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The Legal Value of Changes in the OECD Commentary

Paper within JIBS Master of International Tax Law
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Abbreviations

CFA	Committee on Fiscal Affairs
ECouHR	European Court of Human Rights
EConHR	European Convention of Human Rights
ICJ	International Court of Justice
ICL	International Law Commission
OECD MTC	OECD Model Tax Convention
OECD Report	Issues in International Taxation no 6 – The Application of the OECD Model Tax Convention to Partnerships
OECD Commentary	Commentary to the OECD Model Tax Convention
OECD Introduction	Introduction to the OECD Model Tax Convention and Commentaries
OECD MS	Member States of the OECD
PCIJ	Permanent Court of International Justice
VCLT	Vienna Convention of the Law of the Treaties

1 Introduction

1.1 Background

In 1993, the Committee on Fiscal Affairs (CFA) formed a Working Group to study the application of the OECD Model Tax Convention (OECD MTC) to partnerships, trusts, and other non-corporate entities.[1] In Issues in International Taxation no 6 – The Application of the OECD Model Tax Convention to Partnerships (OECD Report), different cases involving the issues relating to the taxation of partnerships are discussed. In dealing with these cases the CFA tried to develop general principles.[2] There are several issues involved when discussing the taxation of partnerships. Depending on the circumstances in the actual case different tax issues arise.

The OECD Report resulted almost exclusively in making changes in the commentary to the OECD MTC (OECD Commentary) and not in the OECD MTC itself. The only change made in the OECD MTC itself is found in article 23 OECD MTC. The changes made in the OECD Commentary are of two different categories: a) changes that are a direct consequence of the changes in the articles themselves in the OECD MTC, and b) changes that are neither clarifications nor amendments to unchanged articles in the OECD MTC. It is important to make this difference in classification since different consequences are at hand for the OECD Member States (OECD MS).

Bilateral tax treaties are part of public international law and therefore, their interpretation is governed by the Vienna Convention of the Law of the Treaties (VCLT). Articles 31-33 VCLT are relevant for treaty interpretation. Since the CFA adopted the above-mentioned method, it is important to analyse if the OECD Commentary and changes made to it can be used as a legal means of interpretation according to the VCLT. It must be determined what legal value the OECD Commentary and the implemented changes have upon the parties to the bilateral treaties in force.

The determination of the legal value of the OECD Commentary is an important issue and well discussed in the literature. Since the legal status of the OECD Commentary is debated, it is even more important to discuss the consequences of changes made in the OECD Commentary. The OECD Report has been chosen since this is a good example of resolving tax issues by making changes in the OECD Commentary rather than amending the OECD MTC itself.

1.2 Purpose and delimitation

The purpose of this thesis is to analyse the legal value of the OECD Commentary and changes made to it when interpreting bilateral treaties in force according to the VCLT. Furthermore, it shall be analysed if the OECD Commentary and changes made in the OECD Commentary are a legal means of interpretation within the meaning of the VCLT. In the OECD Report, OECD takes the position that the changes made in the OECD Commentary due to the OECD Report clarify the application and not change the meaning in the articles in question. The OECD Report is a good example of how the OECD has proceeded to change the application of the OECD MTC simply by proposing and making changes in the OECD Commentary instead of in the OECD MTC itself.

[1] The OECD Report, p 7.
[2] The OECD Report, p 7 f.

Bilateral treaties are part of international law and its interpretation is governed by the VCLT. In my analysis it is necessary to analyse whether the OECD Commentary and changes made in it can be used as a legal means of interpretation according to the VCLT when interpreting bilateral treaties. This is due to the fact that it is the different bilateral treaties that are in force and not the OECD MTC. Since bilateral treaties are governed by the VCLT, the analysis must be done with the VCLT as my starting point. Articles 31-33 VCLT are relevant for treaty interpretation. However, article 33 VCLT deals with the linguistic aspect of treaty interpretation and this is not relevant for this thesis. This is due to the fact that the raised issues in relation to the legal status of the OECD Commentaries and changes made to it are not linguistic issues. Therefore, article 33 VCLT has been excluded from this thesis.

This thesis does not deal with EC law and the effects EC law may have on the changes made in the OECD Commentary due to the OECD Report. This is due to the fact that this area makes the study too extensive. It should be stressed that EC law is far from irrelevant in this area but in my thesis I have chosen to limit my analysis to whether the OECD Commentary and changes made to it can be used as a legal means of interpretation according to articles 31-32 VCLT.

1.3 Methodology

Throughout the entire thesis, it must be bear in mind that it is the VCLT that is the most important legal source in the area of treaty interpretation. My analysis is done with the VCLT as the starting point. This is due to the fact that the VCLT is the international legal instrument to be applied in this particular legal area. If the relevance and importance of the VCLT is foreseen it is not possible to fulfil the above-mentioned purpose. Interpretation of double tax treaties is significantly different from the interpretation of domestic tax rules. There is not one legislator involved but two or more since a treaty is an agreement between two or more contracting states. The VCLT is based on the thought that the essential task for the interpreter is to find the common intention of the parties and thereby interpret the provision in question.[3] The analysis must begin by an analysis of the relevant articles in the VCLT, i e articles 31-32.

In my analysis, I have used international jurisprudence from different international courts and tribunals. These cases have been used in order to clarify the meaning and application of articles 31-32 VCLT. In cases where the wording of articles 31-32 in question in the VCLT does not give a clear answer to its meaning, international jurisprudence can be used in order to clarify the meaning of the article in question. However, it must be noted that the starting point must always be the wording of the article in question and not how the article has been applied or interpreted in international jurisprudence.

Furthermore, I have also used, to some extent, Swedish domestic jurisprudence. This approach has been chosen since the use of Swedish preparatory work is extensive and this becomes evident when analysing Swedish domestic jurisprudence. Here, it must be noted that Swedish preparatory works do not have the same meaning as the preparatory works of a tax treaty. This is due to the fact that within Swedish domestic law there is only one legislator as opposed to the case of a tax treaty where there are two or more legislators involved. In this respect the Swedish domestic jurisprudence is of a

[3] See article 31 VCLT, in which there is a direct reference to the intention of the parties.

somewhat subordinate importance. However, I have chosen to use Swedish domestic law in order to exemplify how Swedish preparatory works are used throughout the entire interpretation procedure.

Doctrine has also been used in order to clarify, understand and determine the meaning of articles 31-32 VCLT. In the doctrine different arguments are put forward for different views. I have used these arguments as a complement to the wording of articles 31-32 VCLT, international jurisprudence and preparatory works in order to arrive at my view of the meaning of articles 31-32 VCLT. This must be done in order to analyse the legal value of the OECD Commentary and changes made in the OECD Commentary.

Furthermore, I have highlighted the relationship between domestic law and international law in this area, i e the VCLT. This has been included in order to provide an understanding of the legal value of the VCLT for the states that have ratified the convention. Here, I have used Swedish domestic law as an example and made an analysis of how a treaty becomes part of Swedish domestic law. It must be bore in mind that once a treaty is incorporated into Swedish domestic law it takes precedence over Swedish law. Sweden ratified the VCLT 1974 and the convention came into force in 1980.[4] As stated above, this leads me back to the fact that it is the VCLT that is the prevailing legal source in the area of treaty interpretation.

1.4 Disposition

Chapter two provides an outline of the findings in the OECD Report. The focus in chapter two is the findings in the OECD Report and not the factual cases presented in the OECD Report. This chapter has been included due to the fact that it is necessary for the understanding of the thesis to get an outline of the findings in the OECD Report. If this outline was not included, it would not be possible to analyse what legal status the OECD Commentary and changes made in it would have upon the OECD MS.

Chapter three aims at providing a thorough description and analysis of articles 31-32 VCLT. This is due to the fact that the OECD MTC is part of international law and is therefore governed by the VCLT. An analysis of these articles must be made in order for me to apply my findings in regard to these articles in relation to the OECD Commentary and changes made to it. The purpose of chapter four is to analyse the legal status of the OECD Commentary and changes made to it in relation to the VCLT. In this chapter my findings from chapter three have been applied to the OECD Commentary and changes made to it.

Finally, chapter five provides a summary of my findings in chapter three and chapter four. This summary is followed by a de lege ferenda discussion. In this section I also highlighted some issues discussed by other authors in this particular legal area. This section is of relevance since there are still issues to be resolved in relation to the legal status of the OECD Commentary and changes made to it.

[4] Dahlberg, Mattias, *Svensk Skatteavtalspolitik och utländska basbolag*, p 66.

2 Issues in International Taxation no 6 – The Application of the OECD Model Tax Convention to Partnerships

2.1 Introduction

The purpose of this chapter is to give a general outline of the issues discussed in the OECD report, provide a summary of the conclusions drawn in the OECD Report and also to provide a summary of the changes made in the OECD MTC and its commentaries. This chapter has been included in order to give the reader an understanding of the underlying discussions made by the CFA in the OECD Report. In my opinion this is of importance in order to understand the changes made in the OECD Report and also to enhance the understanding of the further discussion in this thesis.

However, the cases discussed in the OECD Report have been excluded since it is my opinion that they are not necessary for the fulfilment of my purpose or for the understanding of the conclusions drawn in the OECD Report. In the OECD report it is recognised by the CFA that many of the principles discussed in the report may also be applicable in respect to other non-corporate entities.

First follows an outline of the issues discussed in the OECD Report followed by an analysis of the changes proposed by the OECD Report to the OECD Commentary and the OECD MTC. I have chosen only to give a brief outline of the material changes that have been made in the OECD MTC and the OECD Commentary. Instead, the focus is to emphasise the method used by the OECD Report and also to emphasise the view chosen in the OECD Report.

2.2 Issues discussed in the OECD report

2.2.1 Introduction

The CFA has chosen an approach where different cases that might occur have been analysed in relation to the OECD MTC. This method is considered by the CFA to be the best approach to use in order to analyse the legal situation for taxation of partnerships. In my opinion this is important to recognise in order to understand the purpose of the OECD Report and also to facilitate the understanding of the changes made in the OECD Commentary as a result of this report.

It is important to discuss the issues analysed in the OECD Report in order to draw conclusions that later will be analysed in relation to the VCLT in order to establish whether the OECD Commentary and changes made in it are a legal means of interpretation for the OECD MS. First follows a discussion around articles 1, 3 and 4 OECD MTC. Thereafter follows a brief discussion on the matter of treaty benefits. Finally a discussion of the concept of “liable to tax” takes place.

2.2.2 The application of article 1, article 3 and article 4 of the OECD MTC

When income is derived from a particular state, the determination of the tax consequences in that state will first require the application of the domestic laws of that state. These provisions will determine who may be subjected to tax on that particular

income in that state. The provisions of tax conventions may, after the application of the domestic laws, intervene to restrict or eliminate the taxing rights originating from domestic law where a person, usually but not necessarily the taxpayer identified under domestic law, is eligible for the benefits of the tax convention in relation to that income.[5]

According to article 1 the OECD MTC, only persons who are residents of the contracting states are entitled to the benefits of the tax convention entered into by these states. The first issue is therefore if a partnership can be considered to be a person under article 3 of the OECD MTC. The OECD Commentary to article 1 OECD MTC does not discuss the issue of whether a partnership is a "person" within the meaning of article 3. However, the CFA "has determined that partnerships should be considered to be "persons" within the meaning of the definition found in article 3" OECD MTC.[6]

Furthermore, it has been acknowledged that the definition of the term "national" in article 3 (1) (f) (ii) may give rise to an implication that partnerships are not "persons" for purposes of the OECD MTC. This definition provides that the term "national" includes "any legal person, partnership or association deriving its status as such from the laws in force in a contracting state".[7] The conclusion of the CFA provides that when "the state in which a partnership has been organised treats the partnership as fiscally transparent, then the partnership is not "liable to tax" in that state within the meaning of article 4" OECD MTC and "the partnership cannot be considered a resident for purposes of the OECD MTC".[8]

The conclusion of this part is that the CFA has determined that a partnership does fall within the definition of a person in article 3.[9] Furthermore, a transparent partnership, i e a partnership that is not liable to tax, cannot be regarded as a resident of a contracting state as defined in article 4.[10] However, a non-transparent partnership is liable to tax and consequently such a partnership is regarded to be a resident as defined in article 4.[11]

2.2.3 Cases when a partnership is entitled to benefits of a tax convention when the partnership is considered to be a resident of a contracting state

A useful starting point when analysing the taxation of partnerships is to examine how foreign entities are treated for tax purposes by the state of source when the income is derived from its territory.[12] Most OECD MS apply tax laws on the basis of the legal relationship deriving from other branches of the law. Therefore, the OECD MS will refer to those entities that constitute partnerships according to domestic civil or commercial law. Difficulties often arise when income is derived by an entity organised under the law of another jurisdiction. In such a case, the entity shall be classified in accordance with the domestic tax laws of the state of source. This classification shall be used regardless of whether this classification is compatible with the civil or commercial

[5] The OECD Report, p 12.
[6] The OECD Report, p 12.
[7] The OECD Report, p 13.
[8] The OECD Report, p 14.
[9] The OECD Report, p 12.
[10] The OECD Report, p 14.
[11] The OECD Report, p 12.
[12] The OECD Report, p 9.

law system of the jurisdiction from which the entity derives its legal status. In such a system risks of double taxation arise.[13]

Another issue is related to the different definitions of companies and of partnerships for tax purposes. Similarities between the legal systems in the OECD MS are, in most cases, sufficient to ensure that the legal entity is recognised as such in both states. However, entities that are not common in the civil or commercial laws of the OECD MS will create difficulties in cases where it is necessary to classify them for tax purposes and they cannot be duly placed in one of the mentioned categories. Furthermore, problems will arise in cases where the classification of a legal entity is the same in two countries but the treatment is different. Such issues are particularly important for partnerships.[14]

2.2.4 The concept of "liable to tax"

The CFA discusses how the concept of "liable to tax" is to be understood in the context of different tax systems to partnerships. Two common approaches to taxation of partnerships are examined. The first approach means that the income derived by a partnership from a particular source must be computed at the level of the partnership as if the partnership was a distinct taxpayer. Each partner is then allocated his share of the income. The second approach is similar to the first approach in the way that the income and the tax payable are computed in a similar way. However, the tax payable by the partners is aggregated at the level of the partnership instead at the level of the partner.[15]

The CFA agreed that for purposes of determining whether a partnership is liable to tax, the real issue is whether the amount of tax payable on the partnership income is determined in relation to the personal characteristics of the partners. If this is the case then the partnership should not in itself be considered to be liable to tax. The fact that the income is computed at the level of the partnership before being allocated to the partners, does not mean that the tax is technically paid by the partnership or that it is assessed on the partnership and this will not change the result. However, it is not sufficient that a partnership can be said to be liable to tax in a state in order to be considered a resident of that state for purposes of tax conventions.[16]

2.2.5 Conclusion

The CFA decided that a partnership does fall within the definition of the term person in article 3 OECD MTC. A non-transparent partnership is considered to be a resident as defined in article 4 OECD MTC. However, a transparent partnership is not considered to be a resident of a contracting state as stated in article 4. Many issues arise due to the fact that the OECD MS refer to entities that constitute partnerships according to the domestic civil or commercial law. In such cases, the CFA stated that the classification should be done in accordance with the domestic law of the state of source. This classification shall be used irrespective of whether it is compatible with the civil or commercial law in the state from which the entity derives its legal status.

[13] The OECD Report, p 10.
[14] The OECD Report, p 10.
[15] The OECD Report, p 15.
[16] The OECD Report, p 15.

Two different approaches for calculating the tax payable in relation to a partnership are identified in the OECD Report. The CFA agreed that for purposes of determining the tax liability of a partnership, the real issue is the determination of whether the income is calculated in relation to the personal characteristics of the partners. If this is the case, the partnership is not considered to be liable to tax. However, it is not sufficient for a partnership to be liable to tax in a state, in order to fall within the definition of a resident in tax treaties.

2.3 Changes made in the OECD MTC due to the OECD Report

2.3.1 Introduction

This section deals with the changes made in the OECD MTC and its commentary due to the OECD Report. I have chosen only to give a brief outline of the material changes proposed in the OECD Report. This is due to the fact that a complete outline is not necessary for the fulfilment of the purpose of this thesis. I have focused on the view taken in the OECD Report, in order to give the reader an understanding of the basis for the changes proposed and made in the OECD MTC and the OECD Commentary.

2.3.2 Changes made in the OECD MTC and its Commentary

It is important to note that the CFA has chosen the approach to almost exclusively propose changes in the OECD Commentary and not in the OECD MTC itself. Only one article in the OECD MTC has been changed. This change is found in article 23 OECD MTC. The CFA proposes that a new paragraph, paragraph 4, shall be added to article 23 OECD MTC. This change is intended to prevent double non-taxation.

Several changes have been proposed in the commentary to article 1.[17] A partnership shall now be considered to be a resident of a contracting state if the partnership is treated as a company or taxed in the same way. In cases where a partnership is a transparent legal entity, the partnership is not a resident of that state. Consequently, the partnership is not entitled to the benefits under the tax convention between the two OECD MS but so are the partners. Due to this, the following principle has been added in paragraph 6.3 in the commentary to article 1: "*that the income be paid to or derived by a resident should be considered to be satisfied even where, as a matter of the domestic law of the state of source, the partnership would not be regarded as transparent for tax purposes, provided that the partnership is not actually considered a resident of the state of source*".[18]

Issues in relation to cases involving three states are also discussed by the CFA. It is stated that many problems may be solved through the application of the principles described above.[19] The most important change here is that if the state of residence of the partnership treats the partnership as a transparent legal entity and the partners of the partnership is located in another state the partners of the partnership shall be entitled to the benefits of the convention between the state of source and the state of residence of

[17] The OECD report, p 51 ff.
[18] The OECD report, p 53.
[19] The principles referred to are found in paragraph 6.2 to 6.4 in the Commentaries to article 1, which is p 51 ff in the OECD report.

the partnership. It must be noted, that these cases of double benefits are restricted in different ways depending on the situation at hand.[20] For example, provisions can be enforced that "could ensure appropriate and simplified administration of the giving of benefits".[21]

The commentary to article 3 is also amended in a way that a partnership falls within the definition of a person under article 3.[22] This also means that the partnership can allocate treaty benefits since it falls within the term person. In OECD MS where the partnership is considered to be a transparent entity, it is the partners of the partnership that are entitled to claim the benefits between their state of residence and the state of source.[23] A change has also been made in the Commentary to article 15 OECD MTC (income from employment). Here, the issue of whether a partnership can fall within the definition of an employer is discussed. It is stated that a transparent partnership can be classified as an employer within the meaning of article 15.

