

Chapter VII

The Power of Persuasion: The Legal Effects of the OECD Commentary as a Non-Binding Recommendation

1. Introduction

Double taxation agreements (DTAs) are at present the dominant means of organizing international income tax relations. Almost all DTAs are bilateral, and are based to a certain extent on the a Model Tax Convention on Income and Capital (“Model”) that was drafted and published by the Organization for Economic Cooperation and Development (hereafter referred to by its abbreviation “OECD”). From the time it was first introduced in 1963, the Model is accompanied by a Commentary, which includes statements on the interpretation and application of the provisions of the Model. Both the Model and its Commentary are the subject of a recommendation by the OECD Council to its members⁹¹².

In practice, the Commentary is widely used by taxpayers, tax authorities and national courts. The authority of the Commentary seems generally recognized, although not everybody always agrees with its contents. When it comes to the “legal basis” or “status” of the Commentary, there seems to be more disagreement. With “legal status” or “basis” it is meant the rule of law (if any) which determines the rights and obligations of states and their organs with respect to the Commentary. In that regard, the primary attention of tax scholars understandably goes out to the international law on treaty interpretation given the fact that the Commentary concerns the interpretation of a (model) treaty. Much discussion exists on the Commentary may as one or more of the instruments and elements featured in art. 31 and 32 of the Vienna Convention on the Law of Treaties⁹¹³. Other possible perspectives include

⁹¹² OECD Council Recommendation of 30 July 1963.; Recommendation of 11 April 1977.; Recommendation of 1 September 1992.; Recommendation of 21 September 1995

⁹¹³ Avery Jones, J., et al. “The interpretation of tax treaties with particular reference to art. 3(2) of the OECD Model”, *British Tax Review*, 1984, p. 90.; *Ault, J.*, “The role of OECD Commentaries in the interpretation of tax treaties”, *Intertax*, 1994, p. 144.; Van Raad, C., “Interpretatie van belastingverdragen”, *MBB*, 1978, p. 49.; Van Raad, C., “Interpretation and Application of Tax Treaties by Tax Courts, *European Taxation*, 1996, p. 3.; Tieskens, “De betekenis van het OESO-Modelverdrag voor de

the relationship between municipal and international law, the legal merits of the Commentary under domestic law (tax or administrative law or law of judicial procedure) and international institutional law. This contribution briefly examines another obvious perspective for the Commentary under international law, namely its legal effects as a recommendation by an international economic organization⁹¹⁴. One could say that this perspective is one of “sources of international law”, although it has distinct associations with the law of international institutions.

1.1 The OECD and its Constituting Convention

In 1948, the “Organization for European Economic Cooperation” was established to administer the aid provided by the US to European countries within the framework of the so-called Marshall-plan⁹¹⁵. In 1960, when much of Western Europe had already economically recovered, it was decided to reconstitute the organization as the OECD⁹¹⁶. The OECD’s aim is basically to “promote policies” designed to “achieving the highest sustainable growth”, “to contribute to sound economic expansion in Members as well as non-Members and “contribute to the expansion of world trade”⁹¹⁷. As Sands and Klein note, “[t]he OECD emerges mostly [...] as a forum for discussion and consultation, as well as collection and exchange of information between member states in the economic field”⁹¹⁸.

The OECD has three main organs: the Council, the Committees and the Secretariat⁹¹⁹. The Council is the principal organ which comprises all members and is the body from which all acts of the OECD derive⁹²⁰. The Council may take decisions or recommendations, but both are to be taken

interpretatie van belastingvedragen”, *Weekblad voor Fiscaal Recht*, 1999/6368 p. 1757 et esq.

⁹¹⁴ See also in this regard Vogel, K., *Double Taxation Conventions*, 3rd edition, Kluwer, 1997, p. 45.; De Bont, G., “Tax treaty interpretation in the Netherlands”, in (M. Lang ed.) *Tax Treaty Interpretation*, p. 245.; Tieskens, *ibid.*, ft. 913, p. 1757 et esq.; Vogel, K. and Prokisch, R. “Interpretation of Double Taxation Conventions - General Report”, *IFA Cahiers de Droit Fiscal International*, vol. 78a, p. 64-65.

