent Supplementary Report the WP recommended its deletion as it stated the obvious and many treaties by credit states did not contain it. FC/WP15(60)1 (25 April 1960) p 5-6. [↑](#footnote-ref-56)
57. See text at n 97. [↑](#footnote-ref-57)
58. The German and UK delegates said it should also cover third state income. FC/M(59)5 (30 December 1959) p 5-6. [↑](#footnote-ref-58)
59. FC/M(59)5 (30 December 1959) p 6. [↑](#footnote-ref-59)
60. FC/M(59)5 (30 December 1959) p 9. [↑](#footnote-ref-60)
61. FC/WP14(60)1 (19 January 1960). Our italics. [↑](#footnote-ref-61)
62. FC/M(60)1 (20 February 1960) p 6-7. [↑](#footnote-ref-62)
63. CFA/WP1(73)4 (12 April 1973). Nor did they think that the tie-breaker provisions in art 4 had any relevance to third state income. [↑](#footnote-ref-63)
64. FC/M(60)3 (28 May 1960) p 16. The Secretary prepared comparative tables of the articles in advance of the meeting: TFD/FC/98 (9 June 1960). [↑](#footnote-ref-64)
65. FC/WP14(61)1 (9 January 1961), being a revision of FC/WP14(59)1 that had not previously been considered by the FC. [↑](#footnote-ref-65)
66. FC/M(61)4 (8 July 1961) p 6. [↑](#footnote-ref-66)
67. The definition of company is dealt with in more detail in JFAJ et al ‘The Definitions of Dividends and Interest in the OECD Model: Something Lost in Translation? [2009] BTR 406; 2009 (vol 1) World Tax Journal No 1. [↑](#footnote-ref-67)
68. Originally in the 1963 Draft both the definitions of dividend and interest contained a reference to the domestic tax treatment. The working parties dealing with these had a joint meeting (a note by the Secretariat as a basis for discussion is at TFD/FC/98 (9 June 1960)) to discuss any overlap but no minutes are available, and no change was made to the definitions following this meeting. The definition of ‘interest’ was subsequently made autonomous (WP 27 preliminary report FC/WP27(68)1) (30 December 1968), subsequent report FC/WP27(70)1 (16 February 1970), proposal FC/WP27(70)2 (4 November 1970), approved by the FC FC(71)1 (14 January 1971)). This causes problems, see JFAJ et al, The Definitions of Dividends and Interest in the OECD Model: Something Lost in Translation? [2009] BTR 406. [↑](#footnote-ref-68)
69. FC/WP14(61)1 (9 January 1961) p 3 pars 3-4. [↑](#footnote-ref-69)
70. Second Report FC/WP14(61)2 (18 September 1961). [↑](#footnote-ref-70)
71. FC/M(61)5 p 3 para 3 (29 September 1961). [↑](#footnote-ref-71)
72. The Application of the OECD Model Tax Convention to Partnerships, OECD 1999. [↑](#footnote-ref-72)
73. Arts 10(4), 11(4) and 12(3). [↑](#footnote-ref-73)
74. FC/WP14(62)1 (8 January 1962). [↑](#footnote-ref-74)
75. FC/M(62)1 (19 February 1962); the change was relevant to trustees. The second sentence contained in the First Report said ‘The same provisions shall apply to partnerships and associations which are not legal persons under the national laws by which they are governed.’ [↑](#footnote-ref-75)
76. FC/WP14(61)1 (9 January 1961) p 3-4, proposing the exclusion from the definition of all income other than industrial and commercial income strictly speaking, which they pointed out meant that provisions were needed in the dividends, interest and royalties articles. [↑](#footnote-ref-76)
77. If the taxpayer did not carry on a financial trade the UK and Ireland would consider that the income was not within art 7 and therefore art 21 applied and sent one to art 7. [↑](#footnote-ref-77)
78. FC/WP14(62)3 (16 April 1962), FC/M(62)3 p 10 (8 June 1962). [↑](#footnote-ref-78)
79. The term ‘residence’ was adopted from US and UK treaties in preference to fiscal domicile. As has been mentioned (text at n 22) UK treaties originally provided that a company was resident where it was managed and controlled; for the reason, see JFAJ ‘Changed HMRC interpretation of the residence articles in 16 double taxation agreements’ [2016] BTR 1. The UK said that this was the same as place of effective management (FC/WP5(56)1 (2 October 1956) p 6) which they later repudiated by which time place of effective management was in art 8; it was changed to residence in 2017. Some demarcation issues arose with shipping, for example whether incidental investment income was included in art 8, the FC deciding that it was not in order to secure withdrawal of reservations by three states (FC/M(57)2 (3 July 1957) p 3). [↑](#footnote-ref-79)
