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

Summary

The attached note was prepared by the International Bureau of Fiscal Documentation (IBFD) at the request of the Committee and as a follow up to the paper considered at the Committee's seventh session in 2011. The aim of this research is to assess, in the authors' view, the impact of the UN Model Double Taxation Convention between Developed and Developing Countries (the UN Model) in its various versions on current tax treaty practice. This research is a continuation of the research carried out by the IBFD in 1997 and in 2011 that has been considered by the Committee and its predecessor body. The note is designed to assist the Committee in its work of preparing the next update of the UN Model

[draft]

The UN Model in Practice

1997 – 2013

Research carried out by

The International Bureau of Fiscal Documentation

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The UN Model in Practice
1997 - 2013

Prof. Wim Wijnen*
Prof. Jan de Goede**

Co-ordinators and secretaries of the research:
Dr. Ziemowit Kukulski***
Matteo Cataldi****

The research and analysis was compiled with the assistance of the following IBFD staff members:
Giulia Gallo Research Associate at IBFD (secretary of the research)
Dr. Noah Gaoua Research Associate & Account Manager at IBFD
Carlos Gutierrez Puente Principal Research Associate at IBFD
Ridha Hamzaoui Principal Research Associate at IBFD
Katja Jacobs Research Associate at IBFD
Ivana Kireta Research Associate at IBFD
Lydia Ogazon Senior Research Associate at IBFD
Andreas Perdelwitz Principal Research Associate at IBFD
Anapaula Trindade Marinho Research Associate at IBFD

IT-team IBFD
Jaap van der Meulen

This research was carried out at the request of the Committee of Experts on International Co-operation in Tax Matters of the United Nations and focuses on the use of the specific UN Model provisions in tax treaties concluded in the 1997 to 2013 period.

The authors present this report on their research on the UN Model provisions with full knowledge that their research is not exhaustive, however, it is hoped that their work will provide the Committee with some useful new insights.

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* Counsel to the Director of the Knowledge Centre at IBFD, and LUISS University, Rome (Italy).
** Senior Principal, Tax Knowledge Management, at IBFD, and University of Lodz (Poland).
*** Adjunct-Professor of the University of Lodz (Poland), Deputy Head of the Centre of Tax Documentation and Studies of the University of Lodz, who was posted by his university for three months at the IBFD.
**** Senior Tax Consultant at Ernst & Young, Milan (Italy), who was posted by that firm for three months at the IBFD.

Table of Contents

The UN Model in Practice 1997 - 2013

1 Introduction

1.1 The objective and approach of the research

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

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

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

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

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

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

1.2 The scope of the research

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

Article 5(3)(a) UN Model 1980	construction activities
Article 5(3)(a) UN Model 1980	period 6 months
Article 5(3)(b) UN Model 1980	furnishing of services
Article 5(4)(a) and (b) UN Model 1980	delivery of goods
Article 5(5)(b) UN Model 1980	stock agents
Article 5(6) UN Model 1980	insurance activities
Article 5(7) UN Model 1980/2001	agents with one principal
Article 5(7) UN Model 1980/2001	agents with one principle with arm’s length limitation
Article 7(1) UN Model 1980	limited force of attraction
Article 7(3) UN Model 1980	management fees, interest and royalty payments
Paragraph 5 UN Comm. on Article 7	inclusion purchase of goods provision
Article 8B(2) UN Model 1980	shipping profits
Article 9(3) UN Model 2001	adjustment and penalties
Article 12(1) and (2) UN Model 1980	shared taxation right on royalties
Article 12(3) UN Model 1980	radio/TV broadcasting included in definition of royalties

Article 12(3) UN Model 1980	use of equipment included in definition of royalties
Article 13(4) UN Model 1980	real property shares
Article 13(4) UN Model 2001	extension provision real property shares (partnership, trust or estate)
Article 13(4) UN Model 2001	exclusion provision real property shares (real property in use by company, partnership, trust or estate)
Article 13(5) UN Model 1980/2011	other shares
Article 14(1)(a) UN Model 1980	independent personal services
Article 14(1)(b) UN Model 1980	length of stay
Article 14(1)(c) UN Model 1980	remuneration amount
Article 16(2) UN Model 1980	top-level managerial officials
Article 18B(1) and (2) UN Model 1980	pensions
Article 18A(2) and (3) UN Model 1980	social security payments
Article 21(3) UN Model 1980	source state taxation of other income
Paragraph 19 UN Comm. 2011 on Article 23A	unintended double exemptions
Article 25(5) UN Model 2011	arbitration
Article 27 UN Model 2011	assistance in tax collection

The provisions relating to the level of withholding taxes on dividends, interest and royalties were not examined, as the UN Model, unlike the OECD Model, does not recommend a particular percentage for these categories of income. In this respect, any withholding rate, including the rates recommended in the OECD Model, is consistent with the UN Model.

Unlike the 1997 research, the specific elements of the UN provisions on the exchange of information contained in Article 26 were not taken into account. Because of the complexity of the matter and rapid developments in this field towards a unified worldwide standard, it did not seem to be useful to include the use, by countries of the UN, of specific elements of these provisions in the current research (*see* also under 1.1).

For the purpose of comparability of the results with the research undertaken in 1997 and 2011, it was considered useful to distinguish between developed and developing countries. Such a distinction inevitably carries with it an element of subjectivity and, therefore, this invidious task was considerably simplified by referring to the membership of the OECD, distinguishing, in this manner, between OECD and non-OECD Member countries as a proxy for the distinction between developed and developing countries. It is clear that such a distinction is an oversimplification of the matter, as there is a group of resource rich countries that are not OECD Member countries that cannot be considered as developing countries under the traditional World Bank standards. In addition, there is an increasing group of developing countries with emerging economies that have become significant capital exporters, which may also affect their tax treaty policy. As a practical definition of a developing country on these grounds for the purposes of this research is not available, the simplified approach of the previous research has again been adopted.

This approach implies that Chile, Estonia, Israel, the Slovak Republic and Slovenia, which joined the OECD during the period of research, are considered to be OECD Member countries with regard to the treaties and amending protocols they signed as from the date that they became members of the OECD. For simplicity's sake, the OECD Member countries are referred to as "OECD countries" and all other countries are referred to as "UN countries".

In order to gain a better understanding of the use of the UN Model amongst various groups of countries, the 1811 tax treaties and amending protocols have been divided into the following three groups: (1) tax treaties concluded between two UN countries (Group A), (2) tax treaties concluded between a UN and an OECD country (Group B) and (3) tax treaties concluded between two OECD countries (Group C). Group A comprises 762 tax treaties, Group B, 825 tax treaties and Group C, 224 tax treaties.

In the 1997 research, only two groups of countries were distinguished. Group A of the 1997 research comprised Groups A (UN/UN) and B (UN/OECD) of the current research and Group B of the 1997 research comprised Group C (OECD/OECD) of the current research. In comparing the results of the 1997 research with the results of the current research, the results of Groups A and B of the current research were combined (*see* Table 12 in Section 3).

1.3 Interpretative aspects of the research

Given the number of treaties involved in this research, a significant amount of data needed to be collected. Even a cursory glance at a number of treaties and amending protocols reveals the tremendous variety that can be achieved within the confines of a seemingly simple and rigid framework. Although the standard provisions of the UN Model are largely taken as an example, a myriad of variations are found in the treaties, the identification of which was necessarily left to the discretion of the members of the research team. In spite of the guidelines drafted for the research, the appreciation of these variations by the members of the team may have resulted in different assessments due, inter alia, to the fact that they had to deal with so many different languages. Given the significant number of variations, the authors of this paper had no choice but to select the most important and commonly occurring variations for comment. Nevertheless, where appropriate, some provisions of particular interest are mentioned even though they are found in only a limited number of treaties.

For all of these reasons, the authors realize that the data, as presented in this report, cannot be regarded as more than a best effort. Nevertheless, they are convinced that they have given a fair picture of the use, in practice, by treaty negotiators of the various specific UN provisions.

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

2 Analysis of the application of the UN Model in practice

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

2.1.1 The UN Model

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

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

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

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

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

The provisions are examined in terms of whether or not they include the term "supervisory activities" and the "minimum period of six months".

According to the UN Model, supervisory activities are covered by this provision, irrespective of whether they are performed by the main contractor or subcontractor. The OECD Model does not include these activities in the construction clause. According to the OECD Commentary, supervisory activities were, until 2003, explicitly subsumed under the construction clause provided the work was performed by the main contractor itself. Supervisory activities performed by a subcontractor were not, however, covered by this provision. This difference between the OECD and UN Models disappeared due to the changes to the OECD Commentary in 2003.[4]

In respect of the time threshold, the UN Model provides for a period of six months whereas the OECD Model provides for a period of twelve months.

[4] Par. 17 OECD Commentary on Art. 5.

2.1.2 Supervisory activities

2.1.2.1 Tax treaties: 1 April 1997 – 1 January 2013

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

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

Of the 1,162 treaties in which supervisory activities are included as one of the elements that may constitute a permanent establishment (PE), 629 were concluded between two UN countries (Group A), 455 between a UN and an OECD country (Group B) and 78 between two OECD countries (Group C).

Few tax treaties deviate from the standard provision for "supervisory activities". Nevertheless, a number of tax treaties contain "consultancy activities",[5] "inspection activities"[6] or "supervisory services"[7] in addition to or instead of "supervisory activities". Furthermore, some tax treaties contain additional "activities consisting of planning"[8] or "on-site planning"[9] or include supplementary "activities consisting of planning, supervising, consulting or other auxiliary work".[10] Other treaties contain, in addition to "supervisory activities", an installation, drilling rig, ship or structure used for the exploration of natural resources.[11] In some tax treaties, "supervisory activities" are referred to only for the purpose of calculating the period that determines the PE.[12]

2.1.2.2 Comparison with the 1997 research

The results of the current research are not significantly different from the earlier 1997 research. In 1997,[13] the combined results of the UN treaties in Groups A and B amounted to 59% whereas this result, according to the current research, amounts to 68%. Regarding Group C, there is hardly any change. In 1997, this provision was adopted by 34% of the treaties, whereas this percentage according to the current research now amounts to 35%.[14]

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[5] For example, Art. 5(2)(h) of the tax treaty between *Azerbaijan and Italy* of 2004.
[6] For example, Art. 5(3) of the tax treaty between *Belgium and Georgia* of 2000.
[7] For example, Art. 5(3)(a) of the tax treaty between *Bulgaria and Kazakhstan* of 1997; and Art. 5(3)(a) of the tax treaty between *Singapore and Malta* of 2006.
[8] For example, Art. 5(3) of the tax treaty between *Austria and Greece* of 2007 and Art. 5(3) of the tax treaty between *Greece and South Africa* of 1998.
[9] For example, Art. 5(3)(a) of the tax treaty between the *Czech Republic and Colombia* of 2012.
[10] For example, Art. 5(3) of the tax treaty between the *Nordic Countries* of 1996.
[11] For example, Art. 5(3)(b) of the tax treaty between *Belgium and Azerbaijan* of 2004 and Art. 5(3)(a) of the tax treaty between *China and Sri Lanka* of 2003.
[12] For example, Art. 5(3) of the tax treaty between *Chile and Brazil* of 2001.
[13] Wijnen & Magenta, *supra* n. 2.
[14] Wijnen & Magenta, *supra* n. 2.