Changes have also been made in the Commentary to article 23. These changes concern the conflicts of qualification. According to the CFA both articles 23 A and B require that relief be granted, through the exemption method[24] or credit method[25] where an item of income or capital may be taxed by the state of source in accordance with the provisions of the convention. The difference is that the state of residence shall exempt income or capital despite of whether the state of source has actually taxed the income or capital.[26] As long as the state of source has allocated the taxing right for the income or capital the state of residence has an obligation to exempt the income or capital from taxation. According to the CFA this is the most practical method.[27] Furthermore, changes are made in the Commentary to article 23 (4), which purpose is to avoid double non-taxation due to disagreements between the state of source and the state of residence.[28]

2.3.3 The method used in the OECD Report

It is highly important to note that the OECD Report resulted in changes made both in the OECD MTC itself and to its commentary. One change is made to an article in the OECD MTC, i e article 23 OECD MTC. It is more important to recognise the fact that the rest of the changes were done in the OECD Commentary in order to clarify the interpretation of a specific article but in some cases the interpretation of an article was changed.

The changes proposed by the CFA due to the OECD Report are of two different categories: a) changes that are a direct consequence of the changes in the articles themselves in the OECD MTC, and b) changes that are neither clarifications nor amendments to unchanged articles in the OECD MTC. It is relevant to note that there

[20] The OECD Report, p 54.
[21] The OECD Report, p 54.
[22] The OECD Report, p 55.
[23] The OECD Report, p 55.
[24] The exemption method means that in order to avoid double taxation the income, which both states want to tax, is exempt from taxation in one of the states.
[25] The credit method means that in order to avoid double taxation a credit is granted in the state of residence amount to the tax, which has been paid in the source state.
[26] The OECD Report, p 59.
[27] The OECD Report, p 59.
[28] The OECD Report, p 60.

are two different categories of changes proposed in the OECD Report. This is due to the fact that different consequences are at hand when analysing the obligation of the OECD MS to follow the changes made.

In relation to the changes made in article 23 OECD MTC, it is stated that it is necessary to clarify the meaning of the phrase "in accordance with the provisions of this Convention, may be taxed".[29] Since there is only one change proposed to the articles of the OECD MTC, this change has been made in order to clarify the meaning of that particular article. This can also be seen in relation to changes made in the OECD Commentary to article 23.[30] Here, the purpose is to clarify further how the phrase "in accordance with the provisions of the Convention, may be taxed", shall be interpreted.

When a change is made in paragraph 8.2 the Commentary to article 4 OECD MTC, it is implicated that this amendment shall change the interpretation of article 4 OECD MTC.[31] In the OECD Report there are both changes made in order to change the interpretation of the article in question and changes in order to clarify a particular part of an article in the OECD MTC.

2.3.4 Conclusion

The OECD Report mainly resulted in changes made in the OECD Commentary and not in the OECD MTC itself. Only one change was made in the OECD MTC and this change is found in article 23 OECD MTC where a new paragraph, paragraph 4, was added to the article. The rest of the changes were made in the OECD Commentary. These changes have been made both in order to change the actual interpretation of an article, while some have been made in order to clarify the interpretation of a specific article. The changes made are, according to the CFA, enough in order to solve several of the problems that occur in relation to the taxation of partnerships in regard of the OECD MTC.

2.4 Conclusion

The CFA is of the opinion that by making the proposed changes in the OECD MTC and the OECD Commentary, the issues at hand in relation to the taxation of partnerships will be solved. As stated above the OECD Report almost exclusively resulted in changes made in the OECD Commentary instead of making changes in the OECD MTC itself. The changes made in the OECD Commentary are intended both to change the actual interpretation of an article and also in order to clarify the interpretation of a specific article.

Since the CFA has chosen the above-mentioned approach it is of significant importance to analyse the legal value of the OECD Commentary and changes made in the OECD Commentary. This is due to the fact that if the OECD Commentary and changes made in the OECD Commentary are of no legal value, these changes will not solve the issues in relation to the taxation of partnerships. Furthermore, it is important to note that it is not the OECD MTC that is in force. The treaties in force are bilateral treaties formulated and negotiated by two or more states and these treaties are often

[29] The OECD Report, p 38.
[30] The OECD Report, p 40.
[31] The OECD Report, p 22.

formulated and negotiated with the OECD MTC as an example. This fact complicates the analysis of what legal value the changes made in the OECD Commentary have further.

The OECD does not have the power to change the bilateral treaties in force between states. This is due to the fact that the OECD is not one of the contracting parties to any of the bilateral treaties in force between states. The contracting parties are the states that have negotiated, formulated and signed the bilateral treaty in question. However, the OECD MTC and the OECD Commentary are used as an aid in the application of these treaties. This is due to the fact that several bilateral treaties in force have their basis in the OECD MTC. The issue at hand is therefore to determine whether the changes made in the OECD MTC and its Commentary can alter the application and interpretation of the bilateral treaties in force between states.

3 The Vienna Convention of the Law of the Treaties

3.1 Introduction

Bilateral tax treaties are part of public international law and therefore, their interpretation is governed by the VCLT. The purpose of this chapter is to give a thorough description of the articles in the VCLT that governs treaty interpretation, namely articles 31-32 VCLT. In order to analyse the legal status of the OECD Commentary and changes made in the OECD Commentary when interpreting bilateral treaties it is necessary to analyse the criterions laid down in articles 31 and 32 VCLT.

Articles 31 and 32 VCLT will be dealt with in separate sections below. Each of the sections begins with a quotation of the article in question. This is due to the fact that the starting point for treaty interpretation is the actual wording of the article in question. Thereafter, literature and jurisprudence in relation to each specific area is discussed and analysed together with my arguments. Finally, my conclusions in relation to the legal area in question are stated. This structure has been chosen since I am of the opinion that it will, in the best possible way, facilitate the understanding of each article and its criterions of application.

The interpretation of double tax treaties is different from the interpretation of domestic tax rules.[32] This is due to the fact that treaties are an agreement between two or more states. Consequently, there is not one legislator involved but two or sometimes more. Therefore, it is not possible to subside after examining the practise or doctrine in one of the contracting states. However, the core of interpreting domestic law is to establish what the legislator intended. This is a different approach compared to the interpretation of bilateral treaties.

The aim with treaty interpretation is not an issue with a clear answer. There are three different schools of thought to be identified. These schools are commonly said to reflect the *subjective approach* (or intentions of the parties approach), the *objective approach* (or textual approach) and the *teleological approach* (or object and purpose approach).[33] These schools are not independent from one another. They are entwined in each other. This is due to the fact that the most extreme form of the textual approach would probably not argue that a court should "seek to establish a meaning, which is not within the contemplation, or intention, of any of the parties to the dispute".[34] Furthermore, the "most rigid adherent of the intentions approach would not seek to deny that the text of the treaty will constitute evidence of what was the intent of the parties".[35] It is the objective approach that is suggested in the VCLT.

3.2 Article 31

3.2.1 Introduction

In this section, article 31 VCLT will be dealt with in detail in order to determine the actual meaning of the entire article. From the wording itself in article 31 it is evident

[32] Lindencrona, Gustaf, *Dubbelbeskattningsavtalsrätt*, p 77.
[33] Sinclair, Ian, *The Vienna Convention on the Law of Treaties*, p 115.
[34] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 115.
[35] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 115.

that the starting point for the application of article 31 is the common intention of the parties.

3.2.2 Article 31 – general rule of interpretation

> *"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
>
> *2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
> *(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
> *(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
>
> *3. There shall be taken into account, together with the context:*
> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
> *(c) any relevant rules of international law applicable in the relations between the parties.*
>
> *4. A special meaning shall be given to a term if it is established that the parties so intended."*

3.2.3 Good faith (article 31.1)

The principle of good faith underlies the most fundamental of all the norms of treaty law – namely, the rule *pacta sunt servanda*[36]. If good faith is required of the parties in relation to the observance of treaties, logic demands that good faith be applied to the interpretation.[37] The International Law Commission (ILC) states that the principle of good faith flows directly from the rule pacta sunt servanda.[38] An issue related to this is the issue about whose good faith is intended in the process of interpretation. Due to the fact that the principle of good faith in this context is so closely linked to the principle of pacta sunt servanda, it is primarily the good faith of the contracting parties that is intended.[39] Furthermore, the actual wording of article 31 VCLT shows that the point of origin when dealing with treaty interpretation shall be the common intention of the

[36] The rule pacta sunt servanda is defined in article 26 VCLT. Article 26 VCLT states that every treaty in force is binding upon the parties to it and must be performed by them in good faith.

[37] This has been put differently by Yasseen, *L'interprétation des traits d'après la Convention de Vienne sur le Droit des Traités*, p 151: Or, si le traité doit être execute de bonne foi, il doit nécessairement être interprété de bonne foi. L'exécution depend de l'interprétation et, sans se confondre, ces deux operations juridiques sont intimement liées. Simply translated Yasseen states that due to the fact that a treaty shall be applied in good faith it also shall be interpreted in good faith. The application depends on the interpretation and therefore, the two juridical operations are closely related.

[38] *Yearbook of the International Law Commission*, (1966-II), p 221.

[39] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 119.

parties.[40] Therefore, if a third party is called upon to interpret the treaty, his/hers obligation is to draw inspiration from the good faith as if they were themselves called upon to seek the meaning of the text which they have drawn up.

The principle of good faith applies to the entire process of interpretation, including the examination of the text, the context and subsequent practice. Furthermore, the result obtained must be appreciated in good faith. Here, good faith means an objective criterion in the light of the particular circumstances and not good faith as an abstract notion. It is said that the principle of good faith in the process of interpretation underlies the concept that interpretation should not lead to a result, which is manifestly absurd or unreasonable.[41]

Sinclair states that it is the good faith of the contracting parties that shall be used in the interpretation procedure.[42] Furthermore, Yasseen states that the interpretation of a treaty in good faith depends on the application of the treaty in good faith.[43] The statement made by Sinclair proposes the appropriate and logical way of determining the issue at hand. These statements are supported by the fact that the actual wording of article 31 indicates that the core of treaty interpretation is the common intention of the parties. See for example article 31.4 "a special meaning shall be given to a term if it is established that the parties so intended". From this phrase and from the other paragraphs in article 31 it is evident that the interpretation of a treaty provision shall have its origin in the common intention of the parties.

Furthermore, the fact that the principle of good faith is so closely linked to the principle of pacta sunt servanda is also an argument for the fact that it is the good faith of the contracting parties that should be determined.[44] This is supported by the definition of the principle of pacta sunt servanda in article 26 VCLT. Due to the above-mentioned, I am of the opinion that it is the good faith of the contracting parties that shall be the object of the subsequent interpretation and application of the treaty in question. This is mainly due to the fact that treaty interpretation is indeed a search for the common intention of the parties.[45]

3.2.4 Ordinary meaning (article 31.1)

Furthermore, the ordinary meaning shall be given to the terms of the treaty. This follows from the next element in article 31.1 VCLT. It is not necessary that the ordinary meaning is the result from a pure grammatical analysis. This is due to the fact that the true meaning of a text has to be determined by taking into account all the consequences, which normally and reasonably flow from the text in question. The concept of ordinary meaning of a text should be understood as the result, which postulate its practical

[40] See for example article 31.4 "a special meaning shall be given to a term if it is established that the *parties so intended*".
[41] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 120.
[42] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 119.
[43] Yasseen, *L'interprétation des traits d'après la Convention de Vienne sur le Droit des Traités*, p 151.
[44] See Yasseen, *L'interprétation des trait d'après la Convention de Vienne sur le Droit des Traités* and Sinclair, *The Vienna Convention of the Law of the Treaties*.
[45] See the actual wording of article 31, where there are direct references to the common intention of the parties. For example article 31.4 "a special meaning shall be given to a term *if it is established that the parties so intended*".

application and constitutes its specific significance.[46] Vogel is of the opinion that significance should be given to the opinion, which is present in the particular legal area in question, when determining the ordinary meaning of a text.[47]

Dahlberg supports the above-mentioned view.[48] This since Dahlberg claims that it becomes even clearer that the search for the ordinary meaning should have its origin in the language used in that particular legal area if the rest of article 31 is taken into account at this stage in the interpretation process.[49] This is due to the fact that there is a reference in article 31.2 to the context of the treaty and the context shall be taken into account in the interpretation procedure. Dahlberg also refers to the fact that the object and purpose of a treaty shall be taken into account in the search for the ordinary meaning of a word or phrase.[50]

In my opinion, it is possible to arrive at somewhat irrational or illogical results if the meaning of a term or phrase, which it has in the particular legal area in question, would be disregarded from.[51] This is due to the fact that if this meaning was disregarded from the analysis would take its place from the meaning a word or phrase has in the general language, which is used by people in general and without knowledge of that particular legal area. Therefore, the search for the ordinary meaning of a word or phrase should take place by looking at the meaning a word or phrase has in the language of that particular legal area.

One example from international jurisprudence illustrates the necessity to go beyond a purely grammatical or linguistic interpretation of a particular word or phrase. Of importance here is a case from the International Court of Justice (ICJ) concerning the interpretation of the agreement of 25 March 1951, with the World Health Organisation and Egypt. A majority of the member states of the World Health Organisation wanted to revise the agreement. Section 37 of the agreement dealt with the possibilities of revising the agreement. The dispute concerned the interpretation of the word "revise" in section 37. In this case the ICJ took the view that the word "revising" should be defined in accordance with its ordinary meaning.

It must be noted that the ordinary meaning of a treaty provision should in principle be the meaning, which is attributed to it at the time of the conclusion of the treaty. This is what Fitzmaurice has defined as the principle of contemporaneity requiring that the terms of a treaty must be "interpreted according to the meaning which they possessed, or which would have been attributed to them and in the light of current linguistic usage, at the time when the treaty was originally concluded".[52] This view is supported by the judgment of the ICJ in the US Nationals in the so-called Morocco case.[53]

In international jurisprudence, it is shown that it is necessary to go beyond a purely grammatical or linguistic interpretation of a word or phrase. The courts have in cases interpreted the word or phrase by looking at the context of the phrase or word, i e read

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[46] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 121. The original French text is as follows: … l'interprétation consiste non as simplement à retrouver la signification primitive d'un instrument juridique mais à lui donner, sous reserve toujours du respect du texte, *la signification spécifique que postule son application practique*."

[47] Vogel, Klaus, *Klaus Vogel on Double Taxation Conventions*, marginal no 70.

[48] Dahlberg, Mattias, *Vilket rättskällevärde har kommentaren till OECDs modellavtal? i Festskrift till Gustaf Lindencrona*, p 151.

[49] Dahlberg, Mattias, *Svensk skatteavtalspolitik och utländska basbolag*, p 69.

[50] Dahlberg, Mattias, *Svensk skatteavtalspolitik och utländska basbolag*, p 69.

[51] See for example the Alecta case, RÅ 2001 ref 46.

[52] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 124.

[53] International Court of Justice Report (1978), at 32.

the word or phrase together with the treaty as a whole or the article as a whole. This is in line with article 31.1 VCLT. Vogel is of the opinion that significance shall be given to "the opinion present in the particular legal area in question when the ordinary meaning is determined".[54]

My first association to the term ordinary meaning is that it relates to the opinion of a certain expression by the general public and how people in general would interpret the expression in question. However, as stated above such an interpretation might result in somewhat illogical and irrational results. After analysing literature and jurisprudence combined with my conclusion and arguments, it is my opinion that the ordinary meaning does not relate to the opinion of the general public.[55]

My view is that it is logical to define a phrase or a word in the context of the treaty in question and not by an interpretation of the general meaning of a word or phrase. If the latter method would be used, we would probably arrive at somewhat absurd or unreasonable results.[56] As stated by Fitzmaurice, a view that is shared by me, the ordinary wording of a word or phrase shall be determined in the light of the current linguistic usage and therefore, be interpreted in a juridical terminology rather than the general meaning of a word. It is essential that the word or phrase is interpreted in the light of the significant situation at hand and not be given a general meaning. This is due to the fact that it is not satisfactory to arrive at a result that might be illogical or unreasonable.

Furthermore, it must be determined whether the word or phrase shall be interpreted in the light of current linguistic usage at the time when the treaty was originally concluded or at the time of the interpretation. Fitzmaurice supports the former view.[57] It is the static interpretation method[58] that is suggested here. This view is also supported by international jurisprudence.[59] In my view, it would be unreasonable if the ordinary meaning were to be established from the general meaning at the time of interpretation. This is due to the fact that according to article 31 the common intention of the parties must always be taken into account when dealing with treaty interpretation.[60] Consequently, the ordinary meaning shall be determined at the time of conclusion of the treaty. The entire article 31 must be taken into account and since there is a direct reference to the common intention of the parties, I have concluded that it is the ordinary meaning at the time of conclusion of the contract that shall be established.

3.2.5 Object and purpose (article 31.1)

The object and purpose of a treaty shall also be considered in the interpretation procedure according to article 31.1. In some but quite unusual cases the object or purpose of the treaty is so overwhelmingly apparent that it must necessarily and from

[54] Vogel, Klaus, *Klaus Vogel on Double Taxation Conventions*, marginal no 70.
[55] See for example Vogel, Klaus, *Klaus Vogel on Double Taxation Conventions* and ICJ in the case concerning the interpretation of the agreement of 25 March, 1951, with the World Health Organisation and Egypt.
[56] See for example the Alecta case, RÅ 2001 ref 46.
[57] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 124.
[58] The static interpretation method means that a provision is given the meaning it has upon the conclusion of a treaty.
[59] See for example US Nationals in Morocco case (International Court of Justice) and Aegean Continental Shelf case (International Court of Justice).
[60] This follows from the actual wording of article 31.

the very outset exercise a determining influence upon the search for the contextual ordinary meaning. This is due to the fact that most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes.[61] The search for the object and purpose of a treaty is by definition a search for the common intentions of the parties who drew up the treaty.[62] This approach is the core of the VCLT, however, it has certain dangers. Due to the fact that many of the parties have acceded to the treaty, it can be assumed that they have agreed upon the basis of what the text actually says and mean. The text is the expression of the common intention of the parties and it is to that expression of intent that attention must first be given.[63]

There is also a risk that the placing of undue emphasis on the object and purpose of a treaty will encourage teleological methods of interpretation. The teleological approach, in some of its more extreme forms, will even deny the relevance of the intentions of the parties. It is, in effect, based on the concept that, whatever the intentions of the parties may have been, the convention is framed to have a certain object and purpose and should be interpreted by giving effect to it.[64] There are some examples in the jurisprudence from the European Court of Human Rights (ECouHR) that show that the court has arguably stretched the interpretation of particular provisions of the European Convention on Human Rights (EConHR) by adopting the teleological approach.[65] Furthermore, there are examples from the ECouHR of the fact that the preparatory works of the EConHR has been ignored when interpreting articles in the convention.[66]

In order to establish the object and purpose of a treaty, it is sometimes possible to use the preamble. It should be noted that a treaty could have several objects and purposes and sometimes even conflicting ones. Take for example the OECD MTC, which purpose is both to avoid and eliminate double taxation but also to prevent non-taxation. In a situation where it might be difficult to determine what the actual object and purpose of the treaty is, I am of the opinion, that the different and maybe conflicting objects and purposes must be analysed in order to try to identify a common denominator. This can be done by for example looking at the treaty as a whole and from this try to establish the main purpose of the treaty. If it is not possible to identify a common denominator, one should identify the main purpose of the treaty and from this analyse the other purposes that have subordinate importance. This should be done due to the fact that if this procedure is not performed it will not be possible to establish the main object and purpose of the treaty.

