The Mistaken Removal of Article 14 from the OECD Model Tax Convention

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I INTRODUCTION

The Organisation for Economic Co-operation and Development's Model Tax Convention on Income and on Capital (the OECD Model) is the most influential and widely followed model tax convention on which Double Tax Agreements between states are based.[1] It underpins nearly all of the 3,000-odd bilateral tax treaties that are currently in force throughout the world.[2] And yet despite general acceptance of the OECD Model as the template of choice, it is still not wholly followed by states. Based on current treaty practice, states tend to disagree with the OECD's current position on the taxation of independent personal services.

Prior to the year 2000, the OECD Model provided for the taxation of independent personal services in a separate article: art 14. However, art 14 was deleted in that year following concerns with its ultimate function and fit. In the 2000 version and subsequent versions of the OECD Model, the taxation of independent personal services was assimilated with the taxation of business profits in one article: art 7. Despite this assimilation, many states still prefer the OECD's pre-2000 approach.

Many recent Double Tax Agreements continue to provide for the taxation of independent personal services in a separate article to that of business profits. Given the stark contrast between model treaty theory and state practice, this article suggests the OECD made a mistake when it deleted art 14 from the OECD Model. The first part of this article outlines how and why the current OECD position on the taxation of independent personal services arose. It discusses the provisions of the deleted art 14, art 14's related Commentary and the other articles in the Model that were relevant to art 14's interpretation. From there it examines the OECD's reasons for removing art 14 from the Model.

Next, the article looks at how states have responded to the OECD's decision to remove art 14. It sets out three observations of contemporary tax treaty theory and practice to show that the OECD's removal of art 14

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1 OECD Committee on Fiscal Affairs *Model Double Taxation Convention on Income and on Capital* (1977) [OECD Model].

2 See generally Christine Lagarde "Remarks on the 50th Anniversary of the OECD Model Tax Convention" (2008) 52 Tax Notes Int'l 209; Joanne M Weiner "OECD Celebrates 50th Anniversary of Model Tax Treaty" (2008) 51 Tax Notes Int'l 997.

was a mistake. These are: first, that separate independent personal services articles still play an important role in tax treaty negotiations, especially from a developing country's perspective; second, that confusion has arisen as to the meaning of the term "fixed base" in art 14; and third, that states have since found alternative ways to overcome the issues relating to the ambit and personal scope of art 14.

Finally, this article considers the 2008 OECD amendment to the Commentary on art 5 of its Model. The amendment allows states to include a provision in art 5, which indirectly deals with independent personal services. It is suggested that while the amendment is useful, it is still not completely satisfactory. An amended art 14 should be reinstated into the OECD Model. Failing that, an exemplar art 14 and a definition of a "fixed base" should be included in the Commentary on the OECD Model.

II ARTICLE 14 AND ITS REMOVAL FROM THE OECD MODEL

The Pre-2000 Position

1 Independent Personal Services: Article 14 of the OECD Model

Before the year 2000, the OECD Model provided for the taxation of independent personal services in art 14.[3] Article 14(1) reserved the prima facie right to tax income earned from "professional services or other activities of an independent character" to the resident state.[4] The source state was only entitled to tax the income from such services if the services had been derived from a "fixed base" held in the source state, and if the fixed base had been "regularly available" to the taxpayer for the purposes of his or her activities.[5] The income taxable by the source state was limited to that which was attributable to the fixed base so found. Article 14(2) provided that "professional services" included independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.[6]

The OECD's Commentary on art 14 provided a number of guidelines to assist its interpretation.[7] First, "professional services and other activities of an independent character" excluded industrial and commercial activities, professional services performed in employment and the independent

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3 OECD Model, above n 1, art 14.

4 Ibid, art 14(1).

5 Ibid.

6 Ibid, art 14(2).

7 "Commentary on Article 14" in OECD Model, above n 1, at [1]–[4].

activities of entertainers and athletes.[8] These activities were covered in arts 7 (business profits), 15 (dependent personal services) and 17 (artists and athletes), respectively.[9] Secondly, the list of professional services in art 14(2) was not exhaustive.[10] Services similar to the examples provided would also come within the ambit of art 14. Thirdly, art 7 and its related Commentary could be used as an aid to interpret art 14 because arts 7 and 14 were similar and rested on the same principles.[11] Fourthly, the art 7 term "permanent establishment" had not been used in art 14 because a permanent establishment was only suitable for use in situations involving commercial and industrial profits.[12] The term "fixed base" was therefore used instead.[13] The OECD did not define the term "fixed base", but it included premises such as a physician's consulting room or the office of an architect or lawyer.[14]

2 Business Profits: Article 7 of the OECD Model

It is helpful to understand art 7 in light of its close connection with, and applicability to, art 14. Article 7 dealt with the taxation of business profits.[15] Its main provision was art 7(1). Article 7(1) operated in much the same way as art 14(1): it reserved the general right to tax business profits to the resident state. The source state was only entitled to tax such profits if the business had been carried on through a permanent establishment held within the source state.[16] Even then, the source state's taxation rights were limited to the profits attributable to the permanent establishment found to exist. The rest of art 7 provided supplementary rules to art 7(1). Subarticles 7(2) to 7(6) outlined how to attribute profits to a permanent establishment. Article 7(7) provided that where business profits included other items of income that were dealt with separately in other articles of the Model, those articles would take precedence over art 7.[17]

(a) The meaning of a "permanent establishment": Article 5 of the OECD Model

The definition of a "permanent establishment" was not included in art 7 or its related Commentary. Instead, it was included in art 5 of the OECD

8 Ibid, at [1].
9 OECD Model, above n 1, arts 7, 15 and 17.
10 "Commentary on Article 14" in OECD Model, above n 1, at [2].
11 Ibid, at [3].
12 Ibid, at [4].
13 OECD Model, above n 1, art 14(1).
14 "Commentary on Article 14" in OECD Model, above n 1, at [4].
15 OECD Model, above n 1, art 7.
16 Ibid, art 7(1).
17 Ibid, art 7(7).

Model.[18] Article 5(1) defined a permanent establishment as "a fixed place of business through which the business of an enterprise is wholly or partly carried on".[19] According to the Commentary on art 5, the essential characteristics of a permanent establishment were that:[20]

- a "place of business" had to exist (that is, premises, machinery or equipment);
- the place of business had to be "fixed" (that is, established at a distinct place with a certain degree of permanence); and
- the business of the enterprise had to be carried on through this fixed place of business (that is, the entrepreneur or related personnel had to conduct the business of the enterprise in the fixed place regularly).