2.1.3 Minimum period

2.1.3.1 Tax treaties: 1 April 1997 – 1 January 2013

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

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

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

Of these 1,116 treaties, 559 (50%) were concluded between UN countries (Group A), 485 (43%) between UN and OECD countries (Group B) and 72 (32%) between OECD countries (Group C). It is striking that so many OECD/OECD treaties (32%) include a minimum period of less than the 12 months recommended by the OECD Model.
In respect of the other treaties, it should be noted that there is one treaty concluded between UN countries (Group A)[15] and one treaty concluded between a UN and OECD country (Group B)[16] without a time threshold. Further, in two group A treaties[17] and five Group B treaties[18] this provision is not included.
The following periods shorter than 12 months are found in the treaties:

Table 1: Period < 12 months			
	Group A	**Group B**	**Group C**
No threshold	1	1	-
3 m	26	13	-
4 m	2	1	-
5 m	1	1	-
6 m	391	337	57
7 m	1	-	-
8 m	7	2	-
9 m	131	130	14
10 m	-	1	1
Total	559	485	72
Note: For the sake of simplicity, the periods are reported in months. For example,			

[15] Art.5(2)(f) of the tax treaty between *Congo (Dem. Rep.) and Zimbabwe* of 2002.
[16] Art.3(a)(gg) of the tax treaty between *Cameroon and France* of 1976/1999.
[17] For example, the tax treaty between *Argentina and Chile* of 1976/ 2003.
[18] For example, the tax treaty between *Guernsey and United Kingdom* of 1952/2009.

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

Of the 1,811 treaties included in this research, 686 treaties prescribe a minimum period of 12 months or longer. These are divided over the three groups noted in section 1.2. as follows:

(1) Group A: 200 of 762 tax treaties (26%);
(2) Group B: 334 of 825 tax treaties (40%); and
(3) Group C: 152 of 224 tax treaties (68%).

Of these 686 treaties, 200 were concluded between UN countries (Group A), 334 between UN and OECD countries (Group B) and 152 between OECD countries (Group C). The following periods of 12 months or longer are found in the treaties:

Table 2: Period ≥ 12 months			
	Group A	**Group B**	**Group C**
12 m	190	328	150
15 m	-	1	-
18 m	9	5	-
24 m	1	-	2
Total	200	334	152
Note: For the sake of simplicity, the periods are reported in months. For example, periods of 90 and 91 days are counted as three months and those of 180, 182 and 183 days as six months.			

2.1.3.2 Comparison with the 1997 research

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

According to the 1997 research, 513 of the 811 treaties (63%) prescribed a minimum period shorter than 12 months (in 2013: 62%) and 298 of the 811 treaties (37%), a minimum period of 12 months or longer (in 2013: 38%).

Of the 513 treaties covered by the 1997 research with a period shorter than 12 months, 484 (94%) were concluded by UN countries with either a UN or an OECD country (in 2013: 93%) and 29 (6%) were concluded between OECD countries (in 2013: 6%).

Of the 298 treaties covered by the 1997 research with a period of 12 months or longer, 215 (72%) were concluded by UN countries with either a UN or an OECD country (in 2013: 78%) and 83 (28%) were concluded between OECD countries (in 2013: 22%).

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

2.2.1 The UN Model

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

(3) The term "permanent establishment" likewise encompasses:

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

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

(3) The term "permanent establishment" likewise encompasses:

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

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

2.2.2 Tax treaties: 1 April 1997 – 1 January 2013

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

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

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

Table 3: Furnishing of services periods			
	Group A	**Group B**	**Group C**
1 m	5	1	-
2 m	11	2	-
3 m	64	24	-
4 m	8	7	1
5 m	1	-	-
6 m	289	207	36
8 m	1	1	-
9 m	34	21	2
10 m	-	1	-
12 m	22	26	1
15 m	1	-	-
18 m	3	-	-
Note: There is significant variance in terms of the periods in tax treaties that are counted in days or months. For the sake of simplicity, the periods are reported in months. Periods of 90 days are counted as three months, periods of 180, 182 and 183 days as six months, a period of 270 days as nine months, a period of 300 days as ten months and a period of 365 days as twelve months. The UN provision also refers to six months within any 12-month period. This period of 12 months is extended in a limited number of treaties,[19] in particular in treaties in respect of which the threshold for services is longer than six months. This element of this treaty provision is omitted herein.			

More than 40% of the tax treaties concluded between two UN countries do not contain this UN provision on services. There is no simple explanation. This group represents a broad spectrum of countries. It could be that a significant number of these countries have a treaty policy that, in this respect, is more in line with the OECD than the UN Model. It could also be that for countries in this group a provision on services is less relevant because of the fact that this provision is considered to be more appropriate in relation to the service economies of the OECD countries.

In some tax treaties, the duration of services provided by associated enterprises must be aggregated in computing the time limit if these services are identical or substantially similar.[20]

In two tax treaties, a distinction is made between services performed for unrelated enterprises and services performed for related enterprises. In these tax treaties, a minimum period of 90 days in any 12-month period applies to services performed for unrelated enterprises and a

[19] For example, Art. 5(4) of the tax treaty between *the Isle of Man and Singapore of* 2012 and Art. 5(3)(b) of the tax treaty between *Jersey and Singapore* 2012.
[20] For example, Art. 5(3) of the tax treaty between *Bahrain and Mexico* of 2010 and Art. 5(5)(a) of the tax treaty between *Australia and Chile* of 2010.

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

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

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

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

2.2.3 Comparison with the 1997 research

The results of the current research are considerably higher than those of the earlier 1997 research. The combined result of the UN countries in Groups A and B amounted to 31% in 1997, whereas this result, as indicated by the current research, now amounts to 46%. It is also striking that the same applies to Group C. The 1997 research indicated that this typical UN provision was adopted in 2% of tax treaties between OECD countries, whereas this percentage, according to current research, amounts to 17%.

2.3 Article 5(4) (a) and (b) of the UN Model 1980: distribution activities

2.3.1 The UN Model

Article 5(4)(a) and (b) of the UN Model reads as follows:

[21] For example, Art. 5(2)(l) of the tax treaty between *India and Switzerland* of 1994/2000.
[22] For example, Art. 5(3)(c) of the tax treaty *between Australia and India* of 1991.
[23] Recommendation Para. 42.23 OECD Commentary on Art. 5: *Notwithstanding the provisions of paragraphs 1, 2 and 3, where an enterprise of a Contracting State performs services in the other Contracting State (a) through an individual who is present in that other State for a period or periods exceeding in the aggregate 183 days in any twelve month period, and more than 50 per cent of the gross revenues attributable to active business activities of the enterprise during this period or periods are derived from the services performed in that other State through that individual, or (b) for a period or periods exceeding in the aggregate 183 days in any twelve month period, and these services are performed for the same project or for connected projects through one or more individuals who are present and performing such services in that other State, the activities carried on in that other State in performing these services shall be deemed to be carried on through a permanent establishment of the enterprise situated in that other State, unless these services are limited to those mentioned in paragraph 4 which, if performed through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph. For the purposes of this paragraph, services performed by an individual on behalf of one enterprise shall not be considered to be performed by another enterprise through that individual unless that other enterprise supervises, directs or controls the manner in which these services are performed by the individual.*
[24] For example, Art. 5(8) of the tax treaty between the *United States and Bulgaria* of 2007 and Art. 5(5) of the tax treaty between *Hong Kong and New Zealand* of 2010.
[25] For example, Art. 5(4)(a) of the tax treaty between *Australia and New Zealand* of 2009 and Art. 5(4) of the tax treaty between *Norway and Turkey* of 2010

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

(a) The use of facilities solely for the purpose of storage *or* display *[...]* of goods or merchandise belonging to the enterprise;
(b) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage *or* display *[…]*; (...)

The UN Model does not list "delivery" as one of the business activities that are treated as exceptions to the general PE definition in paragraph 1.

2.3.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 tax treaties included in the research, 384 treaties omit the term "delivery". These are divided over the three groups noted in section 1.2. as follows:

(1) Group A: 247 of 762 tax treaties (32%);
(2) Group B: 124 of 825 tax treaties (15%); and
(3) Group C: 13 of 224 tax treaties (6%).

Of these 384 tax treaties, 247 were concluded between two UN countries (Group A), 124 between a UN and an OECD country (Group B) and 13 between two OECD countries (Group C). These scores are rather low. As the UN countries are generally the importing countries where the goods and merchandise are stored and delivered, a score of 15% of the treaties between UN and OECD countries in Group B is striking.

Only a limited number of tax treaties contain specific provisions dealing with "delivery". In 8 tax treaties of Group A[26] and 5 tax treaties of Group B[27] it is expressly indicated that the term "delivery" does not include sales activities. In one tax treaty of Group B the term delivery refers to goods and merchandise the price of which is determined before they are imported in order to ensure that the place where they are stored or the warehouse from which they are delivered does not constitute a sales outlet".[28]

In six tax treaties of Group A[29] "delivery" is listed as one of the activities that do not constitute a PE if this delivery is "occasional". Under these tax treaties, delivery on a regular basis will constitute a PE.

In two treaties of Group A[30] it is expressly stated that the use of facilities for delivery of goods and merchandise is to be regarded as a "deemed" PE if they are used as sales outlets.

2.3.3 Comparison with the 1997 research

[26] For example, Art. 5(4)(a)(b) of the tax treaty between *Belarus and Pakistan* of 2004.
[27] For example, Art. 5(4)(a)(b) in conjunction with Prot. 1 of the tax treaty between *Austria and Venezuela* of 2006.
[28] For example, Art. 5(4)(a)(b) in conjunction with Prot. 3 of the tax treaty between *Algeria and France* of 1999.
[29] For example, Art. 5(4) (1) and (2) of the tax treaty between *Azerbaijan and Serbia* of 2010.
[30] For example, Art. 5(3)(a)(b) of the tax treaty between *Cyprus and Thailand* of 1998.