According to the VCLT, the interpretation procedure shall always strive at establishing the common intention of the parties (see the actual wording of article 31). Furthermore, the common intention of the parties is also emphasised in the literature.[67] However, this gives rise to certain issues that should be discussed. First of all, the teleological methods of interpretation might be encouraged. Here it should be emphasised that I am not of the opinion that this method of interpretation should not be used at all.

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[61] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 130.
[62] Degan, *L'interprétation des accords en droit international*, p 13. This becomes evident also by reading the actual wording in article 31.
[63] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 131.
[64] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 131.
[65] See the Golder case, the National Union of Belgian Police case etcetera.
[66] See the case of Campbell and Cosans, Judgment of 25 February 1982, published by the Council of Europe.
[67] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 131.

My conclusions are that the common intention of the parties is the most significant criterion when interpreting a treaty. This is due to the fact that there is a direct reference to the common intention of the parties in article 31. Consequently, the common intention or the parties must be taken into account in the search for a common denominator in cases where several and sometimes conflicting objects and purposes can be identified. It is also concluded that a teleological interpretation method can be used as long as the intention of the parties is not disregarded from.

3.2.6 The context (article 31.2)

In the literature it has been emphasised that the text of a treaty must be read as a whole. This is due to the fact that it is not possible to only concentrate on a paragraph, an article, a section, a chapter or one part of the treaty.[68] According to article 31.2, the context shall also be part of the interpretation procedure and in my opinion the reference made to the context in article 31.2 makes it difficult to only concentrate on one part of the treaty or one paragraph. This is due to the fact that there is a direct reference in article 31.2 to use the context of a treaty in the interpretation procedure.

The preamble to a treaty may assist in determining the object and purpose of the treaty. There are several examples in international jurisprudence of reference being made to the preamble of a treaty in order to elucidate the meaning of a particular provision.[69] In the literature it has been emphasised that the preamble in such cases has to be written upon the conclusion of the treaty. Otherwise, it seems, as the preamble shall not have such great importance in the interpretation procedure. If this is the case, then the preamble shall be considered a part of the context of the treaty. It might seem quite easy to determine what should be considered to be part of the treaty. However, it can be questioned whether everything that has not been written upon the conclusion of the treaty can be included in the context of the treaty.

It is essential that the agreement or instrument should be related to the treaty. It must be concerned with the substance of the treaty and clarify certain concepts in the treaty or limit its field of application.[70] Equally it must be drawn up on the occasion of the conclusion of the treaty. Any agreement or instrument fulfilling these criteria will form part of the context of the treaty and will thus not be treated as part of the preparatory works but rather as an element in the general rule of interpretation.[71] In the United States Nationals in the so-called Morocco case, the ICJ referred to the preamble of the Madrid Convention of 1880 to ascertain its object and purpose.[72] Furthermore, reference to the preamble has been made by the ECouHR in the Golder case and by the ICJ in the Ambatielos case.[73]

It has become more common practice within the Council of Europe that governmental experts, charged with the task of negotiating and formulating an international convention on a particular topic, also should draw up an explanatory

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[68] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 127 and Yasseen, *L'interprétation des traits d'après la Convention de Vienne sur le Droit des Traités*, p 151.

[69] See cases United States Nationals in Morocco, the Golder case, Beagle Channel and the Ambatielos case.

[70] Yasseen, *L'interprétation des traits d'après la Convention de Vienne sur le Droit des Traités*, p 37.

[71] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 129.

[72] International Court of Justice Report (1952) at 196.

[73] European Court of Human Rights, I L R 57, at 217 (Golder case) and International Court of Justice Report (1952) 28 (Ambatielos case).

report. Such an explanatory report sets out the framework within which and the background against which the convention has been drawn up and also provides for a commentary on the text. It should be mentioned that any explanatory report, when published, is normally prefaced by a note indicating that it does not constitute an instrument providing an authoritative interpretation of the text. This is the case although the explanatory report may facilitate the understanding of the provisions in the agreement. It would nonetheless seem, as an explanatory report of this nature should be considered to be part of the context of the agreement for interpretation purposes.[74]

It is important to read the treaty as a whole and therefore it can be questioned whether for example an explanatory report, should be considered a legal means of interpretation. According to Sinclair, an explanatory report, which was written upon conclusion of the treaty, shall be considered to be a legal means of interpretation and fall within the definition of the context.[75] This can be questioned due to the fact that although an explanatory report, which was not written upon conclusion of the treaty, might as well be of importance for the interpretation procedure. However, this presupposes that it is the same experts who wrote the explanatory report as the experts who negotiated and formulated the treaty itself.

In relation to the above-mentioned a reference can be made to the OECD Report where the OECD wants to clarify and in some cases change the application of the OECD MTC in regard of the taxation of partnerships. According to the actual wording of article 31 it is evident that treaty interpretation shall always take into account the common intention of the parties. In my view, this probably means that it is only possible to use documents, which are part of the context, upon conclusion of the bilateral treaty. An explanatory report written after the conclusion of the contract would therefore not be considered to be part of the common intention of the parties. This is due to the fact that if the explanatory report has been written after the conclusion of the treaty it might not express the common intention of the parties. An explanatory report can only be used in the interpretation procedure if it can be establish that the explanatory report in question expresses the common intention of the parties.

As presented above, there are arguments for the fact that even though the explanatory report was not done at the time of the conclusion of the treaty it might anyhow be a legal means of interpretation available upon interpretation. This is due to the fact that if the above-mentioned circumstances are at hand, the intention of the parties are taken into account in the explanatory report and therefore, the explanatory report should be a legal means of interpretation. In such cases, the explanatory report should be considered to be a part of the context as defined by article 31.2 VCLT. A counterargument, however, is the fact that in article 31.1 VCLT the intention of the parties shall be taken into account when a treaty is interpreted. This might be an argument for the fact that if the explanatory report was not written upon the conclusion of the treaty it might not be considered to be part of the intention of the parties.

My conclusion is that an explanatory report shall be considered to be a part of the context of a treaty. This is due to the fact that the explanatory report, under certain circumstances (as defined above), does take the intention of the parties into account. However, it must be bore in mind that an explanatory report written by other persons than the experts who wrote the report, can probably not be seen as part of the context of a treaty. This is due to the fact that such an explanatory report, in my view, does not

[74] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 129 f.
[75] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 129 f.

consider the common intention of the parties, which is a mandatory criterion according to the wording of article 31.

3.2.7 Subsequent agreements, subsequent practices and relevant rules of international law (article 31.3 (a), (b) and (c))

3.2.7.1 Subsequent agreements (article 31.3 (a))

In the Jaworzina case, the Permanent Court of International Justice (PCIJ) ruled that it is "an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it".[76] Furthermore, in the US/France Air Service Agreement case a three-member arbitral tribunal stated that the text of the entire agreement is as significant for what it omits as for what it specifies.[77] The judgment of the tribunal was that the agreement leaves to the parties the right to decide a wide range of key issues concerning almost every aspect of service on designated routes apart from those regarding rates and capacity.

In relation to this, it should be stressed that it is not the same body that formulates the treaty that incorporates the treaty into domestic law. At the same time as a treaty is amended, the domestic law of a country is also amended. This is done although the changes have not been incorporated into domestic law in accordance with the specific incorporation procedures provided by the domestic law in question. According to the rule of law in the area of tax law, as defined in Swedish domestic law, a tax liability shall be stated in the Swedish domestic law in force at that particular time.[78] The consequences of changes in a tax treaty, means that the Swedish domestic law is modified although the proper procedures have not been followed.

An amendment to a treaty might be said to be contrary to the rule of law. This is due to the fact that the domestic law is changed although the changes have not been approved by the proper domestic legislative channels. However, if the body that formulated the treaty did not have this power invested in it, rather absurd consequences would arise. For example, the fact that they cannot amend the treaty due to the fact that it has been incorporated in the domestic law of the contracting states. Finally, if the contracting parties (i e the body that concluded the treaty) has agreed upon modifying or in any other way change the original contract both contracting parties are bound by these modifications.

3.2.7.2 Subsequent practices (article 31.3 (b))

The value and significance of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent. A practice is a sequence of facts or acts and cannot in general be established by one isolated fact or act or even by several individual applications.[79] The ICJ has in several cases stressed the significance of subsequent practice as an element to be taken into account in the interpretation of a

[76] Permanent Court of International Justice, serie B, No 8, at 37.
[77] United Nations, Reports of International Arbitral Awards, Volume XVII, at 331.
[78] Hultqvist, Anders, *Legalitetsprincipen vid inkomstbeskattning*, p 73.
[79] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 137.

treaty.[80] A good example of subsequent practice in this sense is the practice of the Security Council in relation to the interpretation of article 27.3 of the United Nations Charter, which requires that decisions of the Security Council on all other matters than procedural matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.

Furthermore, the ICJ has ruled in a case concerning the legal consequences for states of the continued presence of South Africa in Namibia.[81] In this case the ICJ ruled that the fact that the proceedings of the Security Council extended over a long period of time was sufficient evidence of the fact that presidential rulings and the positions taken by members of the Council have consistently and uniformly interpreted the practice of voluntary abstention as not constituting a bar to the adoption of resolutions. This case shows that although the charter of the United Nation stated one view, a change in the practice of the Security Council over a long period of time resulted in the fact that the Security Council altered the charter.

However, it must be stressed that article 31.3 (b) VCLT does not cover subsequent practice in general. It only covers a specific form of subsequent practice, which is to say concordant subsequent practice common to all parties involved. Subsequent practice, which does not fall within this narrow definition, may nonetheless constitute a supplementary means of interpretation within the meaning of article 32 VCLT.[82] Consequently, a subsequent practice cannot arise only due to the fact that one court in one of the contracting states has ruled in a certain way regarding a treaty provision. Therefore, it is insufficient that the courts in one of the contracting states begin to interpret a treaty provision in a certain way. The fact that a subsequent practice must be common to all parties is an important element. Otherwise, one of the contracting states would be able to argue that due to a change in the jurisprudence in that state a treaty provision should be given another interpretation than was intended at the time of conclusion of the treaty.

It is, in my view, significant that before accepting the existence of a subsequent practise, it must be established that the possible subsequent practise does not result in absurd or unreasonable results. This is due to the fact that it is not desirable to arrive at results that are absurd or unreasonable. Sometimes the development requires a change in the practice of the interpretation of a certain treaty provision and this is, in my view, one of the most significant arguments why such an opportunity is necessary for the parties to a treaty. It should also be noted that it is essential that this subsequent practice takes place over a long period of time in order for it to become established and recognised practice in the jurisprudence of the contracting states.

3.2.7.3 Relevant rules of international law (article 31.3 (c))

From the commentary of the VCLT it appears that this element in the general rule was originally designed to deal with the intertemporal aspect of interpretation. In the first reading of the ILC in 1964 a similar statement was found in article 31.1 instead. In this reading it was stated that the ordinary meaning to the terms of a treaty was to be determined *"in the light of the general rules of international law at the time of its conclusion"*. These words were intended to reflect the general principle that a juridical

[80] See the Chamizal case, 5 A J I L and the Corfu Channel case I C J Report 1949.
[81] International Court of Justice Report (1971), at 22.
[82] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 138.

fact must be appreciated in the light of the law contemporary with it.[83] However, this was transferred from article 31.1 to 31.3. This was due to the fact that the ILC concluded that this element was an element extrinsic both to the text and to the context as defined in article 31.2.

An important issue in relation to this provision is to determine if a treaty shall be interpreted in the light of the rules of international law in force at the time of conclusion of a treaty or those in force at the time of the interpretation. In the Island of Palmas case, ruled by the ICJ, it was stated that a juridical fact must be appreciated "in the light of the law contemporary with it and not of the law in force at the time when the dispute in regard to it arises or falls to be settled".[84] However, the ICJ has also given its support to a different view, namely the view that a treaty shall be interpreted in the light of the rules of international law in force at the time of interpretation.[85] Nonetheless, it is important to note that the ICJ has also approved of the principle of contemporaneity.[86] This is due to the fact that a treaty can be in force for many years and since international law may evolve and develop during the period when the treaty is in force and therefore, the treaty should be interpreted in light of the international law in force at the time of interpretation.

In the literature and international jurisprudence, support for both views, i e international law in force at the time of conclusion of a treaty and international law in force at the time of interpretation of the treaty, are to be found.[87] It is stressed in the VCLT that the whole treaty should be considered and not only discuss one provision totally isolated from the rest of the provisions in the treaty in question. Therefore, it should be taken into account the fact that according to article 31.1 VCLT the common intention of the parties shall be considered. If this is the case, my view is that article 31.3 must be interpreted as meaning the international law at the time of conclusion of a treaty. This is due to the fact that in order to consider the common intention of the parties, it is necessary to go back and examine what was intended at the time of conclusion of a treaty.

However, by referring to the common intention of the parties, the fact that international law (including jurisprudence) can have changed from the time of conclusion of a treaty until the time of interpretation is disregarded from. For example, it might be possible to disregard from the existence of subsequent practise. If subsequent practise were not considered in the interpretation procedure, the interpretation would be contrary to article 31.3 (b) VCLT. It is a fact that a treaty can be in force for many years before an issue of interpretation comes before a court. My opinion is that if developments in international law during the time of conclusion until the time of interpretation were not taken into account, important developments and other important changes that have occurred in international law during this period would risk being missed. If such changes were not taken into account, the interpretation would be contrary to article 31 VCLT.

In order to avoid the non-consideration of developments and other important changes at hand in international law at the time of interpretation, it would be, in my view, more appropriate to use the international law in force at the time of interpretation. However, it

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[83] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 139.
[84] 2 R I A A 845.
[85] See case Legal Consequences for States of the continued presence of South Africa in Namibia.
[86] See Minquiers and Ecrehos case, International Court of Justice Report (1953), at 91.
[87] See International Court of Justice Report (1971) and Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 138

must be noted that the common intention of the parties must always be taken into account. This follows from the actual wording of article 31. This fact is an argument for the view that it would be the international law in force upon conclusion of a treaty that was to be used instead. However, I am of the opinion that this would be contrary to article 31 VCLT. This is due to the fact that changes and developments that have taken place in international law from the time of conclusion until the time of interpretation cannot be disregarded from. Furthermore, the common intention of the parties is, according to my opinion, not left aside by using the international law in force at the time of interpretation. This is due to the fact that if there is a subsequent practise at hand, this practise should be considered to fall within the common intention of the parties.

My conclusion is that it is the international law in force at the time of interpretation that shall be used in order to come to a correct ruling. This is due to the fact that if changes and developments in international law were not taken into account, subsequent practises might be disregarded from and the results might be absurd or unreasonable. Such results are contrary to the VCLT and therefore, such an approach cannot be recommended.

3.2.8 Special meaning (article 31.4)

According to article 31.4 VCLT "a special meaning shall be given to a term if it is established that the parties so intended". The converse of the ordinary meaning of a term is its special meaning and this shall also be taken into account when interpreting tax treaties. When the VCLT was concluded there were some doubt as to whether it was necessary to include a special provision on this point. The ILC was of the opinion that there was a certain utility in laying down a specific rule on this point and this paragraph was therefore included in article 31. The underlying ideas to this provision are essentially the issue of burden of proof that emerges from the scant jurisprudence on this point.

In the Legal Status of Eastern Greenland case, in which the PCIJ stated that it was the parties that had the burden of proof for establishing that some unusual or exceptional meaning is to be attributed to the word "Greenland".[88] Furthermore, the Court of Arbitration in the UK/French Continental Shelf arbitration where the court was confronted with the interpretation to be given to the phrase "Bay of Granville" in the French reservation to article 6 of the Continental Shelf Convention of 1958 can be mentioned.[89] In this case, it was debated whether the term "Bay of Granville" was to include all the Channel Islands in the region between France and the UK. The court stated that, in the reservation, it was found that it was the whole region of the Channel Islands that had been discussed and therefore, the court ruled that the phrase "Bay of Granville" should be given a special meaning and include the entire Channel Island region.

The issue at hand here is the issue of the burden of proof. From the jurisprudence in this area it is quite hard to find a common denominator. However, as seen above, there are some cases of the fact that a phrase has been given a special meaning due to the practice of only one of the contracting states or parties. From the jurisprudence it is obvious that it is the party that argues for the special meaning that has the burden of proof (see for example the Greenland case).

[88] Permanent Court of Justice (1933), ser. A/B, No 53, at 49.
[89] 54 I.L.R. at 57.

In my opinion, it is the party that argue for the existence of a special meaning that shall have the burden of proof. This is due to the fact that if the burden of proof would lie on the other party, it would become too easy to establish a special meaning for a phrase. This is supported by jurisprudence and the common principle that the party who argue for the existence of, for example, a special meaning also have the burden of proof. If this second approach would be the acceptable one, I am of the opinion, that such a situation would jeopardise the value of a legal agreement between two or more states. By this I am referring to the fact that if one party could give a phrase a special meaning simply by saying that a special meaning is at hand, this would create legal uncertainty for the other party. In such a case, the parties to a legal agreement would not be able to rely on what has been agreed upon in the agreement in question. Therefore, the burden of proof shall lie with the party that says that a phrase has a special meaning. This is due to the fact that it is necessary to have a high degree of legal certainty.

Consequently, the burden of proof shall lie with the party who argue for the fact that a special meaning is at hand and not on the other party. By using this approach, the legal uncertainty that, in my view, would occur otherwise is removed and the parties can rely upon the content and meaning of the agreement, as was the case upon conclusion of the contract. This is also in line with the fact that, in order to constitute a subsequent practise, it is necessary that both contracting states have established this new practice and it also must have taken place over a long period of time. Due to the fact that my conclusion is in accordance with another criterion in article 31 VCLT corresponds with the fact that a treaty shall be read as a whole. A treaty provision shall be read in conjunction with the other provisions of the treaty and the provision shall be interpreted together with the treaty as a whole.

3.2.9 Conclusions in relation to article 31

The actual wording of article 31 states that it is the common intention of the parties that is the most important criterion throughout the entire interpretation procedure.[90] Therefore, it is very important that the analysis of the different criterions laid down in article 31 always takes into account the common intention of the parties. Otherwise, the interpretation would be contrary to article 31.

