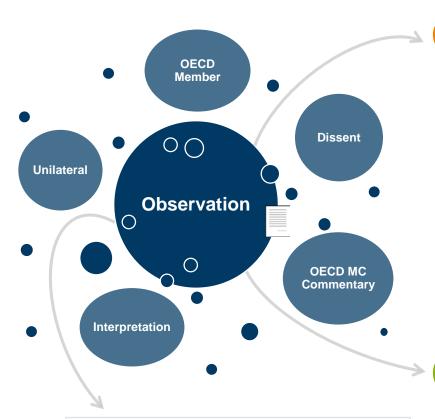


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Impact of observations to the OECD Model Commentary for the interpretation of tax treaties





Legal status and effect

- · Solely political statements?
- Non-binding as such or binding for the (non-)observing State?
- Arts. 31/32 VCLT?

Are observations declared to the OECD MC Commentary or (implicitly) to tax treaties?

What are possible (legal) reasons for a State to express observations?

Can observations solve conflicts of qualification?



"Chile wishes to clarify that, with respect to paragraph 8.12, entities that are not regarded as residents may also include pension funds unless expressly covered by the convention."

(para. 25 of the 2017 OECD Model Commentary on Article 4)



"Concerning paragraph 64, Germany reserves its position on whether and under which circumstances the acquisition of a right of disposal over the transport capacity of pipelines or the capacity of technical installations, lines and cables for the transmission of electrical power or communications (including the distribution of radio and television programs) owned by an unrelated third party could result in disposal over the pipeline, cable or line as a fixed place of business."

(para. 170 of the 2017 OECD Model Commentary on Article 5)



"Italy and Spain do not adhere to the interpretation in paragraph 8.2. They hold the view that payments in consideration for the transfer of the ownership of an element referred to in the definition of royalties fall within the scope of this Article where less than the full ownership is transferred."

(para. 27 of the 2017 OECD Model Commentary on Article 12)



"The *United States* does not agree with the final sentence of paragraph 11.1 of the Commentary."

(para. 82 of the 2017 OECD Model Commentary on Article 23A/B) $\,$

Possible Outcomes

- Reference is rarely made to observations within tax treaties and States do neither accept nor object an observation of other States.
- Observations are expressed to the legally non-binding OECD MC and qualify as unilateral interpretative statements.
- The legal effect depends on the legal effect of the OECD MC Commentary and whether both Contracting States are OECD Members. The application of the OECD MC Commentary is subject to observations.
- States do not explain the reasons for the declaration of observations. Even though, corresponding judgements or fiscal interests can be a reason.