Article 9
Associated Companies

Martin Lehner

1. Introduction

Article 9 of the OECD Model Convention covers the allocation of income of multinational enterprises. Over the last decades the apportionment of income of associated enterprises resident in different countries has been of increasing importance in international taxation. Major obscurities due to the broadness of the wording lead to uncertainties about the scope and purpose of the article.[1] Thus, documents provided by the OECD are highly relevant for the interpretation of Article 9.

Important sources are the reports of the Committee on Fiscal Affairs of the OECD. The core is formed by a report from 1995 entitled *"Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations",* which has been advanced and subsequently expanded. However, among other OECD reports documents of the OECD Working Parties showing the process of negotiating the wording of the article and the Commentary thereof are also able to help find some clarifications.

This contribution describes the history of Article 9 of the OECD Model and aims to analyse developments, taking into account documents of the OECD Working Parties that elaborate on the text of the OECD Model of 1963 and 1977.

2. Role and purpose of Article 9 OECD MC

2.1 Problem

In international tax law in general entities of multinational enterprises are taxed separately in each country.[2] Profits made by one enterprise can be influenced through special conditions for dealings with an associated enterprise. Hence, multinational enterprises have possibilities to shift income between jurisdictions in order to lower their gross tax burden.[3] States are not willing to accept such an avoidance of taxation. Profits of an enterprise should be attributed and taxed as if accrued under conditions set by independent enterprises.[4]

2.2 Article 9(1) OECD MC

Double Tax Conventions in general restrict the domestic tax law of the contracting states and are not designed to create tax liability.[5] Article 9(1) OECD

1 See Baker, *Double Taxation Conventions* (London: Sweet & Maxwell, 2002), Art 9 mn. B.01.

2 See para. 5 of the preface of the OECD Transfer Pricing Guidelines.

3 See para. 7 of the preface of the OECD Transfer Pricing Guidelines.

4 See para. 6 of the preface of the OECD Transfer Pricing Guidelines.

5 See Vogel, *Klaus Vogel on Double Taxation Conventions*, 3rd edition (London: Kluwer Law International, 1996), Introduction mn. 46; Lang, *Introduction to the Law of Double Taxation Conventions* (Vienna: Linde, 2010), mn. 44.

MC itself usually does not grant authority to make adjustments of income.[6] Although the imposition of a higher tax burden is in principle possible through a tax treaty,[7] there is a broad consensus that Article 9(1) does not give independent authority to make income adjustments.[8] The provision is in general not self-executing.[9] In order to make an income adjustment a contracting state has to rely on its domestic law.[10] Legislation in many countries provides for a correction of profits, which are taxed accordingly.[11] The increase of income is called "primary adjustment". The function of Article 9(1) is to limit such corrections to the level of profits which would have accrued under conditions made between independent enterprises.[12] The allocation norm of the OECD MC is the separate entity approach with the arm's length principle for transactions between associated enterprises.[13]

2.3 Article 9(2) OECD MC

Article 9(2) OECD MC aims to compensate the income adjustment of a contracting state by an appropriate adjustment by the other contracting state ("corresponding adjustment"). The re-writing of accounts in both states should avoid economic double taxation.[14] A corresponding adjustment is not intended to be a

6 The Question was raised in the Australian Case *Roche Products Pty v. Commissioner* in 2008 but not decided by the Court; see AAT Sidney, 22 July 2008, AATA 2008, 639.

7 See Lang, *Introduction to the Law of Double Taxation Conventions*, mn. 46; Baker, *Double Taxation Conventions*, Art. 9 mn. B.05. See also OECD Commentary, Article 1 para. 9.2.

8 See Vogel, *Klaus Vogel on Double Taxation Conventions*, Art. 9 mn. 15; Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law* (Alphen aan den Rijn: Kluwer Law International, 2010), p. 191; Wittendorff, *The Transactional Ghost of Article 9(1) of the OECD Model*, Bulletin for International Taxation (2009), p. 110; German BFH 21 January 1981, BStBl II, 517; French Conseil d'Etat 14 March 1984, Cases 34.430–36.880, 36 Droit Fiscal 45–46 (1984) at 1352. Pogorelova is of the view that anti-avoidance is a purpose of Article 9 and that it may expand taxing rights; see Pogorelova, *Transfer Pricing and Anti-abuse Rules*, Intertax (2009), pp. 683 et seq.

9 See Schaumburg, *Internationales Steuerrecht* (Cologne: Otto Schmidt, 2010), mn. 16.291.

10 See Lang, *Introduction to the Law of Double Taxation Conventions*, mn. 468; Baker, *Double Taxation Conventions*, Art. 9 mn. B.05; Vogel, *Klaus Vogel on Double Taxation Conventions*, Art. 9 mn. 16; Wassermeyer, in Debatin and Wassermeyer (eds.), *Doppelbesteuerung* (Munich: C.H.Beck, 2004), Art. 9 mn. 3.

11 See Maisto, "Transfer pricing in the absence of comparable market prices, General Report", in IFA (ed.), *Cahiers de Droit Fiscal, Vol. 77a (1992)*, pp. 23 et seq.

12 See Vogel, *Klaus Vogel on Double Taxation Conventions*, Art. 9 mn. 16; Lang, "Unterkapitalisierung", in: Gassner/Lang/Lechner (eds.), *Aktuelle Entwicklungen im Internationalen Steuerrecht* (Vienna: Linde, 1994), p. 132; Wassermeyer, in Debatin and Wassermeyer (eds.), *Doppelbesteuerung*, Art. 9 mn. 2 and 77.

13 See OECD Commentary, Article 9 para. 1 and 2; para. 15 of the Preface and para. 1.14 et seq of the OECD Transfer Pricing Guidelines.