⁹¹⁵ Organization for European Economic Cooperation, 888 UNTS 141.

⁹¹⁶ See paragraph 11 of the preamble of the Convention on the Organization for Economic Cooperation and Development of 14 December 1960, 88 UNTS 179.

⁹¹⁷ Art. 1 OECD Convention.

⁹¹⁸ Sands, P. and Klein, P., *Bowett’s Law of International Institutions*, Sweet & Maxwell, 2001, p. 168.

⁹¹⁹ It also has a tribunal for disputes between the organization and its officials.

⁹²⁰ Art. 7 OECD Convention.

by *unanimity*⁹²¹. An abstention does not invalidate a decision or recommendation, but it shall not apply to the abstaining member⁹²². For that reason, members usually do not vote against a decision or a recommendation, but simply abstain if they do not agree⁹²³. No decisions are binding upon any member until it has complied with the requirements of its own constitutional procedures⁹²⁴. Actual decisions by the Council remain rare⁹²⁵. Recommendations by the Council oblige the member states to examine whether the recommended measures are opportune⁹²⁶.

The OECD has more than 200 specialized committees and working groups which are competent in particular areas. The Committee for Fiscal Affairs is one of them. It includes Working Groups on several tax-related issues, including one on the Model Tax Convention. The Secretariat essentially functions in a way similar to the UN Secretariat. One of its main tasks is to research, compile and analyze information in the economical field. The Secretary-General may submit proposals to the Council.

On the whole, it is fair to say that in law (in view of its requirement that decisions and recommendations must be taken in mutual agreement by the members) as well as in practice, the role of the OECD has been more in terms of informing, coordinating and promoting than legislating.

⁹²¹ Art. 6 (1) OECD Convention (unless the OECD otherwise agrees for special cases). Each member has one vote; Other international organizations that require unanimity for enactments are *inter alia* the Central Commission for the Navigation of the Rhine, the Benelux Economic Union, the European Free Trade Association (Skubiszewski, K., "Resolutions of international organizations and municipal law", Polish Yearbook on International Law, II, 1968-1969, p. 83).

⁹²² Art. 6 (2) OECD Convention.

⁹²³ Sands, P. and Klein, P., *ibid.*, ft. 918, p. 168.

⁹²⁴ Art. 6 (3) OECD Convention; Verhoeven observes that this provision is somewhat mysterious and of doubtful practical value as no constitution has any sort of provision setting out rules for implementing or ratifying decisions of the OECD (Verhoeven, J., in *A Handbook on International Organizations*, Martinus Nijhoff, Dordrecht, 1998 on p. 424).

⁹²⁵ Verhoeven, J., *ibid.*, ft.924, p. 423-424.

⁹²⁶ Art. 18 c) Procedural Rules of the OECD

1.2 Why do International Organizations Make Recommendations?

All international organizations are empowered to make non-binding recommendations to their members⁹²⁷. As Verhoeven noted, it is difficult to imagine how one could prevent or forbid international organizations from making recommendations within the area of their competence⁹²⁸.

There may be various reasons why an international organization prefers to issue a recommendation instead of an act with “harder” legal effect. It may consider that at this particular point in time, it is less complicated or sufficient to influence state behavior with a recommendation than to instigate the conclusion of an international treaty or a binding decision of an international organization. Perhaps the degree of agreement between the parties on the subject-matter is not yet “ripe” for an actual treaty, but a recommendation would benefit its further development. Chinkin calls this aptly “the feeling that something must be done”⁹²⁹. Along the same lines, Kooijmans notes that “the most probable reason to opt for a non-legal arrangement may well be that it enables the parties involved to include in it provisions which do not yet reflect legal norms but are deemed desirable as norms for future behavior”⁹³⁰. It has also been observed that certain subject-matters change so often that keeping up with those changes requires a flexible format without lengthy negotiations and ratification-procedures.