To that extent, the term especially included places of management, branches, offices, factories, workshops and quarries.[21]

Article 5 also provided for exceptions. Building sites, or construction or installation projects that lasted 12 months or less, were not permanent establishments.[22] Neither were premises that were preparatory or auxiliary to the main operations of the business.[23] An enterprise did not have a permanent establishment merely because it carried on business through a broker, general commission agent or any other agent of an independent status, provided that such persons were acting in the ordinary course of business.[24] That a company in one state controlled, or was controlled by, a company in another did not, in itself, deem either company to be a permanent establishment in the other state.[25]

The 2000 OECD Report

In 1996, an OECD Committee was tasked with investigating the viability of art 14. States had complained that there were still many problems with art 14, despite all the guidance that its Commentary and art 7 purported to provide.[26] In 2000, the working group found that there were few practical

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18 Ibid, art 5. Article 7 was merely a "continuation of, and corollary to" art 5 on the definition of "permanent establishment": see "Commentary on Article 7" in OECD Model, above n 1, at [1].

19 OECD Model, above n 1, art 5(1).

20 "Commentary on Article 5" in OECD Model, above n 1, at [2].

21 OECD Model, above n 1, art 5(2).

22 Ibid, art 5(3).

23 Ibid, art 5(4).

24 OECD Model, above n 1, art 5(6). However, a permanent establishment did exist where a person (other than an agent of independent status to whom subart 6 applied) acted on behalf of an enterprise and habitually exercised authority to conclude contracts in the name of the enterprise: ibid, art 5(5).

25 Ibid, art 5(7).

26 See, for examples of these issues, the OECD Member Country Observations and Reservations: OECD Committee on Fiscal Affairs "Commentary on Article 14" in OECD Model Tax Convention on Income and on Capital (1992) at [4.1]–[10].

differences between arts 7 and 14.[27] Furthermore, the group found that there was no valid policy justification for the few differences that did exist.[28] Based on these results, the OECD's Committee for Fiscal Affairs decided to delete art 14 from the Model.[29]

The reasons for the Committee's decision were published in the 2000 OECD Report "Issues Related to Article 14 of the OECD Model Tax Convention".[30] The Report described three key concerns with art 14 that pertained to its relevance (or lack thereof) in the OECD Model. These three concerns, phrased in the form of questions, were:[31]

(a) Which activities fell within art 14 as opposed to art 7?
(b) Which entities fell within art 14 as opposed to art 7?
(c) What were the practical differences concerning taxation under arts 7 and 14?

1 The Activities that Fell Within Article 14 as Opposed to Article 7

The Committee's first concern with art 14 was that its definition of "independent personal services" had been drafted in extremely broad terms.[32] Indeed, it was difficult to identify the exact range of activities that it encompassed. The central problem was the art 14(1) phrase "other activities of an independent character". The Committee could not readily define what this phrase meant. It thought that if the phrase were read literally, the phrase could potentially apply to any and every entrepreneurial activity that art 7 would otherwise capture.[33]

The potential overlap in ambit created uncertainty in the application of either article. This was foreseen to lead to arbitrage in instances where the articles produced different results.[34] However, perhaps the Committee's most pressing concern was that states had been forced to adopt ad hoc interpretations of art 14 to combat the uncertainty created by the phrase. For example, many states created a workable divide between arts 7 and 14 by applying the former to situations involving individuals and the latter to situations involving corporations.[35] This downplayed the importance of the distinction between the activities covered by either article.[36] More

27 Organisation for Economic Co-operation and Development "Issues Related to Article 14 of the OECD Model Tax Convention" (2000) Issues Related to International Taxation No. 7 [OECD Report] at [4].

28 Ibid.

29 Ibid.

30 Ibid.

31 Ibid, at [3].

32 Ibid, at [7].

33 Ibid, at [9].

34 Ibid, at [11]. The OECD Report was vague on the exact nature of the difficulties that the overlap in ambit would create. The OECD Report stated that the phrase would "eventually create practical difficulties, especially in cases where the provisions of paras 3 to 5 would be relevant", but failed to elaborate further.

35 Ibid.

36 Ibid.

radically, other states only read in the "professional services" aspect of the independent personal services definition and disregarded the latter problematic phrase entirely.[37]

The Committee considered two potential solutions. The first was to return to the 1963 Draft Double Taxation Convention wording: "professional services or other independent activities of a similar character".[38] The second was to remove art 14 entirely. The first option was ultimately rejected because the 1963 phrase would have required clarification over what activities were of a "similar character" to professional services. The Committee noted that the contents of such clarification would be "difficult to determine" and concluded that deleting art 14 was the best way of dealing with the issue.[39]

2 The Entities that Fell Within Article 14 as Opposed to Article 7

The Committee also felt that the personal scope of application in art 14 was uncertain.[40] States had generally considered that art 14 was only applicable to individuals.[41] Nevertheless, a few countries, such as Mexico and Turkey, considered that art 14 was applicable to all legal persons and applied it to situations involving corporations and partnerships.[42]

However, in its attempt to ascertain the true scope of art 14, the Committee soon discovered that the real problem lay in its inherent conflict with art 7. An unsatisfactory outcome would therefore arise no matter which interpretation of scope was adopted. For instance, to apply art 14 to situations involving individuals and art 7 where other legal persons were involved would create two differing sets of rules, the structure of which would be vulnerable to exploitation. Entities could easily shift between business structures to avail themselves of the more favourable article.[43] On the other hand, to reject the 'individual only' interpretation would be to find that art 14 applied to all legal persons. This interpretation, considered in conjunction with the already similar activities covered by arts 7 and 14, would make the two articles virtually identical. The Committee could not justify why there were two separate articles for business profits and independent personal services if their treatment was to be so alike. Faced with this 'catch-22' situation the Committee decided that the only resolution was to delete art 14.

37 Ibid, at [9].
38 Ibid, at [10].
39 Ibid.
40 Ibid, at [13].
41 Article 7 was applied in situations involving other legal persons, such as corporations and partnerships.
42 Ibid, at [16].
43 Ibid, at [11] note 2.

3 The Practical Differences Concerning Taxation under Articles 7 and 14

The last major concern the Committee had with art 14 was its practical interaction with art 7. The most pertinent issue in this regard was the distinction, if any, between a "permanent establishment" and a "fixed base" used in arts 7 and 14 respectively.[44] Both terms described the level of economic connection that an entity needed to have with a source state before the source state could impose tax on the income derived by that entity from its respective activities. The Committee therefore had to determine whether the two concepts had identical or different meanings.

