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Application of Double Taxation Conventions to Sovereign Wealth Funds

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To my teachers, professors and mentors
with gratefulness and deepest respect
for their work, involvement and efforts.

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List of abbreviations

Art. or Arts.	Article(s)
ADDF	Abu Dhabi Development Fund
ADIA	Abu Dhabi Investment Authority
ADIC	Abu Dhabi Investment Council
ADFED	Abu Dhabi Fund for Economic Development
BB	Betriebs-Berater (German tax journal)
BGBl	Bundesgesetzblatt (Federal law gazette)
Bill.	Billion
BIT	IBFD – Bulletin for International Taxation
CCASG	Cooperation Council for the Arab States of the Gulf
DDIA	Dubai Development and Investment Authority
DIA	Dubai Investment Authority
DIC	Dubai Investment Company
DIDC	Dubai Investment and Development Corporation
DIO	Dubai Investment Office (today: Dubai Investment Group)
DTC or DTCs	Double Taxation Convention(s)
DTD	Dubai Tourism Department
ed. or eds.	editor(s)
e.g.	for example
et seq.	et sequence(s)
etc.	et cetera
FN	Footnote
i.e.	that is
ICD	Investment Corporation of Dubai
IFSWF	International Forum on Sovereign Wealth Funds
IMF	International Monetary Fund
Intro.	Introduction
IPIC	International Petroleum Investment Company
IRC	Internal Revenue Code
IStR	Internationales Steuerrecht (German tax journal)
IWG	International Working Group of Sovereign Wealth Funds
MN or MNs	Marginal number(s)
No.	Number
N.Y.U.	New York University
OECD	Organisation for Economic Co-operation and Development
OECD Model	OECD Model Tax Convention on Income and on Capital
OEEC	Organisation for European Economic Co-operation
ÖStZ	Österreichische Steuerzeitung (Austrian tax journal)
para. or paras.	paragraph(s)
Prot.	Protocol
SAMA	Saudi Arabia Monetary Agency
SWF or SWFs	Sovereign Wealth Fund(s)
SWFI	Sovereign Wealth Fund Institute
SWI	Steuer und Wirtschaft International (Austrian tax journal)
UAE	United Arab Emirates
UN	United Nations
UN Model	UN Model Tax Convention on Income and on Capital
US(A)	United States of America

USD	US dollar
WHT	Withholding tax
Vol.	Volume
vs.	versus
ZCF	Zayed Charity Foundation

1. Introduction

Due to their increasing number, the size of their funds and their continuing investment activity Sovereign Wealth Funds (SWFs) have developed as new and important cross-border financial actors in the last decade in particular. Today they play an indisputably important role in the international monetary and financial system as institutional investors.[1] SWFs are likely to become even more important in the next years as e.g. income from commodities will not stop to continue to grow. The substantial investments have raised an intensive public debate on a national, European and international level. The discussion focuses on opportunities and potential risks of SWFs (e.g. their contribution to economic investments vs. control of strategically important economic sectors and national security concerns), their regulation and other very important issues (e.g. a lack of transparency and the impact on the global financial system) for states, investors and recipients of SWF flows.[2]

One important aspect of this discussion is taxation and therefore also the application of Double Taxation Conventions (DTCs) to SWFs. The OECD has recently published the 2010 update to the OECD Model Tax Convention on Income and on Capital (OECD Model) and its Commentary,[3] which also incorporated changes on the application of DTCs to state-owned entities, including SWFs, in the Commentary to Arts. 1, 4, 10 and 11 OECD Model.[4] The incorporation was based on a public discussion draft from November 2009.[5]

This master thesis will discuss the application of DTCs to SWFs, on the one hand, on the basis of the OECD Models from 2008 and earlier including the Commentaries and, on the other hand, based on special rules for SWFs in bilateral DTCs. Moreover, the recent update of the Commentary to the OECD Model will be presented and

[1] See section 2.3.
[2] See e.g. IWG, *Sovereign Wealth Funds – Generally Accepted Principles and Practices – „Santiago Principles“* (2008); OECD, *OECD Guidance on Recipient Country Policies Towards Sovereign Wealth Funds* (2008); Commission of the European Union, *A Common European Approach to Sovereign Wealth Funds*, COM(2008) 115 final; Dreizehntes Gesetz zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsordnung (Thirteenth Act amending the Foreign Trade and Payments Act and the Foreign Trade and Payments Regulation) German BGBl I 20/2009.
[3] All references to the OECD Model and its Commentary are to the 2010 version (unless otherwise indicated).
[4] See OECD, *The 2010 Update to the Model Tax Convention* (2010).
[5] See OECD, *Discussion Draft on the Application of Tax Treaties to State-Owned Entities, Including Sovereign Wealth Funds* (2009).

changes relating to the application and interpretation of existing DTCs to SWFs will be discussed in depth. The results of this master thesis will form a basis to advance understanding of this investor group's international tax implications. It should contribute to the worldwide discussion and meet the interest of readers even beyond the scientific tax community.

This master thesis is divided into six parts. After this short introduction (section 1) to the topic, section 2 will concentrate on fundamentals on SWFs. An overview will be given, on the one hand, on different definitions of SWFs and, on the other hand, on their diversity based on objectives and sources. A short outline on their present role in global financial markets will round off that part of the master thesis. The next section (section 3) will deal with the application of DTCs to SWFs on the basis of the OECD Models from 2008 and earlier including their Commentaries. After a short introduction to the entitlement to DTCs and its consequences and the importance of model conventions and their commentaries for DTC negotiations, section 3 focuses on the personal scope, i.e. the definitions "person" and "resident of a contracting state". In section 4 specific provisions that can be found in the DTC networks of two major players in the SWF business [United Arab Emirates (UAE) and Saudi Arabia] will be analyzed. Section 5 first outlines the 2010 update of the OECD Model and its Commentary on the application of DTCs to state-owned entities, including SWFs. The focus is on the changes through the update and their consequences for the application and interpretation of existing DTCs. The last section (section 6) contains the conclusion of the master thesis along with some critical remarks.

2. Fundamentals on Sovereign Wealth Funds (SWFs)

2.1. Definitions

Although SWFs are not new[6] and play a very important global role in today's world for cross-border financial activities, academic research on these investors only began in 2005 and is thus still in its beginnings.[7] It has mainly been dealt with in business media in recent years.[8] Research with a special focus on tax law is nearly unknown: There are only few recently published articles.[9]

It is thus not really remarkable that there is no single internationally accepted definition of SWFs. In fact, *Razanov* only used the term for the first time ever in 2005.[10] The main reason which makes a standardized definition difficult is, on the one hand, the heterogeneity of their structure, characteristics, objectives and strategies and, on the other hand, their missing transparency. The following definitions give an overview of the different attempts:

1) The International Working Group of Sovereign Wealth Funds (IWG) defines SWFs as "special purpose investment funds or arrangements, owned by the general government. Created by the general government for macroeconomics purposes, SWFs hold, manage, or administer assets to achieve financial objectives, and employ a set of investment strategies that include investing in foreign financial assets. The SWFs are commonly established out of balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, fiscal surpluses, and/or receipts resulting from commodity ex-

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[6] The first SWF, the Kuwait Investment Board, later renamed the Kuwait Investment Authority, was established in 1953.
[7] For an overview with further references see e.g. Loh, *Sovereign Wealth Funds – States Buying the World* (2010); Claus, A Typology of Sovereign Wealth Funds in Consideration of their Investment Characteristics, *WU doctoral thesis* (2010).
[8] See Claus, *A Typology of Sovereign Wealth Funds in Consideration of their Investment Characteristics*, 1.
[9] See e.g. Kandev, Sovereign Wealth Funds: Are They Welcome in Canada? *BIT* 2010, 649 et seq.; Fleischer, A Theory of Taxing Sovereign Wealth Funds, *N.Y.U. Law Review* Vol. 84 (2009) 440 et seq.; Knoll, Taxation and the Competitiveness of Sovereign Wealth Funds: Do Taxes Encourage Sovereign Wealth Funds to Invest in the United States? *Southern Californian Law Review* Vol. 82 (2009) 703 et seq.; Cui, Is Section 892 the Right Place to Look for a Response to Sovereign Wealth Funds? *Tax Notes* Vol. 123 (2009) 1237 et seq.
[10] See Razanov, Who Holds the Wealth of Nations? *Central Banking Journal* Vol. 15, No. 4 (2005) 52 et seq.

ports."[11] The Working Group was established in the course of a meeting of representatives of SWFs from various states in Washington, D.C. (USA) in 2008. Further meetings were facilitated and coordinated by the International Monetary Fund (IMF) and resulted in the publication of the "Santiago Principles", which properly reflect the SWFs' investment practices and objectives. In 2009 the IWG established the International Forum of Sovereign Wealth Funds (IFSWF). It is a voluntary group of SWFs, which meets and exchanges views on issues of common interest, and facilitates understanding of the "Santiago Principles" and SWF activities. Members of the Forum are: Australia, Azerbaijan, Bahrain, Botswana, Canada, Chile, China, Equatorial Guinea, Iran, Ireland, Korea, Kuwait, Libya, Mexico, New Zealand, Norway, Qatar, Russia, Singapore, Timor-Leste, Trinidad & Tobago, the UAE and the USA.

2) The Sovereign Wealth Fund Institute (SWFI), an organization designed to study SWFs and their impact on global economics, politics, financial markets, trade and public policy, defines SWFs as follows: "A Sovereign Wealth Fund (SWF) is a state-owned investment fund composed of financial assets such as stocks, bonds, real estates, or other financial instruments funded by foreign exchange assets. These assets can include: balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, fiscal surpluses, and/or receipts resulting from commodity exports. Sovereign Wealth Funds can be structured as a fund, pool, or corporation. The definition of sovereign wealth fund exclude, among other things, foreign currency reserve assets held by monetary authorities for the traditional balance of payments or monetary policy purposes, state-owned enterprises (SOEs) in the traditional sense, government-employee pension funds, or assets managed for the benefit of individuals. Some funds also invest indirectly in domestic state-owned enterprises. In addition, they tend to prefer returns over liquidity, thus they have a higher risk tolerance than traditional foreign exchange reserves."[12]

3) According to the US Department of Treasury, "SWFs are a government investment vehicle which is funded by foreign exchange assets, and which

[11] IWG, *Sovereign Wealth Funds – Generally accepted Principles and Practices – "Santiago Principles"*, Annex 1.
[12] SWFI, www.swfinstitute.com (visited February 25, 2011).

manages those assets separately from the official reserves of the monetary authorities".[13]

In addition to the definitions of the IWG, the SWFI and the US Department of Treasury, practitioners and researchers have also compiled other definitions.[14] *Razanov*, for example, stated that they "are neither traditional public-pension funds nor reserve assets supporting national currencies, but a different type of entity" and defined them as "a by-product of national budget surpluses, accumulated over the years due to favourable, macroeconomic, trade and fiscal positions, coupled with long-term budget planning and spending restraint."[15] According to *Balding*, an SWF is "a pool of capital controlled by a government or government related entity that invests in assets seeking returns above the risk free rate of return".[16]

It has been demonstrated that a wide range of definitions of SWFs have been developed and that no common, generally accepted definition has emerged until now. This master thesis is based on the definition provided by the IWG, because the OECD also uses this definition in the Commentary to the 2010 OECD Model.[17]

2.2. Diversity based on objectives and sources

Due to the various definitions of SWFs, the number of investors that are regarded as SWFs in articles, empirical analysis and studies etc. varies significantly. Although they share certain characteristics (e.g. a sovereign government owns them; investments in a portfolio of assets of different risk profiles; no explicit individual liabilities; separately managed from the sovereign central bank, ministry of finance and treasuries)[18], SWFs follow different policy objectives.

The IMF has identified five types of SWFs based on their main objectives:

[13] US Department of Treasury, *Semiannual Report on International Economic and Exchange Rate Policies* (2007) Appendix 3.
[14] See in more detail Claus, *A Typology of Sovereign Wealth Funds in Consideration of their Investment Characteristics*, 13 et seq.
[15] Razanov, *Central Banking Journal* Vol. 15, No. 4, 52.
[16] Balding, A Portfolio Analysis of Sovereign Wealth Funds, *University of California – Irvine Research Paper* (2008).
[17] See Commentary to the OECD Model, Art. 4 para. 8.5.
[18] See Loh, *Sovereign Wealth Funds – States Buying the World*, 3.

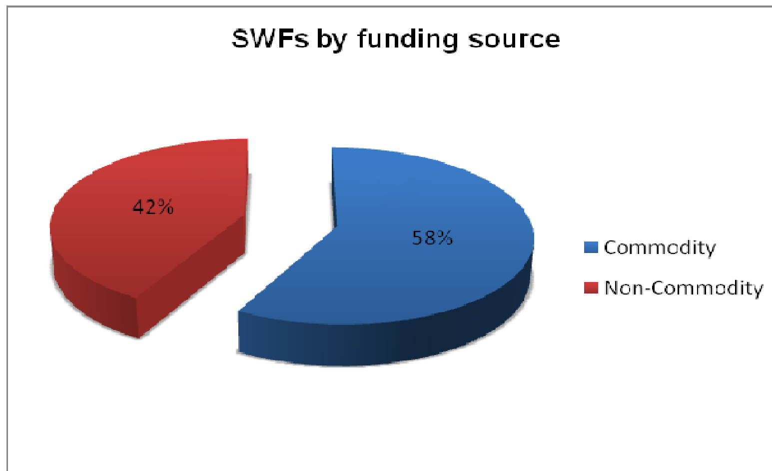
- Stabilization funds: Established in order to insulate the budget and economy from fluctuating commodity (usually) oil prices, e.g. the Stabilization Fund of Russia;
- Saving funds: Transfer of non-renewable assets into a diversified portfolio of international financial assets with the intention of sharing wealth across generations, e.g. the Kuwait Investment Authority;
- Reserve investment corporations: Set up to reduce the negative cost-of-carry of holding reserves or to pursue investment policies with a higher return, e.g. the Korea Investment Corporation;
- Development funds: Allocation of resources for financing socio-economic projects, like infrastructure, e.g. the Temasek Holdings;
- Pension reserve funds: Established to finance future public pensions and/or contingent liabilities, e.g. the Australian Future Fund.[19]

Most SWFs operate as stabilization or saving funds. In practice, SWFs have multiple objectives or change their objectives gradually over time. This is especially true for states that generate revenues from commodity exports. At first, a stabilization fund is established to smooth fiscal revenue or sterilize foreign currency inflows. As the assets in the fund continue to grow beyond the level needed for the purpose of stabilization, the objectives of the fund may be changed and the fund may start diversified investments in assets and currencies. This may also lead to the creation of separate funds with different objectives.[20]

If one does not classify SWFs based on their policy objectives, they can also be categorized by their sources. Funds may have their origin in commodities or non-commodities. In former times, SWFs were set up by resource-rich states mainly based on revenues from commodities, particularly oil and gas exports. In the meantime a lot of non-commodity SWFs have been established as well. These financial investors are largely funded by excess foreign exchange reserves and fiscal budget surpluses, public savings or privatization revenue. Today, the size of non-commodity SWFs is still smaller than the commodity-based SWFs (see chart 1).

[19] See IMF, *Global Financial Stability Report* (2007) 45 (Annex 1.2.); examples provided by author.
[20] See IMF, *Global Financial Stability Report*, 47 (Annex 1.2.).

Chart 1: SWFs by funding source

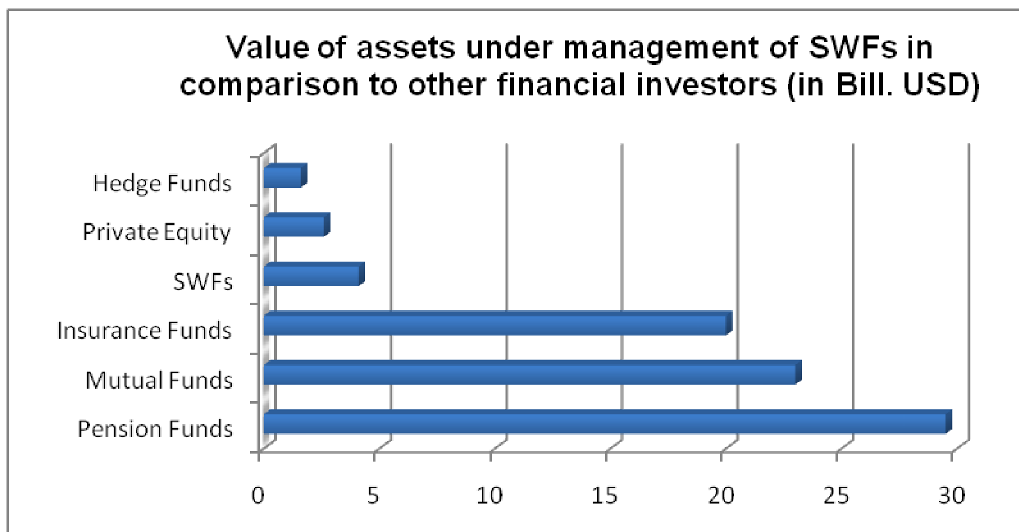


2.3. SWFs role in today's global financial markets

Finding reliable figures on the size of SWFs and the value of the assets they manage is difficult. Most SWFs follow a limited disclosure policy. Figures thus differ significantly between sources. Hence, all the following figures in this master thesis should be taken as indicative.