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

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

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

2.4.1 The UN Model

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

> (5) Notwithstanding the provisions of paragraphs 1 and 2, where a person – other than an agent of an independent status to whom paragraph 7 applies – is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such a person:
>
> > (a) Has and habitually exercises in that State an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or
> >
> > *(b) Has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise.*

This subparagraph (b) expands on the concept of a deemed agency PE.

2.4.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 tax treaties included in the research, 499 (28%) include a stock agent provision similar to that of the UN model. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 307 of 762 tax treaties (40%);
(2) Group B: 167 of 825 tax treaties (20%); and
(3) Group C: 25 of 224 tax treaties (11%).

Of these 499 tax treaties, 307 were concluded between two UN countries (Group A), 167 between a UN and an OECD country (Group B) and 25 between two OECD countries (Group C).

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

> (c) he habitually secures orders for the sale of goods or merchandise in the first-mentioned State, wholly or almost wholly on behalf of the enterprise itself, or on behalf of the enterprise and other enterprises controlled by it or which have a controlling interest in it.

Further, 11 of these treaties[32] include a specific provision for agents who manufacture, assemble, process, pack or distribute goods or merchandise. An example of such provision is:

> Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 8 applies - is acting on behalf of an enterprise and b) manufactures or processes in a Contracting State for the enterprise goods or merchandise belonging to the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for that enterprise.

2.4.3 Comparison with the 1997 research

The results of the current research are in line with the results of the 1997 research. There is a slight decrease in respect of the UN treaties and a slight increase in respect of the OECD treaties, which seems remarkable.

According to the 1997 research, the combined results of the treaties concluded by UN countries in Groups A and B amounted to 34%, while this result according to the current research now amounts to 30%. The result regarding treaties concluded between OECD countries amounted to 8% in 1997 and 11% in 2013.

2.5 Article 5(6) of the UN Model 1980: insurance activities

2.5.1 The UN Model

Article 5(6) of the UN Model reads as follows:

> *Notwithstanding the preceding provisions of this Article, an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies.*

This provision broadens the PE definition by including the following activities carried on by insurance enterprises:

(a) the collection of premiums; and
(b) the insurance of risks.

[31] For example, Art. 5(6)(b) of the tax treaty between *Mauritius and Nigeria* of 2012.
[32] For example, Art. 5(7)(b) of the tax treaty between *Australia and Finland* of 2006.

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

2.5.2 Tax treaties: 1 April 1997 – 1 January 2013

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

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

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

Of the 543 tax treaties, 64 tax treaties (12%) do not contain a specific PE provision for insurance activities but a provision stating that the provisions of Article 7 do not affect the application of domestic law regarding the taxation of profits from insurance business.[33] Some treaties allow for the taxation of insurance profits whether or not the insurance enterprise carries on its activities in the source state through a PE through which the same result is achieved.[34]

In one treaty of Group A and in one treaty of Group B the scope of this UN provision is extended to reinsurance activities.[35]

In one treaty of Group A[36] and two treaties of Group B[37] the person acting on behalf of the insurance enterprise must have the authority to conclude contacts in the name of the insurance enterprise and must collect premiums in the source state.

In one treaty of Group A[38] and two treaties of Group B[39] the right of the source state to tax profits from insurance activities is limited to a maximum tax rate ranging from 2.5% to 5% of the gross amount of the premiums.

2.5.3 Comparison with the 1997 research

[33] For example, Prot. 7(2) to Art. 7 of the tax treaty between *Russia and Saudi Arabia* of 2007 and Art. 7(7) of the tax treaty between *Argentina and Australia* of 1999.
[34] For example, Art. 7(7) of the tax treaty between *Argentina and Switzerland* of 1997/2000.
[35] *Supra*, n. 37 and Art.5(6) of the tax treaty between *Belarus and Israel* of 2000.
[36] For example, Art. 5(6) of the tax treaty between *Bahrain and Seychelles* of 2010.
[37] For example, Art. 5(5) of the tax treaty between *Qatar and Belgium* of 2007.
[38] Art. 5(6) of the tax treaty between *Chile and Paraguay* of 2005: 3%.
[39] Art. 7(7) of the tax treaty between *Argentina and Switzerland* of 1997/2000: 2.5%; Art. 7(6) of the tax treaty between *Finland and Uzbekistan* of 1998: 5%.

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

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

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

2.6.1 UN Model 1980: agents with one principal

2.6.1.1 The UN Model

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

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

The second sentence of this provision extends the scope of the PE concept by treating an agent who acts wholly or almost wholly for one principal as a dependent agent.

2.6.1.2 Tax reaties: 1 April 1997 – 1 January 2013

Of the 1,811 tax treaties included in the research, 622 treaties (34%) include a specific provision for agents with only one principal. These are divided over the three groups in section 1.2 as follows:

(1) Group A: 377 of 762 tax treaties (49%);
(2) Group B: 240 of 825 tax treaties (29%); and
(3) Group C: 5 of 224 tax treaties (2%).

Of the 622 treaties included in the research, 377 were concluded between two UN countries (Group A), 240 between a UN and an OECD country (Group B) and 5 between two OECD countries (Group C).

Of these 622 tax treaties, 28 treaties of Group A[40] and 4 treaties of Group B[41] not only cover activities performed by the agent on behalf of the enterprise itself in this specific UN provision, but also activities on behalf of associated enterprises. The interest in this extension of the provision slightly decreased from 9% according to the 1997 research to 5% under the current research. Most of these provisions read as follows:

> *However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise or on behalf of that enterprise* ***and other enterprises, which are controlled by it or have a controlling interest in it****, he will not be considered an agent of independent status within the meaning of this paragraph.*

[40] For example, Art. 5(7) of the tax treaty between *Kuwait and Ukraine* of 2003.
[41] For example, Art. 5(7) of the tax treaty between *Thailand and Norway* of 2003.

2.6.1.3 Comparison with the 1997 research

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

2.6.2 UN Model 2001: arm's length limitation

2.6.2.1 The UN Model

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

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

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

2.6.2.2 Tax treaties: 1 April 1997 – 1 January 2013

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

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

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

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

Of the 293 treaties included in the research, 131 were concluded between two UN countries (Group A), 145 between a UN and an OECD country (Group B) and 17 between two OECD countries (Group C).

In 4 treaties, the arm's length requirement is not limited to independent agents with only one principal. An example of such provision is:

> *An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business* ***and that the conditions that are made or imposed in their commercial or financial relations with such enterprises do not differ from those which would be generally made by independent agents.***[42]

2.6.2.3 Comparison with the 1997 research

In 1997, no specific research was undertaken in respect of the arm's length relationship between the (independent) agent and his principal. The only information that was found and included in the 1997 report is that 54 of the 811 treaties concluded in that period of research, i.e. 7%, contained an arm's length limitation. However, it is not clear how these treaties were divided over the two groups covered by the 1997 research. The results of the current research show a general upward tendency, as they amount to 16%. It seems that the increasing attention to this provision is a direct consequence of the introduction of this provision in the UN Model.

2.7 Article 7(1) of the UN Model 1980: limited force of attraction

2.7.1 The UN Model

Article 7(1) of the UN Model reads as follows:

> 1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to (a) that permanent establishment; *(b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment.*

Clauses (b) and (c) provide for a limited force of attraction rule. They strengthen the position of the source state by extending its right to tax to business profits that are incurred by an enterprise through its PE. The source state may attribute such non-PE profits to a PE of the enterprise if they are derived from the sale of goods or merchandise or any other business activity in the source state, provided that these transactions are similar in kind to those concluded through the PE.

[42] For example, Art 5(7) of the tax treaty between *Ireland and Mexico* of 2008.

2.7.2 Tax treaties: 1 April 1997 – 1 January 2013

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

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

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

In 35 of these 250 treaties, the limited force of attraction rule only refers to profits from sales of goods or merchandise (*subparagraph b*), but not to profits from other business activities (*subparagraph c*). Of these 35 treaties, 10 were concluded between two UN countries (group A), 16 between a UN and an OECD country (Group B) and 9 between two OECD Countries (Group C).

In 20 treaties, the limited force of attraction does not apply if the enterprise can prove that the transactions or the business activities were genuinely carried out otherwise than through the PE. The wording of this provision differs in the various treaties. An example of such provision is:

> However, the profits derived from the sales described in this subparagraph (b) shall not be taxable in the other State if the enterprise demonstrates that such sales have been carried out for reasons other than obtaining a benefit under this Agreement.[43]

In 32 tax treaties, it is explicitly stated that the limited force of attraction rule only applies with regard to cases of tax avoidance or abuse. In this event, the burden of proof lies on the tax authorities. Of these 32 treaties, 14 were concluded between two UN countries (Group A), 16 between a UN and an OECD country (Group B) and 2 between two OECD countries (Group C). Wording that is frequently used is as follows:

> However, profits derived from the sale of goods or merchandise of the same or similar kind as those sold, or from other business activities of the same or similar kind as those effected, through that permanent establishment may be considered attributable to that permanent establishment *if it is established that such sales or activities were structured in a manner intended to avoid taxation in the State where the permanent establishment is situated*.[44]

In 9 of these treaties, the limited force of attraction rule applies only if there is some connection with the PE. Of these 9 treaties, one was concluded between two UN countries (Group A), 5 between a UN and an OECD country (Group B) and 3 between two OECD countries (Group C). An example of such a provision is:

[43] Art. 7(1) of the tax treaty between *Australia and Mexico* of 2002.
[44] For example, Art. 7(1) of the tax treaty between *Lithuania and the United States* of 1998.

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

2.7.3 Comparison with the 1997 research

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

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

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

2.8.1 The UN Model

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

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

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

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

The second sentence expressly disallows deductions for amounts paid (otherwise than towards reimbursement of actual expenses) by the PE to its head office (except for interest on intra-bank loans). Therefore, only payments being of a reimbursement nature, incurred directly or indirectly by the enterprise on behalf of the PE, are deductible. Consistently, payments by the head office to the PE are, in the third sentence, excluded from the profits of the PE.

2.8.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 treaties included in the research, 480 treaties (27%) contain a clarification with respect to the determination of PE profits. These are divided over the three groups noted in section 1.2 as follows:

> (1) Group A: 294 of 762 tax treaties (39%);
> (2) Group B: 163 of 825 tax treaties (20%); and
> (3) Group C: 23 of 224 tax treaties (10%).

In respect of this UN provision, no striking deviations are found. The main deviation is that, in 101 of the 480 treaties, the third sentence is omitted, the impact of which is limited, as this provision seems to be of an explanatory nature. Of these 101 treaties, 57 were concluded between two UN countries (Group A), 35 between a UN and an OECD country (Group B) and 9 between two OECD countries (Group C).

