

# The Legal Status of the OECD Commentaries

## General Introduction

*Sjoerd Douma\* and Frank Engelen\*\**

This book is the first edition in the *Conflict of Norms in International Tax Law Series*. This title reflects the Leiden research programmes on ‘International and Supranational Limits of Tax Jurisdiction’ and ‘Securing the Rule of Law in a World of Multilevel Jurisdiction: Coherence, Institutional Principles and Fundamental Rights’. One of its central research questions reads: to what extent is the fiscal sovereignty of States limited by rules of international (tax) law, Community law and other rules of international or supranational law? It is our conviction that many of the questions arising at the intersection of international tax law, Community law and public international law cannot be answered by reference to only one of the disciplines involved. On the contrary, only an integrated approach of all fields of study will bring us closer to resolving major unanswered questions of international tax law. This need for systemic integration has been recognised by the International Law Commission’s Study Group on Fragmentation of International Law. Under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account “any relevant rules of international law applicable in the relations between the parties” (Article 31(3)(c) VCLT). According to the Study Group “article 31(3)(c) may be taken to express what may be called the principle of “systemic integration”, (...) whereby international obligations are interpreted by reference to their normative environment (“system”).”<sup>1</sup> The rationale for such a principle is understandable:

“All treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law. None of such rights or obligations has any *intrinsic* priority against the others. The question of their relationship can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole.”<sup>2</sup>

This effort at systemic integration implies an “integration in the system of principles and presumptions that underlie the idea of an inter-State legal order” in

---

\* PhD fellow, Leiden University; tax adviser with PricewaterhouseCoopers, Rotterdam.

\*\* Professor of International Tax Law, Leiden University; fellow of the International Tax Center Leiden; and partner with PricewaterhouseCoopers.

<sup>1</sup> International Law Commission, 58th session, nr. A/CN.4/L.682, p 208, § 413.

<sup>2</sup> International Law Commission, 58th session, nr. A/CN.4/L.682, p 208, § 414.

order to “provide its argumentative materials”.<sup>3</sup> The Study Group has taken the position that Article 31(3)(c) VCLT comprises two presumptions, one positive, the other negative:

- “(a) According to the *positive presumption*, parties are taken “to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way”;<sup>4</sup>
- (b) According to the *negative presumption*, in entering into treaty obligations, the parties intend not to act inconsistently with generally recognized principles of international law or with previous treaty obligations towards third States.<sup>5,6</sup>

Along these lines, the *Conflict of Norms in International Tax Law Series* aims at answering questions at the crossroads of international tax law, Community law and public international law by reference to their normative environment.

The first edition of this series is dedicated to an evergreen of international tax law: the legal status of the Commentaries on the OECD Model Tax Convention on Income and on Capital. This was also the topic of a conference which was held on 14-15 September 2006 and hosted by Leiden University and the International Tax Center Leiden in Leiden, the Netherlands.<sup>7</sup> The legal status of the OECD Commentaries is one of the major unresolved issues in modern international tax law. Since the mid-1980s, the legal basis of the -- not always uniform -- practice of tax administrations and courts around the world to conform to the Commentaries when interpreting and applying bilateral tax treaties based on the OECD Model has been the subject of an ongoing academic debate. The debate recently received new impetus following the publication of a study of Arts. 31, 32 and 33 of the Vienna Convention on the Law of Treaties and their application to tax treaties by Engelen, who was the initiator of the conference.<sup>8</sup> The primary focus now is on the general principles of international law. In particular, opinions differ on the question whether the Commentaries can be a

---

<sup>3</sup> International Law Commission, 58th session, nr. A/CN.4/L.682, p 234, § 465.

<sup>4</sup> Original footnote: “*Georges Pinson* case (France/United Mexican States) Award of 13 April 1928, UNRIAA, vol. V, p. 422.”

<sup>5</sup> Original footnote: “*Case concerning the Right of Passage over Indian Territory (Portugal v. India) (Preliminary Objections) I.C.J. Reports 1957* p. 142; Sir Robert Jennings and Sir Arthur Watts (eds.), *Oppenheim’s International Law* (London: Longman, 1992) (9th ed), p. 1275.”

<sup>6</sup> International Law Commission, 58th session, nr. A/CN.4/L.682, p 234, § 465.