Article 31.1 VCLT refers to the good faith of the contracting parties at the time of conclusion of a treaty. This is due to the fact that this principle is so closely linked to the rule of pacta sunt servanda (article 26 VCLT) and due to the reference to the common intention of the parties in the actual wording of article 31. Furthermore, the fact that the treaty shall be read as a whole and that there is a direct reference to the object and purpose of the treaty makes it evident that it is the good faith of the contracting parties that is at hand.

The ordinary meaning of a phrase or a word shall be determined in the light of the meaning it has in that particular legal area of expertise and not in relation to the general meaning of the word or phrase. This is due to the fact that it is not in accordance with the VCLT to arrive at such absurd or unreasonable results that might be the case if a word or a phrase is given its general meaning (article 32 (b) the VCLT). The ordinary meaning shall be determined upon the time of conclusion of the treaty. This is due to the fact that the common intention of the parties must be taken into account.

[90] See for example article 31.4 “a special meaning shall be given to a term if it is established that the *parties so intended*”.

According to article 31.1 the interpretation of a treaty must be done in the light of the object and purpose of the treaty. Due to the fact that the common intention of the parties plays a significant role in the entire interpretation process (due to the actual wording in article 31), this must be taken into account when determining a common denominator when dealing with several and maybe conflicting object and purposes. It is also concluded that a teleological interpretation method can be used as long as the intention of the parties is not disregarded from.

Article 31.2 (a) VCLT states that "any subsequent agreements that have been concluded between the parties shall be taken into account in the interpretation procedure".[91] Here, the issue that it is not the same body that formulates the treaty that incorporates the treaty into domestic law should be stressed. The rule of law was discussed in relation to this and it is my view that an amendment to a treaty might be considered to be contrary to the rule of law. This is due to the fact that the domestic law is changed although the changes have not been approved by the proper domestic legislative channels. However, if the body that formulated the treaty did not have this power invested in it, rather absurd consequences would arise

The importance of subsequent practises should also be stressed. My opinion is that it is significant for the contracting parties to have the possibility to change the interpretation of a certain treaty provision by means of subsequent practise. This is due to the fact that otherwise the courts might arrive at absurd or unreasonable results and this is contrary to the VCLT. It must be stressed that a subsequent practise must be the result of actions taken in both contracting states and over a long period of time.

"Any relevant rules of international law" shall be taken into account in the interpretation according to article 31.3 (c) VCLT. In my opinion this provision relates to the international law in force at the time of interpretation. This is due to the fact that if changes and developments in international law were not taken into account, subsequent practises must be disregarded from and it might be possible to arrive at a result that is considered absurd or unreasonable. Such a result is contrary to the VCLT and therefore, cannot be a recommended approach. Due to this, the conclusion is that it is the international law in force at the time of interpretation that is relevant for the interpreter.

The last requisite in article 31 VCLT is related to the fact that "a special meaning shall be given to a term if it is established that the parties so intended" (article 31.4 VCLT). My conclusion in relation to this provision is that, it is the party who argue for the existence of a special meaning that shall have the burden of proof. This is due to the fact that a high degree of legal certainty must be at hand and by giving the burden of proof to the party who argues for the existence of a special meaning such legal certainty can be established in a satisfactory way. Furthermore, this conclusion corresponds with the fact that a treaty shall be read as a whole and that a treaty provision shall not be taken out of its context.

[91] This phrase is another reference to the fact that the common intention of the parties should be the starting point for the entire interpretation procedure.

3.3 Article 32

3.3.1 Introduction

This section deals with article 32 VCLT in detail in order to establish the meaning of article 32 VCLT. The meaning of article 32 VCLT must be established in order to discuss and analyse the legal value of the OECD Commentary and the changes made in the OECD Commentary due to the OECD Report. This section begins with a quotation of article 32 VCLT. This is due to the fact that the starting point is the wording of the article in question. Thereafter, literature and jurisprudence in relation to each specific area will be discussed and analysed together with my views. Finally, my conclusions are briefly stated.

Throughout this section it is important to bear in mind the difference between preparatory works of a treaty and preparatory works in relation to domestic law. Preparatory works of a treaty are documents written by both of the contracting parties and therefore, are an expression of the common intention of the parties. In this regard it should be stressed that the bilateral treaty in question, which will be part of the domestic law of the countries involved, are formulated by the parties to the treaty in question and not by one legislator. This is also the case when formulating the preparatory works to a treaty. However, in domestic law there is only one legislator involved.

3.3.2 Article 32 – Supplementary means of interpretation

> *"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*
>
> *(a) leaves the meaning ambiguous or obscure; or*
>
> *(b) leads to a result which is manifestly absurd or unreasonable."*

3.3.3 Doctrine and international jurisprudence

From the wording of article 32 VCLT it can be said that an interpreter of a treaty shall constantly bear in mind the historical background against which the treaty has been negotiated.[92] It may also be necessary to take into account the individual attitudes of the parties in seeking to determine the reality of the situation, which the parties wished to regulate by means of the treaty.[93] Some of these factors may of course emerge from a study of the preparatory works or may indeed be apparent from a study of the text of the treaty when read in its context. However, there may arise situations where neither of the mentioned sources can provide appropriate guidance for the interpreter. In such cases recourse may have to be made to extrinsic evidence.

The preparatory works of a treaty should always be used with caution and prudence.[94] The meaning of a particular text will often find its origin in the preparatory

[92] "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the *circumstances of its conclusion* [---]".
[93] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 141.
[94] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 142.

works[95] themselves. It is quite common that negotiators settle for a vague or ambiguous formulation. The preparatory works to a treaty are unlikely to give an accurate or detailed description of what happened during the negotiations. This is due to the fact that the preparatory works will not contain what may have been agreed upon between the delegations in discussions outside the actual negotiations.[96]

In the Territorial Jurisdiction of the International Commission of the River Oder case, the PCIJ stated that the preparatory works could not be used in order to interpret some of the provisions in the Treaty of Versailles.[97] This was due to the fact that some of the states appearing before the PCIJ had not participated in the negotiations of the Treaty of Versailles. In the so-called Young Loan case the majority of the arbitration tribunal was of the opinion that the preparatory works were to be analysed in order to interpret the provision in question.[98]

3.3.4 Analysis

There is a clear difference between the role of the preparatory works between international law and Swedish domestic law. It is very important to bear in mind that the reference to preparatory works in article 32 VCLT only refers to materials that have been formulated by both contracting parties. This follows from the fact that the actual wording of the VCLT (in article 31) states that it is the common intention of the parties that is the very core of treaty interpretation. Furthermore, it must be noted that the starting point for the reference to Swedish preparatory works is not the common intention of the parties. This is due to the fact that there is only one legislator involved in the formulating of preparatory works to domestic law as opposed to the formulating of preparatory works in relation to a treaty.

In international jurisprudence it has been stated that the preparatory works cannot be used if the parties in the dispute have not been part of the negotiations of the treaty. Here, it must be stressed that it is the preparatory works in relation to treaties that are discussed. This is due to the fact that these arguments cannot be applied to Swedish preparatory works because there is only one legislator involved and the main task is not to find the common intention of the parties involved.

If the rule stated in the case of the Territorial Jurisdiction of the ILC in the River Oder case,[99] is applied a somewhat strange result would appear. In that case, the PCIJ stated that the preparatory works could not be used in order to interpret some of the provisions in the Treaty of Versailles. In such a case, a party that was part of the negotiations cannot rely upon what was discussed and agreed upon in future disputes only due to the fact that the other party was not part of the negotiations.

Such a result is, in my view, not a desired result since it jeopardises the legal certainty for parties in a future legal dispute. Here, a party has relied upon what was agreed upon and discussed during the conclusion of the contract and therefore, been able to foresee how this particular legal situation would be resolved in a possible future legal dispute. This argument can only be used if both parties involved have formulated

[95] Here, I relate to the preparatory works in relation to a treaty and not to the preparatory work as defined in Swedish domestic law.
[96] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 142.
[97] Permanent Court of Justice (1929), serie A, No 23.
[98] 59 I L R, at 544 f.
[99] Permanent Court of Justice, Serie A, No 23.

the preparatory works. If the rule stated by the PCIJ was to be applied, my opinion is that the legal certainty discussed above would be disregarded from. The reason for this would simply be that one of the parties was not part of the negotiations.

It should be noted that the party, which was not part of the negotiations, could argue that it does not agree with what was agreed upon during the negotiations. A party to a treaty does have the opportunity to make an observation[100] if the party does not have the same opinion as stated in the treaty provision or the commentary to the provision in question. However, it must be noted that it is not possible to make an observation in all cases. I am of the opinion that if the party has not made an observation against a certain provision, a part in the preparatory work or the like this party should be bound by what has been agreed upon during the negotiations, i e bound by passiveness.

It is evident that the preparatory works in Swedish domestic law have a strong legal position as a means of interpretation. Here it is important to note that, in my opinion, the arguments used in Swedish domestic law cannot directly be transferred to the interpretation of tax treaties.[101] This is due to the fact that the two interpretation procedures are quite different and different rules of application apply to the two procedures. It must be stressed that although I am of the opinion that the preparatory works do have a strong legal position and shall be used as a means of interpretation, it is not possible to apply the same legal arguments in relation to the use of preparatory works within treaty interpretation. Consequently, preparatory works in relation to bilateral treaties can probably not be given such high importance as Swedish preparatory works has been given by referring to the arguments used in Swedish domestic law. This is due to the fact that the same rules do not apply to the two interpretation procedures.

When discussing the legal relevance of preparatory works in relation to treaty interpretation, I am of the opinion that the preparatory works should be used as a legal means of interpretation. This is due to the fact that the preparatory works, as defined in relation to treaty interpretation, can give the interpreter an idea of what was intended by the parties upon conclusion of the treaty. According to Dahlberg, the Swedish preparatory works could fall within the definition of supplementary means of interpretation as defined in article 32 VCLT as long as the Swedish preparatory works do express what is stated in documents that definitely fall within the meaning of supplementary means of interpretation.[102] This criterion can be fulfilled by for example providing documents of communication between the contracting parties in which it is evident that this statement is shared by both contracting parties.[103] However, it must always be bore in mind that the preparatory works should only be given a high degree of importance if it can be established that the preparatory works expresses the common intention of the parties. If the intention of the parties was not taken into account the interpretation would be contrary to article 31 VCLT.

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[100] The MS can record their disagreement with the Commentaries by making an observation. See Avery Jones, John F, *The Effect of changes in the OECD Commentaries after a Treaty is Concluded*, 2002 International Bureau of Fiscal Documentation, March 2002.

[101] This view is supported by Dahlberg, Mattias in *Svensk skatteavtalspolitik och utländska basbolag*, p 78 f.

[102] Dahlberg, Mattias, *Svensk skatteavtalspolitik och utländska basbolag*, p 77.

[103] Dahlberg, Mattias, *Svensk skatteavtalspolitik och utländska basbolag*, p 77.

3.3.5 Conclusions in relation to article 32

The preparatory works in relation to the interpretation of treaties shall be given importance in the interpretation procedure. However, this is only the case if it is established that the preparatory works can be said to express the intention of the parties to the treaty. If the intention of the parties was not taken into account the interpretation would be contrary to article 31 VCLT. This is due to the fact that in article 31 VCLT there is a direct reference to the intention of the parties. Furthermore, the very core of treaty interpretation is to establish the common intention of the parties and this shall always be taken into account when interpreting a treaty provision.

Support for my opinion has been found in the Swedish domestic jurisprudence. However, it is important to note that there is a significant difference between Swedish preparatory works and preparatory works in relation to treaties. In the Swedish domestic legislative procedure there is only one legislator involved and only one part has been involved in the formulation of the Swedish preparatory works. This is not the case with preparatory works in relation to treaties. In such cases, there are two or more legislators involved and therefore, the arguments found for the use of Swedish preparatory works cannot be directly applied to treaty interpretation.

3.4 Conclusion

The purpose of this chapter was to give a thorough outline of the articles 31-32 VCLT since these articles governs treaty interpretation. This is due to fact that it is necessary to analyse and come to a conclusion in relation to all criterions listed in articles 31-32 VCLT in order to be able to analyse the legal status of the OECD Commentary and changes made in it.

First of all the good faith of the contracting parties shall be taken into account upon interpreting a treaty provision. It is the good faith of the contracting parties at the time of conclusion of the treaty that is at hand here. This is due to the fact that the principle of good faith is so closely linked to the rule of pacta sunt servanda in article 26 VCLT. My conclusion is also supported by the fact that there is a direct reference to the object and purpose of the treaty. This reference makes it evident that it is the good faith of the contracting parties that is intended.

The next criterion is that a phrase or a word shall be interpreted in accordance with its ordinary meaning. This relates to the meaning the word or phrase has in that particular area of expertise. This is due to the fact that it is not in accordance with the VCLT to arrive at such absurd or unreasonable results (article 32 (b) the VCLT). The ordinary meaning shall be determined upon the time of conclusion of the treaty. This is due to the fact that the intention of the parties must be taken into account.

Furthermore, treaty interpretation shall be done in the light of the object and purpose of the treaty (article 31.1 VCLT). Here, it must be stressed that in the case a treaty has several and maybe conflicting objects and purposes, a common denominator must be established. However, in the search for the common denominator the intention of the parties must always be taken into account.

According to article 31.2 (a) VCLT “any subsequent agreements that have been concluded between the parties shall be taken into account in the interpretation procedure”. In relation to this it is important to discuss the relevance of the rule of law and the fact that when a treaty is amended, the domestic law of a country is also

amended although the proper incorporation procedure has not been followed. However, if the body that formulated the treaty did not have the power to amend and modify the treaty invested in it, rather absurd consequences could arise

In the interpretation procedure, subsequent practises between the contracting states shall be taken into account (article 31.3 (b) VCLT). It is my opinion that it is important for the contracting parties to have the possibility of changing the interpretation of a certain provision by means of subsequent practise. This is due to the fact that otherwise the courts might arrive at absurd or unreasonable results and this is contrary to the VCLT. It must be stressed that a subsequent practise must be the result of actions taken in both contracting states and over a long period of time.

Furthermore, relevant rules of international law in force at the time of interpretation shall be taken into account. This is due to the fact that if changes and developments in international law were disregarded from there is a risk that subsequent practises were to be missed. The result of such practises can be absurd or unreasonable results, which are contrary to article 32 VCLT. Due to this, the conclusion is that it is the international law in force at the time of interpretation that is relevant for the interpreter.

In the interpretation procedure a term shall be interpreted in accordance with its special meaning (article 31.4 VCLT). My conclusion here is that it is the party who argue for the existence of a special meaning that shall have the burden of proof. This is due to the fact that a high degree of legal certainty must be at hand and by giving the burden of proof to the party who argues for the existence of a special meaning such legal certainty can be established in a satisfactory way.

Preparatory works in relation to the interpretation of treaties should, in my view, be given more importance in the future. However, this is only the case if it can be established that the preparatory works state the intention of the parties. An interpretation that does not take the intention of the parties into account is contrary to the VCLT and therefore not a legal interpretation method according to the VCLT. Furthermore, the very core of treaty interpretation is to establish the common intention of the parties and must always be taken into account when interpreting a treaty provision. My opinion is supported by Swedish domestic jurisprudence. Here, it must be stressed that although there is a significant difference between Swedish domestic preparatory works and preparatory works in relation to treaties, arguments found in Swedish jurisprudence can be used in treaty interpretation as well. However, this is only the case if the intention of the parties is taken into account throughout the entire interpretation procedure.

4 Analysis

4.1 Introduction

In this chapter I will use my findings from chapter 3 to analyse whether the parties to a bilateral treaty can use the OECD Commentary and changes made in it as a legal means of interpretation when interpreting a bilateral treaty. Bilateral tax treaties are part of international law and therefore they are governed by the VCLT. Consequently, it is necessary to use my findings in chapter three in order to establish whether the OECD Commentary and the changes made in it are a legal means of interpretation for the parties to a treaty.

In order to fulfil the purpose of this thesis it is important to divide the bilateral treaties in force into two categories: 1) bilateral treaties that are not in accordance with the OECD MTC, and 2) bilateral treaties that are in accordance with the OECD MTC. The later part of this chapter has therefore been divided according to these two categories in order to perform a proper analysis. This is due to the fact that bilateral treaties in accordance with the OECD MTC and bilateral treaties not in accordance with the OECD MTC must be analysed separately. If this division were not done, the result would be inaccurate since it is not possible to apply the same arguments to both categories.

Changes, which are a direct consequence of the changes in the articles themselves in the OECD MTC, cannot, according to the OECD, be applied when interpreting tax treaties that have been concluded before the change in question.[104] Changes, which are either clarifications or amendments to unchanged articles in the OECD MTC, are, according to the OECD, "[---] normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD Member countries as to the proper interpretation of existing provisions and their application to specific situations".[105] Here, the OECD states that an ambulatory interpretation method shall be used.

The changes made in the OECD Commentary due to the OECD Report are changes that are neither clarifications nor amendments to unchanged articles in the OECD MTC. According to the OECD (see above) these changes are applicable to the interpretation and application of provisions of the OECD MTC. This is the view taken by the OECD since the changes are said to reflect the consensus of the OECD MS. Furthermore, it is stated that "[---] existing conventions should, as far as possible, be interpreted in the spirit of the revised Commentaries, even though the provisions of these conventions did not include a more precise wording [---]".[106] However, a statement by the OECD of the legal status of changes made in the OECD Commentary shall not be given too much importance. This is due to the fact that it is the legal status these changes have according to the VCLT that is of importance.

[104] Paragraph 35 OECD Introduction.
[105] Paragraph 35 OECD Introduction.
[106] Paragraph 33 OECD Introduction.

4.2 Recommendation of the OECD Council

There is a Recommendation of the OECD Council concerning the OECD MTC included as an appendix to the OECD MTC. In my view, this is an important legal source when discussing what legal value the OECD Commentary has. This is due to the fact that it is an explicit statement made by the OECD Council in regard to the OECD MTC and its Commentary. This view is supported in the literature as well.[107] However, as will be shown below, it can certainly be questioned what value can be given to a statement by the OECD in regard to the legal status of one of its own publications. Here follows a quote of the Recommendation of the OECD Council:

> *" The Council /…/*
>
> *I. Recommends the Governments of Member countries:*
> *1. to pursue their efforts to conclude bilateral tax conventions on income and on capital with those Member countries, and where appropriate with non-Member countries, with which they have not yet entered into such conventions, and to revise those of the existing conventions that may no longer reflect present-day needs;*
>
> *2. when concluding new bilateral conventions or revising existing bilateral conventions, to conform to the Model Tax Convention, as interpreted by the Commentaries thereon;*
>
> *3. that their tax administrations follow the Commentaries on the Articles of the Model Tax Convention, as modified from time to time, when applying and interpreting the provisions of their bilateral conventions that are based on these Articles.[108]"*

The tax administrations in the OECD MS are recommended by the OECD to use the OECD Commentary when interpreting bilateral treaties in force. Furthermore, the tax administrations are recommended to follow changes made in the OECD Commentary. However, it must be emphasised that this is merely a recommendation issued by the OECD itself on the legal value of the OECD MTC and its Commentary. The addressees in this case is the governments of the OECD MS. Furthermore, it must be stressed that it is explicitly stated that this is only a recommendation to the governments of the OECD MS and not a binding legal source. It must be noted that a distinction must be made between the OECD Commentary in its original version[109] and the OECD Commentary after changes made in it.[110]

The OECD MS are recommended, "to pursue their efforts to conclude bilateral tax conventions on income and on capital" with other OECD MS.[111] Furthermore, the OECD MS are recommended to follow the OECD MTC when revising or negotiating new bilateral treaties. The national tax administrations are also recommended to follow the OECD Commentaries, as modified from to time to time, in the application of the provisions in the bilateral treaties concluded by the state in question. The core of this recommendation is that the OECD MS should follow the OECD Commentary and also changes made in it.