In the case of the OECD, the reason why the Model was recommended seems obvious enough. Double taxation was considered harmful for international trade and investment, a subject-matter proper to the OECD, and the availability of a Model would both promote the conclusion of DTAs and somewhat harmonize their provisions. As the Commentary states: “it has long been recognized among the Member countries of the OECD that it is desirable 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. This is the main purpose of the OECD Model, which provides a

⁹²⁷ Schermers H. and Blokker, N., *International Institutional Law*, Martinus Nijhoff Publishers, 3rd edition, 2001, par 1218.

⁹²⁸ Verhoeven, J., *ibid*, ft. 924, p. 428.

⁹²⁹ Chinkin, C., “Normative development in the international legal system” in *Commitment and Compliance*, Shelton D., (ed.) Oxford University Press, p. 42.

⁹³⁰ Kooijmans, P., “Some thoughts on the relation between extra-legal agreements and the law-creating process”, in *Theory of International Law at the Threshold of the 21st Century*, p. 429.

means of settling on a uniform basis the most common problems that arise in the field of international juridical double taxation”⁹³¹. It seems that the Commentary was created for much the same reasons. The uniformity of solutions desired by the OECD would be hard to realize in practice if the OECD members would widely vary in their interpretations of the text of the Model⁹³². The Commentary primarily provides helpful uniform practical solutions to real-life problems and situations⁹³³.

In order to create uniformity in international taxation, the OECD could also –or better- have promoted the conclusion of a multilateral convention on the elimination of double taxation. However, as Juillard already pointed out, apparently the level of international agreement in this subject-matter is at present insufficient to make this a practical possibility: “L’apparition de modèles conventionnels signale donc les écueils auxquels se heurte le multilatéralisme. Car, enfin, si un problème économique se pose dans les mêmes termes, entre les mêmes états, au même moment, on pourrait penser que ce problème pourrait être avantageusement réglé dans le cadre d’une négociation multilatérale. Mais il n’en va pas toujours ainsi[...] C’est ce qui s’est passé en matière d’élimination des doubles impositions”⁹³⁴. It seems that a Model with a Commentary was considered the next best thing.

A “model convention” was defined by Juillard as “un ensemble de clauses, arrêtées à titre indicatif, soit par un Etat, soit par un groupe d’Etats, soit par une organisation internationale, afin de fournir son cadre à la négociation bilatérale”⁹³⁵. It offers a text that can be reproduced in whole or in part, or at least serve as a starting point in bilateral negotiations. The creation of a model convention is an attempt at harmonization of rules, in this case rules contained in DTAs. It is a clear example of the OECD’s coordinative function in international economic relationships⁹³⁶. Drafting a model is only useful if there is indeed occasion to use it in many bilateral relations. The rapid increase in DTAs after world war II is justification enough in this respect.

⁹³¹ Commentary, Introduction, par 2 and 3.

⁹³² Ibid, par. 5.

⁹³³ Vogel, K. and Prokisch, R. “Interpretation of Double Taxation Conventions - General Report”, *IFA Cahiers de Droit Fiscal International*, vol. 78a, p. 64-65.

⁹³⁴ Juillard, P., “L’ Evolution des Sources du droit des investissements”, Hague Receuil, V.1, V.250, 1999, p. 121.; See also Commentary, Introduction, par. 37-40 (on the prospects for a multilateral treaty).

⁹³⁵ Juillard, P., *ibid*, ft.934, p. 120.

⁹³⁶ Juillard, P., *ibid*, ft.934, p. 123-127.