Today SWFs play an indisputably important role in the international monetary and financial system as institutional investors. Even though at the moment the size of assets under the management of SWFs is – in comparison to other financial investors such as pensions funds, insurance funds, or mutual funds – relatively small, they already exceed hedge funds and private equity funds.

Chart 2: Value of assets under management of SWFs in comparison to other financial investors (in Bill. USD)



According to the SWFI, SWFs hold approximately assets in the amount of USD 4,156 trillion.[21] The world's largest SWF is the Abu Dhabi Investment Authority (ADIA) managing assets of approximately USD 627 billion, representing 15% of the global total. The Norwegian Government Pension Fund – Global comes in second with an estimated USD 512 billion of assets under management. The third biggest SWF is the Saudi Arabian SAMA Foreign Holdings that holds around USD 439 billion of assets. The three biggest SWFs, all established by commodity-exporting states, thus manage assets that are worth more than USD 1.5 trillion; around 38% of the SWFs global assets holdings.

The following table provides an overview of the largest SWFs based on assets under management. In addition, the year of inception and the origin of source are indicated[22]:

Chart 3: Overview of the largest SWFs by assets under management

Country	**Fund name**	**Assets (Bill. USD)**	**Inception**	**Origin**
UAE (Abu Dhabi)	Abu Dhabi Investment Authority (ADIA)	627	1976	Commodity (Oil)
Norway	Government Pension Fund – Global (GPF)	512	1990	Commodity (Oil)
Saudi Arabia	SAMA Foreign Holdings	439.1	n/a	Commodity (Oil)
China	SAFE Investment Company	347.1[23]	1997	Non-Commodity
China	China Investment Corporation (CIC)	332.4	2007	Non-Commodity
China (Hong Kong)	Hong Kong Monetary Authority Investment Portfolio (HKMA)	259.3	1993	Non-Commodity
Singapore	Government of Singapore Investment Corporation (GIC)	247.5	1981	Non-Commodity
Kuwait	Kuwait Investment Authority (KIA)	202.8	1953	Commodity (Oil)
China	National Social Security Fund (NSSF)	146.5	2000	Non-Commodity
Russia	National Welfare Fund (RNWF)	142.5[24]	2008	Commodity (Oil)

[21] See SWFI, www.swfinstitute.com/fundrankings (visited February 25, 2011; last update: December 2010).
[22] Adapted from SWFI, www.swfinstitute.com/fundrankings (visited February 25, 2011; last update: December 2010).
[23] This number is a best-guess estimation by the SWFI.

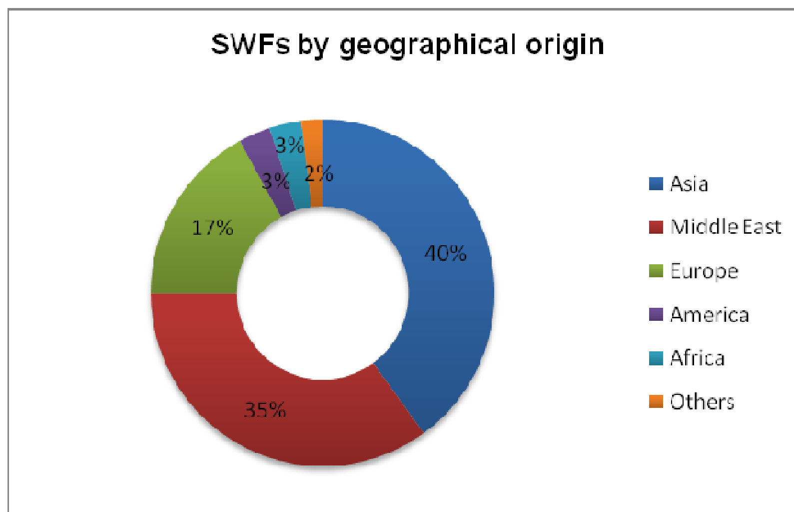
Singapore	Temasek Holdings (TH)	133	1974	Non-Commodity
Qatar	Qatar Investment Authority (QIA)	85	2005	Commodity (Oil)
Libya	Libyan Investment Authority (LIA)	70	2006	Commodity (Oil)
Australia	Australian Future Fund (AFF)	67.2	2004	Non-Commodity
Algeria	Revenue Regulation Fund (RRF)	56.7	2000	Commodity (Oil)
UAE (Abu Dhabi)	International Petroleum Investment Company (IPIC)	48.2	1984	Commodity (Oil)
Kazakhstan	Kazakhstan National Fund (KNF)	38	2000	Commodity (Oil)
South Korea	Korea Investment Corporation (KIC)	37	2005	Non-Commodity
USA (Alaska)	Alaska Permanent Fund (APF)	37	1976	Commodity (Oil)
Malaysia	Khazanah Nasional (KN)	36.8	1993	Non-Commodity
Ireland	National Pensions Reserve Fund (NPRF)	33	2001	Non-Commodity
Brunei	Brunei Investment Agency (BIA)	30	1983	Commodity (Oil)
France	Strategic Investment Fund (SIF)	28	2008	Non-Commodity
Iran	Oil Stabilisation Fund (OSF)	23	1999	Commodity (Oil)
Chile	Social and Economic Stabilization Fund (SESF)	21.8	1985	Commodity (Copper)
Azerbaijan	State Oil Fund (SOF)	21.7	1999	Commodity (Oil)
UAE (Dubai)	Investment Corporation of Dubai (ICD)	19.6	2006	Commodity (Oil)
Canada (Alberta)	Alberta's Heritage Fund (AHF)	14.4	1976	Commodity (Oil)
USA (New Mexico)	New Mexico State Investment Council (NMSIOT)	13.8	1958	Non-Commodity
UAE (Abu Dhabi)	Mubadala Development Company (MDC)	13.3	2002	Commodity (Oil)
New Zealand	New Zealand Superannuation Fund (NZSF)	12.1	2003	Non-Commodity
Bahrain	Mumtalakat Holding Company (MHC)	9.1	2006	Commodity (Oil)
Brazil	Sovereign Fund of Brazil (SFB)	8.6	2009	Non-Commodity
Oman	State General Reserve Fund (SGRF)	8.2	1980	Commodity (Oil & Gas)

[24] This number includes the Oil Stabilization Fund of Russia.

Botswana	Pula Fund (PF)	6.9	1994	Commodity (Diamonds & Minerals)
East Timor	Timor-Leste Petroleum Fund (TLPF)	6.3	2005	Commodity (Oil & Gas)
Saudi Arabia	Public Investment Fund (PIF)	5.3	2008	Commodity (Oil)
China	China-Africa Develop-ment Fund (CADF)	5.0	2007	Non-Commodity
USA (Wyoming)	Permanent Wyoming Mineral Trust Fund (PWMTF)	4.7	1974	Commodity (Oil & Gas)
Trinidad & Tobago	Heritage and Stabilization Fund (HSF)	2.9	2000	Commodity (Oil)
UAE (Ras Al Khaimah)	RAK Investment Authority (RIA)	1.2	2005	Commodity (Oil)

When taking a look at SWFs from the point of view of geography, it can be noted that Asian and Middle Eastern states dominate; together they account for 75% of global assets. Europe comes in second; however, its percentage is mainly based on the Norwegian Government Pension Fund – Global.

Chart 4: SWFs by geographical origin



Most recently, SWFs in particular invested directly. The economic downturn, the financial crises and the states' budget deficits gave them the opportunity to invest in companies that were struggling and experiencing difficulties. In many cases they provided the necessary liquidity. For example, ADIA bought 4.9% in Citi-group Inc. in 2007, Qatar Investment Authority, a 6.4% stake in Barclays in 2008 and a 17% stake in Volkswagen AG in 2010 and since 2009 IPIC holds 9.1% in

Daimler AG. However, the financial crises also hit SWFs, e.g. due to the substantial decline of share prices and thus substantial losses. Nevertheless, SWFs are a preferred capital provider due to their ability to act quickly, the large funds available and their commitment to long-term investments. It can be expected that SWFs will become even more important participants in the global monetary and financial world in the future, as e.g. income from commodities will not stop to increase. *Maslakovic,* of the International Financial Service London, for example, expects that SWFs' assets will increase to USD 5.5 trillion by the end of 2012.[25] Actual SWFs' assets growth rate will of course be mainly influenced by worldwide economic factors, e.g. the oil price, global crises or international exchange rate policies. However, in light of the growth potential it is not remarkable that the following states have recently launched or are planning to establish SWFs: Angola, Bolivia, Brazil, Canada, France, India, Japan, Nigeria, Taiwan and Thailand.[26]

[25] See Maslakovic, Sovereign Wealth Funds 2010, *International Financial Services London Research* (2010) 1.
[26] See Maslakovic, *International Financial Services London Research*, 2.

3. Application of Double Taxation Conventions (DTCs) to SWFs on the basis of the OECD Models from 2008 and earlier including their Commentaries

3.1. Entitlement to DTCs and its consequences

International law places few limits on the tax sovereignty of states.[27] Persons engaged in cross-border business therefore may (also) be liable to tax in the state in which they invest. When investing, cross-border SWFs are, like other investors, thus sensitive to the tax treatment they get in the potential investee states. Even though taxes only form part of an investment decision, they play an important role. Australia, for example, plans to soon set out clear and certain taxation guidelines for potential SWF investments in order to improve its attractiveness as a destination for these funds.[28] DTCs play an important role in the whole investment process. Their main aim is to settle technical problems generated by overlapping tax jurisdictions and to avoid international double taxation, but they are also commonly used to boost cross-border economic relations.

In principle, two forms of international double taxation have to be distinguished: juridical and economic double taxation. Juridical double taxation arises from the taxation of the same (natural or juridical) person with respect to the same subject matter, e.g. income or capital, for identical periods in more than one state.[29] This form of international double taxation mainly arises because states not only levy taxes on domestic income or assets and domestic economic transactions, but also on capital situations and economic transactions carried out in other states to the extent that they benefit resident taxpayers.[30] In contrast, economic double taxation occurs when the same income or capital is taxed for identical periods in more than one state, but in the hands of different persons.[31] This form of international double taxation, for example, frequently arises if one state taxes a legal ent-

[27] See Lang, *Introduction to the Law of Double Taxation Conventions* (2010) MN 1 et seq.
[28] See Australian Government, Greater Certainty for Sovereign Investments – the Framework Rules, *Consultation Paper* (June 2010, submissions published in November 2010).
[29] See Commentary to the OECD Model, Intro. para. 1.
[30] See Commentary to the OECD Model, Intro. para. 1.
[31] See Lang, *Introduction to the Law of Double Taxation Conventions*, MN 11.

ity at its seat whereas another state disregards the legal entity and taxes its income or capital by attributing it to the shareholders.[32]

SWFs, however, mainly do not have to deal with the problem of double taxation, because typically they do not pay taxes in their home jurisdiction either by reason of a specific tax exemption or because of the principle of sovereign immunity from taxation. *Djanani/Brähler* refer then to virtual double taxation, because at least two states have the possibility of taxing the same income or capital for identical periods, but in fact one of the two states does not tax due to the domestic tax law.[33]

Nevertheless, when investing abroad, SWFs want to be entitled to the DTC network. Treaty entitlement is only possible if the personal and substantive scope of a DTC is fulfilled. If a treaty is based on the OECD Model, the personal scope is established in Arts. 1 and 4. This master thesis will deal in detail with the personal scope in section 3.3. The substantive scope is regulated in Art. 2 OECD Model and covers taxes on income and on capital that are imposed on behalf of a contracting state or of its political subdivisions or local authorities. DTCs regularly contain an exemplary list of taxes on income and capital to which they are applicable.[34] The substantive scope is fulfilled most of the time when a DTC is applied to SWFs. It is therefore not covered in detail in this master thesis.

When a DTC is applicable, it will determine in the next step to what extent each state is allowed to levy taxes and in which situations these states relinquish completely or partially the imposition of taxes. This fact is of particular relevance to SWFs, especially in respect of passive income, i.e. dividend, interest and royalty payments, and also with regard to income from immovable property, business profits, capital gains and capital. Special provisions, especially the non-discrimination clause and the mutual agreement procedure, can also be of interest. Moreover, the methods for elimination of double taxation are set out in DTCs.

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[32] See Vogel in Vogel (ed.) *On Double Taxation Conventions*[3] (1997) Intro. MN 3.
[33] See Djanani/Brähler, *Internationales Steuerrecht. Grundlagen für Studium und Steuerberaterprüfung* (2009) 17.
[34] See on Art. 2 OECD Model in detail Lang, *Introduction to the Law of Double Taxation Conventions*, MN 222 et seq.

The OECD and the UN Models[35] propose the exemption[36] (with a proviso safeguarding progression[37]; Art. 23 A) and the credit methods[38] (Art. 23 B).

The importance of whether SWFs are entitled to DTCs or not will be demonstrated based on the dividend, interest and royalty article of the OECD Model (Arts. 10, 11 and 12), which are the most important specific provisions for SWFs in DTCs and which partly have also been in focus of the 2010 update of the Commentary to the OECD Model.[39] That is also the reason why this master thesis, when analyzing specific provisions in DTCs, will mainly concentrate on these three articles.[40] Under Arts. 10(1) and 11(1) OECD Model, the residence state of the recipient of the dividend/interest payments has the right to tax. Therefore, SWFs are primarily taxed in their residence state. However, the source state also has a taxing right, but it is limited to a certain percentage if the recipient is the beneficial owner of the dividend/interest payments. Art. 10(2) OECD Model, for example, limits the source state taxing right to 5% if the recipient of the dividends is a corporation that directly holds less than 25% of the capital of the company paying the dividends; otherwise, it is limited to 15%. According to Art. 11(2) OECD Model, the tax charged on interest payments may not exceed 10% of the gross amount of these payments. Unlike Arts. 10 and 11 OECD Model, Art. 12(1) OECD Model gives the residence state the exclusive taxing right; the source state is not entitled to levy taxes. However, numerous DTCs can be found that also give the source state a limited taxing right. In contrast to the OECD Model, the UN Model does not propose in either the dividend, the interest or the royalty article any rates of withholding tax, but leaves the actual percentage to be fixed in the bilateral negotiations. Moreover, Art. 10(2)(a) UN Model fixes the threshold for the differentiation between direct and portfolio investments at 10%. Under the source states national law, the right to tax in cases of dividend, interest or royalty payments may be higher, e.g. 30%. By concluding a DTC states have thus mutually

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[35] All references to the UN Model and its Commentary are to the 2001 version (unless otherwise indicated).

[36] See Lang, *Introduction to the Law of Double Taxation Conventions*, MN 413 et seq.; Vogel in Vogel (ed.) *On Double Taxation Conventions*[3], Art. 23 MN 64.

[37] See Lang, *Introduction to the Law of Double Taxation Conventions*, MN 423 et seq.; Vogel in Vogel (ed.) *On Double Taxation Conventions*[3], Art. 23 MN 205 et seq.

[38] See Lang, *Introduction to the Law of Double Taxation Conventions*, MN 432 et seq.; Vogel in Vogel (ed.) *On Double Taxation Conventions*[3], Art. 23 MN 147 et seq.

[39] See section 5.1.

[40] See section 4.

agreed to reduce or even give up taxing rights that form part of their pure domestic law. Accordingly, SWFs have a high interest in being entitled to DTCs that follow the OECD/UN Model and to make use of the reduced source's state taxing right or even profit from DTCs that refrain entirely from withholding taxes. Any foreign tax paid by an SWF is a net cost, because it cannot credit the tax paid, if it is not taxed in its state of residence (if the credit method applies) or reclaim withholding taxes paid.

Apart from DTCs, the unilateral avoidance of double taxation is also of high importance. In that case the investee country steps back from its tax claim. Unilateral measures are based on domestic tax law and differ from state to state. In some states, e.g. Germany, precise rules exist; in other states, e.g. Austria, the tax authorities have a certain leeway in the application of the double taxation avoidance rules.[41] In connection with SWFs the international law doctrine of sovereign immunity is of greatest interest. According to this principle, a sovereign state (including its agents, property and activities) is, as a general rule, immune from the jurisdiction of the courts of another sovereign state. There is no international consensus, however, on the precise limits of the sovereign immunity principle. Most states, for example, would not recognize that the principle applies to business activities and many states do not recognize the application of this principle in tax matters. There are therefore considerable differences between states as regards the extent, if any, to which that principle applies to taxation. Even among states that would recognize its possible application in tax matters, some apply it only to the extent that it has been incorporated into domestic law and others apply it as customary international law but subject to important limitations.[42] As SWFs have become powerful players in the international markets, this principle has, for example, been intensively discussed in the United States.[43] As of now, investment inflows to the US by SWFs are tax exempt under Section 892 IRC, because they are considered part of a foreign government. The law dates back to 1917 during a

[41] See Lang, *Introduction to the Law of Double Taxation Conventions*, MN 18.
[42] See Commentary to the OECD Model, Art. 1 para. 6.38; see also Gaukrodger, Foreign State Immunity and Foreign Government Controlled Investors, *OECD Working Papers on International Investments* (2010).
[43] See e.g. Fleischer, *N.Y.U. Law Review* Vol. 84, 440 et seq.; Knoll, *Southern Californian Law Review* Vol. 82, 703 et seq.; Cui, *Tax Notes* Vol. 123, 1237 et seq.; Mason, Efficient Management of the Wealth of Nations, *Tax Notes* Vol. 120, 1321 et seq.

time when such investments were highly welcome. The main point of discussion is whether SWFs represent a government or whether they operate separately from it. If these investments are commercial in the sovereign immunity sense, then SWFs should – based on the principle that equals should be taxed equally – compete on fair terms with private-sector investors.