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[107] Dahlberg, Mattias, *Vilket rättskällevärde har kommentaren till OECD:s modellavtal?*, i Festskrift till Gustaf Lindencrona, p 143.
[108] This follows by paragraph 3 OECD Introduction.
[109] Here I refer to the version of the OECD Commentary upon conclusion of the OECD MTC.
[110] Here I refer to all the changes made to the OECD Commentary and not only changes made in it due to the OECD Report.
[111] See Recommendation I:1.

It must be noted that it is a question of a statement made by the OECD itself in regard of the legal status of the OECD Commentary and changes made in it. This statement should be given subordinated importance. The important issue in treaty interpretation regarding the status of the OECD MTC and the OECD Commentary is what legal status can be given to these sources according to the VCLT and not what legal value is given to these sources according to the OECD itself.

Both Vogel and Dahlberg support the view that the OECD Commentary and changes made in it are not binding upon the OECD MS.[112] According to Dahlberg, the OECD Commentary alone cannot be seen as a binding legal source upon the OECD MS. Furthermore, the OECD Commentary cannot have such great importance that a question of interpretation could be settled only by reference to the OECD Commentary.[113] Vogel is of the opinion that it can be presumed that the OECD MS wanted to follow the OECD MTC and its Commentary.[114] Furthermore, Vogel states that it would not be necessary for the OECD MS to issue affirmations in the form of reservations and observations if the recommendations merely obliged the OECD MS "to examine whether the recommendation was appropriate.[115] However, both Vogel and Dahlborg agree upon the fact that the Recommendation itself is only a recommendation and not legally binding for the OECD MS.[116]

4.3 The Introduction to the OECD MTC and Commentaries

In the OECD Introduction, the OECD makes several statements in relation to what legal status the OECD Commentary shall have upon tax treaty interpretation. The purpose of the OECD Commentary is to explain and interpret the articles.[117] The OECD Commentary has been formulated and approved by experts that have been appointed by the governments of the OECD MS to be a part of the CFA. Due to this the OECD Commentary is of special importance in the development of international fiscal law.[118] The importance is laid down by the OECD Commentaries themselves in paragraph 29 OECD Introduction:

> *"As the Commentaries have been drafted and agreed upon by the experts appointed to the Committee on Fiscal Affairs by the Governments of Member countries, they are of special importance in the development of international fiscal law. Although the Commentaries are not designed to be annexed in any manner to the conventions signed by Member countries, which unlike the Model are legally binding international instruments, they can nevertheless be of great assistance in the application and interpretation of the conventions and, in particular, in the settlement of any disputes."*

This paragraph has been interpreted in different ways in the literature. Dahlberg states that the statement in paragraph 29 OECD Introduction merely confirms the common

[112] Dahlberg, Mattias, *Vilket rättskällevärde har kommentaren till OECD:s modellavtal?*, i Festskrift till Gustaf Lindencrona, p 143.
[113] Dahlberg, Mattias, *Vilket rättskällevärde har kommentaren till OECD:s modellavtal?*, i Festskrift till Gustaf Lindencrona, p 143.
[114] Vogel, Klaus, *Klaus Vogel on Double Tax Conventions*, no 80.
[115] Vogel, Klaus, *Klaus Vogel on Double Tax Conventions*, no 80.
[116] Dahlberg, Mattias, *Vilket rättskällevärde har kommentaren till OECD:s modellavtal?*, i Festskrift till Gustaf Lindencrona, p 143 as well as Vogel, Klaus, *Klaus Vogel on Double Tax Conventions*, no 80.
[117] Paragraph 28 OECD Introduction.
[118] Paragraph 29 OECD Introduction.

view that the OECD Commentary is of great importance when interpreting double tax treaties.[119] Furthermore, it is said that this paragraph only clarifies the fact that the OECD Commentary alone is not a binding legal instrument.[120] Another author states that it is unlikely to believe that states intended the OECD Commentary to merely be a supplementary means of interpretation.[121]

According to paragraph 28 OECD Introduction, the purpose of the OECD Commentary is to explain and interpret the articles. The OECD Commentary is not designed to be annexed to the treaty itself. This implies that the OECD Commentary is not binding upon the OECD MS. However, it is stated that the OECD Commentary is of special importance and should be taken into account when interpreting the OECD MTC. Furthermore, the OECD Commentary shall be used in order to settle future disputes. In paragraph 35 OECD Introduction, it is stated that "changes or amendments to the Commentaries are normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD member countries as to the proper interpretation of existing provisions and their application to specific situations". This would be an argument in favour of the fact that the changes made in the OECD Commentary are part of the common intention of the parties.

The opinion of the OECD itself in relation to the legal status of its own documentation is of subordinate importance. This is due to the fact that it is the legal status of the OECD Commentary according to the VCLT that is important. The present legal situation should be interpreted in such a way that the treaty itself is used in order to find an independent meaning for a certain provision. Thereafter the OECD Commentary shall be applied in order to confirm that meaning or settle ambiguities or obscurities.[122] Furthermore, Avery Jones states that due to the amount of work that goes into the making and changing of the Commentary, it can be presumed that the OECD Commentary has extensive legal value in the interpretation procedure.[123] Here, it is important to note that Avery Jones relates to bilateral treaties negotiated and formulated before changes made in the OECD Commentary.[124]

Vogel states that although the OECD Commentary may not be binding upon the OECD MS, they constitute a "soft obligation" and that the Recommendation "generates a loose legal duty, but a legal duty nonetheless".[125] Due to the fact that the observations and reservations can be issued in relation to the original version of the OECD Commentary such a soft obligation might only be at hand in relation to the OECD Commentary in its original version. By a soft obligation, Vogel means that due to the fact that the OECD MS issue reservations and observations, the OECD MS indirectly state that the OECD Commentary is not legally binding as such but is indirectly legally

[119] Dahlberg, Mattias, *Vilket rättskällevärde har kommentaren till OECD:s modellavtal?*, i Festskrift till Gustaf Lindencrona, p 144.
[120] Dahlberg, Mattias, *Vilket rättskällevärde har kommentaren till OECD:s modellavtal?*, i Festskrift till Gustaf Lindencrona, p 144.
[121] Avery Jones, John F, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, in March 2002 Bulletin, 2002 International Bureau of Fiscal Documentation, p 102 f.
[122] Avery Jones, John F, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, in March 2002 Bulletin, 2002 International Bureau of Fiscal Documentation, p 103.
[123] Avery Jones, John F, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, in March 2002 Bulletin, 2002 International Bureau of Fiscal Documentation, p 103.
[124] Avery Jones, John F, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, in March 2002 Bulletin, 2002 International Bureau of Fiscal Documentation, p 103.
[125] Vogel, Klaus, *Klaus Vogel on Double Taxation Conventions*, no 80.

binding due to its importance in the eyes of the OECD MS.[126] Consequently, in Vogel's view, it can be derived from the Recommendation that the OECD MTC must be applied unless the OECD MS has entered into original reservations.[127] Dahlberg supports Vogel's view of the existence of a "soft obligation" for the OECD MS to follow the OECD Commentary.[128]

My opinion in this regard is that the OECD Commentary, in its original version, is of great importance throughout the interpretation procedure although not binding upon the OECD MS. This is due to the fact that the OECD MS tend to give the OECD Commentary great importance and also there is the fact that the OECD MS by issuing reservations and observations give the OECD Commentary great importance. However, there is no evidence for the fact that the OECD Commentary is legally binding upon the OECD MS. In this regard, it should be pointed out that it has not been analysed whether the OECD Commentary can be used as a legal means of interpretation according to the VCLT.

Due to the fact that the OECD Commentary in its original version is not legally binding upon the OECD MS, it might not be possible to arrive at another conclusion than the fact that changes made in the OECD Commentary is not legally binding either. This would be due to the fact that if a legal document in its original version is not legally binding, changes made to it would not be binding either. However, a distinction must be made between bilateral treaties put into force before the changes made and bilateral treaties put into force after the changes in question. This is due to the fact that in the case of a bilateral treaty concluded after changes made in the OECD MTC the parties to the bilateral treaty in question would, if the argument above would be followed, be obliged to issue reservations or observations in order not to be bound by the OECD Commentary and the changes made to it.

It is still questionable if the OECD Commentary, in any version, is legally binding upon the OECD MS. In my opinion, this is not the case. The fact that the OECD MS can issue reservations and observations in the case they do not agree with a provision or a change in the OECD MTC or OECD Commentary does not make the OECD MTC or the OECD Commentary in any version legally binding upon the OECD MS. My interpretation of the OECD Introduction is that the OECD Commentary is not part of the OECD MTC itself and therefore not a legally binding upon the OECD MS. This is due to the wording of paragraph 29 OECD Introduction.[129] However, it must once again be emphasised that this does not mean that the OECD Commentary and changes made to it might be a legal means of interpretation according to the rules in the VCLT.

4.4 Bilateral treaties not in accordance with the OECD MTC

4.4.1 Introduction

In this section, an analysis of whether the OECD Commentary and changes made to it can be used as a legal means of interpretation when interpreting a bilateral treaty that is

[126] Vogel, Klaus, *Klaus Vogel on Double Taxation Conventions*, no 80.
[127] Vogel, Klaus, *Klaus Vogel on Double Taxation Conventions*, no 80.
[128] Dahlberg, Mattias, *Svensk skatteavtalspolitik och utländska basbolag*, p 91.
[129] See paragraph 29: "Although the Commentaries are not designed to be annexed in any manner to the conventions signed by the Member countries, which unlike the Model are legally binding international instruments [---]".

not in accordance with the OECD MTC according to the VCLT takes place. In relation to bilateral treaties not in accordance with the OECD MTC it is not necessary to make a distinction between treaties concluded before changes made in the OECD Commentary and treaties concluded after changes made in the OECD Commentary. This is due to the fact that the very core in this section of the analysis is to analyse whether the OECD Commentary, in any version (i e either before or after changes made to it) can be used as a legal means of interpretation according to the VCLT although the bilateral treaty in question is not in accordance with the OECD MTC.

4.4.2 Analysis

4.4.2.1 Article 31

The very core of treaty interpretation is a search for the common intention of the parties. This is due to the fact that there is a direct reference in the wording of article 31 VCLT to the common intention of the parties. The first criterion in article 31.1 VCLT is that of good faith. It is the good faith of the contracting parties that is meant. This is due to the fact that there is a direct reference in the wording of article 31.1 VCLT to the common intention of the parties and the principle of pacta sunt servanda is closely linked to this paragraph.

There are examples of statements made by the OECD, that the OECD Commentary should be part of the good faith of the contracting parties.[130] Arguments in favour of the fact that the OECD Commentary in any version is part of the good faith of the contracting parties are at hand. The essence of the OECD Introduction gives the reader the impression that the CFA is of the opinion that the OECD Commentary shall be part of the good faith. Although there are arguments in favour of the fact that the OECD Commentary falls within the definition of good faith, it can be questioned whether the OECD Commentary falls within the good faith of the contracting parties.

In this section, bilateral treaties not in accordance with the OECD MTC is discussed and analysed. In my opinion the fact that the parties to the bilateral treaty in question have chosen not to follow the OECD MTC speaks for the fact that the OECD Commentary in any version does not fall within the good faith of the contracting parties or the common intention of the parties. Consequently, I am of the opinion that the OECD Commentary in any version can probably not be used as a legal means of interpretation by reference to article 31.1 VCLT.

Furthermore, the ordinary meaning shall be given to the terms of a treaty (article 31.1 VCLT). The ordinary meaning of a treaty provision is related to the meaning of the word or phrase upon conclusion of the treaty. This is due to the fact that according to article 31 VCLT the common intention of the parties must always be taken into account when dealing with treaty interpretation.[131] It seems unlikely that the ordinary meaning of a provision of a bilateral treaty not in accordance with the OECD MTC can be established by reading the OECD Commentary in any version since the bilateral treaty is not formulated in accordance with the OECD MTC. The ordinary meaning should instead be established by a search for the actual wording of the provision in question. The common intention of the parties must also be taken into account in the search for the ordinary meaning. My opinion is that it seems unlikely that

[130] See for example paragraph 35 OECD Introduction.
[131] This follows from the actual wording of article 31.

it is the common intention of the parties to use the OECD Commentary in any version when establishing the ordinary meaning of a treaty provision. The OECD Commentary in any version should therefore, in my opinion, not be used as a legal means of interpretation by reference to the ordinary meaning as defined in article 31.1 VCLT.

The next criterion in article 31.1 VCLT is that of the object and purpose. The object and purpose of a bilateral treaty is stated in the treaty itself and consequently, the interpreter must begin by looking at the object and purpose as stated in the treaty in question. In the case where a bilateral treaty has several objects and purposes the first issue at hand must be to look at the common intention of the parties in order to establish one single object and purpose. It is significant that the common intention of the parties is taken into account since this is stated explicitly in article 31.1 VCLT. In the case that the object and purpose of a bilateral treaty is the avoidance of double taxation (which is also the object and purpose of the OECD MTC, see paragraphs 1-3 OECD Introduction), it could be argued that due to the fact that both treaties have similar objects and purposes it might be possible to use the OECD Commentary as a legal means of interpretation.

The common intention of the parties must always be taken into account and since the bilateral treaties are not in accordance with the OECD MTC, I am of the opinion that the OECD MTC and the OECD Commentary in any version falls outside the common intention of the parties. This is due to the fact that the bilateral treaty does not correlate with the provisions in the OECD MTC. Therefore, my opinion is that the OECD Commentary in any version should not be used as a legal means of interpretation by reference to the object and purpose as defined in article 31.1 VCLT.

When interpreting a bilateral treaty the context shall also be taken into account (article 31.2 VCLT). This means that a treaty shall be read as whole since it is not possible to only concentrate on a paragraph, an article or one part of the treaty.[132] For example, the preamble of a bilateral treaty or an explanatory report to a bilateral treaty can be used as a legal means of interpretation by reference to the definition of the context in article 31.2 VCLT. In my opinion, it is probably not possible to state that the OECD Commentary in any version can be seen as being part of the context to a bilateral treaty not in accordance with the OECD MTC. This is due to the fact the OECD MTC or the OECD Commentary in any version is not part of the common intention of the parties.

Article 31.3 VCLT states three additional alternatives for treaty interpretation. The first criterion is subsequent agreements (article 31.3 (a)). This criterion means that the parties to a bilateral treaty are given the right to alter a previous application of a specific treaty provision. In order to constitute a subsequent agreement within the meaning of article 31.3 (a) VCLT, the document in question require a procedure identical to the one used to enforce the bilateral treaty in question. Therefore, in order for the OECD Commentary in any version to fall within the definition of a subsequent agreement, according to article 31.3 (a) VCLT, it is necessary that the OECD Commentary in any version be accepted by both contracting parties in accordance with the procedure used to incorporate the bilateral treaty in question. This is not the case and the OECD Commentary in any version could not on this ground be used as a legal means of interpretation.

According to article 31.3 (b) VCLT certain subsequent practice shall be taken into account in the interpretation procedure. The article only covers certain forms of

[132] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 127 and Yasseen, *L'interprétation des traits d'après la Convention de Vienne sur le Droit des Traités*, p 151.

subsequent practice, which is to say concordant subsequent practice common to all parties involved. The OECD Commentary and/or changes made in it could only constitute subsequent practice if all contracting parties commonly use the OECD Commentary and/or changes made in it when interpreting the bilateral treaty in question. In my view, this would be unlikely since in these cases the bilateral treaty in question is not similar to the OECD MTC.

International law in force at the time of interpretation shall be used in order to come to a correct ruling (article 31.3 (c) VCLT). This is due to the fact that if changes and developments in international law were not taken into account, subsequent practises might be disregarded from and the results might be absurd or unreasonable. However, the OECD Commentary in any version is not part of international law since it is not a binding legal instrument. Therefore, it is unlikely that the OECD Commentary in any version could fall within this category. Furthermore, the OECD Commentary in any version, in my view, does not fall within the common intention of the parties and therefore cannot be a legal means of interpretation according to article 31.3 (c) VCLT.

Article 31.4 VCLT states that "a special meaning shall be given to a term if it is established that the parties so intended". From the actual wording of article 31.4 VCLT it is evident that a special meaning require that the special meaning expresses the common intention of the parties. In my view, it would be quite difficult to say that the OECD Commentary in any version is part of the common intention of the parties since the parties to the bilateral treaty in question have chosen not to build the treaty in question on the OECD MTC. However, if it can be established that all contracting parties intended to use the OECD Commentary in order to establish a special meaning it would be possible to use the OECD Commentary. My view, though, is that the OECD Commentary does not express the common intention of the parties. This is due to the fact that the contracting parties have chosen not to build the bilateral treaty in question on the OECD MTC.

4.4.2.2 Article 32

According to article 32 VCLT preparatory works to a bilateral treaty can be used in certain circumstances. The wording of article 32 VCLT indicates that it is only materials written upon conclusion of the treaty in question that can constitute supplementary means of interpretation. It has been argued that the OECD Commentary is at least a supplementary means of interpretation, which can be used for example in order to confirm the ordinary meaning of a treaty.[133] However, such statements have been made in relation to bilateral treaties in accordance with the OECD MTC. My opinion though, is that the OECD Commentary in any version could not be labelled as preparatory work in relation to bilateral treaties not in accordance with the OECD MTC.

Furthermore, it should be noted that article 32 VCLT states that it is only preparatory work of the bilateral treaty in question that is of importance. The OECD Commentary in any version is probably not a preparatory work of the bilateral treaty in question but merely a preparatory work or supplementary means of interpretation in relation to the OECD MTC. Avery Jones states that a commentary made after a treaty is concluded cannot form part of the intention of the treaty negotiators or be an agreement made in

[133] Avery Jones, John F, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, in March 2002 Bulletin, p 102.

connection with the conclusion of the treaty.[134] This argument can be used in relation to a bilateral treaty not in accordance with the OECD MTC. Due to the fact that the bilateral treaty in question is not in accordance with the OECD MTC the OECD Commentary probably falls outside the intention of the parties. My view is that the OECD Commentary is not within the common intention of the parties to a bilateral treaty not in accordance with the OECD MTC. Consequently, the OECD Commentary should not fall within the definition of preparatory works of a bilateral treaty according to article 32 VCLT.