80. FC/WP2(56)1 (2 October 1956) and see the summary in its second report FC/WP2(57)1 (27 May 1957) p 9. WP2 did not deal with source-source conflicts. [↑](#footnote-ref-80)
81. FC/M(57)2 (3 July 1957). [↑](#footnote-ref-81)
82. FC/WP14(59)1 (3 March 1959). [↑](#footnote-ref-82)
83. FC/WP2(57)1 p 4. [↑](#footnote-ref-83)
84. FC/WP2(57)1 (27 May 1957) art III. [↑](#footnote-ref-84)
85. TFD/FC/130 (24 July 1961). [↑](#footnote-ref-85)
86. TFD/FC/113 (7 March 1961). [↑](#footnote-ref-86)
87. Simontacchi, *Taxation of Capital Gains under the OECD Model Convention* (Kluwer, 2007) 1-119, Pijl, “Capital Gains: The History of the Principle of Symmetry, the Internal Order of Article 13 and the Dynamic Interpretation of the Changes in the 2010 Commentary on ‘Forming Part’ and ‘Effectively Connected’” (2013) 5 WTJ 5-98. [↑](#footnote-ref-87)
88. TFD/FC/132 (12 September 1961) (list of articles only), TDF/FC/137rev1 (26 January 1962). [↑](#footnote-ref-88)
89. FC/M(63)2 (13 February 1963), FC/M(63)3 (28 March 1963). [↑](#footnote-ref-89)
90. OECD/FC/M(61)1 (31 December 1961 – date in French version only) page 3. [↑](#footnote-ref-90)
91. TFD/FC/158 (22 May 1963). [↑](#footnote-ref-91)
92. TFD/FC/160 (25 May 1963). [↑](#footnote-ref-92)
93. TFD/FC/159 (25 May 1963). [↑](#footnote-ref-93)
94. TFD/FC/160 (25 May 1963) p 1. [↑](#footnote-ref-94)
95. Report on Double Taxation by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp, League of Nations 1923, 45. See JFAJ, ‘Sir Josiah Stamp and Double Income Tax’ in *Studies in the History of Tax Law* vol 6, ed John Tiley, Hart 2013 Ch 1 p 1 [↑](#footnote-ref-95)
96. We can ignore the third which only the US and UK wanted. [↑](#footnote-ref-96)
97. See n 56 where, as long before as 1959, the proposed (but never adopted) general principle was restricted to income arising within the two states, and n 58 where the German delegate considered that it should cover third state income. It may be relevant that Germany had an income tax rather than *impôts reels.* [↑](#footnote-ref-97)
98. DAF/CFA/WP1(73)8 (5 July 1973). No minutes are available which seems to be normal practice at the time; the only record is this summary of discussions. The new WP1 in charge of treaties was set up by the Committee on Fiscal Affairs by CFA/M(71)1 (7 June 1971) p 5 which confirms that all member states were members of WP1. [↑](#footnote-ref-98)
99. Treaties with Belgium (1967), the Netherlands (1967), France (1968), Swaziland (1968), Portugal (1968), Finland (1969), Norway (1969), Barbados (1970), Japan (1969, differently worded), and Zambia (1972). However, the UK treaties during this period with Australia (1967, no art 21 equivalent), Luxembourg (1967), South Africa (1968) and Austria (1969) do not contain this change. The UK therefore disagreed with the consequence of this interpretation and changed it whenever possible. It may be relevant that at the time it was easy for an individual to become resident in the UK in domestic law which is likely to have resulted in the UK often being the loser state, thus making it more important that art 21 prevented taxation on a residence basis. [↑](#footnote-ref-99)
100. DAF/CFA/73.2 (10 October 1973), revised CFA/WP1(73)11 (5 November 1973), approved by WP1 in DAF/CFA/WP1(74)2 (14 January 1974). [↑](#footnote-ref-100)
101. The other articles were two provisions relating to immovable property arts 13(1) and 22(1), and two others, arts 17 (entertainers) and 22(2) (capital taxes on a PE, which may have been a mistake as art 7 applied to ‘an enterprise of a contracting state’ (the definition of which imported residence) but art 22(2) merely said ‘of an enterprise’). [↑](#footnote-ref-101)