3.2. The importance of model conventions and their commentaries

The first DTCs were already concluded in the 19th century: Prussia and the Saxons concluded the first treaty on direct taxes in 1869.[44] In 1921, the League of Nations commenced work on model conventions, resulting in the first model published in 1928 and the Model Conventions of Mexico (1943) and London (1946).[45] This work left its mark on the later work of other international organizations, e.g. the OEEC (today: OECD) adopted its first recommendation concerning double taxation in 1955.[46] The first OECD Model, designed by the OECD Fiscal Committee, was published in 1963. This model was updated in 1977, 1992 (since than as a loose-leaf version), 1994, 1995, 1997, 2000, 2002, 2005, 2008 and 2010. The main purpose of the OECD Model is "to clarify, standardize and confirm the fiscal situation of taxpayers who are engaged in commercial, industrial, financial or any other activities in other countries through the application by all countries of common solutions to identical cases of double taxation."[47] In addition to the OECD Model a Commentary was also developed by the OECD Fiscal Committee, which illustrates the concept, basic principles, terms and definitions used in the model and is one means of interpretation for the application of a DTC. It also contains reservations[48] and observations[49] by the OECD member countries. In today's bilateral DTCs negotiations the OECD Model plays the most important role. The second most important model is the UN Model.

The UN Model was first published in 1979 and was revised in 2001. The next update of the UN Model is planned for 2011. It focuses – in contrast to the OECD

[44] See Djanani/Brähler, Internationales Steuerrecht. Grundlagen für Studium und Steuerberaterprüfung, 76 et seq.
[45] See Commentary to the OECD Model, Intro. para. 4.
[46] See Commentary to the OECD Model, Intro. para. 4.
[47] Commentary to the OECD Model, Intro. para. 2.
[48] Reservations are made by OECD member countries to show their disagreement with the OECD Model and that they therefore do not have the intention of following the Model.
[49] Observations are made by OECD member countries to express their disagreement with the interpretation of the OECD Model.

Model, which represents the interests of developed states – on the interests of developing states and is therefore used as a basis for negotiations between developed and developing states. In principle, this model follows the OECD Model, but some important deviations exist. Major differences can be found in the PE definition, the allocation of business profits and transfer pricing regulations. Moreover, source taxation is generally defined broader than in the OECD Model in order to retain the taxing right on remunerations paid to companies of developed states offering their know-how to developing states.[50]

Furthermore, some states, e.g. Belgium and the US, or groups of states, e.g. the Andean group, have developed their own models, which they present to states that would like to conclude a bilateral convention with them. In these models the states incorporate their own deviations based on their own economic interests and peculiarities of their law and social systems.[51]

However, all these models only form the basis for bi- or multilateral tax treaties and every DTC is negotiated separately. Nevertheless, they resemble each other, because the negotiation partners will only discuss the points on which they disagree.

3.3. Personal scope

The first issue when having a look at the application of DTCs to SWFs on the basis of the OECD Models from 2008 and earlier including their Commentaries that has to be addressed is whether SWFs fall under the personal scope of the applicable DTC. Art. 1 in connection with Art. 4 OECD-Model determines the personal scope and thereby defines which taxpayers under what conditions are covered by it. Art. 1 OECD Model reads as follows: "This Convention shall apply to persons who are residents of one or both of the Contracting States."[52] Therefore, it is relevant, that, on the one hand, a person exists and that, on the other hand, this person has a personal nexus to one or both states, which is referred to as residence in DTCs. If the person is not resident in one or both states, the DTC is not appli-

[50] See in detail Lang, *Introduction to the Law of Double Taxation Conventions*, MN 27; see also section 3.1.
[51] See Lang, *Introduction to the Law of Double Taxation Conventions*, MNs 34 and 36.
[52] See Hattingh, Article 1 of the OECD Model: Historical Background and the Issues Surrounding it, *BIT* 2003, 215 et seq.; Hattingh, The Role and Function of Article 1 of the OECD Model, *BIT* 2003, 546 et seq.

cable.[53] However, four exceptions exist to this principle in the OECD Model: Art. 24(1), Art. 25(1) in cases of Art. 24(1), Art. 26(1) and Art. 27(1). The non-discrimination article refers in para. 1 to nationals and grants them treaty protection even if they fail to be residents of either contracting state. Under Art. 25(1) OECD Model, the mutual agreement procedure allows a person who considers that the action of one or both of the contracting states results or will result for him in taxation not in accordance with the applicable DTC provisions, to present his case – irrespective of the remedies provided by the domestic tax law of those states – to the competent authority of the contracting state of which he is a national. Nor are the exchange of information and assistance in the collection of taxes articles restricted by Art. 1 OECD Model. By using "person" and "resident", Art. 1 OECD Model refers to – without expressly mentioning – Art. 3(1)(a) and Art. 4 OECD Model each of which provisions defines one of those two terms.[54]

3.4. Person

Art. 3(1)(a) OECD Model provides for the purpose of the convention that "the term 'person' includes an individual, a company and any other body of persons." The term "person" is in the formal sense a term used by the OECD Model.[55] However, the domestic law must be consulted to know whether individuals, companies and other body of persons like SWFs, trusts, foundations, collective investment vehicles, partnerships etc. can be regarded as "persons" in light of the applicable DTC.[56] In contrast to the terms "individual" and "any other body of person", the term "company" is defined in Art. 3(1)(b) OECD Model as "any body corporate or any entity that is treated as a body corporate for tax purposes". According to *Vogel,* the company's subcategory "bodies corporate" refers to entities to which the legal system attributes legal capacity to the same general extent as it does to individuals, such as family relationships. Therefore, any "body corporate" created

[53] See Commentary to the OECD Model, Art. 23 para. 11; Vogel in Vogel (ed.) *On Double Taxation Conventions*[3] (1997) Art. 1 MN 4; Wassermeyer in Debatin/Wassermeyer (eds.) Doppelbesteuerung[84] (June 2001) Art. 1 MN 17 et seq.

[54] See Vogel in Vogel (ed.) *On Double Taxation Conventions*[3], Art. 1 MN 13.

[55] See Schuch, Die Ansässigkeit von Pensionsfonds und gemeinnützigen und anderen steuerfreien Körperschaften, in Lang/Schuch/Staringer (eds.) *Die Ansässigkeit im Recht der Doppelbesteuerungsabkommen* (2008) 109 (112).

[56] See Vogel in Vogel (ed.) *On Double Taxation Conventions*[3], Art. 1 MN 14 et seq.; Wassermeyer in Debatin/Wassermeyer (eds.) *Doppelbesteuerung*[82] (September 2000) Art. 1 MN 20 et seq.; Wassermeyer in Debatin/Wassermeyer (eds.) *Doppelbesteuerung*[109] (October 2009) Art. 3 MNs 12, 17 et seq.; Tumpel/Aiger, Die Personeneigenschaft nach Art 3 Abs 1 lit a OECD-MA als Voraussetzung der Ansässigkeit, in Lang/Schuch/Staringer (eds.) *Die Ansässigkeit im Recht der Doppelbesteuerungsabkommen* (2008) 33 (42 et seq.).

under the law of any state is a "company" and consequently also a "person" for purposes of the OECD Model. Contracting states themselves, as well as their political subdivisions and local authorities, are "bodies corporate" and thus "companies" and therefore "persons".[57] In contrast, *Lang, Wassermeyer* and others are of the opinion that only entities subject to tax form part of the category "company" including the subcategory "body corporate".[58] According to para. 2 of the Commentary to Art. 3 OECD Model, the term "company" means in the first place any body corporate. Moreover, entities can fall within the definition of "companies", although not incorporated, if they are treated as a body corporate for tax purposes. Thus, for example a foundation (fondation, Stiftung) may fall within the meaning of the term "person". In the author's view, the most convincing argument brought forward is that the reference "if they are treated as a body corporate for tax purposes" means that only taxable entities can fulfill the requirements for the category "company". The focus of other arguments is on domestic law, even though the context of the provision does not require its application.

Moreover, it has been intensively discussed which (tax) law has to be consulted to know about the (tax) treatment of a "company". It is argued that the (tax) law of the state of application[59], the state of organization[60], one of the contracting states[61] or any state[62] will decide. The third opinion can be supported: Indeed, the definition in Art. 3(1)(b) OECD Model does not restrict the answer to which legal system one has to refer for determining the (tax) treatment of a "company". This question will only be answered when Art. 4 OECD Model is applied. However, the residence criteria in the later article will limit the personal scope determined in

[57] See Vogel in Vogel (ed.) *On Double Taxation Conventions*[3], Art. 1 MN 15.

[58] See Lang, *Hybride Finanzierungen im internationalen Steuerrecht* (1991) 117 et seq.; Wassermeyer in Debatin/Wassermeyer (eds.) *Doppelbesteuerung*[109], Art. 3 MN 18; Debatin, Subjektiver Schutz unter Doppelbesteuerungsabkommen, *BB* 1989, Beilage 2, 4; Pott, *Die Kollission unterschiedlicher Formen der Gesellschaftsbesteuerung im internationalen Steuerrecht* (1982) 191.

[59] See Wassermeyer in Debatin/Wassermeyer (eds) *Doppelbesteuerung*[109], Art. 3 MN 19 with further references; Tumpel/Aigner in Lang/Schuch/Staringer (eds.) *Ansässigkeit im Recht der Doppelbesteuerungsabkommen*, 42 et seq., 47 and 51 et seq.

[60] See Commentary to the OECD Model, Art. 3 para. 3.

[61] See Lang, *Hybride Finanzierungen im internationalen Steuerrecht*, 117 et seq.; Sutter, Die abkommensrechtliche Stellung der atypisch stillen Beteiligung, in Gassner/Lang/Lechner (eds.) *Personengesellschaften im Recht der Doppelbesteuerungsabkommen* (2000) 205 (214 et seq.); Prillinger, Die Ansässigkeit von Körperschaften des öffentlichen Rechts, in Lang/Schuch/Staringer (eds.) *Die Ansässigkeit im Recht der Doppelbesteuerungsabkommen* (2008) 121 (126).

[62] See Vogel in Vogel (ed.) *On Double Taxation Conventions*[3], Art. 3 MN 15; Tumpel/Aigner in Lang/Schuch/Staringer (eds.) *Ansässigkeit im Recht der Doppelbesteuerungsabkommen,* 53.

light of the term “person” to “persons resident of a contracting state”.[63] When having in mind that the residence state will decide on the application of the DTC under Art. 4(1) OECD Model, the state of application, the state of organization or any other state can be ignored. Otherwise, Art. 3(1)(b) OECD Model would lose its function of providing a general definition.[64]

If an entity does not fall within the definition of “company”, because it – according to *Vogel* – has no or only partly has legal capacity or – according to *Lang, Wassermeyer* and others – is not taxable or treated as being taxable like a “body corporate” – an entity can still be treated as a “person” in light of the OECD Model. Such an entity can qualify as “any other body of persons” as mentioned in Art. 3(1)(a) OECD Model.[65] In order to be recognized for treaty purposes, however, at least some rights and obligations have to be assigned to such a body of persons from an income tax perspective.[66] According to para. 2 of the Commentary to Art. 3 OECD Model, partnerships are considered to be “persons” under the OECD Model, because they either fall within the definition of “company” or, where this is not the case, because they constitute other bodies of persons. This paragraph in the Commentary to the OECD Model only refers to partnerships. Since treaty entitlement is based on the same principles, it can be extended to all other entities that are not considered to be partnerships.[67] Para. 2 of the Commentary to Art. 1 OECD Model supports this view by providing that the definition of the term “person” is not exhaustive and should be read as indicating that it is used in a very wide sense. The US Model, for example, explicitly states in Art. 3(1)(a) that the term “person” furthermore includes an estate, a trust and a partnership. As a

[63] See in detail section 3.5.
[64] See Prillinger in Lang/Schuch/Staringer (eds.) *Die Ansässigkeit im Recht der Doppelbesteuerungsabkommen*, 126 et seq. with reference to Lang, Die Besteuerung von Einkünften bei unterschiedlichen Personen aus dem Blickwinkel des DBA-Rechts, *SWI* 2000, 527 (530).
[65] See in detail Vogel in Vogel (ed.) *On Double Taxation Conventions*[3], Art. 1 MN 17 et seq.; Wassermeyer in Debatin/Wassermeyer (eds.) *Doppelbesteuerung*[109], Art. 3 MN 20; Tumpel/Aigner in Lang/Schuch/Staringer (eds.) *Die Ansässigkeit im Recht der Doppelbesteuerungsabkommen*, 37; Lang, *Hybride Finanzierungen im internationalen Steuerrecht*, 33; Huemer, *Die unbeschränkte Steuerpflicht natürlicher Personen* (1996) 81.
[66] See Lang, *SWI* 2000, 539; Toifl, *Personengesellschaften im Recht der Doppelbesteuerungsabkommen* (2003) 46 et seq.
[67] See Canete, Conflicts of Allocation and Conflicts of Qualification: A Focus on Hybrid Entities and the Latest Developments in Austria, in Danon (ed.) *Double Taxation Conventions: Latest Developments*, in print.

result, the term “person” must be seen in a broad sense, which seems legitimate considering the object and purpose of the OECD Model.[68]

It has been demonstrated that under certain conditions SWFs are “persons” in light of the OECD Model. Either Art. 3(1)(b) OECD Model is applicable, because an SWF is a taxable entity or treated as taxable according to the domestic tax law of one of the contracting states or these funds qualify as “any other body of persons” [Art. 3(1)(a) OECD Model]. The next issue that has to be addressed is whether SWFs can also be considered to be “residents of a contracting state”.

3.5. Resident of a contracting state

3.5.1. Unlimited tax liability

Art. 4(1) OECD Model defines when a person is a resident of a contracting state in light of the OECD Model. The provision states that “for the purpose of this Convention, the term ‘resident of a Contracting State’ means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature and that the term also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.”

The provision thus requires that a person is “liable to tax” in at least one of the two contracting states, although this criterion does not – explicitly stated in Art. 4(1) 2nd sentence OECD Model – include a person whose tax liability is limited to income from sources in that state or capital therein. The tax liability is moreover restricted by the fact that under the laws of that state this person is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of similar nature. Therefore, the tax liability must be fulfilled by certain specific criteria; otherwise, the person cannot be resident under a DTC in line with the OECD Model. Especially for SWFs one other aspect is also of high importance: Whether public corporations that are subject to limited tax liability or exempt from it are entitled to treaty benefits. Due to the fact that only since the up-

[68] See Tumpel/Aigner in Lang/Schuch/Staringer (eds.) *Die Ansässigkeit im Recht der Doppelbesteuerungsabkommen*, 37.

date of the OECD Model in 1995 does Art. 4(1) 1st sentence OECD Model explicitly include that State and any political subdivision or local authority thereof, treaty entitlement may has to be analyzed in light of different versions of the OECD Model and its Commentaries, i.e. whether the personal scope of these DTCs deviates from those lacking such a provision.[69]

The OECD Model provides for certain criteria for taxation as a resident, but refers to the concept of residence under domestic law of one or both of the contracting states, which trigger a comprehensive liability to tax based on the taxpayer's personal attachment to the state concerned.[70] As a consequence, only persons who meet the tax-triggering criteria under the domestic law of one or both of the contracting states can be residents under the OECD Model. The criteria set by the OECD Model (domicile, residence, place of management, other criteria of a similar nature[71]) nevertheless also limit the scope, because the domestic law of a contracting state may also refer to other criteria. Treaty entitlement based on those other criteria is not a necessary consequence.[72] Art. 4(1) OECD Model thus requires some kind of "qualified tax liability" for a person to be entitled to a DTC.[73] Therefore, it is of high relevance which criteria under domestic law lead to full tax liability under the OECD Model. The notion "other similar criteria" gives a hint. It makes clear that the list containing the criteria in Art. 4(1) OECD Model is not exhaustive and thus just provides examples of connecting factors triggering residence-type taxation under domestic law.[74] According to *Vogel/Lehner*, *Wassermeyer* and others, all other criteria mentioned in Art. 4(1) OECD Model are of a locality-related nature, i.e. they establish a territorial nexus to a certain state; therefore, another criterion of a similar nature can also only involve this require-

[69] See in detail section 3.5.2.
[70] See Commentary to the OECD Model, Art. 4 paras. 3 and 8; Lehner in Vogel (ed.) *On Double Taxation Conventions*[3] (1997) Art. 24 MN 24; Wassermeyer in Debatin/Wassermeyer (eds.) *Doppelbesteuerung*[83] (March 2011) Art. 4 MNs 8 and 25.
[71] The UN Model additionally mentions the place of incorporation.
[72] See Staringer, Die Ansässigkeit aufgrund des Wohnsitzes, des ständigen Aufenthaltes, des Ortes der Geschäftsleitung oder eines anderen ähnlichen Merkmals nach Art 4 Abs 1 OECD-MA, in Lang/Schuch/Staringer (eds.) *Die Ansässigkeit im Recht der Doppelbesteuerungsabkommen* (2008) 67 (73).
[73] See Staringer in Lang/Schuch/Staringer (eds.) *Die Ansässigkeit im Recht der Doppelbesteuerungsabkommen*, 70.
[74] See Eckerstorfer/Xiong, Treaty Entitlement (Articles 1, 4, and 2 OECD Model) in Lang/Liu/Tang (eds.) & Günther/Cao (ass. eds.) *Europe-China Tax Treaties* (2010) 1 (5 et seq.).

ment.[75] A minority, however, is of the opinion that every characteristic that triggers full tax liability is sufficient.[76]

In Art. 4(1) 2nd sentence the OECD Model excludes from a person's tax liability, income from sources in that state or capital situated therein. As a consequence, the phrase „liable to tax" in Art. 4(1) 1st sentence OECD Model requires comprehensive taxation.[77] In most cases this is worldwide taxation. However, residents of states applying the "territoriality principle" in their taxation should not be excluded from the scope of the OECD Model. This follows from the interpretation of the provision in light of its object and purpose.[78] In cases of limited tax liability in two states a DTC is not applicable.