4.4.3 Conclusion

The starting point for treaty interpretation is, according to article 31 VCLT, to establish the common intention of the parties. In my opinion, the OECD MTC and its Commentary (in any version) falls outside the common intention of the parties to a bilateral treaty not in accordance with the OECD MTC. This is due to the fact that the parties to such a bilateral treaty have chosen to negotiate and formulate a bilateral treaty with a different formulation than the OECD MTC. Although it is my view that the OECD Commentary in any version should not be used as a legal means of interpretation by reference to article 31 VCLT it is possible that the OECD Commentary in any version to fall within the definition of supplementary means of interpretation as defined in article 32 VCLT. In my view it seems unlikely that the OECD Commentary can be used as a legal means of interpretation by reference to article 32 VCLT. This is due to the fact it is unlikely that the OECD Commentary in any version can be of any assistance in the search to establish a correct interpretation of a treaty provision.

4.5 Bilateral treaties in accordance with the OECD MTC

4.5.1 Introduction

In this section, an analysis of whether the OECD Commentary and changes made to it can be used as a legal means of interpretation according to the VCLT when interpreting a bilateral treaty in accordance with the OECD MTC takes place. A bilateral treaty in accordance with the OECD MTC is a bilateral treaty, which articles correlate with the articles in the OECD MTC. In relation to these bilateral treaties, it is necessary to make a distinction between bilateral treaties concluded before changes in the OECD Commentary (static treaty interpretation) and bilateral treaties concluded after changes made in the OECD Commentary (ambulatory treaty interpretation). This is due to the fact that, after studying articles 31-32 VCLT and the literature, it has become evident that the arguments and also the results will not be similar for both static and ambulatory treaty interpretation.

[134] Avery Jones, John F, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, in March 2002 Bulletin, p 103.

4.5.2 Bilateral treaties in accordance with the OECD concluded before changes made in the OECD Commentary

4.5.2.1 Introduction

In this section it will be analysed whether the changes made in the OECD Commentary due to the OECD Report can be used as a legal means of interpretation according to the VCLT when interpreting a bilateral treaty concluded before changes were made in the OECD Commentary. When I refer to the OECD Commentary solely, I mean the OECD Commentary as it is after changes being made due to the OECD Report. The same structure as in chapter 3 has been chosen. It is my opinion that this will enhance the understanding for the reader.

4.5.2.2 Article 31.1

The very core of article 31 VCLT is the establishing of the common intention of the parties. Therefore, the OECD Commentary can only be used as a legal means of interpretation if the OECD Commentary is part of the common intention of the parties. If the parties to a bilateral treaty have chosen to base the bilateral treaty in question on the OECD MTC, it can be argued that the common intention of the parties includes the application of the OECD Commentary (as it was at the time of the conclusion of the bilateral treaty) in the interpretation procedure. This is due to the fact that the parties have chosen to base the treaty on the OECD MTC. In these cases, I am of the opinion that the OECD Commentary and changes made in it until the date of conclusion of the bilateral treaty is part of the common intention of the parties. Consequently, the OECD Commentary could be used as a legal means of interpretation in the mentioned situations according to the article 31 VCLT.

However, in cases the changes made in the OECD Commentary do not fall within the common intention of the parties, the changes could probably not be used when establishing the ordinary meaning of a treaty provision. This is due to the fact that if the changes do not fall within the common intention of the parties the interpretation would be contrary to article 31 VCLT since this criterion is the most essential one when interpreting a treaty provision. This situation might arise if the parties to the bilateral treaty in question expressed the opinion that certain changes in the OECD Commentary are not in accordance with the opinions of the parties.

There are examples of statements made by the OECD that the OECD Commentary should be part of the good faith of the contracting parties.[135] The essence of the OECD Introduction gives the reader the impression that the CFA is of the opinion that the OECD Commentary shall be part of the good faith of the contracting parties. Although such statements shall be considered with caution, there are indications of the fact that the OECD Commentary is part of the good faith of the contracting parties. It seems as though it is not possible to settle whether the OECD Commentary and changes made to it are part of the common intention of the parties. However, there are cases, in my opinion, where it could be argued that the OECD Commentary and changes made in it are in fact part of the common intention of the parties. My further analysis in relation to this type of bilateral treaties will be done in the light of the fact that it can be the

[135] See for example paragraph 35 OECD Introduction.

common intention of the parties to use the OECD Commentary and changes made in it in the interpretation procedure.

The fact that extensive amount of work goes into the making and changing of the OECD Commentary speaks for the fact that it can be presumed that the OECD Commentary has a legal status in the interpretation procedure.[136] My view is that the OECD Commentary does not constitute a legal obligation for the OECD MS to follow the OECD Commentary. This is due to the fact that I have not found any legal support for this fact. Although the OECD Commentary is not legally binding upon the OECD MS, it is part of the good faith of the contracting parties. This is due to the fact that it can be argued that it is part of the common intention of the parties to include the OECD Commentary and changes made in it part of the interpretation procedure.

When interpreting a bilateral treaty, significance shall be given to the ordinary meaning of a provision (article 31.1 VCLT). It is established that the ordinary meaning of a provision in a treaty is related to the meaning of the word or phrase upon conclusion of the treaty. Therefore, it seems unlikely that changes made in the OECD Commentary falls within the ordinary meaning. This is due to the fact that the changes were made after the conclusion of the bilateral treaty in question.

Avery Jones and Vogel put forward arguments of the existence of "soft obligations and that the use of the OECD Commentary in the interpretation would constitute such a soft obligation.[137] A soft obligation means that although the OECD Commentary is not legally binding upon the OECD MS there is "a legal duty nonetheless" to follow the OECD Commentary.[138] The main argument put forward for the existence of a soft obligation is the fact that the OECD MS issue reservations and observations. This fact shows that the OECD MS indirectly state that the OECD Commentary is not legally binding as such but is indirectly legally binding due to its importance in the eyes of the OECD MS.[139] The main difference between a real obligation and a "soft obligation" is the fact that a real obligation has legal support and therefore the obligation becomes legally binding upon the parties involved. The OECD MS might feel that they have an ethical obligation to follow the changes made in the OECD Commentary. However, an ethical obligation as well as a soft obligation can never establish a legal obligation for the OECD MS to follow the OECD Commentary and changes made to it.

If the arguments in relation to a soft or ethical obligation are used the OECD Commentary and changes made to it could be used by reference to the ordinary meaning as defined in article 31.1 VCLT. However, I am of the opinion that this reasoning fails on one major requirement, namely that the ordinary meaning of a treaty provision (as concluded in chapter 3.2.5 above) is related to the meaning of a treaty provision upon conclusion of the bilateral treaty in question. Therefore, it is my opinion that the OECD Commentary and changes made to it should not be used as a legal means of interpretation by reference to the ordinary meaning in article 31.1 VCLT. This is due to the fact that the changes in the OECD Commentary were made after the conclusion of the bilateral treaty.

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[136] For support see Avery Jones, John F, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, in March 2002 Bulletin, 2002 International Bureau of Fiscal Documentation, p 103 and Vogel, Klaus, *Klaus Vogel on Double Taxation Conventions*, no 80.

[137] For support see Avery Jones, John F, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, in March 2002 Bulletin, 2002 International Bureau of Fiscal Documentation, p 103 and Vogel, Klaus, *Klaus Vogel on Double Taxation Conventions*, no 80.

[138] Vogel, Klaus, *Klaus Vogel on Double Taxation Conventions*, no 80.

[139] Vogel, Klaus, *Klaus Vogel on Double Taxation Conventions*, no 80.

According to article 31.1 VCLT the object and purpose of a bilateral treaty shall be taken into account in the interpretation procedure. If the object and the purpose of the bilateral treaty in question correlate with the object and purpose of the OECD MTC it could be argued that the OECD Commentary with its changes could be used as a legal means of interpretation. Please note that this argument is only applicable to situations where the object and purpose of the bilateral treaty in question correlate with the object and purpose of the OECD MTC. Take for example the Nordic Tax Treaty, in which it is stated that the object and purpose is to "avoid double taxation".[140] The purpose of the OECD MTC is to remove "obstacles that double taxation presents to the development of economic relations between countries".[141] In this case it might be argued that the OECD MTC and consequently, the OECD Commentary could be used as a legal means of interpretation due to the fact that the objects and purposes of the two bilateral treaties correspond with each other.

However, it is not certain that it is possible to interpret article 31.1 VCLT. This is due to the fact that simply because the objects and purposes correlates it is not certain that the use of the OECD Commentary were part of the common intention of the parties. The search for the object and purpose of a treaty is by definition a search for the common intentions of the parties who drew up the treaty.[142] This leads to the fact that if the OECD Commentary does not fall within the common intention of the parties it might not be possible to argue for the fact that the OECD Commentary could not be used as a legal means of interpretation according to article 31.1 VCLT.

4.5.2.3 Article 31.2

According to article 31.2 VCLT the context shall also be taken into account when interpreting a bilateral treaty. In the literature, the prevailing view is that the OECD Commentary in its original version is part of the context of the treaty.[143] I support this view, due to the fact that the OECD Commentary in its original version was written upon the conclusion of the bilateral treaties in question and consequently, falls both within the common intention of the parties and the context to the bilateral treaty. This is due to the fact that the contracting parties have chosen to formulate the bilateral treaty in accordance with the OECD MTC. It is likely that the contracting parties intended to include the OECD MTC and also the OECD Commentary in the context of the bilateral treaty in question. This view is supported by Avery Jones, who states that it would be presumably to "say that, in the absence of an observation, they (the OECD MS) intended the treaty to be interpreted in accordance with the Commentaries, which is equivalent to giving the Commentaries the status of the context or a special meaning".[144]

In relation to the context, it is interesting to put forward arguments that the OECD Commentary in any version could be compared to an explanatory report. According to Sinclair, an explanatory report, which was written upon conclusion of the treaty, shall

[140] Article 1 the Nordic Tax Treaty.
[141] Paragraph 1 OECD Introduction.
[142] Degan, *L'interprétation des accords en droit international*, p 13. This becomes evident also by reading the actual wording in article 31.
[143] See Lang, Michael, *The Application of the OECD Model Tax Convention to Partnerships*, p 16 and Vogel, Klaus, *Klaus Vogel on Double Taxation Conventions*, marg no 82 a.
[144] Avery Jones, John F, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, in March 2002 Bulletin, p 103.

be considered to be a legal means of interpretation and fall within the definition of the context.[145] This would make it possible to use the original version of the OECD Commentary as a legal means of interpretation. This is due to the fact that the OECD Commentary, in my opinion, can be compared to an explanatory report since the OECD Commentary was written in a similar way as an explanatory report.

It is essential that the agreement or instrument is related to the treaty in order to fall within the context of a bilateral treaty. Furthermore, it must be concerned with the substance of the treaty and clarify certain concepts in the treaty or limit its field of application and also have been drawn up on the occasion of conclusion of the treaty.[146] It is probably not necessary that the document is in any way annexed to the actual bilateral treaty. Therefore, it might be possible for the OECD Commentary and changes made in it to fall within the context of the bilateral treaty in question. However, it can be argued that it is only texts or documents relating to the bilateral treaty in question that should be considered to be part of the context of a treaty and not documents such as the OECD Commentary that is a document relating to another treaty.

My opinion is that the OECD Commentary in its original version is part of the context of the bilateral treaty. This is due to the fact that the OECD Commentary in its original version can be used in order to establish the meaning of a provision in the bilateral treaty in question. However, changes made in the OECD Commentary probably fall outside the context of the bilateral treaty. This is due to the fact that the changes have been made after the conclusion of the contract and the context of a bilateral treaty should be established upon conclusion of the bilateral treaty.

4.5.2.4 Article 31.3

Subsequent agreements can also be used as a legal means of interpretation according to article 31.3 (a) VCLT. In order to constitute a subsequent agreement within the meaning of article 31.3 (a) VCLT, the document in question require a procedure identical to the one used to enforce the bilateral treaty in question, including a parliamentary approval.[147] The OECD MTC or the OECD Commentary has not been incorporated into the domestic laws of the OECD MS according to the proper procedure for incorporating a bilateral treaty. However, the bilateral treaty in question is part of the domestic laws of the contracting states but since the OECD MTC or the OECD Commentary are not incorporated in the same manner they do not constitute a subsequent agreement as defined in article 31.3 (a) VCLT. Consequently, it is my opinion that the OECD Commentary cannot be used as a legal means of interpretation according to article 31.3 (a) VCLT.

Article 31.3 (b) VCLT does not cover subsequent practice in general. It only covers a specific form of subsequent practice, which is to say concordant subsequent practice common to all parties involved. This leads me to believe that the OECD Commentary and changes made in it could be used as a legal means of interpretation if both contracting parties have used the OECD Commentary in the interpretation of the bilateral treaty in question. This is due to the fact that if the criterions laid down in article 31.3 (b) VCLT are fulfilled the OECD Commentary would be a legal means of

[145] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 129 f.
[146] Yasseen, *L'interprétation des traits d'après la Convention de Vienne sur le Droit des Traités*, p 37.
[147] Vogel, Klaus, *The Influence of the OECD Commentaries on Treaty Interpretation*, in December 2000 Bulletin, p 614.

interpretation according to the mentioned article. However the OECD Commentary must have been used over a long period of time and on several occasion, i e the subsequent practise must be concordant, common and consistent. My opinion is that the OECD Commentary can constitute subsequent practise in cases where both contracting parties have used the OECD Commentary when interpreting the provisions in the bilateral treaty in question. This is due to the fact that in such cases the OECD Commentary falls within the definition of subsequent practise laid down in article 31.3 (b) VCLT.

According to article 31.3 (c) VCLT relevant rules of international law in force at the time of interpretation shall be used in the interpretation procedure. This is due to the fact that changes and developments in international law shall be taken into account so that absurd and unreasonable results can be avoided. In my opinion the OECD Commentary in any version is not legally binding since there is no evidence for the fact that the OECD MS are bound by what is written in the OECD Commentary. Due to this the OECD Commentary is not part of international law since it is not a binding instrument.

4.5.2.5 Article 31.4

Article 31.4 VCLT states that "a special meaning can be given to a word or phrase if the parties so intended". The reference to the common intention of the parties means that a special meaning can probably be given to the OECD Commentary in its original version since this was written upon the conclusion of the bilateral treaty. Avery Jones supports this view.[148] Furthermore, from paragraph 29 OECD Introduction, it is possible to draw the conclusion that the original version of the OECD Commentary falls within the concept of special meaning.[149] It must be stressed that the fact that OECD itself has made such a statement is not sufficient for the fact that the OECD Commentary falls within the concept of special meaning in article 31.4 VCLT. This is due to the fact that it is not the position of the OECD itself on the issue whether the OECD Commentary falls within the concept of the special meaning that is of importance.

Changes made in the OECD Commentary might be used in order to give a word or a phrase a special meaning. However, this is only the case if it was the common intention of the parties. If it can be established that the parties intended to use the OECD Commentary in its original version and future changes made in the OECD Commentary, the changes could be a legal means of interpretation according to article 31.4 VCLT. This is mostly due to the fact that it would then be the common intention of the parties to use changes in the interpretation of a specific bilateral treaty.

My opinion is that the OECD Commentary and changes made in it do not fall within the concept of special meaning as defined in article 31.4 VCLT. This is due to the fact that changes made fall outside the common intention of the parties. Since article 31.4 VCLT build upon this fundamental principle changes made in the OECD Commentary could probably not be used as a legal means of interpretation according to article 31.4 VCLT.

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[148] Avery Jones, John F, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, in March 2002 Bulletin, p 103.

[149] This view is supported by Avery Jones, John F, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, in March 2002 Bulletin, p 102 and Lang, Michael, *The Application of the OECD Model Tax Convention to Partnerships*, p 16.

4.5.2.6 Article 32

The preparatory works in relation to international law shall be used in the interpretation procedure. However, some restrictions to this statement should be made. The main purpose of preparatory works is to assist the interpreter in the interpretation procedure as a whole and not only as a reference in certain pre-determined situations.

In paragraph 29 OECD Introduction, it is stated that the Commentary shall "be of great assistance in the application and interpretation of the conventions and, in particular, in the settlement of any disputes". On the basis of this paragraph several authors have expressed the view that the Commentary shall be a supplementary means of interpretation as defined in article 32 VCLT.[150] However, it must be stressed that the opinion of the OECD is of subordinate importance in regard to what shall be considered to be a supplementary means of interpretation within the meaning of article 32 VCLT. The wording of article 32 VCLT means that supplementary means of interpretation can only be taken into account in very rare situations.[151] Furthermore, the wording of article 32 VCLT indicates that it is only materials written upon conclusion of the treaty that can constitute supplementary means of interpretation

An exhaustive list of what is meant by supplementary means of interpretation is not given in article 32 VCLT. However, the article does state that the preparatory works related to the treaty that was written upon conclusion of the treaty shall be taken into account. My opinion is that the wording in article 32 VCLT gives support to consider the OECD Commentary in its original version as a supplementary means of interpretation as defined in article 32 VCLT. This is due to the fact that it is stated in article 32 VCLT that preparatory works in relation to the treaty written upon the conclusion of the treaty shall be taken into account. Since the bilateral treaty is formulated as the OECD MTC it can be presumed that the OECD Commentary in its original version could be used as a preparatory work to the bilateral treaty in question.

Changes made in the OECD Commentary could, in my view, be used, as preparatory works as long as the changes made are part of the common intention of the parties. If the common intention of the parties was disregarded from the interpretation would be contrary to article 31 VCLT. My opinion is that the OECD Commentary and changes made to it do fall within the definition of a supplementary means of interpretation as defined in article 32 VCLT. This is due to the fact that the OECD Commentary and changes made to it are part of the preparatory works of the bilateral treaty in question as long as it is part of the common intention of the parties.

4.5.2.7 Conclusion

The OECD Commentary can only be used as a legal means of interpretation if the OECD Commentary is part of the common intention of the parties. I am of the opinion that the OECD Commentary and changes made in it until the date of conclusion of the bilateral treaty is part of the common intention of the parties. However, in cases the

[150] Dahlberg, Mattias, *Vilket rättsvärde har kommentaren till OECD:s modellavtal*, i Festskrift till Gustaf Lindencrona, p 144 and Vogel, Klaus, *The Influence of the OECD Commentaries on Treaty Interpretation*, in December 2000 Bulletin, p 614.

[151] See the wording of article 32 VCLT: "when the interpretation according to article 31 a) leaves the meaning ambiguous or obscure; or b) leads to a result which is manifestly absurd or unreasonable".

changes made in the OECD Commentary do not fall within the common intention of the parties, the changes could probably not be used to establish the ordinary meaning of a treaty provision. This is due to the fact that if the changes do not fall within the common intention of the parties the interpretation would be contrary to article 31 VCLT.