The Committee recognised that the two terms could be interpreted to have varying degrees of permanence and, to this extent, outlined opposing arguments for which term was broader than the other.[45] It noted that, on the one hand, contemporary literature had sometimes suggested that a "permanent establishment" may imply a greater degree of permanence than a "fixed base".[46] A permanent establishment required the activities of an enterprise to be carried out in a "fixed place of business" but there was no such requirement for a fixed base.[47] Fixed bases only needed to be "regularly available".[48] On the other hand, the Committee suggested that a fixed base could imply a greater degree of permanence than a permanent establishment, because a "base" from which activities were performed seemed to be narrower than a mere "place of business".[49] In addition, the fixed base requirement of regular availability was more onerous than the requirement that a permanent establishment be intermittently available.[50]

However, the Committee did not comment on the correctness of, nor did it express a preference for, either of these interpretations. Rather, the Committee emphasised that it could not find any real-life examples of fixed bases that would not also be permanent establishments or vice versa, theoretical differences aside.[51] For instance, the examples of fixed bases found in the Commentary on art 14 (such as a physician's consulting room or the office of a lawyer or architect) would equally constitute permanent establishments.[52] The Committee could not justify why the term "fixed base" should still be used if it served the same purpose as the term "permanent establishment", and so considered this another reason to remove art 14.

44 Ibid, at [38]–[54] and [57]–[62]. Other practical differences between the two articles that the OECD considered but are not covered here include whether there were differences in the source taxation rights granted under arts 7 and 14, whether the distinction between the articles impacted on domestic law distinctions and whether art 14 restricted source taxation to income from services performed personally by the taxpayer.

45 Ibid, at [24].

46 Ibid. The OECD Report did not cite its sources.

47 Ibid.

48 Ibid.

49 Ibid, at [27].

50 Ibid.

51 Ibid, at [28].

52 "Commentary on Article 14" in OECD Model, above n 1, at [4].

4 The Relationship Between Article 5 and Article 14

In coming to the above conclusion, the Committee considered the related issue of whether art 5 could be used to interpret art 14. Although the Commentary on art 14 stated that art 7 could be used to interpret art 14, it did not state whether art 5, which was essential to interpreting art 7, could also be used.

This issue was important since the negative cases outlined in art 5 had been thought to expose differences between a fixed base and a permanent establishment. For instance, art 5(3) provided that construction projects lasting 12 months or less were not permanent establishments but there was nothing in arts 5, 7 or 14 to show that the same projects would also be excluded from being fixed bases. If art 5 could not be used to interpret art 14, a construction project lasting 11 months could be a fixed base but not a permanent establishment.

Drawing on case law (namely, the finding in *Revenue Ruling 75-131*)[53] and failing to find any policy reasons against standardising the treatment of permanent establishments and fixed bases, the Committee ultimately decided that there was no reason why art 5 of the OECD Model could not be used to interpret art 14.

III WHY THE REMOVAL OF ARTICLE 14 WAS A MISTAKE

As a result of the Committee's findings, art 14 and its related Commentary were removed from the 2000 OECD Model. Further, the definitions of "enterprise" and "business" in art 3 were amended so that "enterprise" applied to the "carrying on of any business" and "business" included the "performance of professional services and of other activities of an independent character".[54] The net result was that the taxation of income from independent personal services was now treated like any other income earned from a business: it was taxable by the source state under art 7 as if it was derived through a permanent establishment.[55] Articles 5 and 7 were left unchanged, although the Commentary on art 5 was updated to explain the deletion.[56] Statements to a similar effect were also added to the Commentary on art 7.[57] This has remained the OECD's position on the matter to date.

States have responded to the removal of art 14 in a mixed manner. Current trends in tax treaty practice show that a large number of countries

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53 *Revenue Ruling 75-131* (1975) 1 CB 389 (US Internal Revenue Service).

54 OECD Committee on Fiscal Affairs *Model Tax Convention on Income and on Capital* (2000) [OECD Model 2000], art 3.

55 See for further clarification "Commentary on Article 3" in OECD Model 2000, ibid, at [4] and [10.1].

56 "Commentary on Article 5" in OECD Model 2000, ibid, at [1.1].

57 "Commentary on Article 7" in OECD Model 2000, ibid, at [2.1].

have not incorporated the change into their tax treaty negotiations. This author's own empirical research reveals that out of approximately 460 new double tax agreements and protocols to existing double tax agreements that came into force since 2005, only about 100 follow the OECD's recommendation to assimilate the taxation of independent personal services with business profits. Just over 330 of the 460 agreements continue to include a separate "independent personal services" article in some shape or form.[58] Three observations can be made about contemporary tax treaty theory and practice to support the argument that the OECD's decision to remove art 14 was a mistake. These are addressed in turn below.

The Importance of Independent Personal Services Articles to Developing Countries

Based on this author's research, over two-thirds of the 330-odd recent tax treaties that contain separate "independent personal services" articles have been entered into by developing countries. This is no coincidence. Existing literature suggests that developing countries obtain two substantial benefits from including separate independent personal services articles in their tax treaties.

1 Greater Source Taxation Rights

The first benefit is that a developing country accrues greater source state taxation rights. The tax revenue derived from independent personal services often makes up a large proportion of a developing country's overall finances.[59] It is therefore important from the developing country's perspective to keep this taxable base as broad as possible. A separate independent personal services article allows developing countries to do this in two ways: first, by incorporating the term "fixed base"; and second, by including a 183-day provision.

(a) Fixed base

Before the OECD's conclusion that a fixed base and a permanent establishment were practically the same, the predominant academic view was that these terms were quite distinct. Scholars such as Michaux, Vogel and Skaar had all proposed that even though the terms were similar, the term "fixed base" signified a lesser degree of permanence than a

58 Eighteen of the 460 double tax agreements were not analysed because this author could not obtain their full-text versions. Protocols that have not amended the existing position in their respective treaties were assumed to support the existing position. Treaties involving Guernsey, Jersey and the Isle of Man were excluded in this author's analysis because these treaties were greatly simplified and only contained a select few provisions.

59 This premise is based on the assumption that developing countries are net capital importers and net payers of consideration for services.

permanent establishment.[60] The OECD did not express a view on whether this competing view was correct.[61] Instead, the OECD emphasised the lack of real-life differences between the terms to conclude that they were interchangeable, bypassing the issue entirely.[62] This leaves the question unresolved, so it is arguably still open for states to adopt the position of Michaux, Vogel and Skaar that the term "fixed base" signifies less permanence than a "permanent establishment".[63] Such a position gives a developing country broader source state taxation rights than any provision that uses the term "permanent establishment".

(b) The 183-day provision

The 183-day provision is a feature that originated from the United Nations Model Double Taxation Convention between Developed and Developing Countries (UN Model).[64] Like art 14 of the OECD Model, art 14 of the UN Model generally reserves the taxation of income from independent personal services to the resident state. However, under art 14 of the UN Model, the source state's ability to tax this income is broadened with the introduction of an 'either–or' condition. As an alternative to meeting the usual "fixed base" criteria, the source state may impose tax on any income derived from the service provider's activities performed in the source state if the provider resides in the source state for longer than 183 days within a 12-month period.[65] The inclusion of a 183-day provision gives a state broader source taxation rights, because it disregards an entity's economic connection with the country in situations where the entity has spent a prolonged period of time in the country. Many developing countries adopt the 183-day provision almost verbatim in their own articles, or modify the number of days to suit their own preferences.