Art. 4(1) 2nd sentence OECD Model was included in the 1977 update. However, the following provision was already part of the Commentary to the 1963 OECD Model: "An individual, however, is not to be considered 'a resident of a Contracting State' in the sense of the Convention if, although not domiciled in that State, he is considered as a resident according to the national law and is only subject to a limited taxation on the income arising in that State."[79] *Van Genep* concludes that the inclusion of the second sentence did not change the meaning of Art. 4 OECD Model: "In other words, what has been described in one sentence in the 1963 Model has been defined in two sentences in the 1977 Model."[80] Since the term "person" is used in the 1977 OECD Model rather than "individual" in the Commentary to the 1963 OECD Model, the former applies not only to individuals but to companies as well.[81] The inclusion of Art. 4(1) 2nd sentence in the 1977

[75] Lehner in Vogel (ed.) *On Double Taxation Conventions*[3] (1997) Art. 4 MN 29; Wassermeyer in Debatin/Wassermeyer (eds.) *Doppelbesteuerung*[83], Art. 4 MN 29; Staringer in Lang/Schuch/Staringer, *Ansässigkeit im Recht der Doppelbesteuerungsabkommen*, 74; Toifl, *Personengesellschaften im Recht der Doppelbesteuerungsabkommen*, 63.

[76] See Van Raad, Dual Residence, *ET* 1988, 241 (241).

[77] See Lang, *Introduction to the Law of Double Taxation Conventions*, MNs 160, 181 et seq.; Staringer, in Lang/Schuch/Staringer (eds.) *Die Ansässigkeit im Recht der Doppelbesteuerungsabkommen*, 70 et seq.; Schlager, Die Einschränkung der Ansässigkeit bei bloß inländischen Einkunftsquellen nach Art 4 Abs 1 Satz 2 OECD-MA, in Lang/Schuch/Staringer (eds.) *Die Ansässigkeit im Recht der Doppelbesteuerungsabkommen* (2008) 87 (93 et seq.); Schuch, in Lang/Schuch/Staringer (eds.) *Die Ansässigkeit im Recht der Doppelbesteuerungsabkommen*, 114.

[78] See Commentary to the OECD Model, Art. 4 para. 8.3.

[79] Commentary to the OECD Model 1963, Art. 4 para. 10.

[80] Van Ganap, Dual-Resident Companies. The second sentence of Art 4(1) of the OECD Model Convention of 1977, *ET* 2002, 141 (143).

[81] See Eckerstorfer/Xiong in Lang/Liu/Tang (eds.) & Günther/Cao (ass. eds.) *Europe-China Tax Treaties*, 8 with reference to Van Ganap, *ET* 2002, 142 et seq.

OECD Model therefore does not change the meaning of Art. 4; it actually clarifies its application. This view is supported by the Commentary's example of foreign diplomatic and consular staff, who are not considered to be residents by virtue of the second sentence of Art. 4(1) OECD Model.[82]

The imposition of taxes is not a requirement for the application of a DTC following the OECD Model, i.e. a DTC is even applicable if one state does not make use of its taxing right given by a DTC and therefore does not effectively tax certain income or capital. According to *Vogel/Lehner,* "[a]ll it requires is that the person concerned has that personal attachment to at least one of the contracting states – the 'State of residence' – which might result in him becoming subject to full tax liability."[83] In line with this argumentation a person does not have to be subject to taxation according to the domestic law of one or both contracting states in order to be entitled to a DTC. *Lang* supports this view when arguing that it is only a technical difference whether a person is considered to be subject to tax, but exempt with respect to certain income or whether the person is not subject to tax at all. It should thus not make any difference for treaty purposes.[84] In contrast, *Wassermeyer* and others – in line with para. 8.7 of the Commentary to Art. 4 OECD Model – argue that a person is only entitled to a DTC if he/she/it would be liable to tax when deriving taxable income.[85] In this opinion, a person at least has to be covered by the domestic tax law of one of the contracting states. A person can only enjoy treaty benefits if some income can be attributed to that person and thus is a taxable subject, however irrespective of whether this income is effectively taxed or not.[86] A consequence of this view is that the domestic tax law could determine whether a person should be eligible for tax treaty protection or not. But this should

[82] See in detail Eckerstorfer/Xiong in Lang/Liu/Tang (eds.) & Günther/Cao (ass. eds.) *Europe-China Tax Treaties*, 8 et seq.; Schlager in Lang/Schuch/Staringer (eds.) *Die Ansässigkeit im Recht der Doppelbesteuerungsabkommen*, 97 et seq.
[83] See Lehner in Vogel (ed.) *On Double Taxation Conventions*[3], Art. 4 MN 24a; Canete, in Danon (ed.) *Double Taxation Conventions: Latest Developments*, in print.
[84] See Lang, *SWI* 2000, 529 et seq.; see also Schuch in Lang/Schuch/Staringer (eds.) *Die Ansässigkeit im Recht der Doppelbesteuerungsabkommen*, 116 et seq. with further references; Prillinger in Lang/Schuch/Staringer (eds.) *Die Ansässigkeit im Recht der Doppelbesteuerung*, 127 et seq. with further references.
[85] See Wassermeyer in Debatin/Wassermeyer, *Doppelbesteuerung*[84], Art. 1 MN 17; Toifl, *Personengesellschaften im Recht der Doppelbesteuerungsabkommen*, 62; Sutter in Lang/Schuch/Staringer (eds.) *Personengesellschaften im Recht der Doppelbesteuerungsabkommen*, 219 et seq.; Canete, in Danon (ed.) *Double Taxation Conventions: Latest Developments*, in print.
[86] Toifl, Personengesellschaft mit Drittstaatseinkünften aus abkommensrechtlicher Sicht, in Lang/Schuch/Staringer (eds.) *Personengesellschaften im Recht der Doppelbesteuerungsabkommen* (2000) 121 (143 et seq.).

not be the crucial point for tax treaty entitlement: As long as a state has the possibility under domestic law to tax a person, it is irrelevant whether the state actually makes use of this possibility to tax or not. Only if the state were not to have any possibility to deem the person a tax subject the treaty entitlement would be lost.[87] When supporting the view of *Vogel/Lehner*, *Lang* and others, the locality-related nature is therefore the only criterion as regards content set out by the OECD Model. The question whether a person is a tax subject under domestic law is then irrelevant.[88] As a result, the criteria set out in the OECD Model are then rather broad, as domestic characteristics can be multifarious and vary a lot as well.[89]

If full tax liability exists in one of the two states, the other contracting state is obliged to apply the DTC.[90] In cases of fully tax liability in both states, as far as SWFs are concerned (which will be rarely the case), the place of effective management is the criterion to define the residence state under the tie-breaker rule in Art. 4(3) OECD Model.[91]

3.5.2. Treaty entitlement of public corporate entities subject to limited or exempt from full tax liability

Whether public corporate entities that are subject to limited tax liability or exempt from full tax liability are also entitled to tax treaty benefits is a question that is also of high importance for SWFs. In the 1995 update of the OECD Model, Art. 4(1) was changed to the extent that it then expressly included the state and any politic subdivision or local authority thereof as "persons" entitled to treaty benefits [Art. 4(1) 1st sentence 2nd part]. *Vogel/Lehner, Lang* and others are of the opinion that the 1995 addition to the first sentence of Art. 4(1) OECD Model is only a clarification.[92] The Commentary to the OECD Model also supports this view: "It has been

[87] See Schlager in Lang/Schuch/Staringer (eds.) *Die Ansässigkeit im Recht der Doppelbesteuerungsabkommen*, 105 et seq.

[88] Vogel in Vogel (ed.) *On Double Taxation Conventions*³, Art. 1 MN 25a; Lehner in Vogel (ed.) *Double Taxation Conventions*³, Art. 4 MN 24a.

[89] Staringer in Lang/Schuch/Staringer (eds.) *Die Ansässigkeit im Recht der Doppelbesteuerungsabkommen*, 75.

[90] Lang, *Introduction to the Law of Double Taxation Conventions*, MN 160.

[91] See Lang, *Introduction to the Law of Double Taxation Conventions*, MNs 161, 220 et seq.; Wassermeyer in Debatin/Wassermeyer (eds.) *Doppelbesteuerung*⁸³, Art. 4 MN 91 et seq.; Lehner in Vogel/Lehner (eds.) *On Double Taxation Conventions*³, Art. 4 MN 97 et seq.

[92] Lehner in Vogel, *On Double Taxation Conventions*³, Art. 4 MN 23; Lang, Die Bedeutung der 1995 erfolgten Änderungen des OECD-Musterabkommens und des Kommentars des OECD-Steuerausschusses für die Doppelbesteuerungsabkommen, in Lang/Loukota/Lüthi (eds.) *Die Weiterentwicklung des OECD-Musterabkommens* (1996) 25 (36 et seq.).

a general understanding of most member countries that the government of each state, as well as any political subdivision or local authority thereof, is a resident of that State for purposes of the Convention. Before 1995, the Model did not explicitly state this; in 1995, Art. 4 was amended to conform the text of the Model to this understanding."[93] As a result, the 1995 update of the OECD Model can be regarded as declarative. DTCs in line with different versions of the OECD Model and its Commentaries therefore generally do not have to be interpreted differently.[94] The UN Model thus, for example, did also not include the reference in its 2001 update. Moreover, it may be questionable whether public law corporations that are not at the same time a political subdivision or a local authority are also entitled to DTCs and their benefits. The main argument could be that the OECD Model only mentions the state and its political subdivisions or local authorities and thus the reverse conclusion is applicable to public law corporations. However, the intention of the OECD Committee on Fiscal Affairs was obviously not to go in this direction and such a reverse conclusion should not be drawn.[95]

It has been demonstrated that SWFs can be considered to be "residents of a contracting state" under the OECD Models 2008 and earlier and their Commentaries in some cases, but in others not. Each case is different; thus, it depends on the individual facts and circumstances. An SWF will either qualify as a "resident of a contracting state" if the residence state's domestic income attribution rules are in principle able to attribute income to an SWF or if an SWF is regarded as a taxable subject under the domestic law of one of the two contracting states. Whether tax is in fact imposed on the income is not decisive for the treaty residence status of an SWF. This interpretation thus leads to some uncertainty. In some states SWFs are not considered liable to tax if they are exempt from tax under domestic tax laws. These states may in practice not regard such entities as residents for purposes of a DTC unless they are expressly covered by a DTC.[96]

[93] Commentary to the OECD Model, Art. 4 para. 8.4.
[94] See section 5.2.
[95] Lang, *Introduction to the Law of Double Taxation Conventions*, MN 192.
[96] See for examples Schuch in Lang/Schuch/Staringer (eds.) *Die Ansässigkeit im Recht der Doppelbesteuerungsabkommen*, 119 et seq.; see also Commentary to the OECD Model, Art. 1 para. 6.36.

4. Specific provisions for SWFs in DTCs

4.1. Introduction

In order to reduce the uncertainty as to whether SWFs qualify as a “person” and especially as “residents of a contracting state” for the purpose of a specific DTC and therefore fall within its personal scope, states that have set up SWFs seem to address this issue in the course of bilateral negotiations. Moreover, specific rules for SWFs can be found in other provisions (e.g. allocation rules, methods for elimination of double taxation, special provisions). The dividend, interest/debt-claim and royalty articles are most often adopted for state-related entities and thus also SWFs and therefore are – in addition to the fact that Arts. 10 and 11 have also been the focus of the latest update of the Commentary to the OECD Model[97] – of special interest for this master thesis. This section therefore provides an analysis of the articles corresponding to Arts. 1, 3, 4, 10, 11 and 12 OECD Model and of relevant protocol provisions in light of SWFs for the DTCs concluded by the UAE and Saudi Arabia. The analysis thus covers two major players in the SWF business.[98] They cover more than USD 1.7 trillion, around 42% of the SWFs' worldwide assets holdings.[99] The section is based on official DTCs in English and if not available unofficial English translations of the bilateral conventions on income and capital in force on February 25, 2011 as provided by the IBFD Tax Treaty Database[100], if not otherwise indicated. DTCs not available at all or only in other languages than English have not been analyzed.

4.2. United Arab Emirates

4.2.1. Tax treaty network

The UAE already has a quite extensive, but still fast-growing network of DTCs, which – based on the DTCs that were in force on February 25, 2011 – currently numbers 46. The DTC network includes bilateral conventions with Algeria (2001)[101], Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia & Herzegovi-

[97] See section 5.1.
[98] Moreover, a detailed analysis of the DTCs concluded by China – at least with European states – can be found in Lang/Liu/Tang (eds.) & Günther/Cao (ass. eds.) *Europe-China Tax Treaties* (2010).
[99] See section 2.3.
[100] www.ibfd.org.
[101] The DTC was concluded in Arabic. Until now, only an unofficial French translation has been published.

na[102], Bulgaria, Canada, China, the Czech Republic, Egypt (1994)[103], Finland, France, India, Indonesia, Italy, the Republic of Korea, Lebanon (1998)[104], Luxembourg, Malaysia, Malta, Mauritius, Mongolia[105], Morocco (1999)[106], Mozambique, the Netherlands, New Zealand, Pakistan, the Philippines, Poland, Romania, Seychelles, Singapore, Spain, Sri Lanka, Sudan (2001)[107], Syria (2000)[108], Tajikistan[109], Thailand, Tunisia (1996)[110], Turkey, Turkmenistan[111], Ukraine and Yemen (2001)[112]. The following conventions have already been concluded, but are not yet in force: Bangladesh (2011), Cyprus (2011), Georgia (2010), Germany (2010, 1995 treaty terminated), Greece (2010), Ireland (2010), Jordan (2005), Kazakhstan (2008), Portugal (2011), Uzbekistan (2007), Venezuela (2010) and Vietnam (2009).

4.2.2. "Person"

The analysis of the UAE DTC network shows that Art. 1 OECD Model has always been adopted literally. Moreover, the definitions of "person" follow Art. 3(1)(a) OECD Model in most DTCs. Only some bilateral conventions include in the definition – apart from "company" [definition nearly always in line with Art. 3(1)(b) OECD Model] and "other body of persons" – other entities such as financial institutions, funds, trusts or "any other body of persons legally set up". The explicit reference to such entities can be interpreted in two ways. On the one hand, they may not be subject to tax in the state with which the UAE has concluded a DTC or that state does not assign any rights and obligations to such a body of persons from an income tax perspective. If these entities already form a "company" or "any other body of persons" there would be no need for an explicit reference to them. On the other hand, their inclusion can also be for reasons of clarification. Moreo-

[102] Information from and DTC text available on the UAE Ministry of Finance website (visited February 25, 2011).
[103] An English translation of the DTC is not yet available.
[104] An English translation of the DTC is not yet available.
[105] Information from and DTC text available on the UAE Ministry of Finance website (visited February 25, 2011).
[106] The DTC was concluded in Arabic. Until now, only an unofficial French translation has been published.
[107] An English translation of the DTC is not yet available.
[108] An English translation of the DTC is not yet available.
[109] Information from and DTC text available on the UAE Ministry of Finance website (visited February 25, 2011).
[110] The DTC was concluded in Arabic. Until now, only an unofficial French translation has been published.
[111] Information from and DTC text available on the UAE Ministry of Finance website (visited February 25, 2011).
[112] The official text of the DTC is not yet available.

ver, some DTCs differ from the OECD Model by including “any other body of persons treated as a person/entity for tax purposes” or “any other body of persons/entity treated as a taxable unit/entity” in the definition. As a consequence, the definition of “person” in the DTCs with India, Malaysia, Mauritius, Pakistan and Singapore only include entities that are treated as tax subjects.