14 See OECD Commentary, Article 9 para. 5.

benefit granted to the multinational enterprise.[15] The income should be taxed as if the controlled transaction had been undertaken at arm's length conditions in the first place.[16] The Commentary of the OECD Model Convention makes clear that corresponding adjustments are not mandatory.[17] The obligation for a contracting state to make a corresponding adjustment is limited to adjustments justified both in principle and as regards the amount.[18] Some countries wanted to make clear in reservations on Article 9(2) that the adjustment has to be justified from their point of view and not in the view of the other state.[19] The article leaves open several relevant topics, such as the method of a corresponding adjustment,[20] the question of "secondary adjustments"[21] and the application of domestic time limits for the procedure of corresponding adjustments.[22]

2.4 Purpose of Article 9 OECD MC

The main purpose of Article 9 OECD MC is the avoidance of economic double taxation. Economic double taxation is described in the Commentary of the OECD MC as the imposition of comparable taxes in two or more states in respect of the same income or capital for identical periods.[23] Although the OECD MC is designed to prevent juridical double taxation, i.e. the taxation of the same taxpayer in different states,[24] history shows that the Model also aims to prevent double taxation of business income in general.[25] Article 9 (as well as Article 7) indicates that business profits should be taxed where they originate economically.[26] To reach the goal of avoiding double taxation adjustments of profits have to be made by both contracting states.[27] The OECD seeks to establish an inter-

15 See para. 4.32 of the OECD Transfer Pricing Guidelines.
16 See para. 4.32 of the OECD Transfer Pricing Guidelines.
17 See OECD Commentary, Article 9 para. 6.
18 See OECD Commentary, Article 9 para. 6 and para. 4.35 of the OECD Transfer Pricing Guidelines. Wittendorff argues that the expression "in principle and as regards the amount" is inspired by German tax law, according to which an adjustment needs to be justified in principle (*"dem Grunde nach"*) and due to the amount (*"der Höhe nach"*); see Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 241.
19 See the reservations on Article 9 by Germany, Italy and Slovenia.
20 See OECD Commentary, Article 9 para. 7.
21 See OECD Commentary, Article 9 paras. 8 and 9.
22 See OECD Commentary, Article 9 para. 10 and OECD Commentary, Article 25 paras. 39, 40 and 41.
23 See OECD Commentary, Article 23A and 23B para. 2; OECD Commentary, Article 9 para. 5. See also Vogel, *Klaus Vogel on Double Taxation Conventions*, Introduction mn. 3.
24 See OECD Commentary, Article 9 para. 5 and OECD Commentary, Article 23A and 23B para. 2.
25 See section 3 of this contribution.
26 See Vogel, *Klaus Vogel on Double Taxation Conventions*, Art. 9 mn. 10.
27 See Vogel, *Klaus Vogel on Double Taxation Conventions*, Art. 9 mn. 17.

national consensus by developing Guidelines for Tax Administrations and Multinational Enterprises.[28]

As a secondary purpose Article 9 ensures a balanced allocation of taxing rights between the contracting states.[29] The article is in this respect part of one of the general purposes of tax treaties.[30] The allocation of taxing rights of multinational enterprises can have a major impact on the tax revenue of states, since a large portion of the world trade is between associated enterprises.[31]

3. Historic development

3.1 Origins

The direct taxation of business income was first discussed in an international context after World War I. As international trade grew, on the one hand, new and higher taxes should increase revenues, on the other hand, to pay the costs of the war.[32] In general, double taxation of business income should be prevented as it was thought to hinder economic relations between countries. Countries started to give relief from international double taxation domestically.[33] In 1920 the International Chamber of Commerce (ICC) adopted a resolution by the League of Nations to solve the problem of international double taxation.[34]

The origins of Transfer Pricing date back to United States Regulations in connection with the War Revenue Act of 1917. The Internal Revenue Service (IRS) was given authority to *"compute the amount of the tax properly due from each corporation on the basis of an equitable and lawful accounting"*.[35] How-

28 See para. 12 et seq of the Preface of the OECD Transfer Pricing Guidelines.

29 See Schaumburg, *Internationales Steuerrecht*, mn. 16.290; see para. 7 of the preface of the OECD Transfer Pricing Guidelines.

30 See Vogel, *Klaus Vogel on Double Taxation Conventions*, Introduction mn. 45c; Becker, in: Gosch, Kroppen and Grotherr (eds.), *DBA-Kommentar* (Herne: NWB, 2000), Art. 9 mn. 80 et seq. According to the ECJ the purpose is to *"apportion fiscal sovereignty"*; see concerning a treaty between France and Belgium ECJ, 14 November 2006, Case C-513/04 Kerckheart Morres [2006] ECR-10967, mn. 23.

31 See United Nations, Ad Hoc Group of Experts on International Cooperation in Tax Matters, *Transfer Pricing History, State of the Art, Perspectives* (Geneva: 2001), p. 2; Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 5; Hamaekers, in: Kirchhof et al. (eds.), *Staaten und Steuern*, p. 1043.

32 See Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 85.

33 See Carroll, "Taxation of Enterprises with International Interests", in IFA (ed.), *Cahiers de Droit Fiscal, Vol.* I (1939), p. 237. Carroll mentions e.g. the Netherlands in 1893, Belgium in 1906, the United Kingdom in 1916 and after World War I the United States in 1918.

34 See Carroll, in IFA (ed.), *Cahiers de Droit Fiscal, Vol.* I (1939), p. 239.

35 See Article 77 of Regulation 41 relative to the War Excess Profits Tax imposed by the War Revenue Act 1917.

ever, there was no statutory benchmark for the allocation at this time.[36] In order to prevent income shifting to foreign associated enterprises, section 240 (d) was adopted in the United States Revenue Act of 1921 and moved slightly changed to section 45 in the United States Revenue Act of 1928.[37] Without changes the provision was moved to section 482 in 1954, which until today is the domestic transfer pricing provision of the United States. In the history of Article 9 OECD MC the Regulations issued in connection with this provision gained major importance as they served as a standard for the OECD Transfer Pricing Guidelines.[38]

Section 45 of the United States Revenue Act of 1928:

> "*ALLOCATION OF INCOME AND DEDUCTIONS.*
>
> *In any case of two or more trades or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Commissioner is authorized to distribute, apportion, or allocate gross income or deductions between or among such trades or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such trades or businesses."*

3.2 The 1927 Draft Model

The Fiscal Committee of the League of Nations started its work with reports in 1923 and 1925 submitted by a group of "Academic Experts" and a group of "Technical Experts" from seven member countries.[39] In 1927 a draft convention was presented which also contained a provision defining a "permanent establishment" (Article 5). Each state should tax the portion of income produced in its territory. In the absence of accounts properly showing this portion of income, the states should come to an arrangement for apportionment.[40] Affiliated com-

