



International Association of Tax Judges

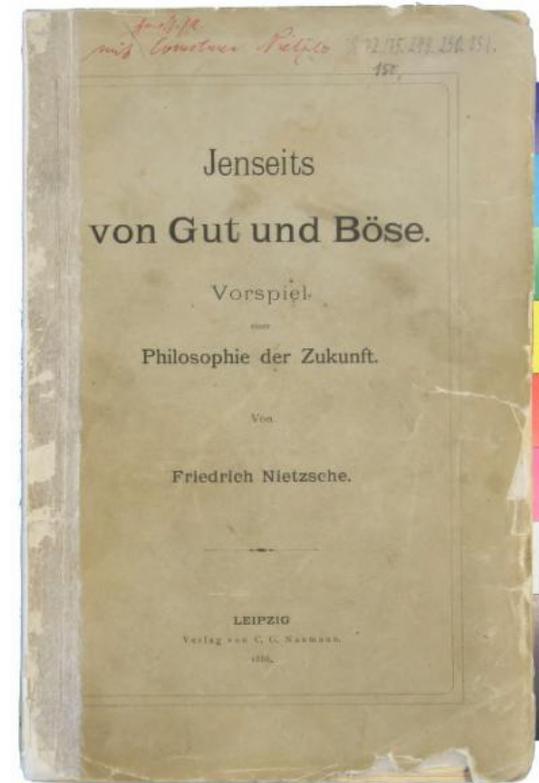
Legal bindingness of the OECD MC Commentaries

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The binary approach

- The lawyer's condition humaine
- Binding or non-binding



Article 38 Statute of the ICJ

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

State sovereignty and international law

- Voluntarism and consensualism versus growing internationalization
- Treaties concerning the State as organization per se (boundary treaties)
- Treaties concerning the interests of the State's nationals (human rights treaties)
- Treaties are cumbersome, unwieldy instruments
- States circumvent onerous treaty procedures
- And, instead, enter into political, morally compelling instruments

Similar in tax law: Commentaries

- Tax treaties are hard in bindingness but soft in meaning
- Anticipating domestic judges
- Contribute to a consistent worldwide understanding
- Soft form chosen as an excuse for judges deciding otherwise

Reasons for entering into legally non-binding instruments

- Easier to reach agreement (no or less issues of state responsibility, facilitates unification)
- Flexible, easily changed: no Parliament needed
- Eight changes in Commentary since 1992
- Parliaments don't have time for technical/highly complex matters but do want to protect their voters
- Invitation to practitioners to review their standards
- Preparation for a later treaty
- Impact on other countries
- Secrecy and confidentiality

The humanization of international law

- *International law* (21st century), not *Law of Nations* (19th century)
- Law of Nations:
 - “a law for the international conduct of states, not of their citizens” (Oppenheim)
 - Citizens objects of international law, their rights given in municipal law, diplomatic intervention
- 20th century: individuals given procedural rights (tax, investment, human rights)

Hybrid status tax treaties: financial interests of individuals and of States

Participant concept (Rosalyn Higgins): international law has an open texture, able to protect interests of states and individuals

Status of Commentaries:

- Politically binding between States
- Keep the State interests in balance with individual's rights

The rule of law

- Treaties need approval by Parliament
- The Commentary is (in most cases) not approved by Parliament

The wish to be bound

- Article 2-1-a and article 26 Vienna Convention: a treaty is legally binding upon States
- Whether an instrument is a treaty: does a State want to be legally bound?
- Structural and linguistic characteristics (Qatar v. Bahrain, Aegean Sea)
- Conduct of states (Temple of Preah Vihear)



Recommendation v. decisions

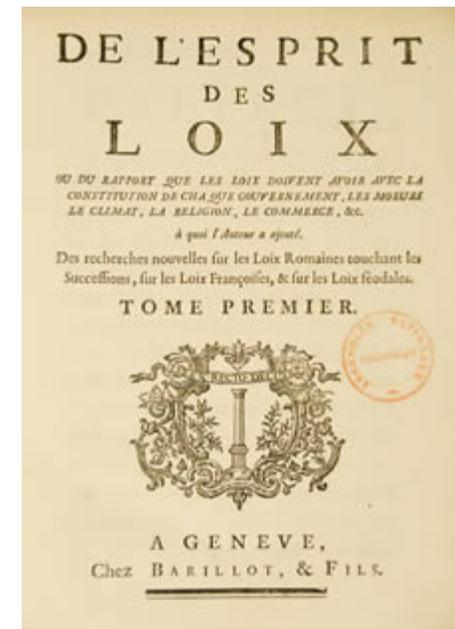
“In order to achieve its aims, the Organisation may: (a) take decisions which, except as otherwise provided, shall be binding on all the Members; (b) make recommendations to Members, and (c) enter into agreements with Members, non-member States and international organisations.” (Article 5 of the Convention on the Organisation for Economic Co-operation and Development)