The following chart gives an overview of the different definitions of “person” in UAE’s bilateral tax treaty network in light of SWFs.

Chart 5: Definitions of “person” in UAE’s DTC network in light of SWFs

Treaty with (Year of conclusion)	**Company**	**Financial institutions**	**Funds**	**Trusts**	**Any other body of persons**	**Any other body of persons legally set up**	**Any other body of persons treated as a person/entity for tax purposes**	**Any other body of persons/entity treated as a taxable unit/entity**	**Any legal person registered**
Armenia (2002) *Prot.*	x				x				
Austria (2003) *Prot.*	x				x				
Azerbaijan (2006) *Prot.*	x				x				
Belarus (2000)	x				x				
Belgium (1996) *Prot.*	x				x				
Bosnia & Herzegovina (2006)									x
Bulgaria (2007) *Prot.*	x				x				
Canada (2002) *Prot.*	x			x	x				
China (1993) *Prot.*	x				x				
Czech Republic (1996) *Prot.*	x					x			
Finland (1996) *Prot.*	x				x				
France (1989, amended 1993)[113]	x[114]								
India (1992, amended 2001) *Prot.*	x							x	
Indonesia (1995) *Prot.*	x				x				
Italy (1995) *Prot.*	x				x				
Korea (2003) *Prot.*	x				x				

[113] Unofficial English translation analyzed. The UAE and France have signed an amending protocol to the DTC in force on February 25, 2011. The text has not yet been published; thus it could not be analyzed.

[114] „Company“ means any body of corporate established under public or private law, including the state of the UAE, political subdivisions and territorial authorities or any entity which is treated as a body corporate for tax purposes.

Luxembourg (2005) *Prot.*	x				x				
Malaysia (1995) *Prot.*	x						x		
Malta (2006) *Prot.*	x				x				
Mauritius (2006) *Prot.*	x			x			x		
Mongolia (2001)	x				x				
Mozambique (2003) *Prot.*	x				x				
The Netherlands (2007) *Prot.*	x				x				
New Zealand (2003) *Prot.*	x				x				
Pakistan (1993)	x							x	
The Philippines (2003) *Prot.*	x			x	x				
Poland (1993) *Prot.*	x					x			
Romania (1993) *Prot.*	x					x			
Seychelles (2006)	x	x	x	x	x				
Singapore (1995) *Prot.*	x							x	
Spain (2006) *Prot.*	x				x				
Sri Lanka (2003) *Prot.*	x				x				
Tajikistan (1995) *Prot.*	x				x				
Thailand (2000) *Prot.*	x				x			x	
Turkey (1993)	x				x				
Turkmenistan (1998)	x				x				
Ukraine (2003) *Prot.*	x				x				

4.2.3. “Resident of a contracting state”

The definitions of “resident of a contracting state” in the DTCs concluded by the UAE show a different picture. Most DTCs deviate from the OECD Model by providing independent rules, which can be considered as strictly followed tax treaty policy by the UAE. Even if these provisions follow the OECD Model (DTCs with Belarus, Belgium, China, the Czech Republic, Indonesia, Italy, Poland, Seychelles, Tajikistan, Thailand, Turkey and Turkmenistan), they exclude the wording of Art. 4(1) 1st sentence 2nd part OECD Model. However, most of these DTCs instead provide an individual provision covering the substantive scope of the OECD provision.

All DTCs provisions differ with regard to their substantive scope. For example, the DTC Austria has a relatively wide scope; in contrast, the DTC Singapore is quite restrictive. The DTCs mainly include in the definition of “resident of a contracting state”, on the one hand, companies and, on the other hand, state-related entities such as the government, any administrative-territorial/political subdivision or a local government/authority. Moreover, a lot of DTCs refer to government/financial institutions such as the central bank, funds, (public) corporations,

authorities, foundations, development funds, commissions, agencies or other similar entities. Some DTCs, e.g. Austria, Bulgaria, Korea, Luxembourg, Malta, Mongolia and New Zealand expressly mention some of the following entities: Abu Dhabi Development Fund (ADDF), Abu Dhabi Investment Authority (ADIA), Abu Dhabi Investment Council (ADIC), Abu Dhabi Fund for Economic Development (ADFED), Dubai Development and Investment Authority (DDIA), Dubai Investment and Development Corporation (DIDC), Dubai Investment Office (DIO), Dubai Tourism Department (DTD), Investment Corporation of Dubai (ICD), International Petroleum Investment Company (IPIC), Zayed Charity Foundation (ZCF).

The following chart provides a detailed overview of the definitions of "resident of a contracting state" in the DTCs concluded by the UAE in light of SWFs.

Chart 6: Definitions of "resident of a contracting state" in the UAE's DTC network in light of SWFs

Treaty with (Year of conclusion)	**"resident of a contracting state"**
Armenia (2002) *Prot.*	+ Company incorporated[115] + Government, any political subdivision, local authority or financial institutions thereof + Any governmental institution created under public law
Austria (2003) *Prot.*	+ Any company or legal entity incorporated or created by reason of its residence, domicile, place of management or any other criterion of a similar nature + The UAE, government, any political subdivision, local authority, local government or governmental institution + Any government institution created under public law such as the central bank, funds, corporations, authorities, foundations, agencies or any other similar entities established + Any intergovernmental entity established the capital of which is owned by the UAE, such as IPIC and ADIA
Azerbaijan (2006) *Prot.*	+ Company incorporated + Government, administrative-territorial/political subdivisions or local authorities + Any governmental institution created under public law such as the central bank, corporation, fund, authority, foundation, agency or other similar entity + Any other entity in whose capital the UAE subscribes together with other states
Belarus (2000)	≈ OECD Model - Art. 4(1) 1st sentence 2nd part OECD Model

[115] In this and the following charts all references are to the law of the UAE or Saudi Arabia. Therefore, e.g. „company incorporated" means that the definition „resident of a contracting state" covers „a company incorporated in the UAE/Saudi Arabia".

Belgium (1996) *Prot.*	≈ OECD Model - Art. 4(1) 1st sentence 2nd part OECD Model + The UAE, any political subdivision, local authority and any financial institution of, and controlled by, the UAE, any political subdivision or local authority
Bosnia & Herzegovina (2006)	+ Company incorporated or place of management + Government, any political subdivision or local authority thereof + Any government institution created
Bulgaria (2007) *Prot.*	+ Company incorporated and registered and place of effective management + The UAE, political subdivisions, local authorities or local governments + Governmental institutions (institutions created by the government for the fulfillment of public functions), including the following types of entities created under public law wholly owned and controlled by the UAE, local governments, political subdivisions or local authorities: the central bank, ADIA, ADIC, IPIC, DIO, government agencies, development funds, and directly or indirectly wholly owned entities of the mentioned governmental institutions. - Other institutions subject to further agreement
Canada (2002) *Prot.*	+ Company incorporated, provided such company can establish that (i) all of its shares are beneficially owned by UAE residents or (ii) all or substantially all of the company's income is derived by the company from the active conduct of a trade or business, other than an investment business, in the UAE and all or substantially all of the value of the company's property is attributable to property used in that trade or business + Government, political subdivision, local government or local authority thereof + Any corporation, the central bank, ADIA, fund, authority, foundation, commission, agency or other entity established and wholly-owned and controlled by the government, or political subdivision or local authority, or by any combination thereof + Any entity established all the capital of which has been provided by the government, political subdivision or local authority, either alone or together with the governments of other states

China (1993) *Prot.*	≈ OECD Model (+ place of head office, - place of management) - Art. 4(1) 1st sentence 2nd part OECD Model - Art. 4(1) 2nd sentence OECD Model + Government, any political subdivision or local authority + Any government institution or other entity established, wholly-owned directly or indirectly by the government, any political subdivision or local authority + Any entity established all the capital of which has been provided by the government either alone or together with the government of other states
Czech Republic (1996) *Prot.*	≈ OECD Model - Art. 4(1) 1st sentence 2nd part OECD Model + Government, any political subdivision, local authority or local government + Any governmental institution created under public law such as the central bank, funds, corporations, authorities, foundations, agencies or any other similar entities established + Any intergovernmental entity established in whose capital the UAE subscribes with other states
Finland (1996) *Prot.*	+ Company incorporated + The UAE, political subdivision, local government or local authority + Government institutions (institutions created for the fulfillment of public functions and recognized as such by mutual agreement) + Any intergovernmental entity with equity capital or other capital of similar nature in which the UAE subscribes together with other states (to the extent of the UAE participation)
France (1989, amended 1993)[116]	+ Any person established or having its place of management, including the UAE, political subdivisions and local authorities
India (1992, amended 2001) *Prot.*	+ Company incorporated and managed and wholly controlled + The UAE, political subdivisions or local governments + Government institutions (institutions created by the government, political subdivisions or local authorities/governments, which are wholly owned and controlled directly or indirectly by the government, political subdivisions or local authority/government and recognized as such by mutual agreement + ADIA

[116] See FN 113.

Indonesia (1995) *Prot.*	≈ OECD Model - Art. 4(1) 1st sentence 2nd part OECD Model - Art. 4(1) 2nd sentence OECD Model + The UAE, any political subdivision or local authority and any financial institution of, and controlled by the UAE, any political subdivision or local authority
Italy (1995) *Prot.*	≈ OECD Model (+ place of head office, - place of management) - Art. 4(1) 1st sentence 2nd part OECD Model
Korea (2003) *Prot.*	+ Company or any financial institution incorporated and place of effective management + Government, any political subdivision or local government authority + Any other governmental institution created under public law such as corporation, fund, the central bank, ADIA, IPIC, DTD, DIDC or any other entities directly or indirectly wholly owned by any of these entities + Any other entity established by the government, any political subdivision, local government authority or any other governmental institution listed under the last enumeration
Luxembourg (2005) *Prot.*	+ The UAE, local government, local authority or governmental institution. * Governmental institution include the following types of entities created under public law which are wholly owned and controlled by the UAE or local government: public corporations, authorities, government agencies, foundations, development funds and directly or indirectly wholly entities thereof. The following financial institutions are recognized as governmental institutions: ADIA, ZCF, the central bank, ADFED and – subject to further agreement – any other institution + Company or any other legal entity created
Malaysia (1995) *Prot.*	+ Person resident for the purpose of tax + Government, local government, any political subdivision or any local authority + Any governmental institution created by public law such as the central bank, ADIA, fund, corporation, authority, foundation, agency or any other similar entity established + Any intergovernmental entity established which is funded solely by the UAE or jointly with other states
Malta (2006) *Prot.*	+ Company incorporated or place of management + Government, any political subdivision or local authority + Any government institution created (including the following types of entities created under public law by the government, local government or local government authority: foundations, corporations, authorities, funds, banks, agencies, and other wholly owned entities directly or indirectly by the mentioned government institutions + Recognized as government institutions: the central bank, ADIA, ADIC, IPIC, DTD

Mauritius (2006) *Prot.*[117]	+ Company incorporated + Government, any local government or authority + Any governmental institution created under public law such as corporation, the central bank, fund, authority, foundation, agency or other similar entity
Mongolia (2001)	+ Company incorporated + Government, any political subdivision or local government authority + Any governmental institution under public law such as corporation, the central bank, fund, ADIA, ADIC, DTD, foundation, agency or other similar entity + Any entity established by the government, any political subdivision, local government authority or any governmental institution together with similar bodies of third states
Mozambique (2003) *Prot.*	+ The UAE, political subdivision, local authority or governmental institution + Company or any other legal entity created + Any governmental institutions created under public law such as the central bank, funds, corporations, authorities, foundations, agencies or any other similar entities + Any intergovernmental entity in whose capital the UAE subscribes together with other states * "Government" includes federal government, local governments, ADDF, ADIA and – subject to further agreement – any other statutory body or institution wholly or mainly owned by the government or the local government
The Netherlands (2007) *Prot.*	+ Company with effective place of management + The UAE, any political subdivision or local authority + Pension fund recognized and controlled according to the statutory provisions and the income of which is generally exempt + Government institutions (institutions created under, wholly owned and controlled by the government or political subdivisions for the fulfillment of public functions and recognized as such by mutual agreement)
New Zealand (2003) *Prot.*	+ Company or other legal entity incorporated or created by reason of its residence, domicile, place of management or other criterion of a similar nature, and also includes the UAE, any political subdivision, local authority, local government or governmental institution + Any institution created by the government, political subdivision, local government or local authority and recognized as government institution by mutual agreement * Recognized institutions: ADIA, DDIA
Pakistan (1993)	+ Any person operating an industrial or commercial establishment or who is liable to tax by reason of his place of management or any other criterion of a similar nature

[117] In any case the protocol provides for a tax exemption for the government, local government, agency of the federal or local government which is agreed to form an integral part of the (local) government (i.e. ADIA, companies engaged in real estate development and ICD) and for any agency, but only to the extent of any share of government in the capital or equity of that agency.

The Philippines (2003) *Prot.*	+ Company incorporated + Government, any political subdivision, local authority or local government + Any governmental institutions created under public law such as the central bank, funds, corporations, authorities, foundations, agencies or any other similar entities
Poland (1993) *Prot.*	≈ OECD Model - Art. 4(1) 1st sentence 2nd part OECD Model - Art. 4(1) 2nd sentence OECD Model + Government, any political subdivision or local authority + Any governmental institution created under public law such as the central bank, funds, corporations, authorities, foundations, agencies or any other similar entities + Any intergovernmental entity in whose capital the UAE subscribes together with other states
Romania (1993) *Prot.*	+ Company incorporated and place of effective management + Government, any political subdivision or local authority + Governmental institutions created under public law such as the central bank, funds, corporations, authorities, foundations, agencies or any other similar entities + Any intergovernmental entity in whose capital the UAE subscribes together with other states
Seychelles (2006)	≈ OECD Model (+ place of head office, - place of management) - Art. 4(1) 1st sentence 2nd part OECD Model - Art. 4(1) 2nd sentence OECD Model + The UAE, government, any political subdivision or local authority + Any governmental institution created under public law such as the central bank, funds, corporations, authorities, foundations, agencies or any other similar entities + Any intergovernmental entity in whose capital the UAE subscribes together with other states
Singapore (1995) *Prot.*[118]	+ Any resident person in accordance with the taxation laws + Federal and local government or political subdivision + The central bank, ADIA, insofar as they are residents in accordance with the taxation laws + Any statutory body, institution or entity which is a resident in accordance with the taxation laws

[118] According to the protocol no provision in the DTC may affect the fiscal privileges, which are available to the government under the doctrine of sovereign immunity. The availability and scope of the fiscal privileges to be granted in each state under this doctrine are subject to the domestic laws of that state. The privileges, if available, are only applicable to activities, which are agreed by the competent authorities of both contracting states to be in the performance of functions, which are public or governmental in nature.

Spain (2006) *Prot.*	+ Company incorporated and place of effective management + The UAE, political subdivisions or local governments + Government institutions (institutions created by the government for the fulfillment of public functions and recognized as such by mutual agreement
Sri Lanka (2003) *Prot.*	+ The UAE, government, political subdivision, local authority or governmental institution + Company or any other legal entity created + Any governmental institutions created under public law such as the central bank, funds, corporations, authorities, foundations, agencies or any other similar entities + Any intergovernmental entity in whose capital the UAE subscribes together with other states
Tajikistan (1995)[119] *Prot.*	≈ OECD Model - Art. 4(1) 1st sentence 2nd part OECD Model + The UAE, any political subdivisions, local authority or any financial institution of, and controlled by the UAE, any political subdivision or local authority.
Thailand (2000) *Prot.*	≈ OECD Model (+ place of incorporation) - Art. 4(1) 1st sentence 2nd part OECD Model + The UAE, any political subdivisions, local authorities, local governments and any financial institution of, and controlled by the UAE, any political subdivisions or local authorities
Turkey (1993)	≈ OECD Model [+ registered office (legal head office)] - Art. 4(1) 1st sentence 2nd part OECD Model - Art. 4(1) 2nd sentence OECD Model
Turkmenistan (1998)	≈ OECD Model - Art. 4(1) 1st sentence 2nd part OECD Model + Government, any political subdivision, local authority + Any governmental institutions created under public law such as the central bank, funds, corporations, authorities, foundations, agencies or any other similar entities + Any intergovernmental entity in whose capital the UAE subscribes together with other states
Ukraine (2003)[120] *Prot.*	+ Any company or any other legal entity constituted or incorporated + Government, any political subdivisions or local authority + Any governmental institutions created under public law such as the central bank, funds, corporations, authorities, foundations, agencies or any other similar entities + Any intergovernmental entity with equity capital or other capital of a similar nature in whose capital the UAE subscribes together with other states (to the extent that corresponds to the capital participation)

[119] The government and its financial institutions are exempt from tax in respect of any income derived by the government and the financial institutions in respect of all type of investments performed by the government.

[120] Any income and profits derived by the UAE, political subdivisions, local governments, or local authorities, or their financial institutions is tax exempt.