2 Flexibility in Tax Treaty Negotiations

The second benefit that a developing country receives from a separate "independent personal services" article is flexibility in the treaty negotiation process, particularly if the other party is a developed country.[66] When independent personal services and business profits are covered in separate

60 E Michaux "An Analysis of the Notion 'Fixed Base' and its Relation to the Notion 'Permanent Establishment' in the OECD Model" [1987] Intertax 68; Klaus Vogel *Klaus Vogel on Double Taxation Conventions* (3rd ed, Kluwer Law International, London, 1997); Arvid Skaar *Permanent Establishment* (Kluwer Law and Taxation Publishers, Boston, 1991).

61 OECD Report, above n 27, at [24]–[27].

62 Ibid, at [28].

63 See Michaux, above n 60; Vogel, above n 60; and Skaar, above n 60.

64 United Nations Department of International Economic and Social Affairs *United Nations Model Double Taxation Convention between Developed and Developing Countries* (1980) [UN Model], art 14.

65 Ibid, art 14(1)(b).

66 See Edwin van der Bruggen "Developing Countries and the Removal of Article 14 from the OECD Model" (2001) 55 BIFD 601 at 606.

articles, states are free to negotiate the taxation of the former without affecting the taxation of the latter. In a treaty between a developing and developed country, this often translates into the negotiation of greater source state taxation rights on independent personal services for the developing country. In exchange, the developed country often places a greater emphasis on the taxation of business profits.

If a developing country were to follow the OECD's approach and assimilate the taxation of independent personal services with business profits, it would be difficult to achieve its desired taxing rights on independent personal services without drastically affecting how business profits in general were to be taxed.[67] Any change that the developing country made to obtain as broad a taxable base as possible would have to be of an 'all-or-nothing' nature. For instance, substituting the term "permanent establishment" in art 7 with "fixed base" would subject all business profits to that criterion, not just independent personal services. Alternatively, incorporating art 5(3)(b) of the UN Model in the treaty would amend the definition of "permanent establishment" to include:[68]

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

This amendment would essentially deem all services that had been furnished for more than six months to be permanent establishments and would subject all profits of the enterprise attributable to those establishments to source state taxation. These 'all-or-nothing' alternatives are very favourable to a developing country, but are unlikely to be readily agreed to by any country with some measure of capital export capability, much less a developed country with large net capital exports.[69] A separate "independent personal services" article thereby serves as a workable middle ground. The developing country can thereby obtain its desired taxing rights without resorting to overly demanding provisions.

3 A Practical Example: Article 11 of the Singapore–New Zealand Double Tax Agreement

The United Nations Statistics Division classifies Singapore as a "small island developing State".[70] At the time of writing, Singapore had successfully

67 Ibid, at 605–606.

68 UN Model, above n 64, art 5(3)(b).

69 See the assumption at above n 59.

70 United Nations Statistics Division "Standard Country and Area Codes Classifications" (2010) <unstats.un.org>.

concluded a total of 60 double tax agreements, 18 of which had come into force after 2005.[71] Of these 18 treaties, 16 contain a separate "independent personal services" article. Three are based on art 14 of the OECD Model and the remaining 13 on art 14 of the UN Model.[72] These 18 treaties bring Singapore's tally of treaties with separate articles to 45.[73]

The Singapore–New Zealand double tax agreement was entered into in 1973 and was recently updated in 2005 with a Third Protocol.[74] The Third Protocol removed the combined "personal services" article, which dealt with the taxation of both independent and dependent personal services, and separated the two items into an "independent personal services" article (art 11) and an "income from employment" article (art 11A).[75] Article 11 is fairly representative of modern independent personal services articles entered into by states.

A number of comments can be made about art 11. First, it expressly applies only to individuals. By clarifying this point, art 11 avoids the usual uncertainty that accompanies "independent personal services" articles over their personal scope. Companies and partnerships fall outside of its ambit. Secondly, art 11 continues to use the problematic phrase "or other activities of an independent character" to define independent personal services.[76] It is unclear whether this phrase has caused, or will cause, the problems of overlap anticipated by the OECD. Thirdly, the 183-day provision of the UN Model is adopted almost verbatim into art 11. Any provider of independent personal services who has a fixed base regularly available or remains in Singapore or New Zealand for longer than 183 days over 12 months, and derives income from the services provided, is subject to tax on this income in the source state. Fourthly, art 11 retains the term "fixed base" to describe the economic connection that a provider of services must have with the source state for the state to impose tax on the income. It can be inferred that Singapore must take the position that the term "fixed base" has a different meaning to "permanent establishment". To that extent, fixed

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71 Singapore has seven limited treaties and three signed, but not ratified; double tax agreements are excluded from this tally.

72 Singapore has also concluded protocols to its Agreements with India and New Zealand.

73 Based on the author's own research, the countries that have maintained a separate "independent personal services" article in their double tax agreements with Singapore are: Austria, Bahrain, Belgium, Brunei, Bulgaria, China, Cyprus, the Czech Republic, Denmark, Egypt, Estonia, Fiji, Finland, Hungary, Germany, India, Indonesia, Israel, Japan, Kazakhstan, Kuwait, Latvia, Lithuania, Malaysia, Malta, Mauritius, Mexico, Mongolia, Myanmar, New Zealand, Norway, Oman, Papua New Guinea, Poland, Portugal, Qatar, Romania, Russia, the Slovak Republic, South Africa, Turkey, the United Arab Emirates, Uzbekistan, the United Kingdom and Vietnam.

74 Agreement between the Government of the Republic of Singapore and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (21 August 1973, entered into force 7 December 1973) [Singapore–New Zealand Agreement]; Third Protocol to the Agreement between the Government of the Republic of Singapore and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (5 September 2005, entered into force 17 August 2006) [Third Protocol to the Singapore–New Zealand Agreement].

75 The updated arts 11 and 11A are found in the Third Protocol to the Singapore–New Zealand Agreement: ibid, art IV.

76 Ibid, art IV.

bases are seen to require a lesser degree of permanence than permanent establishments.

The deliberate insertion of art 11 into the Singapore–New Zealand Agreement in 2005 signifies that the assimilation of taxation of independent personal services with business profits is not suited to a developing country's needs. Developing countries will continue to include separate "independent personal services" articles in their agreements despite the OECD's stance and will tend to use the term "fixed base" and include a 183-day provision to facilitate broader source state taxation rights on the income derived from such services.