36 See Hamaekers, "Arm's Length – How Long?", in: Kirchhof et al. (eds.), *Staaten und Steuern* (Heidelberg: C. F. Müller, 2000), p. 1043.
37 See Avi-Yonah, *The Rise and Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation*, Virginia Tax Review (1995), pp. 95 et seq.; Graetz, *Foundations of International Income Taxation* (New York: Foundation Press, 2003), pp. 403 et seq.
38 See Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 100 and 107 et seq.
39 See Carroll, in IFA (ed.), *Cahiers de Droit Fiscal, Vol.* I (1939), pp. 241 et seq. The experts started their work based on a note submitted by Coates (Document E.F.S.16.A.16.), a member of the Board of Inland Revenue in London; see Spitaler, *Das Doppelbesteuerungsproblem bei den direkten Steuern*, (Cologne: Dr. Otto Schmidt, 1967, reprint of 1936), p. 15.
40 See Carroll, in IFA (ed.), *Cahiers de Droit Fiscal, Vol.* I (1939), p. 247.

panies were treated as permanent establishments. Influenced by German tax law subsidiaries were treated as branches for tax purposes ("branch theory" = "Filialtheorie").[41] In the Commentary to Article 5 examples were included referring to the existing practice of the allocation of income in the member countries.[42]

Article 5 of the 1927 Draft Model:

> *"Income from any industrial, commercial or agricultural undertaking and from any other trades or professions shall be taxable in the State in which the persons controlling the undertaking or engaged in the trade or profession possess permanent establishments.*
>
> *...*
>
> *Should the undertaking possess permanent establishments in both Contracting States, each of the two States shall tax the portion of the income produced in its territory.*
>
> *In the absence of accounts showing this income separately and in proper form, the competent administrations of the two Contracting States shall come to an arrangement as to the rules for apportionment.*
>
> *..."*

3.3 The 1928 Model

In June 1927 the Council of the League of Nation requested the Secretary General to forward the reports of the "Technical Experts" to all states, members and non-members of the League.[43] In 1928 at a conference in Geneva representatives of 27 countries reached an agreement on a model convention on direct taxation in three versions.[44] Thereby a majority was in favour of treating associated enterprises as separate entities.[45] The German "Filialtheorie" was rejected.[46] The allocation of business income should always be established by an agreement between the contracting states.[47]

---

41 See Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 87.

42 See Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 87.

43 See Carroll, in IFA (ed.), *Cahiers de Droit Fiscal, Vol.* I (1939), p. 248.

44 *Ibid*., pp. 250 et seq.

45 See Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 88.

46 *Ibid*.

47 See Draft Convention Ia, Article 5; Draft Convention Ib, Article 2B; Draft Convention Ic, Article 3.

3.4 The Carroll Report 1933

The new Fiscal Committee of the League of Nations undertook a detailed study of the allocation of income in over 35 jurisdictions.[48] The legislative provisions, rulings and practices were published in the first three volumes of the report entitled *"Taxation of Foreign and National Enterprises"*.[49] A summary combined with recommendations for rules and practices in regard to the allocation of income was published as Volume four (The Carroll Report).[50] Volume five described accounting aspects of income allocation.[51]

In connection with the separate entity approach Carroll referred to the arm's length principle.[52] The term was used for the allocation norm in section 45 of the United States Revenue Act of 1928 in the United States report to the League of Nations.[53] Carroll was in favour of separate accounting for permanent establishments and affiliated enterprises.[54] Empirical methods should be used as secondary methods.[55] Carroll points out in detail why the method of fractional apportionment should only be applied as a last resort.[56]

3.5 The 1933 Model and the 1935 Draft Model

In 1933 the Fiscal Committee formulated a model convention on the basis of the Caroll Report only dealing with the question of the allocation of business income.[57] The convention was intended to act as a supplement to the Model Convention of 1928.[58] The formulation of Article 5 which provided that adjustments could be made for associated enterprises is very similar to the formulation of the current article concerning allocation of business income (Article 9(1) OECD MC). The genesis of Article 5 was Article IV of the United States – France tax

48 See Carroll, in IFA (ed.), *Cahiers de Droit Fiscal, Vol.* I (1939), pp. 250 et seq.; Carroll, *Global Perspectives of an International Tax Lawyer* (New York: Exposition Press, 1978), 43. The study was largely financed by the Rockefeller Foundation; see Spitaler, *Das Doppelbesteuerungsproblem bei den direkten Steuern*, p. 24 et seq.

49 See League of Nations, *Taxation of Foreign and National Enterprises*, Vol. I – III, Geneva 1932.

50 See Carroll, "Methods of allocating taxable income", in League of Nations, *Taxation of Foreign and National Enterprises*, Vol. IV (Geneva, 1933).

51 See Jones, "Allocation accounting for the taxable income of industrial enterprises", in League of Nations, *Taxation of Foreign and National Enterprises*, Vol. V (Geneva, 1933).

52 See Carroll, in League of Nations, *Taxation of Foreign and National Enterprises*, Vol. IV, para. 384.

53 See Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 90.

54 See Carroll, in League of Nations, *Taxation of Foreign and National Enterprises*, Vol. IV, para. 673.

55 *Ibid*., para. 674.

56 *Ibid*., para. 667 et seq.

57 Carroll, *Allocation of Business Income: The Draft Convention of The League of Nations,* Columbia Law Review 1934, 473 et seq.

58 See Carroll, *Global Perspectives of an International Tax Lawyer*, 70.

treaty negotiated in 1930 with Mitchell B. Carroll as one of the negotiators; it was the first tax treaty provision that addressed the allocation of income between associated enterprises.[59] The provision was included unchanged in the 1935 Draft Model in Article 6.

Article 5 of the 1933 Model:

> *"When an enterprise of one contracting State has a dominant participation in the management or capital of an enterprise of another contracting State, or when both enterprises are owned or controlled by the same interests, and as the result of such situation there exists, in their commercial or financial relations, conditions different from those which would have been made between independent enterprises, any item of profit or loss which should normally have appeared in the accounts of one enterprise, but which has been, in the manner, diverted to the other enterprise, shall be entered in the accounts of such former enterprise, subject to the rights of appeal allowed under the law of the State of such enterprise."*

3.6 The 1943 Mexico Model and the 1946 London Model

In the Mexico Model of 1943 and the London Model of 1946 the provision which dealt with associated enterprises was largely similar to the 1935 Draft Model.[60] The Commentary of the London Model made clear that for the rectification of accounts the arm's length principle applies. Besides mentioning the arm's length principle, the Commentary states that adjustments *"made in one country may therefore call for a corresponding adjustment in the accounts of the establishment in the other country with which the dealings to which the rectification referred have been effected"*.[61]

3.7 1963 Model

The Fiscal Committee of the OECD started in 1958 to work on a Model Tax Convention which was published in 1963 as the first Income and Capital Draft Model Convention.