4.2.4. Withholding tax rates

The analysis of the UAE's DTC withholding tax rates on dividend, interest/debt-claim and royalty payments from residents of a state with which a DTC has been concluded to UAE residents in light of SWFs shows that the UAE treaty policy is to claim a reduced or even no withholding tax, especially for payments to state-related entities. According to most DTC provisions for passive income, the taxing right is shared between the two contracting states. However, the withholding tax rate never exceeds 15% for dividends, 10% for interest/debt-claim payments [with the exception of the DTCs India (12.5%) and Thailand (15%)] and 10% for royalties [with the exception of the DTC Thailand (12.5%)]. The DTCs with higher rates generally provide reduced rates for dividend payments for substantial direct and/or indirect holdings or for certain types of royalties. There are even some DTCs that give no taxing right for any kind of passive income to the source state: Austria, Finland, France, Malta and Mauritius. Other bilateral agreements provide for no withholding tax at source for at least one or two kinds of passive income. The withholding tax rates for payments derived by state-related entities and thus also SWFs generally tends to be 0%. However, the entities covered by these provisions vary significantly in each DTC. Attention should also be paid to whether an SWF can make use of a reduced withholding tax on dividend payments, which applies only to a recipient company that owns a minimum percentage of the capital. In this respect the definition of "company" in Art. 3 of the applicable DTC has to be consulted. If not, it may make sense to structure an investment by an SWF through a company in order to be able to make use of the low treaty withholding tax rate. In the following chart, which gives a detailed overview on the UAE's DTC withholding tax rates, the differences in the substantive scope are also indicated.

Chart 7: UAE's DTC withholding tax rates

Treaty with (Year of conclusion)	**Dividend WHT rates**	**Interest/Debt-claim WHT rates**	**Royalty WHT rates**
Armenia (2002) *Prot.*	3% (0%[121])	0%	5%
Austria (2003) *Prot.*	0%[122]	0%[123]	0%

[121] Limited to the government, political subdivision or financial institution thereof.

[122] For the purpose of the interpretation of the dividend article it is understood that dividends derived by a resident of a contracting state including the government, financial institutions and investment companies are taxable only in the state of residence.

[123] See FN 122 on interest.

Azerbaijan (2006) *Prot.*	10% (5%[124], 0%[125])	7% (0%[126])	10% (5%[127], 0%[128])
Belarus (2000)	10% (5% for direct holdings exceeding USD 100,000)	5% (0%[129])	10%[130] (5%[131])
Belgium (1996) *Prot.*	10% (5% for at least 25% direct and indirect capital holdings, 0%[132])	5% (0%[133])	5% (0%[134])
Bosnia & Herzegovina (2006)	10% (0-5% for at least 10% direct capital holdings, 0%[135])	0%[136]	5% (0%[137])
Bulgaria (2007) *Prot.*	5% (0%[138])	2% (0%[139])	5% (0%[140])
Canada (2002) *Prot.*	15% (10%[141], 5% for at least 10% direct or indirect holdings based on voting power, 0%[142])[143]	10% (0%[144])	10% (0%[145])[146]

[124] Limited to any governmental institution created under public law such as the central bank, corporation, fund, authority, foundation, agency or other similar entity.
[125] Limited to the government, administrative-territorial or political subdivisions, local governments, local authorities or their financial institutions, holding companies, development funds and authorities.
[126] Limited to the government, administrative-territorial or political subdivisions, local authorities, the central bank or its financial institutions and in particular – ADIA, ADFED and – subject to further agreement – any other financial institution wholly owned by the government. Moreover, for payments to a UAE beneficial owner in respect of a loan guaranteed on behalf of the government by its authorized organ and proportionally to the participation if the government participants in a loan indirectly through an agent or otherwise.
[127] Royalties for the use of or the right to use a computer software or any patent or for information concerning industrial, commercial or scientific experience.
[128] See FN 125.
[129] Limited to UAE residents in respect of a loan made, guaranteed or insured, or in respect of any other debt-claim or credit guaranteed or insured on behalf of the UAE by its authorized organs. Moreover, the tax exemption proportionally to the participation applies if the government participates in a loan indirectly through an agent or otherwise.
[130] Royalties for the use or the right to use, any copyright of literary or artistic work, including cinematograph films or films and tapes for radio or television broadcasting.
[131] Royalties for the use of, or the right to use, any copyright of scientific work, patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or transport vehicles, or for information concerning industrial, commercial or scientific experience.
[132] Limited to the UAE, political subdivision, local authority or financial institution.
[133] See FN 132.
[134] See FN 132.
[135] Limited to the UAE, local government, their financial institutions and local authorities.
[136] Application as well to payments for loans guaranteed by the government or any governmental institution or other entity thereof.
[137] Limited to the government, local government, including any political subdivision or local authority, the central bank or any financial institutions wholly owned by the government or local governments.
[138] Limited to the UAE, political subdivisions, local government, local authority or the central bank, ADIA, ADIC, IPIC or any other institution created by the government, political subdivision, local authority or local government, which is – subject to further agreement – recognized as an integral part of the government. Moreover, the protocol provides for a tax exemption if the beneficial owner of the dividends is the government, local governments, local authorities and their financial institutions.
[139] See FN 138 on interest including DIO.
[140] See FN 139 (without protocol provision).
[141] Applies to dividends paid by a non-resident owned investment corporation that is a resident of Canada to a company holding direct or indirectly at least 10% of its voting power.

China (1993) *Prot.*	7% (0%[147])	7% (0%[148])	0%
Czech Republic (1996) *Prot.*	5% (0%[149])	0%	10%
Finland (1996) *Prot.*	0%	0%	0%
France (1989, amended 1993)[150]	0%[151]	0%[152]	0%
India (1992, amended 2001) *Prot.*	10 (0%[153])	12,5% (5%[154], 0%[155])	10%[156]
Indonesia (1995) *Prot.*	10%[157]	5%[158] (0%[159])	5%

[142] Tax exemption applies only if the recipient, together with all other residents referred to, neither owns or controls more than 25% of the value of all issued and outstanding shares, nor controls in any manner whatever more than 25% of the voting power. Moreover, the recipient must not have received the dividends in the course of carrying on an industrial or commercial activity. The substantive scope is limited to the definition of "resident of a contracting state" with the exception of the first enumeration.
[143] Nothing contained in the dividend article affects the fiscal privileges available under the doctrine of fiscal sovereign immunity to the government, local governments, and their agencies and institutions.
[144] Limited to the government, including political subdivision and local authority. Moreover, to the central bank or any financial institution wholly owned by the government, i.e. ADIA and – subject to further agreement – such other financial institutions the capital of which is wholly owned by the government.
[145] Copyright royalties and other similar payments in respect of the production or reproduction of any literary, dramatic, musical or other artistic work (but not including royalties in respect of motion picture films nor royalties in respect of works on film or videotape or other means of reproduction for use in connection with television broadcasting), and royalties for the use of, or the right to use, computer software or any patent or for information concerning industrial, commercial or scientific experience (but not including any such royalty in connection with a rental or franchise agreement).
[146] The term „royalties" does not include payments in respect of the operation of mines or quarries or the exploitation of natural resources.
[147] Limited to the government, any of its fiscal institutions or other entity wholly owned directly or indirectly by the government or a resident company whose shares are at least 20% owned directly or indirectly by the government.
[148] Limited to the government, political subdivision or local authority, the central bank, authority, corporation, foundation, development fund or any other financial institution wholly owned by the government. Moreover, to any resident with respect to debt-claims indirectly financed by the government, political subdivision or local authority thereof, the central bank or any other financial institution owned by the government; resident company whose shares are at least 20% owned directly or indirectly by the government; or – subject to further agreement – any entity.
[149] Limited to the government, any governmental institution or entity thereof and to a resident company the capital of which is owned directly or indirectly at 25% by the government or governmental institutions.
[150] See FN 113.
[151] Investments of the UAE (including investments by the central bank or public institutions) and income arising from such investments are also tax exempt. However, (income arising from) immovable property is excluded.
[152] See FN 151.
[153] Limited to the government, including political subdivisions, local authorities, local administrations and local governments, the central bank, ADIA, ADFED and – subject to further agreement – any such institution or body.
[154] Limited to payments on a loan granted by a bank carrying on a bona fide banking or by a similar financial institution.
[155] Limited to the government, political subdivision, local authority or the central bank. Moreover, see FN 153.
[156] See FN 153.
[157] Subject to any more favorable treatment according to an agreement between Indonesia and any member state of the Cooperation Council for the Arab States of the Gulf (CCASG) or a third state entered after the signature of the DTC Indonesia.
[158] See FN 157.

Italy (1995) *Prot.*	15% (5% for at least 25% direct and indirect holdings)	0%	10%
Korea (2003) *Prot.*	10% (5% for at least 10% direct holdings[160])	10%[161] (0%[162])	0%
Luxembourg (2005) *Prot.*	10% (5% for at least 10% direct holdings, 0%[163])	0%	0%
Malaysia (1995) *Prot.*	0%	5% (0%[164])	10% (0%[165])
Malta (2006) *Prot.*	0%	0%	0%
Mauritius (2006) *Prot.*[166]	0%	0%	0%
Mongolia (2001)	0%[167]	0%[168]	10%[169]
Mozambique (2003) *Prot.*	0%	0%	5%[170] (0%[171])
The Netherlands (2007) *Prot.*	10% (5% for at least 10% direct holdings, 0%[172])	0%	0%

[159] Limited to the government including local authorities, political subdivision, the central bank or any financial institution controlled by the government and payments on loans guaranteed by the government.
[160] The dividend article is limited to the federal and the local governments, government institution (see definition „resident of a contracting state"); a company provided that such company can prove that at least 75% of its capital is beneficially owned by the UAE and/or by a government institution and give substantial evidence that the remaining capital is beneficially owned by individuals being UAE residents and that the company is controlled by the aforementioned residents.
[161] Applies only to a company that can give substantial evidence that its capital is beneficially owned by the UAE and/or by a government institution and the company is controlled by the aforementioned residents.
[162] Limited to the government including political subdivisions and local authorities. Moreover, to the central bank or any wholly owned financial institution by the government performing functions of a governmental nature, i.e. central bank, ADIA, ADFED, ADIC, IPIC, DTD and – subject to further agreement – any other similar institution. Tax exemption also for payments to foreign investors buying securities of bonds dominated in foreign currency.
[163] Limited to the UAE, local government, local authority or financial institutions, i.e. ADIA, ZCF, the central bank, ADFED and – subject to further agreement – any other institution.
[164] Limited to the government including local governments, local authorities, statutory bodies, the central bank and – subject to further agreement – wholly owned institutions by these aforesaid institutions.
[165] Limited to the government, i.e. federal government, local government and state government.
[166] The protocol defines in any case a tax exemption for the government, local government, agency of the federal or local government which is agreed to form an integral part of the (local) government (i.e. ADIA, companies engaged in real estate development and ICD); any agency, but only to the extent of any share of government in the capital or equity of that agency.
[167] Applies also to the government, any political subdivision or local government authority, any governmental institution created under public law such as a corporation, the central bank, fund, ADIA, ADIC, DTD, foundation, agency or other similar entity. Moreover, any entity established by the government or any political subdivision or local government authority thereof or any governmental institution together with similar bodies of third states.
[168] Includes loans guaranteed by the institutions mentioned in FN 167.
[169] See FN 167.
[170] Royalties for the use of or the right to use any copyright of literary or artistic work, including cinematograph films, and films or tapes for radio or television broadcasting.
[171] Royalties for the use of or the right to use any copyright of scientific work, patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

New Zealand (2003) *Prot.*	15%[173]	10% (0%[174])	10%[175]
Pakistan (1993)	15% (10% for at least 20% holdings)	10% (0%[176])	12%
The Philippines (2003) *Prot.*	15% (10% for at least 10% direct holdings, 0%[177])	10% (0%[178])	10%
Poland (1993) *Prot.*[179]	5% (0%[180])	5% (0%[181])	5%
Romania (1993) *Prot.*	3% (0%[182])	3% (0%[183])	3% (0% for industrial royalties)
Seychelles (2006)	0%	0%	5%
Singapore (1995) *Prot.*[184]	5%	7% (0%[185])	5%
Spain (2006) *Prot.*	15% (5% for at least 10% direct or indirect holdings, 0%[186])	0%	0%

[172] Limited to the UAE, political subdivision, local government, the central bank, pension fund, ADIA, ADIC or – subject to further agreement – any other institution created by the government.
[173] Sovereign immunity from income tax applies to income by the government, local government, agency or the federal or local government which forms an integral part of that government (e.g. ADIA, DDIA).
[174] Limited to the government, political subdivision, local government or local authority, the central bank, any authority, corporation, foundation, development fund or any other financial institution wholly owned by the government, any other similar entity subject to further agreement. Moreover, proportionally to the participation for government participations in a loan through an agent, partnership, fund or otherwise. Moreover see FN 173.
[175] See FN 174.
[176] Limited to the government, political subdivision, local authority or the central bank.
[177] Limited to the government, local governments, political subdivisions, local authorities or any of their governmental institutions or entities, including ADIA, Dubai Investment Authority (DIA) and Dubai Investment Company (DIC).
[178] Limited to payments in respect of a loan made, guaranteed, or insured by the government, political subdivision or local authority, including financial institutions wholly owned by that government, or any instrumentality subject to further agreement.
[179] According to the protocol, the competent authority of Poland will, according to the provisions of its internal laws, consider with sympathy any request of a resident regarding other tax relief or tax holidays pertinent to income derived from investment made in Poland.
[180] Limited to the government, any governmental institution or entity thereof and to a resident company which is owned directly or indirectly at least 25% by the government or governmental institution.
[181] Limited to the government including local authorities, the central bank or any financial institution controlled by the government.
[182] Limited to the government, any governmental institutions or entity thereof and to a resident company the capital of which is owned directly or indirectly at least 25% by the government or governmental institutions.
[183] Limited to the government including political subdivisions, local authorities, local administrations, local governments, the central bank, ADIA and other governmental institutions or its wholly or partially owned financial institutions.
[184] According to the protocol, no provision in the DTC will affect the fiscal privileges, which are available to the government under the doctrine of sovereign immunity. The availability and scope of the fiscal privileges to be granted in Singapore under this doctrine is subject to its domestic laws. The privileges, if available, are only applicable to activities, which are agreed by the competent authorities of both contracting states to be in the performance of functions, which are public or governmental in nature.
[185] Limited to the government including local government, the central bank, ADIA, statutory body or – subject to further agreement – any institution wholly or substantially owned by the government, local authority or statutory body thereof.

Sri Lanka (2003)[187] *Prot.*	10% (0%[188])	10% (0%[189])	10%
Tajikistan (1995)[190] *Prot.*	0%	0%	10%[191]
Thailand (2000) *Prot.*	10%	15% (10% if received by a financial institution, including an insurance company, 0%[192])[193]	15%
Turkey (1993)	12% (10% for at least 25% direct holdings, 5%[194])	10% (0%[195])	10%
Turkmenistan (1998)	0%	0%	10%
Ukraine (2003)[196] *Prot.*	5% (for at least 10% holdings, 0%[197])	3% (0%[198])	10%[199] (0%[200])

186 Limited to the UAE, political subdivision, local government, the central bank, ADIA, IPIC or – subject to further agreement – any institution created by the government, political subdivision or local government which is recognized as an integral part of that government.
187 Tax exemption for the government including political subdivisions, local authorities, local administrations, local governments, the central bank and – subject to further agreement – any such institution or body.
188 Limited to the government including local authority thereof, the central bank or – subject to further agreement – any other institution owned by the government.
189 Limited to the government including local authority, the central bank or – subject to further agreement – any financial institution wholly owned by the government, local authority or local government.
190 The government and its financial institutions are exempt from tax in respect of any income derived by the government and the financial institutions in respect of all type of investments performed by the government.
191 See FN 190.
192 Limited to the government and on payments on loans guaranteed or insured by the government, any governmental institution or other entity thereof (see definition of „resident of a contracting state"). The government includes the political subdivisions, local authorities, local administration, local governments, the central bank, ADIA, ADFED and – subject to further agreement – any such institution or body, bank or other financial institution which is a resident and whose interest is majority controlled or the capital of which is wholly owned by the government or governmental entity or other entity thereof (see „resident of a contracting state").
193 Subject to any more favorable treatment according to an agreement between Thailand and any member state of the CCASG or a third state entered after the signature of the DTC Thailand.
194 Limited to the government or a public institution which is wholly owned by the government, its political subdivisions or local authorities.
195 Limited to payments to central or local government or the central bank.
196 Any income and profits derived by the UAE, political subdivisions, local governments, local authorities or their financial institutions is tax exempt.
197 Limited to the UAE, political subdivision, local authority, the central bank, ADIA or – subject to further agreement – any other such government financial institution.
198 Limited to the government, political subdivisions, local authority, the central bank, ADIA, ADFED and – subject to further agreement – any other governmental financial institution. Moreover, for payments in respect of a loan made, guaranteed or insured, or in respect of any other debt-claim or credit guaranteed or insured on behalf of the UAE by its authorized organs. If the government participates in a loan indirectly through an agent or otherwise, the last-mentioned provision will apply proportionally to the participation of the government in such loan.
199 Royalties for the use or the right to use any copyright of literary or artistic work, including cinematograph films, and films or tapes for radio or television broadcasting.