The Conflicting Interpretations Over What Constitutes a "Fixed Base"

As previously noted, the exact meaning of the term "fixed base" remains unclear given the competing interpretations proffered by scholars and the OECD's position. The OECD's abrupt removal of art 14 without confirming or denying whether scholars such as Michaux, Vogel and Skaar were correct has left the true meaning of the term in doubt. Until further developments occur, it would appear that states can consider themselves free to adopt whichever interpretation suits their needs. It has already been mentioned that developing countries will be more inclined to adopt the Michaux, Vogel and Skaar interpretation that a fixed base is less permanent than a permanent establishment.[77] The Canadian case of *R v Dudney* provides an insight into how a developed country might choose to interpret the term.[78]

1 R v Dudney

(a) Facts

The case of *R v Dudney* concerned the interpretation of the now-deleted art XIV of the United States–Canada Convention with Respect to Taxes on Income and on Capital (1980).[79] Dudney was a resident and citizen of the United States. From 1994 to 1995, he was hired as an independent contractor by Object Systems Group Corporation (OSG) to provide specific computer systems training to employees of PanCanadian Petroleum Limited (PanCan). Both firms were resident in Canada.

Dudney conducted his training on PanCan's premises in Calgary. He trained PanCan employees in their individual offices or in conference

77 See Michaux, above n 60; Vogel, above n 60; and Skaar, above n 60.

78 *R v Dudney* (2000) DTC 6169 (FCA).

79 Convention with Respect to Taxes on Income and on Capital, United States of America–Canada (26 September 1980, entered into force 16 August 1984) [United States–Canada Convention], art XIV; Article XIV was deleted by the Protocol Amending the Convention with Respect to Taxes on Income and on Capital (21 September 2007, entered into force 15 December 2008) [Fifth Protocol to the United States–Canada Convention], art 9.

rooms onsite. His use of PanCan's premises was strictly limited to the purpose of the contract only. He was not permitted to conduct any other business from the premises, he could not use the PanCan telephone unless the call related to his contract and he could not access the premises outside of business hours. Dudney took no equipment of any kind with him when he went to and from the office. He had no letterhead or business cards identifying him as an employee of PanCan. He had no business license in Calgary, and was not in the directory of the PanCan premises. When Dudney invoiced OSG for his hours of work, he prepared the invoices either in Canada or in the United States and then faxed them to OSG. When he left the PanCan premises for the last time, Dudney took nothing with him.

When he was hired, it was expected that Dudney would work for OSG for approximately one year. In fact, he spent 300 days in 1994 and a further 40 days in 1995 in Canada. After that, he terminated his contract with OSG by giving the contracted notice period of 30 days. The Canada Revenue Agency took the view that art XIV did not apply to the income that Dudney had earned during this time and so assessed tax on the income. Dudney appealed to the Tax Court of Canada where his appeal was allowed and the assessments were ordered to be vacated. The Crown appealed the decision, and this is how the matter stood before the Federal Court of Appeal.

(b) Judgment

The Court of Appeal recognised that the phrase "fixed base regularly available" was not defined in the United States–Canada Convention.[80] After turning to arts 5, 7 and 14 of the OECD Model and the related Commentaries for guidance, the Court determined that an enterprise had a permanent establishment where it had a "fixed place of business" or "an identifiable location with a certain degree of permanence in which the business of the enterprise [was] being carried on".[81] The Court went on to hold that by analogy, a location was a "fixed base regularly available" to a person only if the business of that person was being carried on at that fixed base.[82] Where a person was denied the benefit of art XIV because they had a fixed base regularly available in Canada, the question to be asked was whether the person carried on their business at that location during the relevant period.[83] To answer this question, the following factors were to be taken into account:[84]

80 *R v Dudney*, above n 78, at [7].

81 Ibid, at [16]. The Court went on to state at [17] that this approach was considered in the case of *Sunbeam Corp (Canada) Ltd v Minister of National Revenue* [1963] SCR 45 [*Sunbeam Corp*].

82 *R v Dudney*, above n 78, at [16].

83 Ibid, at [19].

84 Ibid.

- the actual use made of the premises that were alleged to be the person's fixed base;
- whether and by what legal right the person exercised, or could exercise, control over the premises; and
- the degree to which the premises were objectively identified with the person's business.

The Court noted that these factors were not a comprehensive list that would apply in all cases but were sufficient on the facts of this case.[85]

(c) Analysis

The Court eventually found that Dudney did not have a fixed base in Canada as he had no control over the premises, nor could he be identified with them in any way. However, more importantly for the purposes of this discussion, the decision shows that, like the OECD, the Court equated the meaning of a "fixed base" with that of a "permanent establishment". The cases that the Court cited in its decision, *Sunbeam Corp (Canada) Ltd v Minister of National Revenue*[86] and *SFWI v Belgium*,[87] both dealt with permanent establishments and the Court freely imported the principles and arguments from these authorities into its interpretation of what it considered to be a fixed base. Also like the OECD, the Court came to its conclusion largely by relying on the Commentary on art 14 of the OECD Model, which stated that art 14 was based on the same principles as art 7.[88]

2 A Comparison between the Singaporean and Canadian Approaches

As can be seen, the uncertainty relating to the term "fixed base", arising directly as a result of the OECD's removal of art 14 from the OECD Model, has led Singapore and Canada to adopt different interpretations. Such disparity is a cause for concern for three major reasons.

First, having conflicting interpretations of legal terms is never desirable. Terms, especially those commonly used in international treaties, should be ascribed clear meanings so that all parties can enter into negotiations with certainty. If a state wishes to give effect to its intentions in an alternative way, it should do so by changing the term used, rather than relying on a different interpretation of the term.

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85 Ibid, at [19].

86 *Sunbeam Corp*, above n 81.

87 *SFWI v Belgium* unreported, noted in Revue Génerale de Fiscalité, No 10, October 1992 at 271.

88 In a subsequent report on the decision, the Canada Revenue Agency disagreed with the Court's conclusion that Dudney did not have a "fixed base". It did not, however, disagree with the Court's finding that "fixed base" and "permanent establishment" had the same meaning. See Canada Revenue Agency "Transfer Pricing Memoranda-08 – The Dudney Decision: Effects on Fixed Base or Permanent Establishment Audits and Regulation 105 Treaty-Based Waiver Guidelines" (2005) <www.cra-arc.gc.ca>.

Secondly, the negotiation of double tax agreements should focus on the avoidance of double taxation and facilitate such an intention between the two states involved. When different interpretations of terms exist, states are forced to depart from this overarching goal and instead concentrate their efforts on clarifying the meaning of the terms; a process that they are unlikely to resolve. Such efforts will lengthen negotiations and, if the disagreement is particularly severe, could even cause the negotiation process to break down.