My opinion is that the changes made in the OECD Commentary could be used as a legal means of interpretation according to article 31 VCLT if it is the common intention of the parties that changes made in the OECD Commentary should be used in the interpretation procedure. This is due to the fact that changes made in the OECD Commentary falls within the good faith of the contracting parties to the bilateral treaty in question. Changes made in the OECD Commentary falls, in my opinion, outside the concept of the other requirements in article 31 VCLT. This is due to the fact that these requirements all make a reference to the time of the conclusion of the treaty in question. Therefore, it is only the version of the OECD Commentary at the conclusion of the bilateral treaty in question that could be used.

Changes made in the OECD Commentary could, in my view, be used, as preparatory works as long as the changes made are part of the common intention of the parties. If the common intention of the parties is disregarded from the interpretation would be contrary to article 31 VCLT. My opinion is that the OECD Commentary and changes made to it do fall within the definition of a supplementary means of interpretation as defined in article 32 VCLT. This is due to the fact that the OECD Commentary and changes made to it are part of the preparatory works of the bilateral treaty in question as long as it is part of the common intention of the parties.

4.5.3 Bilateral treaties in accordance with the OECD concluded after changes made in the OECD Commentary

4.5.3.1 Introduction

In this section it will be analysed whether the OECD Commentary in its revised version, i e the version after changes have been made in the OECD Commentary, can be used as a legal means of interpretation according to articles 31-32 VCLT. When the OECD Commentary is referred, I mean the OECD Commentary as it is in its revised version. The same structure as in chapter 3 has been chosen. This is due to the fact that I am of the opinion that this will enhance the understanding for the reader.

4.5.3.2 Article 31.1

The wording of article 31 VCLT shows that it is the common intention of the parties that is the most significant requirement when analysing whether changes made in the OECD Commentary can be used as a legal means of interpretation. In these cases the bilateral treaty in question was concluded after changes made in the OECD Commentary. The bilateral treaty was formulated in accordance with the OECD MTC. These two facts speak for the fact that it was the intention of the parties that the OECD Commentary as it was at the time of the conclusion of the bilateral treaty in question could be used in the interpretation of the treaty. Furthermore, it falls quite naturally that the parties intended the OECD Commentary to be of assistance when interpreting the bilateral treaty. This is due to the fact that the provisions in the bilateral treaty are

formulated as the provisions in the OECD MTC and the OECD MTC can therefore be of assistance in the interpretation procedure.

However, there might be cases where the parties to a bilateral treaty may have explicitly stated that the OECD Commentary should not be used in the interpretation of the bilateral treaty in question. In such cases, the OECD Commentary would not fall within the common intention of the parties. My opinion is though that in a case where a bilateral treaty is based upon the OECD MTC, it would be the common intention of the parties that the OECD Commentary (the version upon conclusion of the bilateral treaty, i e after changes made in it due to the OECD Report). This is due to the fact that the parties to the bilateral treaty in question have formulated the treaty in question in accordance with the OECD MTC and the OECD Commentary would be of great assistance when interpreting the bilateral treaty in question.

The principle of good faith relates to the good faith of the contracting parties at the time of conclusion of the treaty (article 31.1 VCLT). Since the changes in the OECD Commentary were made prior to the conclusion of the bilateral treaty and this would not be an obstacle for using the OECD Commentary in the interpretation procedure with support in article 31.1 VCLT. Furthermore, the purpose of the OECD Commentary is to explain and interpret the articles.[152] This is also an argument for the use of the OECD Commentary in the interpretation procedure. However, it is not the opinion of the OECD on the legal status of its documents that is relevant, this can merely be used as an argument in the discussion. This is due to the fact that it is the legal status the OECD Commentary has according to the VCLT that is of importance when interpreting a bilateral treaty.

In the case where a bilateral treaty has been concluded after changes made in the original version of the OECD Commentary and the bilateral treaty is in accordance with the OECD MTC, it could be argued that the changes made to the OECD Commentary can be part of the common intention of the parties to the treaty. This is due to the fact that if the parties to the bilateral treaty in question have chosen to base the treaty on the OECD MTC, it is possible that the common intention of the parties was to interpret the treaty in question in accordance with the OECD Commentary in the version it had at the time of conclusion of the bilateral treaty in question. In such a case, I am of the opinion, that the OECD Commentary and changes made in the OECD Commentary up until the date of conclusion of the treaty is part of the common intention of the parties and consequently, a legal means of interpretation according to the article 31.1 VCLT.

The ordinary meaning of a treaty provision is related to the meaning of a word or phrase upon the conclusion of the treaty in question and should also be taken into account in the interpretation procedure (article 31.1 VCLT). In the case of a bilateral treaty being concluded after changes made in the OECD Commentary it might be possible to use the OECD Commentary and the changes made in it when establishing the ordinary meaning of treaty provision. This would be due to the fact that the changes have been made in the OECD Commentary before the bilateral treaty in question was concluded.

My opinion is that changes made in the OECD Commentary can be used to establish the ordinary meaning of a treaty provision as long as the changes were made before the conclusion of the bilateral treaty in question and as long as the changes made fall within the common intention of the parties. This is due to the fact that if the changes do not fall within the common intention of the parties or were not made in the OECD Commentary

[152] Paragraph 28 OECD Introduction.

before the conclusion of the bilateral treaty in question the establishing of the ordinary meaning would be contrary to article 31 VCLT.

The object and purpose of a bilateral treaty shall also be taken into account in the interpretation procedure (article 31.1 VCLT). It might be argued that if the objects and purposes correlate, the OECD Commentary and changes made in it can be used in order to interpret a bilateral treaty. This is due to the fact that the object and purpose correlate and it would therefore be in line with the intention of the parties to use the OECD Commentary in the interpretation procedure according to article 31.1 VCLT.

My opinion is that changes made in the OECD Commentary might fall within the object and purpose of the bilateral treaty in question if the object and purpose of the bilateral treaty in question correlate with the object and purpose of the OECD MTC. This is due to the fact that the changes made in the OECD Commentary are part of the common intention of the parties and since the objects and purposes correlate with each other. However, in the case where the object and purpose of the bilateral treaty in question do not correlate with that of the OECD MTC the changes made in the OECD Commentary could probably not be used as a legal means of interpretation by reference to article 31.1 VCLT. A mandatory requirement is however that the changes made in the OECD Commentary are part of the common intention of the parties to the bilateral treaty in question. If that is not the case, the changes made could not be a legal means of interpretation although the changes might be part of the object and purpose of the bilateral treaty. This is due to the fact that the very core of treaty interpretation according to the VCLT is to establish the common intention of the parties.[153]

4.5.3.3 Article 31.2

According to article 31.2 VCLT, the context shall be part of the interpretation procedure and this means that the text of a treaty must be read as a whole. In order for a document or such to fall within the context of a bilateral treaty, it is essential that the agreement or instrument is related to the treaty. It must be concerned with the substance of the treaty and clarify certain concepts in the treaty or limit its field of application.[154] Equally it must be drawn up on the occasion of the conclusion of the treaty. Consequently, it is essential that the document in question is related to the bilateral treaty in question.

It does not seem to be necessary that the document in question is in any way annexed to the actual bilateral treaty. If this would be the case, the OECD Commentary in any version would not fall within the definition of the context. This is due to the fact that the OECD Commentary is not annexed to any bilateral treaty but rather a complement to the OECD MTC. Since it does not seem to be a requirement that a certain document needs to be, in any way, annexed to the bilateral treaty in question it is possible for the changes made in the OECD Commentary to possibly fall within the context of the bilateral treaty in question.

The above-mentioned arguments can be used in favour of the fact that changes made in the OECD Commentary before the conclusion of the bilateral treaty could also be part of the context of the bilateral treaty in question. This is due to the fact that the changes made in the OECD Commentary should be part of the common intention of the parties since the bilateral treaty in question is based on the OECD MTC. If the bilateral treaty in question is based on the OECD MTC and the parties to the bilateral treaty have

[153] See the actual wording of article 31 VCLT.
[154] Yasseen, *L'interprétation des traits d'après la Convention de Vienne sur le Droit des Traités*, p 37.

not explicitly expressed the fact that the OECD Commentary would not be used as a legal means of interpretation in the interpretation of the bilateral treaty in question, I am of the opinion, that the OECD Commentary and changes made before the conclusion of the bilateral treaty probably fall within the definition of the context in article 31.2 VCLT. Consequently, the changes made could be used as a legal means of interpretation according to the VCLT.

4.5.3.4 Article 31.3

Subsequent agreements shall be taken into account in the interpretation procedure (article 31.3 (a)). A document can only constitute a subsequent agreement within the meaning of article 31.3 (a) VCLT if the document in question has been enforced in accordance with a procedure identical to the one used to enforce the bilateral treaty in question.[155] In my opinion, it does not seem to be possible to state that the OECD Commentary or changes made to it are a subsequent agreement in accordance with the VCLT. This is due to the fact that neither the OECD Commentary nor changes made to it have been enforced into the domestic laws of the parties to the bilateral treaty in question.

According to article 31.3 (b) subsequent practice shall be taken into account in the interpretation procedure if it is concordant, common and consistent. The OECD Report was issued in 1999 and changes made due to OECD Report have later been made in the OECD Commentary. In cases where it can be established that the parties to a bilateral treaty have used the changes made in the OECD Commentary due to the OECD Report when interpreting the bilateral treaty in question, a subsequent practice would be at hand. In such a case the changes made in the OECD Commentary would constitute subsequent practice and would also be a legal means of interpretation according to article 31.3 (b) VCLT.

However, there is also the opposite possibility, i e the fact that the parties to the bilateral treaty in question would not use the changes made in the OECD Commentary in the interpretation procedure. In such a case the changes made would not fall within the narrow definition of a subsequent practice and consequently the changes could not be used as a legal means of interpretation by reference to article 31.3 (b) VCLT. This would also be the case where it is only one of the parties to the bilateral treaty in question that would use the changes in the OECD Commentary. This is due to the fact that one of the criterions in the narrow definition of a subsequent practice is that all contracting parties to the bilateral treaty in question have been using the changes in the OECD Commentary in the interpretation procedure.

My opinion is that changes made in the OECD Commentary could be a subsequent practice within the meaning of article 31.3 (b) VCLT in certain cases. This is due to the fact that the outcome in this section depends on how the contracting parties use the OECD Commentary and changes made in it in the interpretation procedure. However if the contracting parties use the OECD Commentary and changes made in it over a long period of time it should be possible for the OECD Commentary and changes made in it to be a subsequent practice and consequently a legal means of interpretation within the meaning of article 31.3 (b) VCLT.

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[155] Vogel, Klaus, *The Influence of the OECD Commentaries on Treaty Interpretation*, in December 2000 Bulletin, p 614.

Article 31.3 (c) VCLT states that relevant rules of international law shall be taken into account when interpreting a bilateral treaty. The OECD MTC and the OECD Commentary are not legally binding instruments. They are merely documents issued by the OECD in order to assist in the negotiating and interpretation of bilateral tax treaties. My opinion is that neither the OECD MTC nor the OECD Commentary is legally binding instruments. This is due to the fact that there is no legal support for the fact that the OECD MTC and the OECD Commentary are binding upon the OECD MS or upon other states. Consequently, these documents should not fall within the definition of relevant international law as defined in article 31.3 (c) VCLT.

4.5.3.5 Article 31.4

It is stated in article 31.4 VCLT that "a special meaning can be given to a word or phrase if the parties so intended". The reference made to the common intention of the parties in article 31.4 VCLT means that a special meaning to a treaty provision can only be established by reference to the OECD Commentary and changes made in it if they are part of the common intention of the parties. Another conclusion would be contrary to the VCLT. In cases where the bilateral treaty in question was concluded after changes made in the OECD Commentary there are certain arguments pointing at the fact that changes made are part of the common intention of the parties. This is due to the fact that the parties to the bilateral treaty have chosen to base the bilateral treaty in question on the OECD MTC and also that the OECD Commentary are documents to be used in order to clarify provisions in the OECD MTC.

My opinion is that changes made in the OECD Commentary could be used in order to establish the special meaning of a treaty provision. This is due to the fact that I am of the opinion that changes made in the OECD Commentary and the Commentary itself express the common intention of the parties. Consequently, changes made in the OECD Commentary could be used as a legal means of interpretation according to article 31.4 VCLT.

4.5.3.6 Article 32

The wording of article 32 VCLT means that supplementary means of interpretation can only be taken into account in very rare situations.[156] Furthermore, the wording of article 32 VCLT indicates that it is only materials written upon the conclusion of the treaty that can constitute supplementary means of interpretation. By reference to the wording of article 32 VCLT, several authors have stated that the changes proposed in the OECD Report cannot constitute a supplementary means of interpretation.[157] The main reason for this is the reference in article 32 VCLT to the time of the conclusion of the treaty. This argument is not, in my opinion, applicable to bilateral treaties concluded after changes made in the OECD Commentary. In such cases, the arguments favours the fact that the OECD Commentary could be a legal means of interpretation according to

[156] See the wording of article 32 VCLT: "when the interpretation according to article 31 a) leaves the meaning ambiguous or obscure; or b) leads to a result which is manifestly absurd or unreasonable".

[157] See Avery Jones, John F, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, in March 2002 Bulletin, p 102 and Lang, Michael, *The Application of the OECD Model Tax Convention to Partnerships*, p 17.

article 32 VCLT. This is due to the fact that the changes were made upon conclusion of the bilateral treaty in question.

My opinion is that the changes made in the OECD Commentary have such a high degree of importance that they should fall within the scope of article 32 VCLT (supplementary means of interpretation). This is due to the fact that the OECD MS possess the possibility of issuing reservations or observations in cases when the OECD MS in question does not agree with the OECD Commentary. Such an affirmation supports the view that the OECD MS indirectly state that the OECD Commentary is of such high importance that they should be used as a supplementary means of interpretation.

My conclusion is that changes made in the OECD Commentary should fall within the definition of a supplementary means of interpretation as defined in article 32 VCLT. This is due to the fact that if the changes made in the OECD Commentary were not taken into account the results might be unreasonable and this is contrary to article 32 VCLT. Furthermore, the OECD MS have the possibility to issue reservations and observations in relation to changes made in the OECD Commentary.

4.5.3.7 Conclusion

In cases where the bilateral treaty in question was concluded after changes made in the OECD Commentary it is my opinion that the OECD Commentary falls within the common intention of the parties. This is mainly due to the fact that the parties to the treaty chose to formulate the bilateral treaty in accordance with the OECD MTC and it is likely that the parties intended to use the OECD Commentary in the interpretation procedure (in the version it was upon conclusion of the bilateral treaty in question). Consequently, I am of the opinion that it is the good faith of the parties to the bilateral treaty to use the OECD Commentary and changes made in it up until the conclusion of the bilateral treaty in the interpretation procedure. Due to the fact that it is, in my opinion, the common intention of the parties to use the OECD Commentary in the interpretation, the OECD Commentary could be used as a legal means of interpretation in order to establish the ordinary meaning as defined in article 31.1 VCLT, the context (article 31.2 VCLT) and a special meaning (article 31.4 VCLT).

Furthermore, I am of the opinion that the OECD Commentary and changes made to it have such a high degree of importance that they should fall within the scope of article 32 VCLT (supplementary means of interpretation). This is due to the fact that the OECD MS possess the possibility of issuing reservations and observations in cases when the OECD MS in question does not agree with the OECD Commentary. Such an affirmation supports the view that the OECD MS indirectly state that the OECD Commentary is of such high importance that they should be used as a supplementary means of interpretation. My conclusion is that changes made in the OECD Commentary should fall within the definition of a supplementary means of interpretation as defined in article 32 VCLT. This is due to the fact that if the changes made in the OECD Commentary were not taken into account the results might be unreasonable and this is contrary to article 32 VCLT.

5 Concluding remarks

5.1 My conclusions

In this section, my conclusions throughout the entire thesis are summarised. I have chosen to entwine my conclusions from chapter three and chapter four in a way that will enhance the reading. The starting point for this thesis was the OECD Report and the changes made in the OECD Commentary due to this report. According to the CFA, the changes made in the OECD Commentary will solve the issues, which may arise in relation to the taxation of partnerships. This can be questioned since the tax treaties in force are not copies of the OECD MTC instead the tax treaties have been negotiated and formulated with the OECD MTC as an example.

The OECD MTC is part of public international law and is therefore governed by the VCLT. It is articles 31-33 VCLT that are relevant for treaty interpretation. However, article 33 VCLT has been excluded due to the fact that this article only deals with linguistic issues. Such issues are not relevant for my analysis of whether the OECD Commentary and changes made in the OECD Commentary can be used as a legal means of interpretation according to articles 31-32 VCLT. Before my conclusions in relation to articles 31-32 VCLT are presented, a summary from my analysis regarding the Recommendation of the OECD Council and the OECD Introduction follows.

A Recommendation of the OECD Council concerning the OECD MTC has been included in the OECD MTC. In this recommendation the OECD MS are recommended to follow the OECD MTC when concluding bilateral treaties with other countries and the tax administrations in the OECD MS are also recommended to follow the OECD MTC and the OECD Commentary as they can be modified from time to time. However, this is a statement made by the OECD itself in regard of the legal status of the OECD Commentary and changes made in it. This statement shall be given subordinated importance since the important perspective in this regard is what legal status the OECD Commentary and changes made to it have according to the VCLT.

In the OECD Introduction, several statements are made by the OECD in relation to what legal status the OECD Commentary shall have upon tax treaty interpretation. However, the opinion of the OECD on the legal status of its own documents is of subordinate importance. This is due to the fact that it is the legal status documents issued by the OECD have according to the VCLT that is the issue to be resolved. My interpretation of the OECD Introduction is that the OECD Commentary is not part of the OECD MTC itself and therefore not legally binding upon the OECD MS. This is due to the wording of paragraph 29 OECD Introduction.[158] As stated above, this does not exclude the fact that the OECD Commentary and changes made to it could be a legal means of interpretation according to the VCLT.

In my opinion the OECD Commentary and changes made to it do not become legally binding upon the OECD MS simply by referring to the Recommendation of the OECD Council or the OECD Introduction. However, it is possible for the OECD Commentary and changes made to it to fall within the scope of articles 31-32 VCLT. If this is the case then the OECD Commentary and changes made in it are a legal means of interpretation according to the VCLT. Here, I have chosen to entwine my findings from

[158] See paragraph 29: "Although the Commentaries are not designed to be annexed in any manner to the conventions signed by the Member countries, which unlike the Model are legally binding international instruments [---]".

chapter three and chapter four. This is due to the fact that I am of the opinion that this will enhance the understanding for the reader.