---

[59] The provision was based on the principles of sec. 45 of the United States Revenue Act of 1928; see Carroll, *Global Perspectives of an International Tax Lawyer*, 35 ff; Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 93; Hamaekers, in: Kirchhof et al. (eds.), *Staaten und Steuern*, p. 1050; Jones et al., *The Origins of Concepts and Expressions Used in the OECD Model and their Adoption by States*, Bulletin for International Taxation (2006), p. 244. Interestingly the suggested allocation of profits for branches appears later. A provision similar to the 1933 Model was first included in Article III of the US – Canada Treaty of 1942; see Vann, *Tax treaties: the secret agent's secrets*, British Tax Review (2006), p. 370.

[60] See Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 95.

[61] See Commentary on Article IV of the 1946 London Model.

On 4 September 1958 Working Party No.7 of the Fiscal Committee submitted its first report on *"The allocation of profits to permanent establishments and subsidiary companies"*.[62] The OECD continued the work of the League of Nations in this respect. It is important to note that the OECD developed the issue of the allocation of business income for permanent establishments and subsidiary companies together in one Working Party. That shows how strong the connection between Article 7 and Article 9 of the current OECD MC is, since the articles treat the same phenomenon, i.e. the allocation of business income.

In the discussions the question was raised whether there should be a fuller description of direct and indirect methods to compute profits.[63] Working Party No.7 drew a clear distinction between direct and indirect methods based on the arm's length principle and the possibility of fractional apportionment.[64] In the model fractional apportionment should only be suitable as an exception in the case of permanent establishments allowed by Article 7(4).

The work for the 1963 OECD MC was concentrated on the allocation of business income in general and with special topics concerning permanent establishments. Dealings between associated enterprises were not discussed in detail. It should be noted that the text of the single paragraph of Article 9 of this Model remains unchanged and is today found in Article 9(1) of the OECD MC. On the contrary, the Commentary on Article 9 has been changed several times and many reports and guidelines were addressed regarding its interpretation. The statement in the Commentary of the 1963 OECD MC that the article *"seems to call for very little comment"* turned out to be an underestimation.

Article 9 of the 1963 OECD MC:

> *"Where*
> *a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or*
> *b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,*
>
> *and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly."*

[62] See OECD, FC/WP7(58)1.
[63] See OECD, FC/WP7(58)2.
[64] See OECD, FC/WP7(60)1.

3.8 1977 Model

In 1977 the first update of the 1963 OECD Model was published.[65] In Article 9 a second paragraph on corresponding adjustments was added and the Commentary thereon was changed.

The United States made the allocation of income one of the most important topics discussed in the development of the 1977 OECD Model.[66] In 1967 Working Party No. 7 of the Fiscal Committee came up with a report denying the possibility to implement more explicit rules on this topic in the convention.[67] It was held that in Article 7(2) and Article 9 the same principle was embodied.[68] However, the work was concentrated on the application of the arm's length principle concerned with associated enterprises since certain payments by a permanent establishment to its head office are not deductible though they might well be allowable deductions against profits of associated enterprises.[69] To avoid double taxation it was suggested that each individual case should be dealt with by consultation between the parties concerned.[70] In an annex to the report the Working Party circulated the proposed transfer pricing regulations of the United States.[71] To overcome a case-by-case approach as suggested by the Working Party the United States noted that it would help to find solutions and avoid long delays if guidelines would be developed. However, not all cases could be covered adequately in such guidelines because of the complexity of business.[72]

At the 27th and 28th session of the Fiscal Committee in September 1967 and January 1968 the delegates decided to work on the question how general rules could be implemented and on the problem of economic double taxation.[73] For the problem of "correlative adjustments" it was expected to find solutions more easily.[74]

In 1970 Working Party No.7 submitted a report dealing with the problem of corresponding adjustments.[75] It was pointed out that corresponding adjustments should be provided in all cases but it left open which method should apply for

---

65 Although the revision started in the mid 1960s it took the Fiscal Committee until 1977 to finish the Model, mainly due to the lack of resources both of the OECD itself and its negotiating Member States; see Messere, *The Precursors and Successors of the New OECD Model Tax Convention on Income and Capital*, European Taxation (1993), p. 248.
66 See OECD, FC/WP7(67)1, mn. 2.
67 *Ibid*., mn. 19 et seq.
68 *Ibid*., mn. 4.
69 *Ibid*., mn. 5.
70 *Ibid.,* mn. 20.
71 See OECD, FC/WP7(67)1(Annex).
72 See OECD, FC/WP7(67)2.
73 See OECD, TFD/FC/226, mn. 22 and TFD/FC/229, p. 5.
74 See OECD, TFD/FC/226, mn. 2.
75 See OECD, FC/WP7(70)1.

giving a relief and whether time limits should be provided.[76] In its 3rd report entitled "Corresponding Adjustments" Working Party No. 7 suggested adding two paragraphs to Article 9.[77] Because states should be free to choose the method of relief the report provided for two alternatives as second paragraph ("2A" and "2B").[78] Paragraph 3 should provide for time limits of corresponding adjustments.[79] However, the Working Party pointed out that the problem of time limits should be dealt in the Model Convention in general instead of in particular articles.[80] The proposals in the 3rd report of Working Party No.7 were not included in the final amendments of the article.

In March 1971 the Working Party submitted its proposed amendments to Article 9 and the Commentary thereon, which largely contained the final amendments in the 1977 OECD Model by adding a second paragraph concerning corresponding adjustments.[81] In the final revision of Article 9 in the second paragraph as well as in the Commentary a sentence was added stating that the competent authorities of the contracting states must if necessary consult each other.[82] In the Commentary on Article 9 it was clarified that the allocation of income should be made by using the arm's length principle.[83]

Article 9 paragraph 2 of the 1977 OECD MC:

> *"Where a Contracting State includes in the profits of an enterprise of that State – and taxes accordingly – profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other."*

---

76 *Ibid.,* mn. 12, 16 to 18 and 24 et seq.
77 See OECD, FC/WP7(70)2.
78 *Ibid.,* mn. 7 et seq.
79 *Ibid.,* mn. 12 et seq.
80 *Ibid.,* mn. 27 et seq.
81 See OECD, FC/WP7(70)2. See also OECD, *Double Taxation of Income and Capital: Revised Texts of certain Articles of the 1963 Draft Convention and of the Commentary thereon,* Paris 1974. Article 9(2) of the first United States Model Convention in 1976 was identical to Article 9(2) OECD MC.
82 See OECD, CFA/WP1(71)3.
83 See para. 1 of the Commentary on Article 9 of the 1977 OECD MC.