Article 7(3), however, contains a provision in many treaties that limits the deductibility of expenses in the PE state to those expenses that are deductible under its domestic laws. This domestic law limitation clause is in conformity with Paragraph 30 of the OECD Commentary 2008 on Article 7(3), which clause is also included in Paragraph 18 of the UN Commentary 2011 on Article 7(3). Of the 1,811 treaties included in the research, 249 (14%) contain such a provision. In 69 of these treaties, this provision is included in addition to the UN Model provision whereas in the remaining 180 treaties this provision is included instead of the UN Model provision. An example of this provision is:

> 3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere, *in accordance with the provisions of and subject to the limitations of the taxation laws of that State.*[46]

[46] For example, Art. 7(3) of the tax treaty between *India and New Zealand* of 1986/1999.

2.8.3 Comparison with the 1997 research

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

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

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

2.9.1 The UN Model

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

> No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

This provision was deleted from the OECD Model in 2010.

2.9.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 treaties included in the research, 109 treaties (6%) do not have a specific provision for the purchase of goods. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 63 of 762 tax treaties (8%);
(2) Group B: 30 of 825 tax treaties (4%); and
(3) Group C: 16 of 224 tax treaties (7%).

In the 1,702 treaties that contain a purchase provision, no substantial deviations from the wording of the OECD provision are found. Only a few treaties contain some special features of which the following are worth mentioning.

In 5 treaties of Group B, profits from the sale of goods or merchandise by the head office may not be attributed to its PE in the other state:

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

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

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

2.9.3 Comparison with the 1997 research

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

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

2.10.1 The UN Model

Article 8B of the UN Model reads as follows:

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

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

2.10.2 Tax treaties: 1 April 1997 – 1 January 2013

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

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

(1) Group A: 67 of 762 tax treaties (9%);
(2) Group B: 33 of 825 tax treaties (4%); and
(3) Group C: 0 of 224 tax treaties (0%).

Of these 100 treaties, 67 were concluded between UN countries (Group A) and 33 between a UN and OECD country (Group B).

Deviations from the UN Model

A number of the 100 treaties contain provisions similar to, but that deviate from, the UN Model. The most relevant deviating provisions can be summarized as follows:

- In 63 tax treaties of Group A and 33 tax treaties of Group B the scope of the provision is extended to air transport profits;

- 1 tax treaty of Group B provides for an unlimited right to tax in the source state;

- 1 tax treaty of Group A and 1 of Group B provide for an unlimited right to tax, in the source state, in respect of hydrocarbons transportation.

Limitations to the taxing right of the source state

In these 100 treaties there are various types of limitations that provide for a limited right to tax in the source state. These limitations are summarized as follows:

- 50 tax treaties of Group A and 24 of Group B include a reduction of the tax imposed by the source state of 50% or 60%;

- In 1 treaty of Group A and 2 of Group B the taxation in the source state is limited to 1.5% of the gross revenues; 2 other treaties of Group A contain a limitation to 4%;

- 9 treaties of Group A and 5 of Group B provide that the tax charged by the source state is the lesser of: (a) 1.5% of the gross revenue derived from sources in that state; and (b) the lowest rate of tax that may be imposed on profits of the same kind derived under similar circumstances by a resident of a third state.

2.10.3 Comparison with the 1997 research

The current research shows a significant decrease in the use of this provision. The combined result of UN countries in Groups A and B amounted in 1997 to 15%, while this result in the current research decreased to 6%. The result of the treaties concluded between OECD countries decreased from 3% in 1997 to 0% in 2013.

2.11 Article 9(3) of the UN Model 2001: adjustment and penalties

2.11.1 The UN Model

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

> *The provisions of paragraph 2 shall not apply where judicial, administrative or other legal proceedings have resulted in a final ruling that by actions giving rise to an adjustment of profits under paragraph 1, one of the enterprises concerned is liable to penalty with respect to fraud, gross negligence or wilful default.*

Under this provision there is no obligation to make a corresponding adjustment if one of the enterprises is liable to a penalty with respect to fraud, gross negligence or wilful default on the basis of a legal proceeding. Although this provision was not adopted in the UN Model until 2001, a number of treaties concluded in the foregoing years already contained such a provision using the same or similar wording.

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

Of the 1,811 tax treaties included in the research, 235 treaties (13%) contain this new provision dealing with adjustments and penalties. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 85 of 762 tax treaties (11%);
(2) Group B: 104 of 825 tax treaties (13%); and
(3) Group C: 46 of 224 tax treaties (20%).

Of these 235 treaties, 85 were concluded between UN countries (Group A), 104 between a UN and OECD country (Group B) and 46 between OECD countries (Group C). It is remarkable that in so many OECD/OECD treaties such a carve-out was included despite the fact that it is not included in the OECD Model.

In 32 tax treaties, the literal wording of the UN provision has been adopted. However, in the vast majority of the remaining 203 tax treaties, the non-application of the correlative adjustment is not linked to a penalty resulting from a legal proceeding. The wording of this provision in 60 treaties of Group A, 97 treaties of Group B and 46 treaties of Group C is generally formulated as follows:

> The provisions of paragraphs 1 and 2 shall not apply in the case of fraud, wilful default or neglect.[49]
>
> or
>
> The provisions of paragraph 2 shall not apply in the case of fraud, gross negligence, or wilful default.[50]
>
> or
>
> The provisions of paragraph 2 of this Article shall not apply in the case of tax fraud or evasion.[51]

[49] Art 9 of the tax treaty between *Egypt and Slovenia* of 16 December of 2009.
[50] For example, Art. 9 of the tax treaty between *Mexico and South Africa* of 19 February 2009.

2.11.3 Comparison with the 1997 research

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

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

2.12.1 The UN Model

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

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

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

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

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

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

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

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

2.12.3 Comparison with the 1997 research

[51] For example, Art. 9 of the tax treaty between *Bulgaria and Jordan* of 9 November of 2006.

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

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

2.13.1 The UN Model

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

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

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

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

2.13.2 Radio or television broadcasting

2.13.2.1 Tax treaties: 1 April 1997 – 1 January 2013

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

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

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

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

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

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

recording is included in the royalty definition whereby television and radio broadcasting are included but not expressly mentioned.[53]

In 11 tax treaties (5 treaties of Group A, 4 treaties of Group B and 2 treaties of Group C), a generic reference to television or radio recording, transmission or to other means of reproduction is included in the royalty definition whereby broadcasting is not expressly mentioned.[54]

In 14 treaties (8 treaties of Group A, 5 treaties of Group B and 1 treaty of Group C), television and radio broadcasting is included but it is specified that the transmission must be done by satellite, cable, optic fibre or similar technology.[55]

2.13.2.2 Comparison with the 1997 research

The results of the current research indicate a downward trend relative to the results of the 1997 research, in particular in respect of treaties concluded between OECD countries. The combined result of UN countries in Groups A and B amounted to 88% in 1997, while this result, according to the current research, has decreased to 80%. In respect of treaties concluded between OECD countries, there was an even greater decrease from 89% in 1997 to 63% in 2013.

2.13.3 Use of industrial, commercial or scientific equipment

2.13.3.1 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 treaties included in the research, 1,234 treaties (68%) grant the source state a limited right to tax. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 580 of 762 tax treaties (76%);
(2) Group B: 502 of 825 tax treaties (61%); and
(3) Group C: 152 of 224 tax treaties (69%).

Of these 1,234 treaties, 580 were concluded between UN countries (Group A), 502 between a UN and an OECD country (Group B) and 152 between OECD countries (Group C). It is striking that these payments are still included in so many OECD/OECD treaties whereas this provision has been absent from the OECD Model since 1992.

In one treaty of Group A, payments for the use of equipment or leasing in the royalty definition is restricted to the transfer of know-how.[56] In one treaty of Group B, payments

[53] For example, Art. 12(3) of the tax treaty between *Iran and Russia* of 2002.
[54] For example, Art. 12(3) of the tax treaty between *Azerbaijan and Iran* of 2009.
[55] For example, Art. 12(3)(e) of the tax treaty between *Iceland and Mexico* of 2008.
[56] Art. 12(3) of the tax treaty between *Botswana and Namibia* of 2004.

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

2.13.3.2 Comparison with the 1997 research

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

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

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

2.14.1.1 The UN Model

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

> *4. Gains from the alienation of shares of the capital stock of a company the property of which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that State.*

A provision dealing with capital gains on the sale of real property shares was not adopted in the OECD Model until 2003. This OECD provision applies only to capital gains that derive more than 50% of their value directly or indirectly from immovable property.

2.14.1.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 tax treaties included in the research, 1,089 have a specific provision for real property shares. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 430 of 762 tax treaties (56%);
(2) Group B: 510 of 825 tax treaties (62%); and
(3) Group C: 149 of 224 tax treaties (67%).

Of these 1,089 treaties, 430 were concluded between UN countries (Group A), 510 between a UN and an OECD country (Group B) and 149 between OECD countries (Group C). What is remarkable is the high number of OECD/OECD treaties.

In a number of these 1,089 treaties,[58] real property shares are not dealt with in a separate paragraph, but together with gains on the alienation of real property in the first paragraph of the capital gains article.

[57] Art. 12(3) of the tax treaty between *Finland and the Slovak Republic* of 1999.
[58] For example, Art. 13(1) of the tax treaty between *Bangladesh and Indonesia* of 2003, Art. 13(1) of the tax treaty between *Estonia and Korea (Rep.)* of 2009 and Art. 14(1) of the tax treaty between *New Zealand and the United Kingdom* of 1983/2003.

In 31 treaties[59] of these 1,089 treaties, the special regime for real property shares applies only to cases where the alienator holds a certain level of participation in the entity. The following participation thresholds are found in these tax treaties:

Table 4: Participation thresholds			
Percentage	**Group A**	**Group B**	**Group C**
5%	-	10	4
10%	1	1	5
25%	-	4	1
50%	-	3	2
Total	**1**	**18**	**12**

In 7 treaties in Group A,[60] 24 in Group B[61] and 3 in Group C[62] the right of the source state to tax is limited by the exclusion of capital gains derived from the alienation of shares in the course of a corporate reorganization, amalgamation, division or similar transaction. Further, in many treaties real property shares quoted on an approved stock exchange are excluded from this special regime.

In 2 treaties of Group A,[63] the taxation right on real property shares is exclusively attributed to the source state.

In one treaty in Group A,[64] the tax that the source state may levy on capital gains on shares is limited to 10% of such gains.