Thirdly, if current trends continue, it is anticipated that states will adopt biased interpretations of the terms that are favourable to their own situation for perceived economic benefits in the form of greater taxation revenue rather than for any real jurisprudential reasons. This is a dangerous premise from which to begin any sort of international negotiation, much less in the negotiation of double tax agreements. It is suggested that these problems have not been given due weight because they have not arisen in practice. As recognised by the OECD, in the majority of cases, places of business that constitute "fixed bases" also constitute "permanent establishments".[89] The provision of most international professional services involves the use of offices evincing a substantial economic connection that would clearly satisfy both the "fixed base" and the "permanent establishment" criteria. Furthermore, it is anticipated that states will probably not contest borderline cases where the amount of tax at stake is negligible. Maintaining favourable trade relations with a partner state and ensuring future employment and investment is often more important than securing the right to tax a comparatively small amount of income. However, the fact is that differences in interpretation remain.

The Problems of Ambit and Personal Scope in Article 14

It will be recalled that apart from the meaning of the term fixed base, the Committee was also concerned with the ambit and personal scope of art 14. The Committee considered that the best way to deal with these problems was to remove art 14. However, commentators such as de Kort have suggested alternative ways of dealing with these problems, which involve the amendment of definitions and phrases in art 14.[90] Some of these suggestions have been adopted by states in their own tax treaties.

1 Ambit

The Committee's first concern was that it was extremely difficult to ascertain the range of activities covered by art 14. The phrase "other activities of an independent character" meant that the article was seen to

89 OECD Report, above n 27, at [28].

90 JWJ de Kort "Why Article 14 (Independent Personal Services) was deleted from the OECD Model Tax Convention" (2001) 29 Intertax 72.

apply potentially to any and every activity in which an entrepreneur or independent businessperson engaged.[91]

(a) Removing References to "Professional Services"

De Kort suggested that instead of removing art 14 from the OECD Model, all references to "professional services" could be removed.[92] Without the phrase "professional services", art 14 would apply to all independent activities regardless of their nature.[93] This approach was adopted in art XIV of the United States–Canada Convention, which left the term "independent personal services" undefined and open to interpretation if challenged.[94] In theory, such an approach seems feasible, given that the ordinary meaning of "independent personal services" is generally clear. However, since art XIV was subsequently removed before the efficacy of this approach could be considered and tested, it remains to be seen if de Kort's suggested solution would be truly viable.[95]

(b) A Return to the 1963 OECD Draft Convention Wording

The main difficulty in implementing de Kort's suggestion is that the term "professional services" is used in most double tax agreements currently in force. Its continued use suggests that many states consider its definition to be quite settled, making it difficult to justify its removal. It is suggested that "independent personal services" articles should return to the clearer wording used in art 14 of the 1963 OECD Draft Convention: "professional services or other independent activities of a similar character". In the OECD Report, the Committee expressly rejected calls to return to this wording because further clarification would still be needed to define the activities that were "similar" to professional services.[96] The Committee felt it would be "difficult" to achieve any clarity and declined to attempt to do so.[97]

However, it is suggested that determining which activities are similar to professional services is not difficult. Many states and scholars agree that the term is synonymous with the services provided by the *professioni libere* (liberal professions), examples of which can include doctors, advocates, architects, engineers, *notare* (notaries public), *handelschemiker* (analytical chemists), *dentisen* (dentists without a university training), *landmesser* (land surveyor), *wirtschaftsprüfer* (certified public accountants), *steuerberater* (tax consultants) and *chirurgen* (physicians).[98] The theme

91 OECD Report, above n 27, at [9].
92 De Kort, above n 90, at 73.
93 Ibid.
94 United States–Canada Convention, above n 79, art XIV.
95 Third Protocol to the United States–Canada Convention, above n 79, art 9.
96 OECD Report, above n 27, at [10].
97 Ibid.
98 See Vogel, above n 60, at 858–859 for a discussion of these terms.

underlying "professional" services is that they must always be exercised on an independent basis.[99] With that in mind, using the phrase "professional services or other independent activities of a similar character" would be a practical and certain way of limiting the ambit of art 14 to the ordinary definition of "professional services". To date, this approach has been adopted by a number of countries in their tax treaties.[100]

2 The Personal Scope of Article 14

The Committee's second major concern related to the uncertainty surrounding the ambit of art 14: that is, whether the article applied only to individuals or whether it applied to all legal persons. Either application would see flaws exposed in the framework of the OECD Model. De Kort had suggested that this concern was not a real issue. Since art 14 has generally been held to apply to individuals only, he was content to let such an interpretation continue.[101] A simple clarification of the wording of art 14 would have been an effective solution. As both art 11 of the Singapore–New Zealand Agreement and the now-repealed art XIV of the United States–Canada Convention show, this is what states have indeed done in their own articles. De Kort suggests that there are no real problems in having different rules for individuals and corporations.[102] He states that under domestic law, legal persons are not always treated in the same way as individuals, so the problem would not be as significant as the Committee feared.[103] This author agrees that these solutions are suitable answers to the Committee's concerns.

IV MOVING FORWARD: SUGGESTIONS FOR THE FUTURE

The OECD's Alternative Provision

In 2008, the OECD introduced an alternative provision in the Commentary on art 5 of the OECD Model.[104] States were free to include or exclude this provision in their Double Tax Agreements as they saw fit. Essentially,

99 Ibid, at 877.

100 For examples, see the following agreements: Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, Pakistan–Austria (4 August 2005, entered into force 1 June 2007); Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Singapore–Oman (6 October 2003, entered into force 7 April 2006); Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, Luxembourg–India (2 June 2008, entered into force 9 July 2009).

101 OECD Report, above n 27, at [11]. De Kort also concludes that Dutch case law generally supports this view: De Kort, above n 90, at 73 note 11.

102 De Kort, above n 90, at 74.

103 Ibid.

104 OECD Committee on Fiscal Affairs "Commentary on Article 5" in *Model Tax Conventionon Income and on Capital* (2008) [OECD Model 2008] at [42.23].

the provision deemed services performed by an enterprise to be carried on through a permanent establishment in a state if the services had been performed:[105]

> (a) through an individual who is present in that other State for a period or periods exceeding in the aggregate 183 days in any twelve month period, and more than 50 per cent of the gross revenues attributable to active business activities of the enterprise during this period or periods are derived from the services performed in that other State through that individual; or
> (b) for a period or periods exceeding in the aggregate 183 days in any twelve month period, and these services are performed for the same project or for connected projects through one or more individuals who are present and performing such services in that other State.

Paragraphs 1, 2 and 3 of art 5 are to be read subject to the alternative provision, while para 4 of art 5 applies notwithstanding the alternative provision.[106]

1 General Comments

The alternative provision operates as an extension of the "permanent establishment" definition. It deems a permanent establishment to exist where one otherwise would not, creating, in effect, a "services permanent establishment" (services PE).