3.9 1979 OECD Report

In 1979 the OECD published its first report on transfer pricing.[84] As pointed out during the development of the 1977 Model Convention formulating general rules for the allocation of income seems impossible due to the complexity of business life. Thus, the OECD tried to create an international consensus on general concepts. The main objective of the *"Report on Transfer Pricing and Multinational Enterprises"* was to describe relevant considerations of generally accepted methods for the audit of conditions between related enterprises.[85]

The legal status of the Report was not an official interpretation of Article 9 or the arm's length principle.[86] The report was largely based on the United States Section 482 Treasury Regulations of 1968. Formulary apportionment *("the so-called 'global' methods"*) was rejected strongly and underlined that the arm's length principle is the sole allocation norm.[87] However, this must be seen against the background of a conflict between several US states and the rest of the world.[88] In e.g. California the use of global formulary apportionment (unitary taxation) led to double taxation of multinational enterprises because the income departed greatly from arm's length income.[89]

3.10 1984 OECD Report

The OECD report published in 1984 consisted of three separate reports which were prepared as a supplement to the 1979 OECD Report.[90] In 1982 the Report on *"Transfer Pricing, Corresponding Adjustments and the Mutual Agreement Procedure"* was released by the OECD Council. The Reports on *"The Taxation of Multinational Banking Enterprises"* and *"The Allocation of Central Management and Service Costs"* were released in 1984.

The report on corresponding adjustments discusses in its Chapter IV a number of improvements for the Mutual Agreement Procedure.[91] In Chapter III the suggestion is rejected that corresponding adjustments should be mandatory.[92]

---

[84] OECD, *Transfer Pricing and Multinational Enterprises*, 1979.
[85] See OECD, *Transfer Pricing and Multinational Enterprises* (1979), mn. 5 and 6.
[86] See the Recommendation of the Council on the determination of transfer prices between associated enterprises adopted on 16 May 1979.
[87] See OECD, *Transfer Pricing and Multinational Enterprises* (1979), mn. 14.
[88] See Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 100.
[89] *Ibid.,* p. 102. See also Vogel, *Klaus Vogel on Double Taxation Conventions*, Art. 9 mn. 17a.
[90] OECD, *Transfer Pricing and Multinational Enterprises – Three Taxation Issues*, 1984.
[91] *Ibid.,* mn. 64 et seq.
[92] *Ibid.,* mn. 41 et seq.

3.11 1987 OECD Report

In the OECD Report published in 1987 the relationship of domestic thin capitalization rules and Article 9 OECD MC was discussed.[93] In general, Article 9 is relevant when countries are applying their domestic rules on thin capitalisation and it restricts domestic tax law.[94]

3.12 1992 Model

During the revision of the OECD Model in 1992 Article 9 itself was not changed but in the Commentary the findings of the previous OECD reports were implemented.[95] In paragraph 3 of the Commentary on Article 9 the 1979 OECD report *"Transfer Prices and Multinational Enterprises"* was mentioned as containing internationally agreed principles and providing valid guidelines for the interpretation of the arm's length principle. Thus, Article 9 of the 1992 OECD Model was directly connected to the 1979 OECD Report.[96] This direct link shows the importance of the Report for the interpretation of the arm's length principle underlying Article 9. However, the legal quality of the Report was not changed since it already had the same weight regarding interpretation as the Commentary on the Model Convention.[97]

3.13 1992 and 1993 OECD Task Force Reports

The United States section 482 Treasury Regulations were updated as Proposed Regulations in 1992, as Temporary Regulations in 1993 and as Final Regulations in 1994.[98] In 1992 the OECD Fiscal Committee formed a special Task Force to analyse and comment on the proposed regulations. The report was to provide the United States with the collective view of the (other) OECD member countries.

93 OECD, *Thin Capitalization and Taxation of Entertainers, Artists and Sportsmen*, 1987.

94 See OECD, *Thin Capitalization and Taxation of Entertainers, Artists and Sportsmen*, mn 48. For an analysis see Lang, in: Gassner/Lang/Lechner (eds.), *Aktuelle Entwicklungen im Internationalen Steuerrecht* (Vienna: Linde, 1994), p. 127 et seq.

95 See paras. 2 and 4 of the Commentary on Article 9 of the 1992 OECD MC.

96 See Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 103.

97 See Vogel, *Klaus Vogel on Double Taxation Conventions*, Art. 9 mn. 39; Lahodny-Karner, "Verrechnungspreise und Gegenberichtigung", in: Gassner/Lang/Lechner (eds.), *Aktuelle Entwicklungen im Internationalen Steuerrecht* (Vienna: Linde, 1994), p. 99.

98 The basics for the Update of the US regulations date back to a study published by the Treasury Department and the IRS with proposals on how to interpret the Commensurate Witch Income (CWI) standard in the section 482 (the "White Paper"); see Department of the Treasury and Internal Revenue Service, *A Study of Intercompany Pricing under Section 482 of the Code*, 18 October 1988, Notice 88–123, 1988-2 C.B. 458.

The aim of the Task Force Reports in 1992[99] and 1993[100] was to keep the new US regulations in conformity with the interpretation of the arm's length principle in Article 9(1) because of the major importance of the United States for international trade and the negative consequences of double taxation.[101]

3.14 1995–1997 Transfer Pricing Guidelines

The OECD Transfer Pricing Guidelines, developed by Working Party No.6, were approved in June 1995 by the Committee on Fiscal Affairs and in July 1995 by the OECD Council.[102] The Guidelines included five chapters: Chapter I (Arm's Length Principle), Chapter II (Traditional Transaction Methods), Chapter III (Other Methods), Chapter IV (Administration) and Chapter V (Documentation). In 1996 Chapter VI (Intangible Property) and Chapter VII (Intra-Group Services) were added. Chapter VIII (Cost Contribution Arrangements) was added in 1997.