2.14.1.3 Comparison with the 1997 research

The percentage of the countries adopting a specific provision for real property shares is significantly higher than in the earlier 1997 research. The combined result of Groups A and B amounted to 44% in 1997, whereas this result according to the current research amounts to 59%. The same applies to Group C: in the 1997 research this provision was adopted in 57% of the tax treaties between OECD countries, whereas this percentage, as indicated by the current research, amounts to 67%. The tax treaty policy of the OECD countries clearly ran

[59] For example, Art. 14(4) of the tax treaty between *Barbados and Ghana* of 2008, Art. 13(4) of the tax treaty between *Albania and the Netherlands* of 2004 and Art. 13(4) of the tax treaty between *Canada and Luxembourg* of 1999.
[60] For example, Art. 13(4)(a) of the tax treaty between *Hong Kong and Indonesia* of 2010 and Art. 13(5) of the tax treaty between *Cyprus and Russia* of 1998/2010.
[61] For example, Art. 13(4)(b) of the tax treaty between *Belgium and Moldova* of 2008 and Art. 13(2) of the tax treaty between *Azerbaijan and the Netherlands* of 2008.
[62] Art. 13(2)(b) of the tax treaty between *Germany and the Netherlands* of 2012, Art. 13(4)(b) of the tax treaty between *Netherlands and the United Kingdom* of 2008 and Art. 13(4)(b) of the tax treaty between *the Netherlands and Switzerland* of 2010.
[63] Art. 13(2) of the tax treaty between *Belarus and United Arab Emirates* of 2000 and Art. 13(4) of the tax treaty between *Kuwait and Morocco* of 2002.
[64] Art. 13(6) of the tax treaty between *Myanmar and Singapore* of 1999.

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

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

2.14.2.1 The UN Model

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

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

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

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

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

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

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

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

[65] For example, Art. 13(2)(b) of the tax treaty between *Cuba and Ukraine* of 2003 and Art. 13(2)(b) of the tax treaty between *Belgium and Kazakhstan* of 1998.
[66] For example, Art. 14(4) of the tax treaty between *Bangladesh and Vietnam* of 2004, Art. 13(1)(b) of the tax treaty between *Albania and France* of 2002 and Art. 13(5)(b) of the tax treaty between *Canada and Czech Republic* of 2001.
[67] For example, Art. 13(4) of the tax treaty between *Albania and Bosnia and Herzegovina* of 2008, Art. 13(2)(b) of the tax treaty between *Georgia and the United Kingdom* of 2004 and Art. 13(2) of the tax treaty between *Japan and Portugal* of 2011.
[68] For example, Art. 13(2) of the tax treaty between *Israel and Latvia* of 2006 and Art. 14(2) of the tax treaty between *Congo (Dem. Rep.) and Zimbabwe* of 2002.
[69] For example, Art. 13(4) of the tax treaty between *Malaysia and Spain* of 2006 and Art. 13(4) of the tax treaty between *Macedonia (FYR) and Norway* of 2011.
[70] For example, Art. 13(4) of the tax treaty between *Hungary and the United States* of 2010 and Art. 13(4) of the tax treaty between *Australia and Turkey* of 2010.

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

2.14.2.3 Comparison with the 1997 research

The pertinent provision was not part of the 1997 research.

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

2.14.3.1 The UN Model

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

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

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

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

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

a) Immovable properties used in business activities

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

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

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

b) Percentage of value derived from immovable properties

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

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

The thresholds found in the tax treaties are as follows:

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

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

Finally, 2 treaties in Group A,[72] 20 in Group B[73] and 19 in Group C[74] contain the exception for immovable property used in business activities (subparagraph a) but without an indication of their value (subparagraph b).

2.14.3.3 Comparison with the 1997 research

The pertinent provision was not part of the 1997 research.

2.15 Article 13(5) of the UN Model 1980: other shares

2.15.1 The UN Model

Article 13(5) of the UN Model reads as follows:

> *(5) Gains from the alienation of shares other than those mentioned in paragraph 4 representing a participation of ... per cent (the percentage is to be established through bilateral negotiations) in a company which is a resident of a Contracting State may be taxed in that State.*

This provision was amended in 2011 to include an anti-abuse provision:

> *5. Gains, other than those to which paragraph 4 applies, derived by a resident of a Contracting State from the alienation of shares of a company which is a resident of the other Contracting State, may be taxed in that other State if the alienator**, at any time***

[72] Art. 14(2) of the tax treaty between *Congo (Dem. Rep.) and Zimbabwe* of 2002 and Art. 13(4) of the tax treaty between *Venezuela and Vietnam* of 2008.
[73] For example, Art. 14(4) of the tax treaty between *Canada and Oman* of 2004 and Art. 13(4) of the tax treaty between *Qatar and Switzerland* of 2009.
[74] For example, Art. 13(4) of the tax treaty between *Canada and Finland* of 2006 and Art. 13(4) of the tax treaty between *Canada and Slovak Republic* of 2001.

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

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

2.15.2 Tax treaties: 1 April 1997 – 1 January 2013

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

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

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

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

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

- 75 tax treaties[75] contain a minimum participation requirement based on the shares sold;
- 81 tax treaties[76] contain a minimum participation requirement based on the shares owned by the seller. Of these 81 treaties, 17[77] deal with gains from the alienation of shares "*forming part*" of a participation of a minimum percentage, thus indicating that the alienation of *any number* of shares belonging to a participation *of a given minimum percentage* may be taxed by the source state; and

[75] For example, Art. 13(5) of the tax treaty between *China (People's Rep.) and Kyrgyzstan* of 2002, Art. 13(6) of the tax treaty between *Norway and Venezuela* of 1997 and Art. 13(2) of the tax treaty between *Luxembourg and Mexico* of 2001.
[76] For example, Art. 14(3) of the tax treaty between *Chad and Libya* of 2009, Art. 13(5) of the tax treaty between *Korea (Rep.) and Peru* of 2012 and Art. 13(5) of the tax treaty between *Canada and Korea (Rep.)* of 2006.
[77] For example, Art. 14(5) of the tax treaty between *Libya and Malta* of 2008, Art. 13(4) of the tax treaty between *Belgium and Tunisia* of 2004 and Art. 13(5) of the tax treaty between *Iceland and Spain* of 2002.

– 9 tax treaties[78] contain both of the above-mentioned minimum participation requirements.

The minimum participation requirements based on the shares sold are set out in Table 6, while the minimum participation requirements based on the shares owned by the seller are set out in Table 7.

Table 6: Percentage of shares sold			
Percentage	**Group A**	**Group B**	**Group C**
5%	-	1	4
10%	6	5	-
15%	4	2	-
20%	2	2	-
25%	36	11	2
30%	-	1	-
35%	2	1	-
50%	4	1	-
Total	**54**	**24**	**6**

Table 7: Percentage of shares owned by the seller			
Percentage	**Group A**	**Group B**	**Group C**
5%	-	2	1
10%	5	2	-
15%	-	1	-
18%	-	1	-
20%	2	15*	2
25%	11	29	16
35%	1	-	-
50%	1	1	-
Total	**20**	**51**	**19**
* In two tax treaties[79] belonging to this group, the 20% threshold does not represent the minimum participation *above which* the provision applies, but represents the maximum participation *under which* the provision applies (i.e. the source state may tax gains derived from the alienation of shares in a company of which the alienator holds less than 20% of the capital).			

[78] For example, Art. 13(5) of the tax treaty between *Belarus and Israel* of 2000, Art. 13(3) of the tax treaty between *Brunei and Japan* of 2009 and Art. 13(2) of the tax treaty between *Germany and Korea (Rep.)* of 2000.
[79] Art. 13(4)(b) of the tax treaty between *Austria and Bulgaria* of 2009 and Art. 13(4)(b) of the tax treaty between *Austria and Bulgaria* of 2010.

Further, with specific reference to time thresholds:

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

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

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

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

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

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

[80] For example, Art. 13(4) of the tax treaty between *Panama and Qatar* of 2010, Art. 13(5) of the tax treaty between *Slovenia and Turkey* of 2001 and Art. 13(4) of the tax treaty between *Czech Republic and Turkey* of 1999.
[81] For example, Art. 13(4) of the tax treaty between *Saudi Arabia and Singapore* of 2010, Art. 14(5) of the tax treaty between *Austria and Pakistan* of 2005 and Art. 13(3)(a) of the tax treaty between *Australia and Japan* of 31 January 2008. Most of these treaties follow the wording recommended by the UN Model 2011: "if the alienator, *at any time during the 12 month period preceding such alienation*, held directly or indirectly at least ... per cent (…) of the capital of the company".
[82] For example, Art. 13(4) of the tax treaty between *Belarus and Saudi Arabia* of 2009 and Art. 13(4) of the tax treaty between *Chile and Croatia* of 2003.
[83] For example, Art. 13(5) of the tax treaty between *Colombia and Portugal* of 2010 and Art. 13(5) of the tax treaty between *Mexico and Uruguay* of 2009.
[84] For example, Art. 13(3) of the tax treaty between *Austria and Mexico* of 2004 and Art. 13(3) of the tax treaty between *Estonia and Mexico* of 2012.

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

2.15.3 Comparison with the 1997 research

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

2.16 Article 14 of the UN Model: independent personal services

In 2000, Article 14, which deals with independent personal services, was deleted from the OECD Model. From this year, the UN Model deviates in this respect entirely from the OECD Model.

2.16.1 Article 14(1)(a) of the UN Model 1980/2001/2011: fixed base rule

The basic rule for the treatment of independent personal services in Article 14(1)(a) of the UN Model 1980/2001/2011 reads as follows:

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

---

[85] Art. 13(4) of the tax treaty between *Belgium and Tunisia* of 2004.
[86] Art. 13(3) of the tax treaty between *Ireland and Mexico* of 1998 and Art. 13(2) of the tax treaty between *Luxembourg and Mexico* of 2001.
[87] For example, Art. 13(5) of the tax treaty between *Botswana and South Africa* of 2003 and Art. 13(5) of the tax treaty between *Egypt and Georgia* of 2010.
[88] For example, Art. 13(5) of the tax treaty between *Croatia and the Netherlands* of 2000 and Art. 13(6) of the tax treaty between *India and Sweden* of 1997.
[89] For example, Art. 13(6) of the tax treaty between *Austria and Germany* of 2000 and Art. 13(6) of the tax treaty between *Norway and the United Kingdom* of 2000.

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

2.16.1.1 Tax treaties: 1 April 1997 – 1 January 2013

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

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

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

In some treaties, it is explicitly stated that the provision for professional services applies to individuals but not to enterprises.[90] In one tax treaty in Group B, in determining the income attributable to professional services, there shall be allowed as deductions all expenses which would be deductible under the law of the source state insofar as such expenses are reasonably allocable to the performance of those services including executive and general administrative expenses, so deductible and allocable, whether incurred in the source state in which the services are performed or elsewhere.[91]

2.16.1.2 Comparison with the 1997 research

As the OECD Model, like the UN Model, provided for a specific article for independent personal services during the entire period of the earlier 1997 research, the existence of such an article in the treaties concluded in that period was not part of the research.