Each paragraph of the alternative provision deals with a different set of circumstances. Paragraph (a) applies where a service-providing enterprise is carried on by a single individual, or where the income of the enterprise is derived mostly through the services provided by one individual.[107] In this scenario, the ability of the source state to impose taxation is determined by the length of the individual's stay. The rules are therefore the same where services are provided by an individual and where services are provided by a one-person firm. Paragraph (a) also governs instances where services are performed by a sole proprietorship, a partner of a partnership, the employees of a company and so on.[108]

Paragraph (b) applies where the enterprise provides its services through one or more individuals over a period of time.[109] Here, source state taxation is determined by the duration of the individuals' activities and not the individuals' physical presence.[110] So long as the enterprise provides the service through at least one individual on any given day, that

105 Ibid.
106 Ibid, at [42.23].
107 Ibid, at [42.34].
108 Ibid, at [42.35].
109 Ibid, at [42.39].
110 Ibid, at [42.33].

day is included in the tally for the purposes of para (b). However, separate services have separate tallies. For example, if an enterprise provides tax advice for 83 days and then cleaning services for 101 days consecutively thereafter, the enterprise cannot be said to have undertaken the "same project" or a "connected project" for more than the specified time.[111] The reference to the phrase "connected project" is intended to cover cases where the projects have a "commercial coherence".[112]

2 Comparison with Other Articles and Models

The OECD's alternative provision functions as an improved "independent personal services" article. It deals with services provided by enterprises, but focuses on the individuals that conduct business on behalf of these enterprises. As a result, the alternative provision is likely to cover all independent personal services that would have originally been covered by art 14 of the OECD Model. Yet the alternative provision avoids the personal scope problems associated with art 14. Furthermore, by retaining the term "permanent establishment", the alternative provision avoids the problems that both art 14 of the OECD Model and art 14 of the UN Article have with the term "fixed base".

The overall effect of the alternative provision is to bring the OECD treatment of independent personal services closer to the UN Model treatment. It incorporates a 'length of stay' criterion (also 183 days) and the terminology used ("connected projects") brings to mind the "furnishing of services PE" provision in art 5(3)(b) of the UN Model.[113] This is no coincidence. The OECD alternative provision was introduced in response to a reluctance by some states to abide by exclusive resident taxation in the absence of a permanent establishment and by states who wanted to source state taxation rights akin to those granted by art 14 of the UN Model.[114]

3 Problems with the Alternative Provision

The alternative provision is not without its share of related problems. These problems are new and did not arise under art 14 of the OECD Model. It is noted that the OECD at least offers definite solutions to these problems, which is more than it did for the problems it discovered with art 14.

The alternative provision is not immune to potential exploitation. A company could form a number of different subsidiaries, and then use these

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111 Ibid, at [42.23].

112 Ibid, at [42.41].

113 UN Model, above n 64, art 5(3)(b).

114 "Commentary on Article 5" in OECD Model 2008, above n 104, at [42.14]. These states were aware that some service providers did not require a fixed place of business in order to carry on their activities — the nature of their work or perhaps the industry itself allowed such providers to produce a profit without the usual fixtures or offices — and were adamant that there was no justification for exempting the income derived from such businesses from source state taxation, notwithstanding the administration and compliance difficulties that such taxation would create: ibid, at [42.17].

subsidiaries to perform its services in distinct pockets of time, effectively breaking up each subsidiary's stay in the country so as to consistently escape the 183-day period.[115] This is possible because the alternative provision does not deal with associated companies.[116] One solution to this type of abuse is domestic: legislative or judicial anti-avoidance rules will have to be invoked. However, the Commentary also suggests another alternative provision that states can incorporate into art 5 to counteract any abuse.[117] This second alternative provision defines "associated enterprises" and deems services that are performed by these enterprises to be performed for the same project or for connected projects.[118]

Another problem with the alternative provision is that because it takes precedence over the provisions in paras 1, 2 and 3 of art 5 of the OECD Model, it potentially has a limiting effect on what those paragraphs were intended to implement. The limiting effect is the greatest with para 3, particularly if the time threshold in the alternative provision is altered so as to differ substantially from the six month threshold in para 3. Paragraph 3 specifies that a supervisory activity involved with a building site or installation project is considered a permanent establishment only if it lasts for more than 12 months.[119] Since the alternative provision supersedes this rule, once an installation project exists for the time specified in the alternative provision, it becomes a permanent establishment notwithstanding anything in para 3. The shorter the time threshold in the alternative provision, the lesser the effect of para 3.[120] To solve this problem, the Commentary suggested that the time period specified in the alternative provision should be left as close to art 5(3) as possible, or alternatively, para 3 could be drafted to take precedence over the alternative provision.[121]

4 The Alternative Provision in Practice: the "Services PE" Provision in the United States–Canada Convention

The recently enacted art V(9) of the United States–Canada Convention provides an example of the alternative provision in practice.[122] Article V(9) applies if an enterprise of one contracting state provides services in the other contracting state and the preceding provisions in art V have not already deemed the existence a permanent establishment.[123] If the conditions in either para (a) or (b) of art V(9) are met, a permanent establishment is deemed to exist and this subsequently allows profits attributing to that

115 Ibid, at [42.45].

116 Ibid.

117 Ibid.

118 Ibid.

119 OECD Model 2008, above n 104, art 5(3).

120 "Commentary on Article 5" in OECD Model 2008, ibid, at [42.27].

121 Ibid, at [42.27]–[42.28].

122 Article V(9) of the United States–Canada Convention was amended by the Fifth Protocol to the United States–Canada Convention, above n 79, art 3.

123 Ibid, art 3(2).

permanent establishment to be taxed by the source state by the United States–Canada Convention equivalent of art 7.

For the most part, art V(9) is very similar to the OECD alternative provision. However, two differences stand out. First, the "services PE" rule in the United States–Canada Convention is expressly stated to be subject to the preceding para 3, which concerns services performed at, or in relation to, installation and construction projects. The rule in the United States–Canada Convention thus does not interfere with the original function of para 3. Secondly, while para (b) in both the OECD alternative provision and art V(9) of the United States–Canada Convention imposes a 183-day threshold to deem a permanent establishment to exist where services are provided, they have a different focus. The OECD alternative provision only adds days to its tally where services have been performed through individuals who are present in the source state. However, the United States–Canada Convention's tally increases when the services are performed for customers who are either residents of the source state, or who maintain a permanent establishment in that other state and the services are provided in respect of that permanent establishment. The OECD provision therefore checks the status of the provider of the service, while the United States–Canada Convention checks the status of the recipients of the service.

5 The Efficacy of the Alternative Provision

As shown above, the alternative provision has already been put into practice by some states. To a certain extent, the provision solves the issues relating to art 14 that made the interpretation and application of art 14 difficult. However, the alternative provision is still not completely satisfactory. Again, the OECD has declined to comment on the contested status of the term "fixed base" and its continued relevance within the tax treaty framework. The OECD avoids this issue by using the term "permanent establishment". As previously noted, given the entrenchment of the term "fixed" base in the "separate independent personal services" articles of bilateral tax treaties worldwide, its precise meaning must be clarified before states can make informed decisions on how to enforce their desired taxing rights on independent personal services. It is suggested that the only way to deal with the issue satisfactorily is to reinstate art 14. Reinstatement will provide the countries that continue to use a separate independent personal services article with a clear template.