The Transfer Pricing Guidelines were to revise and update the 1979 OECD Report and implement reports and other work of the OECD since 1979.[103] The new United States section 482 Treasury Regulations had a huge impact on the Guidelines.[104] A key issue was the application of profit methods.[105] Both reports recognize in general profit methods as in line with the arm's length principle.[106] In the OECD Transfer Pricing Guidelines in 1995 traditional methods should generally prevail.[107] Alternative methods are only to be applicable in exceptional situations.[108] The profit methods ("other methods") were referred to as methods of last resort.[109] In contrast, under the US Regulations of 1994 the arm's length result must be determined by the method that provides the most reliable result (best method rule).[110]

99 OECD, *Tax Aspects of Transfer Pricing within Multinational Enterprises: the United States Proposed Regulations*, 1993.
100 OECD, *Intercompany Transfer Pricing Regulations under US Section 482 Temporary and Proposed Regulations*, 1993.
101 OECD, *Tax Aspects of Transfer Pricing Within Multinational Enterprises: the United States Proposed Regulations*, mn. 8 and 9.
102 OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 1995*.
103 See the Preface of the OECD Transfer Pricing Guidelines 1995, mn. 13.
104 *Ibid.,* mn. 14; Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 105.
105 See Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 107.
106 See OECD Transfer Pricing Guidelines 1995, mn. 2.49 and 3.49. US Treasury Regulations § 1.482-5 and § 1.482-6.
107 See OECD Transfer Pricing Guidelines 1995, mn. 2.49 and 3.49.
108 *Ibid.,* mn. 2.49.
109 *Ibid.,* mn. 3.50.
110 See US Treasury Regulations § 1.482-1 (c).

3.15 1997–2010

In the 1997 OECD Model paragraphs 1 to 3 of the Commentary on Article 9 were renumbered.[111] In the following years the OECD published several reports: In 2004 the report *"Employee Stock Option Plans: Impact on Transfer Pricing"*, in 2005 the report *"E-Commerce: Transfer Pricing and Business Profits Taxation"* and in 2007 the report *"Improving the Resolution of Tax Treaty Disputes"*. In 2009 a revised edition of the Guidelines was released covering amendments to Chapter IV.

In 2010 the OECD published two major changes in the Transfer Pricing Guidelines.[112] The revision of Chapters I–III led to the equalization of the profit methods and the traditional transaction methods.[113] The most appropriate transfer pricing method to the circumstances of the case should be used.[114] In the newly added Chapter IX the Guidelines treat the issue of business restructurings.[115]

3.16 Future Development

In 2010 the OECD began its work on a new topic. The new project deals with the transfer pricing aspects of intangibles.[116] This work is expected to lead to an update of the existing guidelines on intangibles which is found in Chapter VI of the OECD Transfer Pricing Guidelines as well as Chapter VIII on Cost Contribution Arrangements.[117] In this context the OECD will also have to deal with the application of hypothetical arm's length rules.[118]

4. The Relevance of OECD Documents

4.1 Associated Enterprises

The application of Article 9 OECD MC requires a connection between the enterprises concerned. In Article 9(1) enterprises are described as associated in a very

111 OECD, *The 1997 Update to the Model Tax Convention*, 1997.
112 See para. 19 of the preface of the OECD Transfer Pricing Guidelines 2010.
113 OECD, *Review of Comparability and of Profit Methods: Revision of Chapters I–III of the Transfer Pricing Guidelines*, 2010.
114 See Chapter II of the OECD Transfer Pricing Guidelines 2010; for an overview see *Ahmadov*, The "Most Appropriate Method" as the New OECD Transfer Pricing Standard, International Transfer Pricing Journal (2011), p. 184 ff.
115 OECD, *Report on the Transfer Pricing Aspects of Business Restructurings*, 2010.
116 For the problems concerning this topic see e.g. Markham, *The Transfer Pricing of Intangibles* (The Hague, Kluwer International, 2005).
117 OECD, *Transfer Pricing and Intangibles: Scope of the OECD Project*, 25 January 2011. See Oestreicher, *Valuation issues in Transfer Pricing of Intangibles: Comments on the scoping of an OECD Project*, Intertax 2011, 126 et seq.
118 See e.g. Article 1(3) of the German Foreign Tax Act.

broad way. There must be a participation in the management, control or capital, in a direct or indirect way. The relationship can be vertical or horizontal. There is no definition within the OECD Model and neither the Commentary nor any OECD reports help to interpret the terms. The question arises whether the required connection between the enterprises should be interpreted autonomously or by reference to domestic law under Article 3(2) OECD MC. In paragraph 7 of the 1979 OECD Report it was stated in this regard: *"A broad basis of common understanding of what is meant is assumed"*. The legal consequence of a differing understanding between two states is in general economic double taxation. If there is an income adjustment in a contracting state the other contracting state will deny a corresponding adjustment if in its view Article 9 is not applicable.[119]

In the light of the purpose of the article artificial income shifting would not be possible without the possibility of there being control.[120] Thus, control is dominant requirement for enterprises to be associated. A participation in the management or capital of an enterprise falls within the scope of Article 9(1) only in connection with control.[121] For the application of the article control need not in fact be exercised, i.e. the possibility of control is enough.[122]

To interpret the terms "associated enterprises" or the concept of control in Article 9 the OECD documents are of very little help.[123] From the Commentary on Articles 11 and 12 it can be derived that personal relationships, such as family relations, are not covered by Article 9.[124] In general, an interpretation should be made autonomously.[125] If states apply their domestic law the vague definition

---

[119] See Rotondaro, *The Notion of "Associated Enterprises": Treaty Issues and Domestic Interpretations – An Overview*, International Transfer Pricing Journal (2000), p. 2.

[120] See Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 215; Rotondaro, *The Notion of "Associated Enterprises": Treaty Issues and Domestic Interpretations – An Overview*, International Transfer Pricing Journal (2000), p. 3; contra e.g. Wassermeyer, in Debatin and Wassermeyer (eds.), *Doppelbesteuerung*, Art. 9 mn. 41 and 41a.

[121] See Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 216; Technical Explanations to para. 1 of the 2006 United States Model; Vann, *Tax treaties: the secret agent's secrets*, British Tax Review (2006), p. 371.

[122] See Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 218.

[123] See Rotondaro, *The Notion of "Associated Enterprises": Treaty Issues and Domestic Interpretations – An Overview*, International Transfer Pricing Journal (2000), p. 3.