2.16.2 Article 14(1)(b) of the UN Model 1980/2001/2011: length of stay criterion

2.16.2.1 The UN Model

Article 14(1) (b) of the UN Model 1980 reads as follows:

[90] For example, Art. 14(1) of the tax treaty between *Georgia and Hungary* of 2012 and Art.14(1) of the tax treaty between *Latvia and United Arab Emirates* of 2012.
[91] For example, Art. 15 of the tax treaty between *Barbados and Canada* of 1980.

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

(a) ...
(b) If his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in the fiscal year concerned; in that case, only so much of the income as is derived from his activities performed in that other State may be taxed in that other State;

Article 14(1) (b) of the UN Model 2001/2011 reads as follows:

(b) If his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days ***in any twelve month period commencing or ending*** *in the fiscal year concerned; in that case, only so much of the income as is derived from his activities performed in that other State may be taxed in that other State;*

For the purposes of this research, the difference in wording of this provision in the UN Model 1980 and 2001/2011 is ignored. In comparison with Article 14 of the OECD Model, which was deleted in 2000, the source state's right to tax under the UN Model has been extended in that the source state may levy tax if a professional is present in that state for at least 183 days, even if there is no fixed base.

2.16.2.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 tax treaties included in the research, 984 treaties (54%) include a length of stay criterion. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 518 of 762 tax treaties (70%);
(2) Group B: 409 of 825 tax treaties (50%); and
(3) Group C: 57 of 224 tax treaties (25%).

Of these 976 treaties, 518 were concluded between UN countries (Group A), 409 between a UN and OECD country (Group B) and 57 between OECD countries (Group C).

The following periods are found in these treaties:

Table 10: Length of stay periods			
	Group A	**Group B**	**Group C**
60 days	-	2	-
61 days	1	-	-
90 days	10	8	-
91 days	1	3	-
120 days	6	8	-

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

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

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

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

2.16.2.3 Comparison with the 1997 research

The percentage of countries adopting a length of stay criterion for professional services significantly increased compared to the earlier 1997 research. The combined result of the UN countries in Groups A and B amounted to 38% in 1997, whereas this result according to the current research amounts to 58%. Even in respect of the treaties concluded between OECD countries in Group C, there is an increase from 18% in 1997 to 25% in 2013, which is, in light of the deletion of Article 14 from the OECD Model, a remarkable development.

2.16.3 Article 14(1)(c) of the UN Model 1980: amount of remuneration criterion

[92] For instance, Art. 14(1)(a) of the tax treaty between *Thailand and Bahrein* of 2001.
[93] For instance, Art. 15(1) of the tax treaty between *Malaysia and Egypt* of 1997.
[94] For instance, Art. 15(1) of the tax treaty between *South Africa and Uganda* of 1997.
[95] For instance, Art. 14(1) and (2) of the tax treaty between *Switzerland and Argentina* of 1997/2006 and Art. 14(1) and (2) of the tax treaty between *Malaysia and Indonesia* of 1991/2006.
[96] For instance, Art. 14(1) of the tax treaty between *Russia and Brazil* of 2004.
[97] For instance, Art. 14(1) of the tax treaty between *Argentina and Norway* of 1997.
[98] For instance, Art. 14(1) and (2) of the tax treaty between *France and Guinea* of 1999.

2.16.3.1 The UN Model

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

> (1) Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State except in the following circumstances, when such income may also be taxed in the other Contracting State:
>
> (a) ...
> (b) ...
> *(c) If the remuneration for his activities in the other Contracting State is paid by a resident of that Contracting State or is borne by a permanent establishment or a fixed base situated in that Contracting State and exceeds in the fiscal year ... (the amount is to be established through bilateral negotiations).*

This subparagraph was deleted in the UN Model 2001 because it was not used that often in practice by UN countries. Even so, this provision is included in the present research, as it can still be a basis for source state taxation of professional services in tax treaties.

2.16.3.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 treaties included in the research, 49 treaties (3%) grant the source state a right to tax on the basis of the amount of the payment for the professional activities. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 38 of 762 tax treaties (5%);
(2) Group B: 10 of 825 tax treaties (1%); and
(3) Group C: 1 of 224 tax treaties (0.4%).

Of these 49 treaties, 38 were concluded between UN countries (Group A), 10 between a UN and OECD country (Group B) and 1 between OECD countries (Group C).

Some of the provisions with a remuneration criterion do not have a fixed base and/or length of stay criterion.[99]

In a number of tax treaties, professional services are integrated into the regime for employment income, which means that not only the 183-days rule applies to professional services, but also the "paid by" and "borne by a PE" criteria in Article 15(2)(b) and (c) of the UN/OECD Models. As the scope of the "paid by" criterion in these treaties is not limited to an *employer* resident in the source state but is extended to a *person* resident in the source

[99] For instance, Art. 14 of the tax treaty between *Egypt and Malaysia* of 1997 (no fixed base criterion) and Art. 14 of the tax treaty between *Portugal and Cape* Verde of 1999 (no length of stay criterion).

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

2.16.3.3 Comparison with the 1997 research

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

2.17 Article 16(2) of the UN Model 1980: top-level managerial officials

2.17.1 The UN Model

Article 16(2) of the UN Model reads as follows:

> *(2) Salaries, wages and other similar remuneration derived by a resident of a Contracting State in his capacity as an official in a top-level managerial position of a company which is a resident of the other Contracting State may be taxed in that other State.*

In this provision the principle applicable to the taxation of directors' fees is extended to the taxation of remuneration paid to top-level managerial officials.

2.17.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 treaties included in the research, 167 treaties (9%) contain a specific provision dealing with top-level managerial officials. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 95 of 762 tax treaties (12%);
(2) Group B: 54 of 825 tax treaties (7%); and
(3) Group C: 18 of 224 tax treaties (8%).

[100] *Supra*, n. 80.
[101] For instance, Art. 14(1) of the tax treaty between *Russia and Brazil* of 2004.

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

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

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

2.17.3 Comparison with the 1997 research

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

2.18 Article 18B (1) and (2) of the UN Model 1980: pensions

2.18.1 The UN Model

Article 18B (1) and (2) of the UN Model reads as follows:

> (1) Subject to the provisions of paragraph 2 of article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment *may be taxed* in that State.
>
> *(2) However, such pensions and other similar remuneration **may also be taxed** in the other Contracting State if the payment is made by a resident of that other State or a permanent establishment situated therein.*

The OECD Model does not attribute any right to tax to the source state. The UN Model attributes a non-exclusive taxation right to the source state.

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

Of the 1,811 tax treaties included in this research, 479 treaties (26%) attribute a right to tax pensions to the source state. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 187 of 762 tax treaties (25%);
(2) Group B: 225 of 825 tax treaties (27%); and
(3) Group C: 67 of 224 tax treaties (30%).

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

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

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

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

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

[102] For example, Art. 17(1) of the tax treaty between *Qatar and Sri Lanka* of 2004.
[103] For example, Art. 18(1) of the tax treaty between *Slovak Republic and Taiwan* of 2001.
[104] For example, Art. 17 of the tax treaty between *Hungary and Iceland* of 2005.
[105] For example, Art. 18(1) of the tax treaty between *Brazil and South Africa* of 2003.
[106] For example, Art. 18(1) of the tax treaty between *Albania and Sweden* of 1998.
[107] For example, Art. 17(1) of the tax treaty between the *Czech Republic and Norway* of 2004.
[108] For example, Art. 18(3) of the tax treaty between *Kuwait and the Netherlands* of 2001.
[109] For example, Art. 18(3) of the tax treaty between the *Netherlands and Portugal* of 1999.
[110] For example, Art. 17(2) of the tax treaty between *Barbados and the United Kingdom* of 2012.
[111] For example, Art. 18(3) of the tax treaty between *Australia and Turkey* of 2010.
[112] For example, Art. 19(2) of the tax treaty between *Italy and Uganda* of 2000.
[113] Art. 18(2) of the tax treaty between *Iceland and Italy* of 2002 and Art.18(3) of the tax treaty between *Italy and the United States* of 1999.
[114] For example, Art. 18(3) of the tax treaty between *Taiwan and the United Kingdom* of 2002.
[115] For example, Art. 17(2) of the tax treaty between *Poland and the United Kingdom* of 2006.
[116] For example, Art. 17(2) of the tax treaty between *Liechtenstein and Uruguay* of 2010.
[117] For example, Art. 18(2) of the tax treaty between *Armenia and Finland* of 2006.
[118] For example, Art. 18(1) of the tax treaty between *Canada and Switzerland* of 1997.
[119] For example, Art. 18(2) of the tax treaty between *Canada and Ecuador* of 2001.
[120] For example, Art. 18(2) of the tax treaty between *Canada and Greece* of 2009.
[121] For example, Art. 18 of the tax treaty between *Bulgaria and Canada* of 1999.

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

With regard to the possible conditions prescribed for the application of the taxation right of the source state, in 10 treaties in Group B[123] and 7 treaties in Group C[124] the taxation right of the source state is limited to payments that exceed a certain amount per year. In 10 treaties in Group A,[125] 27 treaties in Group B[126] and 7 treaties in Group C[127] source state taxation applies only if the payments are exempt or not fully taxed in the residence state. Further, in one treaty in Group A,[128] 33 treaties in Group B[129] and 14 treaties in Group C[130] the application of the taxation right of the source state depends on the tax treatment previously applied to contributions made in the source state.

Of the 479 tax treaties, in 20 treaties in Group A[131] and 3 treaties in Group B[132] the taxation right of the source state is limited to pensions and/or annuities paid by a resident of the source state or a PE situated in that state. In 5 treaties in Group A[133] and one treaty in Group C[134] the allocation of the taxation right to the source state is subject to the condition that the pension and/or annuity be borne or deducted by an enterprise or a PE situated in that state.

Finally, in a number of treaties[135] the taxation right of the source state is limited to pensions and/or annuities paid to a former resident of the source state or depends on the nationality of the receiver. A few other treaties contain a number of additional conditions.

2.18.3 Comparison with the 1997 research

The number of treaties attributing a right to tax pensions to the source state is, in respect of treaties concluded by UN countries, significantly lower than indicated by the 1997 research.

The combined result of the UN countries in Groups A and B amounted to 37% in 1997, whereas this result, according to the current research, amounts to 26%. The figure for treaties concluded between OECD countries amounted to 32% in 1997 and 30% in 2013.