4.3. Saudi Arabia

4.3.1. Tax treaty network

Saudi Arabia has 15 DTCs on income and capital in force on February 25, 2011: Austria, China, France, Greece, India, Italy, Korea, Malaysia, the Netherlands, Pakistan, Russia, South Africa, Spain, Turkey and the United Kingdom. The first DTC was concluded with France in 1982; all the other tax conventions have been concluded only from 2006 on. Saudi Arabia's recent approach to extend the DTC network is underlined by the fact that bilateral agreements with Belarus (2009), Japan (2010), Poland (2011) Singapore (2010), Syria (2009), Tunisia (2010), Uzbekistan (2008) and Vietnam (2010) have already been concluded, but are not yet in force.

4.3.2. "Person"

The analysis of the Saudi Arabian DTCs in light of SWFs shows that Art. 1 OECD Model has always been literally adopted. In contrast to the OECD Model, but also to the UAE DTC network, the definition of "person" varies a lot in Saudi Arabia's DTCs. All bilateral conventions define "person" as a company and any other body of person. "Company" is either defined in line with the OECD Model or – without any material difference – as "any juridical person or any entity which is treated as a juridical person for tax purposes"[201]. With the exception of the DTC China[202] the DTCs include in the definition of "person" Saudi Arabia, political and/or administrative subdivisions and local authorities. Quite a high number of DTCs additionally extends the wording of the definition by including statutory bodies, foundations, trusts, estates and/or taxable units, as shown in the following chart. However, these deviations, which can be regarded as Saudi Arabia's tax treaty policy, are not important.[203]

The following chart gives an overview of the different definitions of "person" in Saudi Arabia's bilateral tax treaty network in light of SWFs.

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[200] Royalties for the use or the right to use any copyright of scientific work, patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

[201] DTCs Austria, Italy, Korea, the Netherlands and Russia.

[202] Negotiations for the DTC France, which were concluded in 1982 and in 1991, were based on the 1977 OECD Model and its Commentary. At that time, Art. 4(1) OECD Model did not yet include the phrase „and also includes that State and any political subdivision or local authority thereof"; see in detail section 3.5.2.

[203] See section 3.4.

Chart 8: Definitions of “person” in Saudi Arabia’s DTC network in light of SWFs

Treaty with (Year of conclusion)	Company	Saudi Arabia	Political and/or administrative subdivisions	Local authorities	Statutory bodies	Foundations	Trusts	Estates	Taxable unit	Any other body of persons
Austria (2006)	x	x	x	x		x				x
China (2006) *Prot.*	x									x
France (1982, amended 1991) *Exchange of Notes*[204]	x									x
Greece (2008) *Prot.*	x	x	x	x						x
India (2006) *Prot.*	x	x	x	x					x	x
Italy (2007) *Prot.*	x	x	x	x		x	x			x
Korea (2007) *Prot.*	x	x	x	x		x				x
Malaysia (2006) *Prot.*	x	x	x	x	x	x	x			x
The Netherlands (2008) *Prot.*	x	x	x	x		x	x			x
Pakistan (2006)	x	x	x	x		x	x	x		x
Russia (2006) *Prot.*	x	x	x	x		x	x			x
South Africa (2007)	x	x	x	x		x	x	x		x
Spain (2007) *Prot.*	x	x	x	x		x				x
Turkey (2007) *Prot.*	x	x	x	x						x
United Kingdom (2007) *Prot.*	x	x	x	x						x

4.3.3. “Resident of a contracting state”

The incorporation of Art. 4 OECD Model in Saudi Arabia’s DTC network also shows a great variety. The analysis reveals three main differences. At first, the DTCs concluded with Austria, India, Pakistan, the Netherlands and Russia include Saudi Arabia, the government, legal institutions, agencies and/or local authorities in their definitions of “resident of a contracting state” without referring to the liability to tax. The phrasing of the provisions avoids any discussion of treaty entitlement even if Saudi Arabia does not in fact impose tax on these persons. All other tax conventions – apart from the DTC France – were concluded after the 1995 update of the OECD Model and its Commentary and cover explicitly the government as well as any political subdivision and local authority thereof.[205] Interestingly, some DTCs do not contain Art. 4(1) 2nd sentence OECD Model. As illustrated in section 3.5.1., this should not make any difference for SWFs in practice. The

[204] Unofficial English translation analyzed.
[205] See section 3.5.2.

third main difference is the inclusion of legal persons under Saudi Arabian law that are generally exempt from tax and are established and maintained in Saudi Arabia for certain purposes, found in all DTCs apart from the ones with China and France. This raises the question why such persons have been explicitly included in the personal scope of the DTCs. The reason that seems most understandable is the reduction of uncertainty as to whether these entities fall within the personal scope of an applicable DTC or not.[206]

The following chart provides a detailed overview of deviations from the definition "resident of a contracting state" in the OECD Model in Saudi Arabia's DTC network.

Chart 9: Deviations from the definition "resident of a contracting state" in the OECD Model in Saudi Arabia's DTC network in light of SWFs

Treaty with (Year of conclusion)	**"resident of a contracting state"**
Austria (2006)	+ Saudi Arabia, any legal institutions, agencies and local authorities (irrespective of "person") + Legal person under the law that is generally exempt from tax and is established and maintained either (i) exclusively for a religious, charitable, educational, scientific or other similar purpose; or (ii) to provide pensions or other similar benefits to employees pursuant to plan - Art. 4(1) 2nd sentence OECD Model
China (2006) *Prot.*	+ Head office
France (1982, amended 1991) *Exchange of Notes*[207]	- Art. 4(1) 2nd sentence OECD Model
Greece (2008) *Prot.*	+ Legal person that is generally exempt from tax and established and maintained exclusively for a religious, charitable, educational, scientific or other similar purpose or to provide pensions
India (2006) *Prot.*	+ Government, any political subdivision and local authorities (irrespective of "person") + Legal institutions and agencies of the government, wholly owned directly, and controlled by the government. + Legal person organized that is generally exempt from tax and is established and maintained either (i) exclusively for a religious, charitable, educational, scientific or other similar purpose; or (ii) to provide pensions to employees pursuant to a plan

[206] See section 3.5.1.
[207] See FN 204.

Italy (2007) *Prot.*	+ Legal person organized that is generally exempt from tax and is established and maintained either (i) exclusively for a religious, charitable, educational, scientific or other similar purpose; or (ii) to provide pensions or other similar benefits to employees pursuant to a plan in this respect
Korea (2007) *Prot.*	+ Place of head or main office + Legal person organized that is generally exempt from tax and is established and maintained either (i) exclusively for a religious, charitable, educational, scientific or other similar purpose; or (ii) to provide pensions or other similar benefits to employees pursuant to a plan
Malaysia (2006) *Prot.*	+ Statutory body + Legal person organized that is generally exempt from tax and is established and maintained either (i) exclusively for a religious, charitable, educational, scientific or other similar purpose; or (ii) to provide pensions or other similar benefits to employees pursuant to a plan - Art. 4(1) 2nd sentence OECD Model
The Netherlands (2008) *Prot.*	+ Government, any legal institutions, agencies and local authorities + Legal person organized that is generally exempt from tax and is established and maintained either (i) exclusively for a religious, charitable, educational, scientific or other similar purpose; or (ii) to provide pensions or other similar benefits to employees pursuant to a plan
Pakistan (2006)	+ Saudi Arabia, any legal institutions, agencies and local authorities (irrespective of "person"). + Legal person organized that is generally exempt from tax and is established and maintained either (i) exclusively for a religious, charitable, educational, scientific or other similar purpose; or (ii) to provide pensions or other similar benefits to employees pursuant to a plan - Art. 4(1) 2nd sentence OECD Model
Russia (2006) *Prot.*	+ Place of registration + Saudi Arabia, any legal institutions, agencies and local authorities (irrespective of "person") + Legal person organized that is generally exempt from tax and is established and maintained either (i) exclusively for a religious, charitable, educational, scientific or other similar purpose; or (ii) to provide pensions or other similar benefits to employees pursuant to a plan - Art. 4(1) 2nd sentence OECD Model
South Africa (2007)	+ Legal person organized that is generally exempt from tax and is established and maintained either (i) exclusively for a religious, charitable, educational, scientific or other similar purpose; or (ii) to provide pensions or other similar benefits to employees pursuant to a plan

Spain (2007) *Prot.*	+ Legal person organized that is generally exempt from tax and is established and maintained either (i) exclusively for a religious, charitable, educational, scientific or other similar purpose; or (ii) to provide pensions or other similar benefits to employees pursuant to a plan
Turkey (2007) *Prot.*	+ Place of incorporation + Legal person organized that is generally exempt from tax and is established and maintained either (i) exclusively for a religious, charitable, educational, scientific or other similar purpose; or (ii) to provide pensions or other similar benefits to employees pursuant to a plan
United Kingdom (2007) *Prot.*	+ Place of incorporation + Pension scheme (definition in protocol) + Organization that is established and operated exclusively for religious, charitable, scientific, cultural, or educational purposes (or for more than one of these purposes) and that is a resident, notwithstanding that all or part of its income or gains may be exempt from tax

4.3.4. Withholding tax rates

When analyzing Saudi Arabia's DTC withholding tax rates on dividend, debt-claim and royalty payments from residents of the state with which a DTC is concluded to Saudi Arabian residents in light of SWFs, one notices some differences in the scope of the withholding taxes and their rates. As regards all three categories of passive income, Saudi Arabia's DTC policy seems to be to give both states the right to tax. The amount of tax that may be imposed in the state of source is, however, limited. Dividend withholding tax rates vary from 0%-15%. Some DTCs, especially the ones with higher rates, provide reduced rates for direct/indirect investments. In contrast to these bilateral conventions, generally DTCs with lower rates exempt certain state-related entities from source tax completely. The withholding tax rates for debt-claim payments amount to 10% at the most. A tax exemption concerning debt-claims forms part of every DTC, but differs in the substantive scope. Royalty withholding tax rates vary from 0-10%. Only in the cases of Greece and South Africa are there withholding tax rates for payments derived by the government [including the Saudi Arabian Monetary Agency (SAMA)]; additionally in the DTC Greece the rates for the entities wholly owned by the government are reduced. In contrast to the UAE treaty policy, Saudi Arabia seems not to stress this point in treaty negotiations. The following chart gives a detailed overview of the Saudi Arabia's DTC withholding tax rates.

Chart 10: Saudi Arabia's DTC withholding tax rates

Treaty with (Year of conclusion)	Dividend WHT rates	Debt-claim WHT rates	Royalty WHT rates
Austria (2006)	5% (0%[208])	5% (0%[209])	10%
China (2006) *Prot.*	5% (0%[210])	10% (0%[211])	10%
France (1982, amended 1991) *Exchange of Notes*[212]	0%	0%	0%
Greece (2008) *Prot.*	5% (0%[213])	5% (0%[214])	10% (0%[215])
India (2006) *Prot.*	5%	10% (0%[216])	10%
Italy (2007) *Prot.*	10% (5% for at least 25% direct or indirect capital holdings[217])	5% (0%[218])	10%
Korea (2007) *Prot.*	10% (5% for 25% direct capital holdings)	5% (0%[219])	10% (5%[220])
Malaysia (2006) *Prot.*	5%	5% (0%[221])	8%
The Netherlands (2008) *Prot.*	10% (5% for at least 10% direct capital holdings)	5% (0%[222])	7%
Pakistan (2006)	10% (5%[223])	10% (0%[224])	10%
Russia (2006) *Prot.*	5% (0%[225])	5% (0%[226])	10%

[208] Limited to the government, local authority, any wholly owned agency or instrumentality, including a financial institution or local authority.
[209] See FN 208.
[210] Limited to the government, any institutions or other directly or indirectly wholly owned entity by the government.
[211] Limited to the government, local authority, the central bank, any financial institution wholly owned by the government or by any other resident with respect to debt-claims indirectly financed thereof.
[212] See FN 204.
[213] Limited to the government, including SAMA and its wholly owned state entities.
[214] See FN 213.
[215] See FN 213.
[216] Limited to the government, political subdivision, local authority, SAMA or any other financial institution wholly owned directly, and controlled by the government.
[217] Beneficial owner has to own 25% of the capital of the dividend paying company for of a period of at least 12 months preceding the date the dividend was declared.
[218] Limited to the government, local authority or any agency or instrumentality, including a financial institution wholly owned by the government or local authority.
[219] Limited to the government including political subdivisions, local authorities, the central bank, any other financial institution wholly owned by the government or any financial institution performing functions of a governmental nature. Moreover, limited to any resident of Saudi Arabia with respect to debt-claim guaranteed or financed by the government, the central bank or any other financial institution wholly owned by the government or any financial institution performing functions of a governmental nature.
[220] Royalties for the use or the right to use industrial, commercial or scientific equipment.
[221] Limited to payments from the government, political subdivision, statutory body or local authority and payments to the government, political subdivision, statutory body, local authority or any institutions, agency or instrumentality wholly owned by the government, political subdivision, statutory body or local authority.
[222] Limited to the government, political or administrative subdivision, local authority, the central bank or corporate body, including financial institutions controlled or owned by Saudi Arabia, political or administrative subdivision or local authority thereof.
[223] Limited to a company or an entity wholly owned by the government.
[224] Limited to the government, or any entity wholly owned by it, the central bank or under a loan agreement approved by the government.
[225] Limited to the following beneficial owners: the government, political or administrative subdivision or local authority, the central bank, other governmental agencies or financial institutions (subject to further agreement). Moreover, (according to the protocol): any governmental institution created under

South Africa (2007)	10% (5% for at least 10% direct capital holdings, 0%[227])	5% (0%[228])	10% (0%[229])
Spain (2007) *Prot.*	5% (0% for at least 25% direct capital holdings)	5% (0%[230])	8%
Turkey (2007) *Prot.*	10% (5% for at least 20% direct capital holdings[231])	10% (0%[232])	10%
United Kingdom (2007) *Prot.*	15% (5%[233], 0%[234])	0%	8% (5%[235])

national legislation; any entity established by the government or any governmental institutions, together with similar bodies of other states; a company which is a resident and is controlled or at least 25% of its capital is owned directly by the government, a governmental institution or other entity thereof as defined in the foregoing parts of the protocol provision.

[226] Limited to payments to the government, local authority or any agency or instrumentality (including financial institution) wholly owned by Saudi Arabia or local authority thereof.

[227] Limited to payments derived by the government, including SAMA.

[228] See FN 227.

[229] See FN 227.

[230] Limited to payments to the government, political subdivision or local authority, the central bank, other banks or any financial institutions wholly owned by Saudi Arabia.

[231] Applied also to the central bank or an entity wholly owned by the government.

[232] Limited to the government, an entity wholly owned by the government or the central bank.

[233] Reduced withholding tax applies in all cases, when dividends are not paid by a property investment vehicle (definition in protocol).

[234] Limited to a resident pension scheme.

[235] Royalties for the use or the right to use industrial, commercial or scientific equipment.

5. Application of DTCs to SWFs on the basis of the OECD Model 2010 and its Commentary

5.1. The 2010 update to the OECD Model and its Commentary

Due to the increasing importance of SWFs as cross-border investors, the Working Party 1 on Tax Conventions and Related Questions of the Committee on Fiscal Affairs has recently discussed issues related to the application of DTCs to state-owned entities, including SWFs, as well as the relationship between DTCs and national practices related to the application of the doctrine of sovereign immunity to tax matters. A public discussion draft contained the results of that work and proposed some additions and changes to the Commentary on the OECD Model.[236] The draft was released by the OECD on November 25, 2009 and interested parties were invited to send their comments before January 31, 2009. The OECD Committee on Fiscal Affairs adopted the proposed amendments on June 22, 2010, followed by the approval by the OECD Council on July 22, 2010[237].

The existing text of the Commentary to the OECD Model was amended with respect to Arts. 1, 4, 10 and 11. The first issue addressed by the new Commentary is whether an entity set up and wholly-owned by a state or one of its political subdivisions or local authorities is a resident of a contracting state and thus entitled to DTCs. This issue is especially addressed in connection with SWFs. Moreover, the Commentary to the OECD Model now refers to the application of the doctrine of sovereign immunity to tax matters. Finally, the changes include slight amendments to the explanations given for an alternative provision providing for exemption of interest paid to states and their wholly-owned entities, including SWFs, from source taxation that already formed part of the Commentary and the addition of a similar alternative provision with respect to dividends.

The new text of the Commentary to the OECD Model relating to the application of tax treaties to state-owned entities, including SWFs, as included in the 2010 update reads as follows:

[236] OECD, *Discussion Draft on the Application of Tax Treaties to State-Owned Entities, Including Sovereign Wealth Funds*.

[237] OECD, *The 2010 Update to the Model Tax Convention*.

The new heading and paras. 6.35 to 6.39 were included immediately after the new para. 6.34 of the Commentary on Art. 1 OECD Model:

Application of the Convention to States, their subdivisions and their wholly-owned entities

6.35 Paragraph 1 of Article 4 provides that the Contracting States themselves, their political subdivisions and their local authorities are included in the definition of a "resident of a Contracting State" and are therefore entitled to the benefits of the Convention (paragraph 8.4 of the Commentary on Article 4 explains that the inclusion of these words in 1995 confirmed the prior general understanding of most member States).