[124] See OECD Commentary, Article 11 para. 33 and 34; OECD Commentary, Article 12 para. 23 and 24. The United States made a reservation on Article 9 in the 1977 OECD MC. The Article *"... should apply to all related persons, not just an enterprise of one Contracting State and a related enterprise of the other Contracting State ..."*. The reservation was withdrawn in 1992.

[125] See Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 215; Wassermeyer, in Debatin and Wassermeyer (eds.), *Doppelbesteuerung*, Art. 9 mn. 41a and 79; Baker, *Double Taxation Conventions*, Art. 9 mn. B.05; contra Rotondaro, *The Notion of "Associated Enterprises": Treaty Issues and Domestic Interpretations – An Overview*, International Transfer Pricing Journal (2000), pp. 2 et seq.; Eigelshoven, in:

in the OECD Model can cause economic double taxation. Only limitations can be carved out, e.g. that economic control is not covered by the article. Where e.g. an enterprise is regarded as associated solely because of its market position Article 9 OECD MC is not applicable because the purpose of the article is not to correct ordinary market forces.[126]

4.2 Arm's length principle vs. formulary apportionment

The arm's length principle is used as allocation norm in Article 9(1) OECD MC. The wording of the article does not refer to the principle directly but contains the first part of the description of the legal facts and circumstances. The arm's length principle has always been the heart of Article 7 as well.[127]

In the development of the OECD Model Convention the arm's length principle has been the prevailing allocation norm. In the 1933 Carroll Report the separate entity approach was described as dealing at "arm's length".[128] The term was used in the national report of the United States from 1932.[129] The separate accounting method was laid down as the primary allocation method in Articles 3 and 5 of the 1933 Model. In the 1977 OECD Model it was clarified in the Commentary of Article 9 that the allocation of income should be made in accordance with the arm's length principle.[130] From 1977 onwards in reports of the OECD and in the Commentary of the OECD Model Convention the arm's length principle was mentioned as the only allocation norm within the meaning of Article 9.[131] Especially since the 1979 Report formulary apportionment was rejected.[132] This must be seen in the light of the conflict that arose in the 1970s

Vogel and Lehner (eds.), *Doppelbesteuerungsabkommen*, 5th edition (Munich: C. H. Beck, 2008), Art. 9 mn. 37. See also the Materials of Seminar G of the 57th Congress of the International Fiscal Association, Sidney 2003, IFA Yearbook 2003, p. 49 et seq.

126 See Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 218; Carroll, in League of Nations, *Taxation of Foreign and National Enterprises*, Vol. IV, para. 661. On this basis e.g. a domestic provision in Portugal goes beyond the definition of Article 9(1) OECD MC; see Santos and Almeida, *Portugal: New Transfer Pricing Regime, Tax Planning International transfer pricing* (2002), p. 21 (p. 22). Also Article 1 para. 2 no. 3 of the German Foreign Tax Act goes beyond the treaty definition by referring to the "own interest" of a person or taxpayer; see Wassermeyer, in Debatin and Wassermeyer (eds.), *Doppelbesteuerung*, Art. 9 mn. 41a.

127 See OECD, 2010 Report on the Attribution of Profits to Permanent Establishment, 2010, mn. 52.

128 See Carroll, in League of Nations, *Taxation of Foreign and National Enterprises*, Vol. IV, para. 384.

129 See Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 90.

130 See para. 1 of the Commentary on Article 9 of the 1977 OECD MC.

131 See e.g. para. 1.1 and 1.14 of the OECD Transfer Pricing Guidelines.

132 See OECD, *Transfer Pricing and Multinational Enterprises* (1979), mn. 14; para. 1.16 et seq. of the OECD Transfer Pricing Guidelines.

between some US states and the rest of the world on formulary apportionment.[133] In the academic literature it is argued on the one hand that the arm's length principle could not meet the requirements to allocate income of advanced globalized multinational enterprises.[134] On the other hand, it is argued that the principle is flexible and has evolved continually, taking into account changing economic circumstances and business practices.[135] The OECD sees the arm's length principle as a standard which was developed from the beginning in the 1930s. Paragraph 1.32 of the Transfer Pricing Guidelines 2010 states: *"... OECD member countries reiterate their support for the consensus on the use of the arm's length principle that has emerged over the years among member and non-member countries and agree that the theoretical alternative to the arm's length principle represented by global formulary apportionment should be rejected."*

4.3 Corresponding Adjustments

If the income of an enterprise in one state is adjusted, the other contracting state *"shall make an appropriate adjustment"* if the conditions of Article 9(2) OECD MC are met.[136] The question is whether a corresponding adjustment of a contracting state is mandatory in treaties containing only a provision equivalent to Article 9(1).[137] The second paragraph was first added in the 1977 OECD Model

---

133 See Wittendorff, *Transfer Pricing and the Arm's Length Principle in International Tax Law*, p. 100 and 102. For the history of the dispute see e.g. Avi-Yonah, *The Rise and Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation*, Virginia Tax Review (1995), pp. 111 et seq.; Baker/Mitroyanni, "The CCCTB Rules and Tax Treaties", in Lang et al. (eds.), *Common Consolidated Corporate Tax Base* (Vienna: Linde 2008), pp. 629 (632 et seq.).

134 See e.g. Hellerstein, *The Case for Formulary Apportionment*, International Transfer Pricing Journal (2005), pp. 103 et seq.; Graetz, *Foundations of International Income Taxation*, pp. 407 et seq.; McLure, *Replacing Separate Entity Accounting and the Arm's Length Principle with Formulary Apportionment*, Bulletin for International Fiscal Documentation (2002), pp. 586 et seq.; Sadiq, *Unitary Taxation – The Case for Global Formulary Apportionment*, Bulletin for International Fiscal Documentation (2001), pp. 275 et seq.; Avi-Yonah, *The Rise and Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation*, Virginia Tax Review (1995), pp. 147 et seq.; Langbein, *The Unitary Method and the Myth of Arm's Length*, Tax Notes (1986), pp. 625 et seq.

135 See e.g. Owens, *Should the Arm's Length Principle Retire?*, International Transfer Pricing Journal (2005), p. 101. For a comparison of the approaches see Theunissen, "The influence of economic change on the interpretation of tax treaty provisions under special consideration of the arm's length principle", in Schilcher and Weninger (eds.), *Fundamental Issues and Practical Problems in Tax Treaty Interpretation* (Vienna: Linde, 2008), pp. 387 et seq.