2.19 Article 18A(2) and (3) of the UN Model 1980: social security payments

[122] For example, Art. 18(3)(c) of the tax treaty between *Canada and Italy* of 2002.
[123] For example, Art. 18(2)(c) of the tax treaty between *Albania and the Netherlands* of 2004.
[124] For example, Art. 17(2) of the tax treaty between *Germany and the Netherlands* of 2012.
[125] For example, Art. 18(2) of the tax treaty between *St. Kitts and Nevis and San Marino* of 2010.
[126] For example, Art. 17 of the tax treaty between *Canada and Namibia* of 2010.
[127] For example, Art. 17(1) of the tax treaty between *Japan and the Netherlands* of 2010.
[128] Art. 17(3) of the tax treaty between *Liechtenstein and San Marino* of 2009.
[129] For example, Art. 17(3) of the tax treaty between *Luxembourg and Monaco* of 2009.
[130] For example, Art. 17(2) of the tax treaty between *Denmark and Poland* of 2001.
[131] For example, Art. 19(2) of the tax treaty between *Pakistan and Yemen* of 2004.
[132] Art. 18(2) of the tax treaty between *Austria and Nepal* of 2000, Art. 18(2) of the tax treaty between Brazil and Mexico of 2003 and Art. 18(2) of the tax treaty between *Denmark and Venezuela* of 1998.
[133] For example, Art. 18(2) of the tax treaty between *Russia and Thailand* of 1999.
[134] Art. 19(2) of the tax treaty between *Korea (Rep.) and the Netherlands* of 1978/1998.
[135] For example, Art. 18(3) of the tax treaty between *Denmark and Malta* of 1998.

2.19.1 The UN Model

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

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

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

2.19.2 Tax treaties: 1 April 1997 – 1 January 2013

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

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

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

In 6 treaties in Group B[139] and 6 treaties in Group C,[140] the taxation right of the source state is limited to payments that exceed a certain amount per year. Further, in 5 treaties in Group B[141] and 5 treaties in Group C[142] the source state taxation applies only if the payments are not fully taxed in the residence state or are not taxed at the general rate there.

In one treaty in Group B[143] and one treaty in Group C,[144] the exclusive taxation right attributed to the source state is limited in that social security payments made to an individual who is both a resident and a national of the treaty partner state are excluded and in one treaty in Group B[145] the taxation right of the source state is limited to social security payments made to nationals of the source state.

[136] For example, Art. 19(3) of the tax treaty between *Congo (Dem. Rep.) and Zimbabwe* of 2002.
[137] For example, Art. 18(2) of the tax treaty between *Finland and India* of 2010.
[138] For example, Art. 18(2) of the tax treaty between *Luxembourg and Portugal* of 1999.
[139] For example, Art. 18(2)(c) of the tax treaty between *Georgia and the Netherlands* of 2002.
[140] For example, Art. 18(2)(c) of the tax treaty between the *Netherlands and Switzerland* of 2010.
[141] For example, Art. 17(2)(b) of the tax treaty between the *Netherlands and Slovenia* of 2004.
[142] For example, Art. 18(2)(b) of the tax treaty between the *Netherlands and Portugal* of 1999.
[143] Art. 18(2) of the tax treaty between *Lebanon and Turkey* of 2004.
[144] Art. 18(2) of the tax treaty between *Finland and Turkey* of 2009.
[145] Art. 18(2) of the tax treaty between *Brazil and Turkey* of 2010.

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

2.19.3 Comparison with the 1997 research

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

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

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

2.20.1 The UN Model

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

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

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

2.20.2 Tax treaties: 1 April 1997 – 1 January 2013

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

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

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

In 25 of these treaties[149] (11 from Group B and 14 from Group C), a withholding tax is included to be applied on the gross amount of "other income". In 20 of these treaties[150] (9

[146] Art. 18(2) of the tax treaty between *Malta and Tunisia* of 2000.
[147] For example, Art. 18(2) of the tax treaty between *Finland and Kyrgyzstan* of 2003.
[148] For example, Art. 18(3) of the tax treaty between *Mexico and the Netherlands* of 1993/2008.

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

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

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

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

2.20.3 Comparison with the 1997 research

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

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

2.21.1 The UN Model

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

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

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

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

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

2.21.2 Tax treaties: 1 April 1997 – 1 January 2013

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

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

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

2.21.3 Comparison with the 1997 research

This provision did not form part of the 1997 research.

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

2.22.1 The UN Model

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

(5) Where,

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

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

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

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

2.22.2 Tax treaties: 1 April 1997 – 1 January 2013

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

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

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

2.22.3 Comparison with the 1997 research

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

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

2.23.1 The UN Model

Article 27 of the UN Model 2011 reads as follows:

(1) The Contracting States shall lend assistance to each other in the collection of revenue claims. This assistance is not restricted by Articles 1 and 2. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.
(2) The term "revenue claim" as used in this Article means an amount owed in respect of taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to this Convention or any other instrument to which the Contracting States are parties, as well as

interest, administrative penalties and costs of collection or conservancy related to such amount.

(3) When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the other Contracting State. That revenue claim shall be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State.

(4) When a revenue claim of a Contracting State is a claim in respect of which that State may, under its law, take measures of conservancy with a view to ensure its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of taking measures of conservancy by the competent authority of the other Contracting State. That other State shall take measures of conservancy in respect of that revenue claim in accordance with the provisions of its laws as if the revenue claim were a revenue claim of that other State even if, at the time when such measures are applied, the revenue claim is not enforceable in the first-mentioned State or is owed by a person who has a right to prevent its collection.

(5) Notwithstanding the provisions of paragraphs 3 and 4, a revenue claim accepted by a Contracting State for purposes of paragraph 3 or 4 shall not, in that State, be subject to the time limits or accorded any priority applicable to a revenue claim under the laws of that State by reason of its nature as such. In addition, a revenue claim accepted by a Contracting State for the purposes of paragraph 3 or 4 shall not, in that State, have any priority applicable to that revenue claim under the laws of the other Contracting State.

(6) Proceedings with respect to the existence, validity or the amount of a revenue claim of a Contracting State shall not be brought before the courts or administrative bodies of the other Contracting State.

(7) Where, at any time after a request has been made by a Contracting State under paragraph 3 or 4 and before the other Contracting State has collected and remitted the relevant revenue claim to the first-mentioned State, the relevant revenue claim ceases to be:

(a) in the case of a request under paragraph 3, a revenue claim of the first mentioned State that is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, or

(b) in the case of a request under paragraph 4, a revenue claim of the first mentioned State in respect of which that State may, under its laws, take measures of conservancy with a view to ensure its collection,

the competent authority of the first-mentioned State shall promptly notify the competent authority of the other State of that fact and, at the option of the other State, the first-mentioned State shall either suspend or withdraw its request

(8) In no case shall the provisions of this Article be construed so as to impose on a Contracting State the obligation:

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

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

2.23.2 Tax treaties: 1 April 1997 – 1 January 2013

Of the 1,811 tax treaties included in the research, 286 contain a specific provision concerning assistance in the collection of taxes. These are divided over the three groups noted in section 1.2 as follows:

(1) Group A: 90 of 762 tax treaties (12%);
(2) Group B: 124 of 825 tax treaties (15%); and
(3) Group C: 72 of 224 tax treaties (32%).

As this provision has been part of the OECD Model since 2003, the figure with regard to treaties between OECD countries is significantly higher than that of treaties concluded by UN countries.

2.23.3 Comparison with the 1997 research

This provision for assistance in the collection of taxes did not form part of the 1997 research.

3 Summary of the findings

The results of the current research are summarized in the following two tables.

In Table 11, the results of the current research on the UN/UN, UN/OECD and the OECD/OECD treaties are divided into Groups A, B and C.

Table 11 2013 research results	Group A UN/UN		Group B UN/OECD		Group C OECD/OECD		Total A-B-C	
Number of tax treaties	**762**		**825**		**224**		**1811**	
UN provisions	**Number**	**%**	**Number**	**%**	**Number**	**%**	**Number**	**%**
Art. 5(3)(a) supervisory activities	629	83	455	55	78	35	1162	64
Art. 5(3)(a) period < 12 months	559	73	485	59	72	32	1116	62
Art. 5(3)(b) furnishing of services	440	58	290	35	39	17	769	42
Art. 5(4)(a) and (b) delivery of goods	247	32	124	15	13	6	384	21
Art. 5(5)(b) stock agents	307	40	167	20	25	11	499	28
Art. 5(6) insurance activities	299	39	185	22	59	26	543	30
Art. 5(7) agents with one principal	377	49	240	29	5	2	622	34
Art. 5(7) agent arm's-length limitation	131	17	145	18	17	8	293	16
Art. 7(1) limited force of attraction	138	18	89	11	23	10	250	14
Art. 7(3) management fees etc.	294	39	163	20	23	10	480	27
Art. 7(-) no exclusion purchase goods*	63	8	30	4	16	7	109	6
Art. 8B (2) shipping profits	67	9	33	4	0	0	100	6
Art. 9(3) adjustments and penalties	85	11	104	13	46	20	235	13
Art. 12(1) and (2) shared taxation right	714	94	703	85	162	72	1579	87
Art. 12(3) radio/TV broadcasting	661	87	616	75	142	63	1419	78
Art. 12(3) use of equipment	580	76	502	61	152	69	1234	68
Art. 13(4) real property shares	430	56	510	62	149	67	1089	60
Art. 13(4) extension real property	80	10	195	24	83	37	358	20
Art. 13(4) exclusion real property	16	2	65	8	25	11	106	6
Art. 13(5) UN 1980 other shares	154	20	118	14	30	13	302	17
Art. 14(1)(a) professional services	679	89	624	76	99	44	1402	77
Art. 14(1)(b) length of stay criterion	518	70	409	50	57	25	984	54
Art. 14(1)(c) remuneration amount	38	5	10	1	1	0	49	3
Art. 16(2) top-level managerial officials	95	12	54	7	18	8	167	9
Art. 18B(1) and (2) pensions	187	25	225	27	67	30	479	26
Art. 18A(2)(3) social security payments	318	42	296	36	86	38	700	39
Art. 21(3) source state other income	313	41	277	34	68	30	658	36
Art. 23A unintended double exemption**	1	0	45	5	8	4	54	3
Art. 25(5) arbitration	10	1	71	9	46	21	127	7
Art. 27 assistance in tax collection	90	12	124	15	72	32	286	16

*Paragraph 5 UN Comm. on Article 7.
**Paragraph 19 UN Comm. on Article 23A 2011.