“Recommendations of the Organisation, made by Council in accordance with Articles 5, 6 and 7 of the Convention, shall be submitted to the Members for consideration in order that they may, if they consider it opportune, provide for their implementation.” (Rule 18-b, Rules of Procedure of the Organisation 2011)

“Recommendations are not legally binding, but practice accords them great moral force as representing the political will of Member countries and there is an expectation that Member countries will do their utmost to fully implement a Recommendation. Thus, Member countries which do not intend to do so usually abstain when a Recommendation is adopted, although this is not required in legal terms.” (OECD website)

OECD Decisions, recommendations and the trias politica

- (Internationally binding) decisions are generally addressed to the State as a whole: “The Council decides that member countries ...”
- Recommendations are generally addressed to “the Governments of Member countries”
- Two types: legislation and conduct
- Where legislation is to be made, Recommendations address the State
- “Member Governments should undertake ...” v. “shall undertake”



OECD tax recommendations

- Recommendation on the Determination of Transfer Pricing between Associated Enterprises (C(97)144/Final of 24 July 1997)
- Recommendation concerning the Attribution of Income to Permanent Establishments with respect to the Model Tax Convention on Income and Capital (C(93)147/Final of 26 November 1993)
- Recommendation on the Granting of Tax Sparing in Tax Conventions (C(97)184/Final of 23 October 1997)
- The Recommendation concerning the Model Tax Convention on Income and Capital (C(97)195/Final of 23 October 1997)

OECD Recommendation concerning tax treaties and commentaries

“The Council ... Recommends the Governments of Member Countries:...

2. When concluding new bilateral conventions or revising existing bilateral conventions, to conform to the Model Tax Convention, as interpreted by the Commentaries thereon;
3. That their tax administrations follows the commentaries on the Articles of the Model Tax Convention, as modified from time to time, when applying and interpreting the provisions of their bilateral tax conventions that are based on these Articles.”

The Recommendation’s Preamble:

“Considering further the need *to encourage the common application and interpretation* of the provisions of tax conventions that are based on those of the Model Tax Convention on Income and on Capital (hereinafter referred to as the "Model Tax Convention")...”

Not binding instrument but a role in interpretation

Paragraph 28 Introduction: “Although the Commentaries are not designed to be annexed in any manner to the conventions signed by the Member countries, which unlike the Model are legally binding international instruments, they can nevertheless be of great assistance in the application and interpretation of the conventions and, in particular, in the settlement of any disputes”,

Paragraph 29.1 Introduction: “Tax officials give great weight to the guidance contained in the Commentaries”

Good faith, estoppel and acquiescence

- Acquiescence (action brings reaction, silence means consent)
 - But no State will claim that the Commentary is binding ...
- Estoppel (State A cannot withdraw from an act (commitment), if State B has based its conduct on that commitment)
 - But estoppel requires an unambiguous and clear act
 - And even if accepted, only the Executive is bound...

Despite everything said..., is there domestic background to see the Commentaries as binding?

- Are the Commentaries binding on the domestic plane?
- Depends on the municipal rules:
 - Validity: are the Commentaries as an international binding rule part of the domestic system of rules? (unwritten Netherlands constitutional rule)
 - Bindingness: “Treaty provisions ... which can be binding on every person in terms of their contents shall only be binding after they have been published” (article 93 Netherlands Constitution)
 - Commentary wasn’t published (as prescribed by the law) and can for that reason no be considered binding on the Netherlands domestic plane
 - Dutch Supreme Court on comparable issue of unpublished mutual agreements in BNB 2006/16 and 2006/17
- Conclusion for the Netherlands: even if the Commentaries would be binding on the international plane, they do not percolate as binding into the domestic legal order



Commentaries are not legally binding

- Arguments
 - OECD Convention
 - OECD Rules of Procedure
 - OECD Recommendation
 - The Introduction to the Commentaries
 - The domestic rules (depending from country to country)
- Support:
 - Declarations of domestic governments (see article)
 - EC Commission (see article)
 - Domestic courts decisions