136 See Chapter 2.3 of this contribution.

137 Until 2010 Article 7 OECD MC did not contain a provision dealing with corresponding adjustments. The revised Model of 2010 provides in Article 7(3) a provision similar to Article 9(2).

Convention. Thus, not all double tax conventions (especially negotiated before 1977) contain a provision equivalent to Article 9(2).[138]

In the 1984 Report on corresponding adjustments it was argued that the economic double taxation caused by arm's length profit adjustments of one state which are accepted and justified in the other contracting state is not in accordance with the spirit of the convention.[139] Some countries have observed that a provision similar to Article 9(1) of the OECD Model Convention aims to prevent economic double taxation.[140] Thus, corresponding adjustments should be the subject of a mutual agreement procedure under Article 25.[141] Not all states agreed with this view.[142] The Fiscal Committee of the OECD recommended in the 1984 Report to add this view in the Commentary of the OECD MC.[143] In 1992 paragraph 10 was inserted in the Commentary on Article 25, stating that treaties containing an article equivalent to Article 9(1) OECD MC indicate the intention to solve economic double taxation.[144] It is the view of the most OECD member countries that double taxation caused by profit adjustments should be solved either by mutual agreement or domestic law.[145]

As a consequence, Article 9(2) of the OECD Model Convention solely generates an increased legal obligation regarding corresponding adjustments.[146] It should be noted that not every case of economic double taxation is within the scope of Article 9 (e.g. if assets are attributed to different persons by the domestic law of the states involved).[147]

5. Conclusion

Article 9 of the OECD Model Convention covers the adjustment of profits of associated enterprises in one state as well as corresponding adjustments in the other contracting state. History shows that the allocation of business income was included very early in the Model of the League of Nations in 1933 following the

138 See OECD Commentary, Article 25 para. 11.
139 See OECD, *Transfer Pricing and Multinational Enterprises – Three Taxation Issues*, para. 75.
140 See OECD, *Transfer Pricing and Multinational Enterprises – Three Taxation Issues*, para. 75.
141 *Ibid.,* para. 79 and subdivision 115 b)(ii).
142 *Ibid.,* para. 76.
143 *Ibid.,* para. 79 and subdivision 115 b)(ii).
144 See para. 10 of the Commentary on Article 25 of the 1992 OECD MC. In 2008 the paragraph was split and renumbered and is found now in the paras. 11 and 12 of the Commentary on Article 25 OECD MC.
145 See para. 4.33 of the OECD Transfer Pricing Guidelines.
146 See Eigelshoven, in: Vogel and Lehner (eds.), *Doppelbesteuerungsabkommen*, Art. 9 mn. 159.
147 See Lahodny-Karner, in: Gassner/Lang/Lechner (eds.), *Aktuelle Entwicklungen im Internationalen Steuerrecht*, p. 97; Vogel, *Klaus Vogel on Double Taxation Conventions*, Introduction mn. 3.

findings of the famous Carroll Report of 1933.[148] The wording of Article 9(1) has been unchanged since 1963. Article 9(2) was added 1977 and has been unchanged as yet. The development of the allocation of profits of associated enterprises and the arm's length principle underlying it was stimulated through reports and guidelines. The OECD is seeking a consensus on how the arm's length principle should be applied in individual cases and this should be reached by the OECD Transfer Pricing Guidelines.[149] In the Commentary on Article 9 the OECD points out the significance of the Guidelines as a source of law.[150] Unlike the Commentaries, the member countries do not have the possibility to enter into observations on Guidelines.[151] The Guidelines not only address the interpretation of Article 9 and the arm's length principle but also recommendations on tax policy or dispute resolution and enforcement.[152] Today the OECD Transfer Pricing Guidelines have profound influence on most countries whether OECD members or not, regarding the interpretation and administration of their transfer pricing rules.[153]

Concerning the relevance of OECD documents, the OECD Transfer Pricing Guidelines are perhaps the most relevant OECD document for the interpretation of an article of the OECD Model Convention. In the examples above the relevance of OECD documents is shown in two different ways. Concerning the interpretation of the term "associated enterprises" documents of the OECD are of little help since the problem is addressed neither in the Commentaries nor in a report nor in the OECD Transfer Pricing Guidelines.[154] On the contrary, the prevalence of the arm's length principle has been repeatedly mentioned in many different OECD documents.[155] Finally, the issue of corresponding adjustments in the case of a double tax convention solely containing a provision similar to Article 9(1) is addressed in the 1984 Report on corresponding adjustments.[156]

148 See sections 3.4 and 3.5 of this contribution.

149 See para. 7 and 10 of the preface of the OECD Transfer Pricing Guidelines. Critical concerning the subsequent widening of the scope of the article see Wittendorff, *The Transactional Ghost of Article 9(1) of the OECD Model*, Bulletin for International Taxation (2009), pp. 107 et seq. For a proposal for reconciliation see Avi-Yonah, *Between Formulary Apportionment and the OECD Guidelines: A Proposal for Reconciliation*, World Tax Journal (2010), pp. 3 et seq.

150 See OECD Commentary, Article 9 para. 1. Concerning a discussion of the legal status of the OECD Guidelines see Calderon, *The OECD Transfer Pricing Guidelines as a Source of Tax Law: Is Globalization Reaching the Tax Law?*, Intertax 2007, 4 et seq; Bullen, Arm's Length Transaction Structures (Amsterdam: IBFD, 2011), 33 seq.

151 See Miyatake, "Transfer pricing and intangibles, General Report", in IFA (ed.), *Cahiers de Droit Fiscal, Vol. 92a (2007),* pp. 21.

152 See e.g. para. 10 or 18 of the preface or Chapter IV and V of the OECD Transfer Pricing Guidelines.

153 See Miyatake, in IFA (ed.), *Cahiers de Droit Fiscal, Vol. 92a (2007),* p. 21.

154 See section 4.1 of this contribution.

155 See section 4.2 of this contribution.

156 See section 4.3 of this contribution.

The relevance of OECD documents can be examined by the fact that the proposed solution to the problem was inserted in a new paragraph of the Commentary on Article 25 OECD Model Convention.[157]

[157] See para. 10 of the Commentary on Article 25 of the 1977 OECD MC. In 2008 the paragraph was split and renumbered is found now in paragraphs 11 and 12 of the Commentary on Article 25 OECD MC.