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

Table 12 Comparison of 1997 and 2013 research	**UN/UN and UN/OECD**				**OECD/OECD**			
	1997		**2013**		**1997**		**2013**	
Number of tax treaties	**697**		**1587**		**114**		**224**	
UN provisions	**Number**	**%**	**Number**	**%**	**Number**	**%**	**Number**	**%**
Art. 5(3)(a) supervisory activities	410	59	1084	68	39	34	78	35
Art. 5(3)(a) period < 12 months	484	69	1062	67	29	25	72	32
Art. 5(3)(b) furnishing of services	219	31	730	46	2	2	39	17
Art. 5(4)(a) and (b) delivery of goods	167	24	371	24	0	0	13	6
Art. 5(5)(b) stock agents	234	34	474	30	9	8	25	11
Art. 5(6) insurance activities	184	26	484	30	26	23	59	26
Art. 5(7) agents with one principal	243	35	617	39	0	0	5	2
Art. 5(7) agent arm's-length limitation	*	*	276	17	*	*	17	8
Art. 7(1) limited force of attraction	153	22	227	14	9	8	23	10
Art. 7(3) management fees etc.	195	28	457	29	6	5	23	10
Art. 7(-) no exclusion purchase goods	45	6	93	6	0	0	16	7
Art. 8B(2) shipping profits	105	15	100	6	3	3	0	0
Art. 9(3) adjustments and penalties	*	*	189	12	*	*	46	20
Art. 12(1) and (2) shared taxation right	--	--	1417	89	--	--	162	72
Art. 12(3) radio/TV broadcasting	610	88	1277	80	102	89	142	63
Art. 12(3) use of equipment	**	**	1082	68	**	**	152	69
Art. 13(4) real property shares	308	44	940	59	66	57	149	67
Art. 13(4) extension real property	*	*	275	17	*	*	83	37
Art. 13(4) exclusion real property	*	*	81	5	*	*	25	11
Art. 13(5) UN 1980 other shares	322	46	272	17	62	54	30	13
Art. 14(1)(a) professional services	--	--	1303	82	--	--	99	44
Art. 14(1)(b) length of stay criterion	264	38	927	58	20	18	57	25
Art. 14(1)(c) remuneration amount	45	6	48	3	0	0	1	0.4
Art. 16(2) top-level managerial officials	62	9	149	9	6	5	18	8
Art. 18B(1) and (2) pensions	259	37	412	26	36	32	67	30
Art. 18A(2)(3) social security payments	206	30	614	39	48	42	86	38
Art. 21(3) source state other income	308	44	590	37	36	32	68	30
Art. 23A unintended double exemption	*	*	46	3	--	--	8	4
Art. 25(5) arbitration	*	*	81	5	--	--	46	21
Art. 27 assistance in tax collection	*	*	214	13	--	--	72	32

* No data available in the 1997 research because these provisions were included in the UN Model in 2001 and 2011.
** In 1992, the use of equipment was deleted from the royalty definition in Article 12 of the OECD Model. As from that year the UN Model deviates in this respect from the OECD Model. As the influence of this deletion on tax treaty policy seemed to be limited in the 1980/97 period of research, it was not included in the 1997 research.

4 General conclusions

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

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

Apart from a few exceptions, the figures for all UN provisions are highest with regard to UN/UN treaties (Group A). The figures for the UN/OECD treaties are, apart from a few exceptions, (significantly) lower (Group B). Subsequently, the figures regarding the OECD/OECD treaties are again lower than those of the UN/OECD treaties, albeit with some salient exceptions. What is remarkable is that the figures with regard to 6 UN provisions are equal or higher in respect of OECD/OECD treaties than UN/UN and UN/OECD treaties (*see* under Section 4.3).

When comparing the 1997 and 2013 results, it is striking that by counting both the number of higher and lower figures in respect of the UN/UN and UN/OECD treaties, the number of increases and decreases are practically equal. This could point to a stable level of popularity of the UN Model in these categories of treaties. When performing the same count for the OECD/OECD treaties, the number of higher figures outweighs the lower figures substantially. This seems to indicate that, amongst OECD countries, interest in the UN approach to the various treaty issues is growing. To a certain extent this is not surprising given that, over the years, the OECD Model has introduced a number of provisions in the text and the Commentaries that had already been included in the UN Model, such as the inclusion of supervisory activities in the provision of building sites, the deemed services PE and capital gains on immovable property.

The results of this research can be interpreted in various ways. Only the more general findings are dealt with below.

4.1 UN/UN and UN/OECD treaties in the 2013 research

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

4.1.1 Provisions with a high figure

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

Table 13	
UN provisions	**2013**
Art. 5(3)(a) supervisory activities	68%
Art. 5(3)(a) period < 12 months	67%
Art. 5(3)(b) furnishing of services	46%
Art. 12(1)(2) shared taxation right	89%
Art. 12(3) radio/TV broadcasting	80%
Art. 12(3) use of equipment	68%
Art. 13(4) real property shares	59%
Art. 14(1)(a) professional services	82%
Art. 14(1)(b) length of stay criterion	58%

All of these UN provisions belong to the established treaty policy of many countries. They were already adopted in the UN Model 1980.

4.1.2 Provisions with a low figure

The 2013 research found that 10 of the 30 UN provisions were adopted in less than 15% of the UN/UN and UN/OECD treaties:

Table 14	
UN provisions	**2013**
Art. 7(1) limited force of attraction	14%
Art. 7(-) no exclusion purchase of goods	6%
Art. 8B(2) shipping profits	6%
Art. 9(3) adjustment and penalties	12%
Art. 13(4) exclusion real business property	5%
Art. 14(1)(c) remuneration amount	3%
Art. 16(2) top-level managerial officials	9%
Art. 23A unintended double exemption	3%
Art. 25(5) arbitration	5%
Art. 27 assistance in tax collection	13%

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

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

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

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

4.2.1 Downward trends

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

There are no indications in the research itself for these tendencies.

The declining interest in the limited force of attraction provision of Article 7(1) could be a result of difficulties in the application of this provision. There is no explanation for the declining interest in source state taxation for shipping profits in Article 8B(2), except the worldwide low profitability of this business and perhaps the greater number of land-locked countries that concluded tax treaties in the period of the current research. The interest in adopting radio and television broadcasting in the definition of royalties in Article 12(3) was high and still is high despite the 8 percentage point decrease. There is no satisfactory explanation available for the large variance between the figures of the 1997 and 2013 research on the capital gains on the alienation of shares in Article 13(5). There is also no immediate explanation for the declining interest in source state taxation for pension payments in Article 18B(1)(2). The reason could be that there is no or only a limited interest in this provision unless the country has a developed pension system. This would also explain the relatively high figure in respect of this provision in the OECD/OECD treaties. In respect of the lower figure regarding source state taxation of other income in Article 21(3), no educated guess is available, albeit the fear of this provision being used for treaty dodging by treaty partner states possibly plays a role.

4.2.2 Upward trends

Table 16		
UN provisions	**1997**	**2013**
Art. 5(3)(a) supervisory activities	59%	68%
Art. 5(3)(b) furnishing of services	31%	46%
Art. 13(4) real property shares	44%	59%
Art. 14(1)(b) length of stay criterion	38%	58%
Art. 18A(2)(3) social security payments	30%	39%

The research itself does not give any indications for these trends.

It seems that the increasing popularity of the provisions for supervisory activities in Article 5(3)(a), the furnishing of services in Article 5(3)(b) and capital gains on real property shares in Article 13(4) directly relates to the positive attitude taken by the OECD in respect of these provisions in the period of the current research. As, since 2000, income from professional services has been included by the OECD in Articles 5 and 7, the same applies in a way also to the length of stay criterion of Article 14(1)(b). The higher figure regarding social security payments in Article 18A(2)(3) seems to reflect a tendency to treat these payments in the same way as government payments in Article 19.

4.3 UN provisions in OECD/OECD treaties in the 2013 research

The current research found that 6 of the UN provisions appeared almost as often or more often in OECD/OECD treaties than in UN/UN and UN/OECD treaties:

Table 17		
UN provisions	**2013**	
	UN/UN	**OECD/OECD**

	UN/OECD	
Art. 7(-) no exclusion purchase of goods	6%	7%
Art. 9(3) adjustment and penalties	12%	20%
Art. 12(3) use of equipment	68%	69%
Art. 13(4) real property shares	59%	67%
Art. 18B(1)(2) pensions	26%	30%
Art. 18A(2)(3) social security payments	39%	38%

The exclusion of the attribution of profits to a PE by reason of the purchase by that PE of goods and merchandise in Article 7, as included in the OECD Model 2008 and mentioned in a footnote to Article 7 of the UN Model, is apparently not a real issue. So far, most treaties include such a provision, whether concluded by UN or OECD countries. As this provision was deleted from Article 7 of the OECD Model in 2010 and the UN Model does not recommend this provision but leaves it to be settled in bilateral negotiations in a footnote to Article 7, the question is what consequences these developments will have in respect of the popularity of this provision in the near future. As the OECD Model does not contain an equivalent to Article 9(3) of the UN Model, the relatively high figure for this provision found in OECD/OECD treaties is an unexpected result. Another remarkable result is that although the OECD deleted the use of equipment from the definition of royalties in Article 12(3) in 1992, many OECD countries apparently attach value to the adoption of this provision in the royalty definition. Less surprising is the high figure regarding the provision for real property shares in Article 13(4) since the OECD included a comparable provision in the OECD Model 2003. In addition, the 1997 research already indicated that this provision was more popular among OECD countries. Also, the interest among OECD countries in source taxation for pensions in Article 18B(1)(2) is not really surprising because many of these countries have a developed pension system and problems with the migration of pensioners. The high figure for source state taxation in respect of social security payments in Article 18A(2)(3) is not very surprising either, as there seems to be significant support for such a provision in OECD countries.

4.4 UN provisions in UN/UN and UN/OECD treaties in the 2013 research

The following 12 UN provisions were included significantly more often in UN/UN and UN/OECD treaties compared to the OECD/OECD treaties:

Table 18		
UN provisions	**2013**	
	UN/UN UN/OECD	**OECD/OECD**
Art. 5(3)(a) supervisory activities	68%	35%

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

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

4.5 Closing remarks

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

However, the real impact of the UN Model on tax treaties cannot be measured simply on the basis of figures concerning the presence of UN provisions in tax treaties. Tax treaties are the result of negotiations on an entire set of provisions, in respect of which compromises are made on the basis of trade-offs, especially also between provisions included in the current research and other treaty provisions, such as withholding taxes on dividends, interest and royalties in Articles 10, 11 and 12, the inclusion of general or specific anti-abuse provisions or other provisions that are not included in this research. Consequently, the real importance of the UN Model on treaty practice is not immediately visible from the results of this research.

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