Suggestions for the Future

1 Reinstating Article 14

It is suggested that the art 14 should be reinstated in the OECD Model and should contain a few amendments:

(a) the phrase "other activities of an independent character" in art 14(1) should be replaced with the phrase "other independent activities of a similar character"; and
(b) the personal scope of the article should be restricted to individuals only.

The reinstated article should also be accompanied by a definition of a "fixed base" provided in art 3 (general definitions).

Clarification of the meaning of a "fixed base" is paramount. As long as different countries have different interpretations of what is meant by the term "fixed base", and how it relates to a "permanent establishment", there will be conflict over its usage. There must be an authoritative attempt to define it, preferably with reference to the respected views of scholars like Michaux, Vogel, Skaar and Huston[124] and with reference to how the term has been defined and interpreted in case law.[125] While such a task may be difficult, establishing a precise meaning of the term will allow for its surrounding uncertainty to be put to rest finally. Discussions over removing the term or replacing it with "permanent establishment" skirt the issue. The term is still used in many double tax agreements and progress can only be made when the foundation of the term is authoritatively decided upon. It is therefore suggested that even if art 14 is not reinstated in the OECD Model, the Commentary on the OECD Model should provide an exemplar art 14 for states that wish to continue to use it, as well as a sample definition of "fixed base" in art 3, similar to the alternative provision introduced in 2008.

2 A Suggested Definition

As previously mentioned, the term "fixed base" was not defined in art 14 of the OECD Model or in its Commentary. Historical tax treaties used terms that were similar but not identical.[126] However, scholars such as Michaux and Vogel have put forward helpful definitions of the term that still have relevance today.[127] Combining the two definitions suggested by Michaux and Vogel, it is suggested that in order for a location to comprise a "fixed base", it must meet the following three requirements:

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124 See Michaux, above n 60; Vogel, above n 60; and Skaar, above n 60. See also J Huston "'Fixed Base' in Tax Treaties" (1978–1979) 5 Int'l Tax J 35 at 35.

125 See *R v Dudney*, above n 78; *Revenue Ruling 75-131*, above n 53.

126 In the Germany–Czechoslovakia (1921) Agreement, "industrial undertakings" were taxed on the basis of "business establishment", while professionals such as physicians, lawyers, architects and engineers were subject to tax only "insofar as the exercise of the profession involves permanent headquarters (business establishment) in the host country". Subsequent treaties used variants to the effect of "involves an established centre (business establishment)", "permanent headquarters of the professional activity", "fixed centre", and "office or other fixed place of business": see Huston, above n 124. The recent Belarus–Venezuela Double Tax Agreement attempts to define "fixed base" as a "fixed place such as an office or any place [or] activity where an individual develops full or partially independent personal services": Convention on the Avoidance of Double Taxation and Prevention of Tax Evasion with Regard to Income and Property (Capital) Taxes, Belarus–Venezuela (27 December 2007). This definition seems to add new factors to what a "fixed base" entails and will not be covered in this article.

127 Michaux, above n 60, at 70–71; Vogel, above n 60, at 862.

(a) The location must be "fixed": that is, it needs to be at an ascertainable space.
(b) The location must have been used for the partial or whole performance of the professional's activities. The location need not have been specifically equipped for the professional's activities. It will meet this requirement as long as the professional can, and has, conducted their activities at that location.
(c) The location must have been used for the performance of services for a period of time that is not purely temporary. To aid in such a determination, one should have regard to the intentions of the professional in using the location, and the eventual actual usage of the location.

These requirements should be considered with reference to the needs of the specific occupation of the professional concerned, making the inquiry largely dependent on the facts of each case.

3 Relationship between a "Fixed Base" and a "Permanent Establishment"

What is more difficult to define is the relationship that the term "fixed base" bears with the term "permanent establishment". On one hand, distinguished scholars like Michaux, Vogel and Skaar have all proffered reasons as to why a fixed base could, and should, be interpreted to signify lesser permanence than a permanent establishment.[128] On the other hand, however, lies the reasoning of Huston,[129] *Revenue Ruling 75-131*[130] and the opinion of the OECD[131] as to why the terms are the same.

After considering the competing views, the view of Michaux, Vogel and Skaar that the terms bear different meanings, and that the term "fixed base" signifies a lesser degree of permanence than a "permanent establishment", seems to hold more weight.[132] In coming to this conclusion, of particular note is Michaux's assertion that the term "permanent establishment" refers to industrial activities while a "fixed base" refers to the activities of professionals, a point also made in the Commentary on art 14.[133] It can be inferred that the performance of professional services relies heavily on an individual's, or a team of individuals', personal effort or efforts as opposed to intensive capital outlay. The requirements to find a "fixed base" therefore need to be suitably lower than that of a "permanent establishment", in order to accommodate the fact that professionals can

128 See Michaux, above n 60; Vogel, above n 60; and Skaar, above n 60.
129 Huston, above n 124.
130 *Revenue Ruling 75-131*, above n 53.
131 OECD Report, above n 27.
132 See Michaux, above n 60; Vogel, above n 60; and Skaar, above n 60.
133 "Commentary on Article 14" in OECD Model, above n 1, at [4].

easily set up in a state compared to an enterprise, which may require capital expenditure. It is suggested that in line with the opinions of Michaux, Vogel and Skaar, the length of the "fixed base" requirements should depend on the occupation of the professional. The question to ask is whether the professional has been suitably able to conduct his or her business in a location and whether such performance is intended to, or in fact turns out to be, somewhat permanent. If these features are found, then a fixed base is likely to have been found as well. The rigid conditions pertaining to a permanent establishment should not have any bearing on these considerations.

V CONCLUSION

It is agreed that the interpretation and application of art 14 in the OECD Model was problematic. Its inherent conflict with art 7 may have justified its subsequent removal. However, this article has attempted to show that the OECD's decision was ultimately a drastic overreaction, given current trends in tax treaty theory and practice. It is suggested that because states still use separate "independent personal services" articles in their double tax agreements, an amended art 14 should be reinstated in the OECD Model. The main challenge that the OECD will have to face in doing this will be defining the term "fixed base" and explaining how it relates to the competing concept of a "permanent establishment". If the OECD does not reinstate art 14 in its Model, it should at least provide an exemplar art 14 and a definition of a "fixed base" in the Commentary on the OECD Model. Without a definitive answer to this question, the otherwise straightforward item of "independent personal services" will continue to cause problems for states when they attempt to tax these services.