6.36 Issues may arise, however, in the case of entities set up and wholly-owned by a State or one of its political subdivisions or local authorities. Some of these entities may derive substantial income from other states and it may therefore be important to determine whether tax treaties apply to them (this would be the case, for instance, of sovereign wealth funds: see paragraph 8.5 of the Commentary on Article 4). In many cases, these entities are totally exempt from tax and the question may arise as to whether they are entitled to the benefits of the tax treaties concluded by the State in which they are set up. In order to clarify the issue, some States modify the definition of "resident of a Contracting State" in paragraph 1 of Article 4 and include in that definition a "statutory body", an "agency or instrumentality" or a "legal person of public law" [personne morale de droit public] of a State, a political subdivision or local authority, which would therefore cover wholly-owned entities that are not considered to be a part of the State or its political subdivisions or local authorities.

6.37 In addition, many States include specific provisions in their bilateral conventions that grant an exemption to other States, and to some State-owned entities such as central banks, with respect to certain items of income such as interest (see paragraph 13.2 of the Commentary on Article 10 and paragraph 7.4 of the Commentary on Article 11). Treaty provisions that grant a tax exemption with respect to the income of pension funds (see paragraph 69 of the Commentary on

Article 18) may similarly apply to pension funds that are wholly-owned by a State, depending on the wording of these provisions and the nature of the fund.

6.38 The application of the Convention to each Contracting State, its political subdivisions, and local authorities (and their statutory bodies, agencies or instrumentalities in the case of bilateral treaties that apply to such entities) should not be interpreted, however, as affecting in any way the possible application by each State of the customary international law principle of sovereign immunity. According to this principle, a sovereign State (including its agents, its property and activities) is, as a general rule, immune from the jurisdiction of the courts of another sovereign State. There is no international consensus, however, on the precise limits of the sovereign immunity principle. Most States, for example, would not recognise that the principle applies to business activities and many States do not recognise any application of this principle in tax matters. There are therefore considerable differences between States as regards the extent, if any, to which that principle applies to taxation. Even among States that would recognize its possible application in tax matters, some apply it only to the extent that it has been incorporated into domestic law and others apply it as customary international law but subject to important limitations. The Convention does not prejudge the issues of whether and to what extent the principle of sovereign immunity applies with respect to the persons covered under Article 1 and the taxes covered under Article 2 and each Contracting State is therefore free to apply its own interpretation of that principle as long as the resulting taxation, if any, is in conformity with the provisions of its bilateral tax conventions.

6.39 States often take account of various factors when considering whether and to what extent tax exemptions should be granted, through specific treaty or domestic law provisions or through the application of the sovereign immunity doctrine, with respect to the income derived by other States, their political subdivisions, local authorities, or their statutory bodies, agencies or instrumentalities. These factors would include, for example, whether that type of income would be exempt on a reciprocal basis, whether the income is derived from activities of a governmental nature as opposed to activities of a commercial nature, whether the assets and income of the recipient entity are used for public purposes, whether

there is any possibility that these could inure to the benefit of a non-governmental person and whether the income is derived from a portfolio or from a direct investment.

In the Commentary on Art. 4 OECD Model the following new para. 8.5 was inserted after para. 8.4. The existing paragraphs 8.5. to 8.7. were renumbered accordingly.

8.5 This raises the issue of the application of paragraph 1 to sovereign wealth funds, which are special purpose investment funds or arrangements created by a State or a political subdivision for macroeconomic purposes. These funds hold, manage or administer assets to achieve financial objectives, and employ a set of investment strategies which include investing in foreign financial assets. They are commonly established out of balance of payments surpluses, official foreign currency operations, the proceeds of privatisations, fiscal surpluses or receipts resulting from commodity exports.[238] Whether a sovereign wealth fund qualifies as a "resident of a Contracting State" depends on the facts and circumstances of each case. For example, when a sovereign wealth fund is an integral part of the State, it will likely fall within the scope of the expression "[the] State and any political subdivision or local authority thereof" in Article 4. In other cases, paragraphs 8.6 and 8.7 below will be relevant. States may want to address the issue in the course of bilateral negotiations, particularly in relation to whether a sovereign wealth fund qualifies as a "person" and is "liable to tax" for purposes of the relevant tax treaty (see also paragraphs 6.35 to 6.39 of the Commentary on Article 1).

Moreover, in the Commentary on Art. 10 OECD Model the following new para. 13.2 was immediately inserted after para. 13.1.

13.2 Similarly, some States refrain from levying tax on dividends paid to other States and some of their wholly-owned entities, at least to the extent that such dividends are derived from activities of a governmental nature. Some States are able to grant such an exemption under their interpretation of the sovereign im-

[238] FN 1: This definition is drawn from: International Working Group of Sovereign Wealth Funds, *Sovereign Wealth Funds – Generally Accepted Principles and Practices – "Santiago Principles"*, October 2008, Annex 1.

munity principle (see paragraphs 6.38 and 6.39 of the Commentary on Article 1); others may do it pursuant to provisions of their domestic law. States wishing to do so may confirm or clarify, in their bilateral conventions, the scope of these exemptions or grant such an exemption in cases where it would not otherwise be available. This may be done by adding to the Article an additional paragraph drafted along the following lines:

Notwithstanding the provisions of paragraph 2, dividends referred to in paragraph 1 shall be taxable only in the Contracting State of which the recipient is a resident if the beneficial owner of the dividends is that State or a political subdivision or local authority thereof.

Para. 7.4 of the Commentary on Art. 11 OECD Model was replaced by the following[239]:

7.4 Some States refrain from levying tax on income derived by other States ***and some of their wholly-owned entities (e.g. a central bank established as a separate entity)***, at least to the extent that such income is derived from activities of a governmental nature. ***Some States are able to grant such an exemption under their interpretation of the sovereign immunity principle (see paragraphs 6.38 and 6.39 of the Commentary on Article 1); others may do it pursuant to provisions of their domestic law***. In their bilateral conventions, many States wish to confirm or clarify the scope of th***ese***~~at~~ exemption***s*** with respect to interest ***or to grant such an exemption in cases where it would not otherwise be available***. States wishing to do so may therefore agree to include the following category of interest in a paragraph providing for exemption of certain interest from taxation in the State of source:
a) is that State or the central bank, a political subdivision or local authority thereof;

5.2. Changes in the application and interpretation of existing DTCs

The 2010 update of the Commentary to the OECD Model as outlined above raises the question whether such amendments affect the interpretation of previously

[239] The changes to the existing text of the Commentary to the OECD Model appear in strikethrough for deletions and bold italics for additions.

concluded DTCs. This question is not new, as amendments to the OECD Model and the Commentary have been made continuously since 1992. In the Introduction of the Commentary to the OECD Model the following position is taken: "Needless to say, amendments to the Articles of the Model Convention and changes to the Commentaries that are a direct result of these amendments are not relevant to the interpretation or application of previously concluded conventions where the provisions of those conventions are different in substance from the amended Articles. However, other changes or additions to the Commentaries are normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD member countries as to the proper interpretation of existing provisions and their application to specific situations."[240] The position taken by the Commentary to the OECD Model has to be interpreted in light of Arts. 31 and 32 VCLT as no interpretive relevance may be attached to such a statement by the Commentary itself.[241] Later versions of the Commentary do not form part of the "context" as defined in Art. 31(2) under Art. 31(1)[242], because the DTC parties at the conclusion of a DTC can only refer to an existing Commentary. A later version of the Commentary can moreover not be considered to be a "subsequent agreement" for the purpose of Art. 31(3)(a) VCLT[243] since the Commentary to the OECD Model – in contrast to a bilateral DTC – is not legally binding.[244] According to Art. 31(3)(b) VCLT together with the context, not only subsequent agreements, but also a "subsequent practice" must be taken into account. Art. 31(3)(b) VCLT thus introduces a dynamic element in the interpretation process, as the current understanding of a DTC as established under actual subsequent practice (and not under the Commentary, but in the case discussed here in line with it) is held to be relevant.[245] However, the subsequent practice must be of an interpretive nature.[246] Evidence falling under Art. 31(3)(b) VCLT may only be taken into account together with other means of interpretation

[240] Commentary to the OECD Model, Intro. para. 35.
[241] See Lang/Brugger, The role of the OECD Commentary in tax treaty interpretation, *Australian Tax Forum* 2008, 22 (23).
[242] See Wassermeyer, in Debatin/Wassermeyer (eds.) Doppelbesteuerung[103] (January 2008) Vor Art. 1 MA, MN 60; Vogel, The Influence of the OECD Commentaries on Treaty Interpretation, *BIT* 2000, 612 (615); Prokisch, Fragen der Auslegung von Doppelbesteuerungsabkommen, *SWI* 1994, 52 (57 et seq.); Avery Jones, The Effect of Changes in the OECD Commentaries after a Treaty is Concluded, *BIT* 2002, 102 (103).
[243] See Lang, *Introduction to the Law of Double Taxation Conventions*, MN 94.
[244] See Commentary to the OECD Model, Intro. para. 29.
[245] See Lang/Brugger, *Australian Tax Forum* 2008, 103 with further references.
[246] See Engelen, *Interpretation of Tax Treaties under International Law* (2004) 240.

referred to under Art. 31 VCLT and thus clarify an otherwise ambiguous interpretation result.[247] Moreover, whether the subsequent practice is the most convincing interpretation is mainly decided by the tax authorities applying the tax treaty and finally by the courts. If a subsequent agreement and a subsequent practice cannot be regarded as interpretation of a DTC, but as amendment of a tax treaty, the constitutional law of each state decides on the binding effect and its scope for domestic law.[248] Part of the interpretation rules of treaties in the VCLT is the provision reading "A special meaning shall be given to a term if it is established that the parties so intended" [Art. 31(4) VCLT]. Amendments to the Commentary to the OECD Model later than at the time a DTC was concluded cannot be considered a "special meaning" as the treaty parties cannot already have had them in mind, when concluding the DTC.[249] This is also the reason why Art. 32 VCLT, which refers to the preparatory work of the treaty and the circumstances of its conclusion, is not of relevance.[250]

For all these reasons, a DTC following the OECD Model has always to be interpreted in light of the Commentary existing at the time of the negotiations/conclusion of a corresponding DTC.[251] This principle results in the application of a frozen version of the Commentary. Criticism of it is e.g. based on the argument that changes in business or technology can thus not be taken into account and therefore a different interpretation of the identical wording in DTCs concluded at different times leads to a non-uniform interpretation of DTCs.[252] The frequently different understanding of the very same treaty is, however, an outcome of the many changes of the Commentary to the OECD Model.[253] An updated Commentary must nevertheless in all cases demonstrate a different con-

[247] See Lang/Brugger, *Australian Tax Forum* 2008, 103 et seq.
[248] See Lang, Seminar B, Teil 2: Das OECD-Musterabkommen – 2001 und darüber hinaus: Welche Bedeutung haben die nach Abschluss eines Doppelbesteuerungsabkommens erfolgten Änderungen des OECD-Kommentars? *IStR* 2001, 536 (537).
[249] See Vogel, *BIT* 2000, 612; Lang, Die Bedeutung des Musterabkommens und des Kommentars des OECD-Steuerausschusses für die Auslegung von Doppelbesteuerungsabkommen, in Gassner/Lang/Lechner (eds.) *Aktuelle Entwicklungen im Internationalen Steuerrecht* (1994) 11 (24).
[250] See Lang, Wer hat das Sagen im Steuerrecht? Die Bedeutung des OECD-Steuerausschusses und seiner Working Parties, *ÖStZ* 2006, 203 (208).
[251] See e.g. Lang, *Introduction to the Law of Double Taxation Conventions*, MN 97; Wassermeyer, in Debatin/Wassermeyer (eds.) Doppelbesteuerung[103] , Vor Art. 1, MN 60; Vogel, Probleme der Auslegung von Doppelbesteuerungsabkommen, *SWI* 2000, 103 (109); Ward, Is there an obligation in international law of OECD Member countries to follow the Commentaries on the Model? in Douma/Engelen (eds.) *The legal status of the OECD Commentaries* (2008) 73 (86).
[252] See e.g. Avery Jones, *BIT* 2002, 103.
[253] See in detail Lang, *Introduction to the Law of Double Taxation Conventions*, MN 104.

tent. The interpretation of a DTC concluded before an updated Commentary can also lead to the same understanding as the new Commentary and thus only confirm an opinion based on an existing interpretation.

6. Evaluation

The changes to the Commentary to the OECD Model regarding the application of tax treaties to state-owned entities, including SWFs, are welcomed by the author. SWFs have become very attractive in the last years so that it was time to discuss some tax-related aspects in the Commentary to the OECD Model. The significant divergence of views as to what SWFs are and thus the various definitions found are one of the major problems when dealing with SWFs. It is thus most welcome that the OECD has taken one of the international definitions as standard and included it in the Commentary to the OECD Model. The author acknowledges as well the Commentary changes in relation to the dividend and interest articles as they now both offer alternative provisions providing for exemption of dividend and interest payments to states and their wholly-owned entities, including SWFs. One of the public comments given on the public discussion draft proposed an additional article which covers only SWFs and which applies in priority to the other articles of the OECD Model.[254] The main argument was that a separate article would ensure greater certainty, clarity and transparency. In the author's view, a new article to the OECD Model dealing comprehensively with SWFs should not be on the OECD to-do list as this would open a window for a lot of other articles dealing only with specific tax problems. However, if such an article were to be included in the OECD Model, it should deal in more detail with types of income, beyond dividends and interest, such as business profits, royalties, capital gains, capital or income from immovable property.

However, the OECD should have taken a more prescriptive approach to SWFs concerning the principle of sovereign immunity. In para. 6.38 it is stated that the application of a DTC in line with the OECD Model does not affect in any way the possible application by each state of the customary international law principle of sovereign immunity. Moreover, the Commentary notes that there is currently no international consensus on the precise limits of this principle, especially in relation to business activities and tax matters. The Commentary to the OECD Model then goes on to conclude that it does not prejudge whether and to what extent the principle of sovereign immunity applies. As a result, only a general discussion of the issue takes place, but

[254] See KPMG, *Submission on Application of Tax Treaties to State-Owned Entities, including Sovereign Wealth Funds*, January 29, 2010.

no general conclusion for all state-owned entities, including SWFs, is offered.[255] In the author's view, this is a field the OECD should have worked on in more detail. In not doing so, the OECD should at least turn its attention to this in the future in order to achieve an international consensus on the principle of sovereign immunity in tax matters.[256] The public comment by ADIA given on the public discussion draft proposed in that respect e.g. that SWFs should not be subject to any requirement, obligation, restriction or regulatory action exceeding that to which other investors in similar circumstances may be subject. Two aspects were highlighted regarding this point: First, states should not adversely discriminate between SWFs and other foreign investors or between SWFs from different foreign states. Secondly, and perhaps more critically, states should not discriminate between SWFs and domestic investors, particularly domestic governmental institutions.[257] Moreover, a point of discussion should be the business activities of SWFs. On the one hand, business activities should be defined and distinguished from governmental activities. On the other hand, it should be intensively discussed whether a tax exemption should apply for such activities or – based on the principle that equals should be taxed equally – competition on fair terms with private-sector investors should take place.

Last but not least, the Commentary to the OECD Model now opens a big freeway on the characterization of SWFs as "residents of a contracting state" by stating that it depends on the facts and circumstances of each case. A unified approach for treaty entitlement of SWFs in Art. 4 OECD Model on this point is a task the OECD should work on. Although finding a unified approach may be a hard piece of work, the Commentary to the OECD Model could for the time being at least provide further examples in para. 8.5 on the Commentary on Art. 4.[258] The example now given in para. 8.5 focuses only on SWFs that are an integral part of a state without clarifying what con-

[255] See Barret, Aspects of the 2010 Update Other than Those Relating to Article 7 of the OECD Model Tax Convention, *BIT* 2011, 13 (15).

[256] See also The Institute of Chartered Accountants in England and Wales, *Memorandum in response to the OECD Discussion Draft on the Application of Tax Treaties to State-Owned Entities, Including Sovereign Wealth Funds*, January 22, 2010; differing KPMG, *Submission on Application of Tax Treaties to State-Owned Entities, Including Sovereign Wealth Funds*, January 29, 2010.

[257] ADIA, *Comments on the Application of Tax Treaties to State-Owned Entities, Including Sovereign Wealth Funds,* January 19, 2010.

[258] See PWC, *Comments on the Commentary Discussion Draft on the Application of Tax Treaties to State-Owned Entities, Including Sovereign Wealth Funds*, January 20, 2010.

stitutes an “integral part”. One solution could be to include a definition that is similar to the definition of a “controlled entity” in Section 892 IRC.[259]

All in all, it can be concluded in this master thesis that the taxation and therefore also the application of DTCs to SWFs is a topic that is only in its beginning stages. The update to the OECD Model has brought some clarification to the worldwide discussion of the international tax implications of this investor’s group, but has at the same time demonstrated that a lot of questions are still open, because a unified international approach does not yet exist.

[259] See Taxand, *Comments on the Draft Changes to the Commentary to the OECD Model Tax Convention dealing with the Application of Tax Treaties to State-Owned Entities, Including Sovereign Wealth Funds*, January 27, 2010.

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