<sup>7</sup> The conference was the joint initiative of the Department of Tax Law and Economics and the sections of Public International Law and Constitutional and Administrative Law, as well as the Europa Institute, of the Department of Public Law at Leiden University and the International Tax Center Leiden, with the participation of the OECD and the International Fiscal Association. The conference was sponsored by PricewaterhouseCoopers and the Leiden University Fund. See for an extensive report on the conference Monica Erasmus-Koen and Sjoerd Douma, ‘Legal Status of the OECD Commentaries - In Search of the Holy Grail of International Tax Law’, 61 *Bulletin for International Taxation* 8 (2007), at 339-352.

<sup>8</sup> Engelen, Frank, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications BV, 2004), IBFD Doctoral Series No. 7; in particular, Chap. 10, Part 9: The OECD Model Tax Convention and its Commentaries.

source of legal obligations through the principles of acquiescence and estoppel, both of which are founded on considerations of good faith and equity and provide specific protection of settled expectations.<sup>9</sup>

A distinction should be made between (a) the rights and obligations of states -- acting either as members of the OECD or as parties to a tax treaty in the international legal order, and (b) the rights and obligations of taxpayers in the domestic legal order. In essence, the objective of the conference was to find answers to the following two questions.

(1) The first question is whether, under international law, the states parties to a tax treaty are legally bound by the OECD Commentaries when interpreting and applying the provisions of the treaty which are identical to those of the OECD Model. Regarding this question, a distinction could be made between

(a) the issue of the legal status of the recommendations made by the OECD Council to the OECD Member countries regarding the OECD Model and its Commentaries;

(b) the issue of whether the circumstances of the conclusion of a tax treaty could be such that the contracting states must be held to have acquiesced in the interpretation put forward in the Commentaries or, in any event, are precluded or estopped from later asserting otherwise; and

(c) the issue of whether the Commentaries must be taken into account in applying the general rule of interpretation embodied in Art. 31 VCLT or as a supplementary means of interpretation within the meaning of Art. 32.

The legal complexities relating to these issues are compounded by the fact that the Commentaries are regularly updated, whereas the provisions of the OECD Model and the treaties based thereon typically remain unchanged. Moreover, the legal analysis could be different depending on whether the contracting states are OECD Member countries, non-OECD countries that have officially determined and recorded their position on the OECD Model and Commentaries, or third countries.

(2) The second question is whether, under the contracting states' internal law, taxpayers and the tax authorities are equally bound to apply the

---

<sup>9</sup> The legal status of the OECD Commentaries was the subject of the 2005 Graduation Lecture (Maarten J. Ellis Lecture) delivered by David A. Ward on 1 September 2005 at the International Tax Center Leiden (LLM Program in International Taxation) at the University of Leiden. See Ward, David A., "The Role of the Commentaries on the OECD Model in the Tax Treaty Interpretation Process", and Ellis, Maarten J., "The Role of the Commentaries on the OECD Model in the Tax Treaty Interpretation Process -- Response to David Ward", 60 *Bulletin for International Taxation* 3 (2006), at 97 and 103, respectively. The lecture summarized the legal analysis developed in Ward, David A. et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (Amsterdam: IBFD Publications BV, 2006). On 2 September 2005, the Department of Tax Law and Economics at Leiden University organized, in cooperation with the International Tax Center Leiden, an Expert Meeting on the subject, at which Frank Engelen gave a lecture entitled "Some Observations on the Legal Status of the Commentaries on the OECD Model", 60 *Bulletin for International Taxation* 3 (2006), at 105. For another recent article on the subject, see Pijl, Hans, "The OECD Commentary as a Source of International Law and the Role of the Judiciary", 46 *European Taxation* 5 (2006), at 216.

Commentaries if and when the contracting states themselves are so bound under international law. Although the answer to this question may in certain countries be directly related to the answer to the first question, this generally depends on the constitutional requirements for implementing international obligations in the internal legal order. Therefore, it was suggested that this question can only be answered on a country-by-country basis. The EU Member States, however, might be obliged to apply the Commentaries on the basis of Community law. In particular, the question arises whether Community law protects the legitimate expectations, if any, of taxpayers who exercised the right to free movement guaranteed by the EC Treaty that the tax authorities of the contracting states will interpret and apply the provisions of the treaty which are identical to those of the OECD Model in accordance with the Commentaries so as to comply with their obligations under international law.

This book contains the elaborate views of the speakers and panelists at the conference on both questions. The issues dealt with by the contributors to this book have been outlined in a position paper entitled: *The Quest for the Holy Grail in International Tax Law: The Legal Status of the Commentaries on the OECD Model Tax Convention on Income and on Capital*. This paper served as a basis for the discussions during the conference. As many contributors refer to this paper and in particular to the research questions contained therein, it has been reprinted in this book as a general introduction to the issues.