It is the common intention of the parties that is the very core of treaty interpretation (see the wording of article 31.1 VCLT). Therefore, this criterion must be taken into account throughout the entire analysis of whether the OECD Commentary and changes made to it can be used as a legal means of interpretation according to the VCLT. I am of the opinion that changes made in the OECD Commentary could only fall within the common intention of the parties in cases where the bilateral treaty in accordance with the OECD MTC in question was concluded after changes made in the OECD Commentary. This is due to the fact that it seems unlikely that the common intention of the parties would be to use future versions of the OECD Commentary in the interpretation procedure. However, this could also be the case and when it can be establish that this is the case then I am of the opinion that the OECD Commentary and changes made to it is part of the common intention of the parties.

It can be questioned whether the OECD Commentary could fall within the common intention of the parties in cases with bilateral treaties not in accordance with the OECD MTC. This is due to the fact that the parties to the bilateral treaty have chosen not to follow the OECD MTC and instead formulated and negotiated a bilateral treaty not in accordance with the OECD MTC. The OECD Commentary and changes made to it would not be of assistance in such cases since the provisions in the OECD MTC and the bilateral treaty would not correlate with each other. In my opinion the fact that the parties to the bilateral treaty in question have chosen not to follow the OECD MTC speaks for the fact that the OECD Commentary and changes made in it do not fall within the common intention of the parties.

However, in cases of bilateral treaties in accordance with the OECD MTC but concluded before changes made in it, I am of the opinion that the OECD Commentary in its original version does express the common intention of the parties. This is due to the fact that the parties to the bilateral treaty have chosen to base the bilateral treaty in question on the OECD MTC and probably also intended to include the OECD Commentary. However, changes made after the conclusion of the bilateral treaty are probably not part of the common intention of the parties. This is due to the fact that the contracting parties did not know these changes at the time of conclusion of the treaty in question. In cases where the bilateral treaty was concluded after changes made in the OECD Commentary it is my opinion that the changes made are part of the common intention of the contracting parties. This is mainly due to the fact that the changes were made before the conclusion of the bilateral treaty in question and although these changes have been made the contracting parties decided to build the bilateral treaty on the OECD MTC.

The first criterion in article 31.1 VCLT refers to the good faith of the contracting parties at the time of the conclusion of the treaty. This is due to the fact that this principle is so closely linked to the rule of pacta sunt servanda (article 26 VCLT) and the fact that the treaty shall be read as a whole. I am of the opinion that the OECD Commentary and changes made to it could be used as a legal means of interpretation in cases where the bilateral treaty is in accordance with the OECD MTC and where the bilateral treaty was concluded after changes made in the OECD Commentary. This is due to the fact that the good faith of the parties should be established upon the conclusion of the bilateral treaty in question and not upon interpretation.

Next criterion in article 31.1 VCLT refers to the ordinary meaning of a phrase or a word. This shall be determined in the light of the meaning the word or phrase have in

that particular legal area of expertise and at the time of conclusion of the treaty. This is due to the fact that according to article 31 VCLT the common intention of the parties must always be taken into account when dealing with treaty interpretation.[159] First there is the situation with bilateral treaties that are not in accordance with the OECD MTC. It seems unlikely that the OECD Commentary and changes made in it fall within the ordinary meaning in these cases. This is due to the fact that these bilateral treaties are not formulated with the OECD MTC as a guideline.

However, in cases where the bilateral treaty is in accordance with the OECD MTC it falls quite naturally that recourse is taken to the OECD Commentary in its original version. This is due to the fact that the contracting parties upon conclusion of the treaty intended the bilateral treaty in question to have the same formulation as the OECD MTC. Although changes made after the conclusion of the bilateral treaty in question could probably not be used in order to establish the ordinary meaning of a treaty provision. This is due to the fact that these changes should not fall within the common intention of the parties.

Furthermore, I am of the opinion that changes made in the OECD Commentary can be used to establish the ordinary meaning of a treaty provision as long as the changes were made before the conclusion of the bilateral treaty in question. This is due to the fact that if changes were included in the OECD Commentary at the conclusion of the bilateral treaty in question they could be used in order to establish the ordinary meaning of a treaty provision.

According to article 31.1 the interpretation of a treaty must be done in the light of the object and purpose of the treaty. Due to the fact that the common intention of the parties plays a significant role in the entire interpretation process, this must be taken into account when determining a common denominator when dealing with several and maybe conflicting objects and purposes. In cases with bilateral treaties not in accordance with the OECD MTC, it might be possible to still use the OECD Commentary. This might be the case if the object and purpose of a bilateral treaty is the avoidance of double taxation (which is also the object and purpose of the OECD MTC, see paragraphs 1-3 OECD Introduction). In such a situation, it could be argued that due to the fact that both treaties have similar objects and purposes the OECD Commentary in its original version could be used in the interpretation procedure. However, my opinion is that the OECD Commentary should not be used as a legal means of interpretation by reference to the object and purpose as defined in article 31.1 VCLT. This is due to the fact that the OECD Commentary probably falls outside the common intention of the parties.

In the case of a bilateral treaty in accordance with the OECD MTC but concluded before changes made in the OECD Commentary, I argued in the same way as in the above-mentioned cases. However, in this situation the OECD Commentary in its original version probably falls within the common intention of the parties and therefore could be used as a legal means of interpretation according to article 31.1 VCLT. Furthermore, this would probably not be the case with changes made in the OECD Commentary. This is due to the fact that such changes probably fall outside the common intention of the parties. In cases with bilateral treaties in accordance with the OECD Commentary and concluded after changes made in it, my opinion is that the changes might fall within the object and purpose of the bilateral treaty in question if the object and purpose of the bilateral treaty in question correlate with the object and purpose of

[159] This follows from the actual wording of article 31.

the OECD MTC. This is due to the fact that the changes made in the OECD Commentary are part of the common intention of the parties and since the objects and purposes correlate with each other.

When interpreting a bilateral treaty the context shall also be taken into account (article 31.2 VCLT). This means that a treaty shall be read as whole since it is not possible to only concentrate on a paragraph, an article or one part of the treaty.[160] For example, the preamble of a bilateral treaty or an explanatory report to a bilateral treaty can be used as a legal means of interpretation by reference to the definition of the context in article 31.2 VCLT. In my opinion, it is probably not possible to state that the OECD Commentary can be seen as being part of the context to a bilateral treaty not in accordance with the OECD MTC. This is due to the fact the OECD MTC or the OECD Commentary is not part of the common intention of the parties.

In cases of bilateral treaties in accordance with the OECD MTC the following arguments can be used. In the literature, the prevailing view is that the OECD Commentary in its original version is part of the context of the treaty.[161] This is due to the fact that the OECD Commentary in its original version was written upon the conclusion of the bilateral treaties in question and consequently, falls within the common intention of the parties. Furthermore, the contracting parties have chosen to formulate the bilateral treaty in accordance with the OECD MTC. However, changes made in it probably fall outside the context. This is due to the fact that it was probably not the common intention of the parties to include these changes in the interpretation procedure.

In cases where the bilateral treaty in question is in accordance with the OECD MTC and it was concluded after changes made, I am of the opinion that the OECD Commentary and changes made to it are part of the context of the bilateral treaty in question. This is due to the fact that the changes were made upon conclusion of the bilateral treaty and the changes would also fall within the common intention of the parties.

Article 31.2 (a) VCLT states that "any subsequent agreements that have been concluded between the parties shall be taken into account in the interpretation procedure". Changes made in the OECD Commentary do not constitute a subsequent agreement as defined in article 31.3 (a) VCLT. This is due to the fact that if the same procedure is not being used the OECD Commentary falls outside the definition of subsequent agreements as defined in article 31.3 (a) VCLT. These arguments can be used in all three situations mentioned in this thesis. Consequently, neither the OECD Commentary nor changes made in it could be used as a legal means of interpretation by reference to article 31.3 (a) VCLT.

Article 31.3 (b) VCLT states that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account in the interpretation procedure. This article only covers certain forms of subsequent practice, which is to say concordant subsequent practice common to all parties involved. In my opinion, the OECD Commentary and changes made in it could only be used as a legal means of interpretation if both contracting parties have used the OECD Commentary and changes made in it in the interpretation of the bilateral

[160] Sinclair, Ian, *The Vienna Convention of the Law of Treaties*, p 127 and Yasseen, *L'interprétation des traits d'après la Convention de Vienne sur le Droit des Traités*, p 151.

[161] See Lang, Michael, *The Application of the OECD Model Tax Convention to Partnerships*, p 16 and Vogel, Klaus, *Klaus Vogel on Double Taxation Conventions*, marg no 82 a.

treaty in question. This is due to the fact that the criterions laid down in article 31.3 (b) VCLT would be fulfilled in such situations.

According to article 31.3 (c) VCLT, “any relevant rules of international law” shall be taken into account. My conclusion is that it is the international law in force at the time of interpretation. This is due to the fact that if changes and developments in international law were not taken into account, subsequent practises might be disregarded from and the results might be absurd or unreasonable. However, the OECD Commentary and changes made in it are not part of international law since they are not legally binding. Therefore, it is my opinion that it is unlikely that the OECD Commentary in any version could be a legal means of interpretation by reference to article 31.3 (c) VCLT.

Furthermore, if the OECD Commentary and changes made in it can be said to give a phrase or a word a special meaning in accordance with article 31.4 VCLT, it would be a legal means of interpretation. However, this can only be the case if the contracting parties so intended, i e if it is the common intention of the parties (see article 31.4 VCLT). This leads to the possibility that the OECD Commentary would be a legal means of interpretation if the contracting parties, upon conclusion of the bilateral treaty, intended that the word or phrase would be given such a special meaning in accordance with the OECD Commentary and changes made in it. This is due to the fact that the special meaning falls within the common intention of the parties and consequently, can be used in the interpretation procedure in accordance with article 31.4 VCLT. In cases involving a bilateral treaty not in accordance with the OECD MTC, it is my opinion that it would probably not be possible to argue for the fact that the OECD Commentary falls under the special meaning. This is due to the fact that the parties to the bilateral treaty in question have chosen not to build the treaty in question on the OECD MTC.

In cases where the bilateral treaty in question is in accordance with the OECD MTC but concluded before changes made in it, I am of the opinion, that the OECD Commentary in its original version would be a legal means of interpretation if the contracting parties intended that the word or phrase would be given such a special meaning in accordance with the OECD Commentary in its original version. This is due to the fact that the special meaning would fall within the common intention of the parties and consequently, could be used in the interpretation procedure in accordance with article 31.4 VCLT. However, changes made in the OECD Commentary do probably fall outside the common intention of the parties. This is due to the fact that the contracting parties did not know these changes at the time of conclusion of the bilateral treaty in question.

According to article 32 VCLT, preparatory works in relation to a bilateral treaty can be taken into account only if it is established that the preparatory works express the common intention of the parties. Otherwise the interpretation would be contrary to article 31 VCLT. The wording of article 32 VCLT indicates that it is only materials written upon conclusion of the bilateral treaty in question that can constitute a preparatory work within the meaning of article 32 VCLT. In cases where the bilateral treaty in question is not in accordance with the OECD MTC, it is my opinion that the OECD Commentary is not within the common intention of the parties to a bilateral treaty not in accordance with the OECD MTC. Consequently, the OECD Commentary should not fall within the definition of preparatory works of a bilateral treaty according to article 32 VCLT.

In cases where the bilateral treaty is in accordance with the OECD MTC and concluded after changes made in the OECD Commentary, it is my opinion that the

wording in article 32 VCLT gives rise to the fact that they could be considered a supplementary means of interpretation as defined in article 32 VCLT. This is due to the fact that it is stated in article 32 VCLT that preparatory works in relation to the treaty written upon the conclusion of the treaty shall be taken into account. However, in cases where the bilateral treaty in question is in accordance with the OECD MTC but concluded before changes made in the OECD Commentary, it is my opinion that the OECD Commentary (excluding changes made in it) does fall within the definition of a supplementary means of interpretation as defined in article 32 VCLT. This is due to the fact that it is stated in article 32 VCLT that preparatory works in relation to the treaty written upon the conclusion of the treaty shall be taken into account. Consequently, in cases where the bilateral treaty was concluded after changes made even changes made in the OECD Commentary could be used as a legal means of interpretation according to article 32 VCLT.

The above leads me to the conclusion that changes made in the OECD Commentary should only be used as a legal means of interpretation according to the VCLT in cases where the bilateral treaty was concluded after changes made in the OECD Commentary and if the bilateral treaty is in accordance with the OECD MTC. This is due to the fact that in such cases, I am of the opinion, that the changes are part of the common intention of the parties.

5.2 De lege ferenda

This section is built on my opinion that changes made in the OECD Commentary should only be used as a legal means of interpretation according to the VCLT in cases where a bilateral treaty was concluded after changes made in the OECD Commentary and if a bilateral treaty is in accordance with the OECD MTC. This is due to the fact that in such cases, I am of the opinion, that changes made are part of the common intention of the parties. However, in cases where the bilateral treaty is in accordance with the OECD MTC but concluded before changes made it is more doubtful that the changes could be used as a legal means of interpretation according to the VCLT. This is due to the fact that it is difficult to determine whether the changes made fall within the common intention of the parties. However, if this is the case then changes made could be used as a legal means of interpretation according to the VCLT.

The OECD itself seems to be of the opinion that the OECD MS should follow the OECD Commentary as it is modified from time to time. This is evident from statements made in the OECD Introduction (for example paragraph 29 and 35). However, the opinion of the OECD itself on the legal status of the OECD Commentary and changes made in it are of subordinate meaning as has been stressed before in this thesis. Due to this, solving issues in relation to the taxation of partnership (or other legal areas) simply by making changes in the OECD Commentary is not a definite solution. This is due to the fact that the OECD Commentary and changes made in it are not legally binding. However, my opinion is that the OECD MS and its courts have legal support for the use of the OECD Commentary and changes made in it as a legal means of interpretation in certain cases.

I am of the opinion that the OECD MS should investigate how issues relating to the fact that the OECD Commentary and changes made in it are not legally binding upon the OECD MS. This is due to the fact that although changes are made in the OECD Commentary it is uncertain whether these changes are followed by the OECD MS. It is

also important to stress the fact that the bilateral treaties in force are not a direct copy of the OECD MTC. The treaties in force are merely negotiated and formulated with the OECD MTC as a model. Therefore, it can be questioned what legal value the OECD Commentary and changes made in it have upon the interpretation of a bilateral treaty in the OECD MS.

The OECD Commentary and changes made to it do have some significance in the interpretation of tax treaties between OECD MS. This is due to the fact that in cases where the treaty provision in question is a copy of the corresponding provision in the OECD MTC the OECD Commentary and changes made in it are of significant importance. Therefore, I am of the opinion that the OECD MS should somehow agree upon what legal value the OECD Commentary and changes made to it shall have upon the OECD MS. This is due to the fact that the OECD Commentary and changes made in it are not legally binding at this time. Consequently, it is quite difficult for the OECD MS to establish how much importance shall be given to the OECD Commentary and changes made in it.

If the OECD MS agree upon the fact that the OECD Commentary and changes made to it shall be legally binding, it is necessary to enforce the OECD Commentary in accordance with the procedure used when enforcing the OECD MTC. After incorporation, the OECD Commentary and changes made in it would become legally binding to the OECD MS and be part of the domestic law of the OECD MS. In relation to this it is important to stress the importance of the rule of law and the fact that modifying the OECD Commentary would also change the domestic law of the OECD MS. In such a case the domestic laws in the OECD MS would change although the proper procedure for incorporating a legislative act into the domestic law would not be followed. This result would be contrary to the rule of law and therefore, I am of the opinion, that such consequences cannot be accepted.

In order to solve or at least come closer to a solution, the OECD must investigate the legal effects changes made in the OECD Commentary have upon the OECD MS. This is due to the fact that the OECD has chosen to change the legal situation in some legal areas, for example in the case of taxation of partnerships, simply by modifying the OECD Commentary instead of modifying the articles in the OECD MTC. If the issues related to the above-mentioned are not solved in a near future these problems will continue to raise questions in the OECD MS and also create legal uncertainty.

Avery Jones puts forward four arguments against the use of later versions of the OECD Commentary.[162] First, it is argued that since judicial decisions are necessarily retroactive, adopting later versions of the OECD Commentary would have the effect of giving them retroactive effect as well. This argument is quite interesting but it must bore in mind the fact that the common intention of the parties should always be taken into account during the entire interpretation procedure. Second, it is the duty of a court to give an independent view of the meaning of a treaty. This is not disputed, but it is not an argument for ignoring later versions of the OECD Commentary.[163]

Third, it may be argued that effectively tax authorities make the OECD Commentary and the duty of the court is to interpret the treaty, not to give effect to the views of one

[162] Avery Jones, John F, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, in March 2002 Bulletin, p 103.
[163] Avery Jones, John F, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, in March 2002 Bulletin, p 103.

party to the case.[164] Furthermore, it is argued that the OECD Commentary and changes made in it are a reflection of the view of an international organisation, which is officially approved by the governments of all OECD MS. Fourth, constitutional points can be made that, where a particular treaty has been approved by a parliament in light of its intended interpretation given by the existing OECD Commentary, later changes to the OECD Commentary do not have the same parliamentary approval.[165]

Dahlberg gives a Swedish perspective on the changes made in the OECD Commentary and puts forward that it should require a parliamentary approval in order to make the changes to the OECD Commentary legally binding upon the OECD MS. Another solution is that the parties involved should include a paragraph in the treaty that makes later changes to the OECD Commentary legally binding upon the parties involved. Otherwise, it is not possible, according to Dalhberg, to find the changes proposed to be legally binding to the parties involved. It cannot be within the intention of the parties to accept future changes in the OECD Commentary.[166]

My opinion is that the changes made to the OECD Commentary are not legally binding and this is also applicable to the OECD Commentary. This is due to the fact that there is no legal support for the fact that the OECD Commentary or changes made to it are legally binding. However, I am of the opinion that the OECD Commentary and changes made to it can in some situations (see above) be used as a legal means of interpretation. This is due to the fact that the OECD Commentary falls within the meaning of article 31-32 VCLT in some particular cases. Changes made to the OECD Commentary are also a legal means of interpretation according to article 32 VCLT. This is due to the fact that the changes made are of such high importance that they should fall within the meaning of a supplementary means of interpretation as defined in article 32 VCLT. However, references to the OECD Commentary and changes made in it shall always be made with caution and it must be bore in mind the intention of the parties. This is due to the fact that the search for the intention of the parties is the very core for the interpreter according to the VCLT.

[164] Avery Jones, John F, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, in March 2002 Bulletin, p 103.
[165] Avery Jones, John F, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, in March 2002 Bulletin, p 104.
[166] Dahlberg, Mattias, *Vilket rättsvärde har kommentaren till OECD:s modellavtal*, i Festskrift till Gustaf Lindencrona, p 145.

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