102. CFA/WP1(75)5 (12 September 1975) at [6]. [↑](#footnote-ref-102)
103. See the third solution below. [↑](#footnote-ref-103)
104. See n 101 for the articles concerned. This the opposite of the earlier proposal to remove the reference to residence from art 15 to bring it into line with art 6, see n 43. [↑](#footnote-ref-104)
105. Art 16 (directors’ fees) was already in the 1963 Draft in similar form to the revised art 6 so it was strange that it did not contain ‘shall be taxable only’ for cases where the company was not a resident of the other state even though it was drafted by the same Working Party as arts 14, 15, 17, 18 and 19. This may be because the original version said ‘shall be taxable only’ in OS [not yet defined] which was changed to ‘may be taxed’ in OS by the Drafting Group (the same change was also made to art 6). See FC(58)7 (30 December 1958) for the original version containing a footnote saying that the wording did not prejudge the method of avoiding double taxation. [↑](#footnote-ref-105)
106. WP27 considered that deleting the reference to domestic law in the interest article ‘would offer greater security from the legal point of view, in that the State of source would be able to exercise its limited right to tax only in respect of interest defined as such in paragraph 3.’ (FC/WP27(68)1 (30 December 1968)). They recommended this in FC/WP27(70)1 (16 February 1970) and in FC/WP27(70)2 (4 November 1970) giving as reasons that the definition covered practically all kinds of income covered by domestic law; it would ensure that treaties were unaffected by changes in domestic law; and references to domestic law should as far as possible be avoided. The minutes of the FC’s meeting in December 1970 where this was discussed appear to be missing. The result following that meeting is at FC(71)1 (14 January 1971). [↑](#footnote-ref-106)
107. See our article (with other authors) *The Definitions of Dividends and Interest in the OECD Model: Something Lost in Translation?* [2009] BTR 406, World Tax Journal Vol 1 Issue 1 under the heading *Treaties that deal with the relationship between Articles 10 and 11*. [↑](#footnote-ref-107)
108. Countries where this is not true can simply deal with the matter in domestic law (by bringing their taxes up to the amount permitted by the treaty), rather than using treaty provisions to the same end. Australia finally realised this in relation to its treaty sourcing rule that effectively changed domestic law in 2019, see Satyam Computer Services Ltd v Commissioner of Taxation (2018) 21(2) International Tax Law Reports 274, Income Tax Assessment Act 1997 Div 764. [↑](#footnote-ref-108)
109. This would be going back to the form of the original treaties. Art 1 of Prussia-Saxony (1869) said this: Johann Hattingh, ‘On the origins of Model Tax Conventions: Nineteenth-Century German Tax Treaties and Laws Concerned with Double Tax’ in ed J Tiley, *Studies in the History of Tax Law* vol 6, Oxford, Hart Publishing, 2013, 31, 39. [↑](#footnote-ref-109)
110. Rule (1) in WP15’s rejected draft of 1959, see n 55; and Rule (2) in the first solution above, see n 102, although it can be traced earlier to WP2’s art III in FC/WP2(57)1 (27 May 1957), see text at n 84. [↑](#footnote-ref-110)
111. Examples include Czechoslovakia-Germany (1921), Austria-Czechoslovakia (1922), Austria-Germany (1922), France-Saar (1922), Austria-Hungary (1924), Danzig-Poland (1924), Austria-Switzerland (1927), France-Italy (1930), Finland-Sweden (1931), Denmark-Sweden (1932), Netherlands-Sweden (1935), Hungary-Sweden (1936), Hungary-Netherlands (1938). [↑](#footnote-ref-111)
112. Notably it was only in 2017 that the inland waterways provisions were eliminated from art 8 of the OECD Model, despite their relevance being almost exclusively European. [↑](#footnote-ref-112)