2. Recommendations are in Themselves Not Legally Binding

a) Lack of binding character

As was said above, both the OECD Model and its Commentary are “recommendations” under art. 5 (b) of the OECD Convention⁹³⁷. Contrary to “decisions”, they are not binding upon the members⁹³⁸. The terminology used in the OECD Convention is in line with general international practice, where the term “recommendation” indicates a non-binding suggestion by an international organization⁹³⁹. A recommendation does thus normally not contain binding rules⁹⁴⁰. The fact that it is not formally binding is the essence of the word “recommendation”. A recommendation is not binding almost by definition⁹⁴¹, although the term has sporadically been used as a name for legally binding acts as well⁹⁴². As a principle, a recommendation is thus not (international) legislation⁹⁴³. As was already mentioned, the “recommendations” under art. 5(b) of the OECD Convention are clearly no exception. Therefore, the fundamental and often decisive *starting point* of an examination of the legal effects of the Commentary must remain that in the matter that concerns us here, the OECD has not been given any legislative competence under its constitutive convention⁹⁴⁴. The same can be said for any other treaty besides the constituting convention.

⁹³⁷ Bizioli, G., “Tax treaty interpretation in Italy” in *Tax Treaty Interpretation*, (M. Lang ed.), p. 217.

⁹³⁸ See on this issue Freymond, P., “Les décisions de l’Organisation Européenne de Coopération Economique (OECE)”, *Annuaire Suisse de Droit International*, vol. 11, 1954, p. 82.

⁹³⁹ Schermers, *ibid.*, ft.927, par. 1217; Castaneda, J. “Valeur juridique des résolutions des Nations Unies”, 129 *RdC* (1970 I) at 227; Schreuer, C., “Recommendations and the traditional sources of international law”, in *German Yearbook Of International Law*, Vol. 20, 1997, p. 104.; The binding “recommendations” by the European Coals and Steel Community was replaced by “directive” at the time of the establishment of the EEC.

⁹⁴⁰ Schreuer, C., *ibid.*, ft. 939, p. 104.; Skubiszewski, K., *ibid.*, ft.927, p. 91.; Schreuer, C., *Decisions of international institutions before domestic courts*, Oceana, London, p. 53.

⁹⁴¹ Skubiszewski, K., “Enactment of law by international organizations”, *British year book of international law 1965-1966*, Forty-first year of issue, Oxford, 1968, p. 201.

⁹⁴² Art. 14 par. 3 Treaty Constituting the Community of Coal and Steel, UNTS, vol. 261, p. 141; North Atlantic Fisheries Convention, 24 January 1959, Miscellaneous No. 3, 1959, Cmnd. 659.

⁹⁴³ Skubiszewski, K., *ibid.*, ft.921, p. 82.; Skubiszewski, K., *ibid.*, ft. 941, p. 198.

⁹⁴⁴ For a similar approach (but with respect to UN General Assembly resolutions) see Institut de Droit International, 13th Commission, *Annuaire de l’Institut de Droit International*, Vol. 61, I., (1985) p. 34 and Conclusion 1 and 2 on p. 310-311.

No DTA or any other agreement between states or between one (or more) state(s) and the OECD bestows upon that organization the power to *enact* international tax legislation for its members.

This also reflects in the absence of state responsibility when a state fails to comply with a recommendation⁹⁴⁵. State responsibility and the duty to repair damage caused is subject to the violation of a legal obligation, and as was said above, there is no legal obligation to comply with any particular recommendation. Nevertheless, sanctions may be incurred. The breach of “political agreements” may be followed by “political sanctions”⁹⁴⁶, but this can hardly be imagined with respect to the Commentary. In addition, as was said above, the systematic ignoring of recommendations issued by an international organization by a certain member of that organization may constitute a breach of good faith of the constituting treaty of that organization⁹⁴⁷.

b) Non-binding recommendations as a new source of international law?

The lack of legally binding character for a phenomenon that nonetheless features so prominently in the organization of international affairs has sparked debate between scholars with respect to the sources and even the nature of international law, especially because these non-binding recommendations are in practice often respected by the actors of international law as if they would have been binding. Some scholars suggest that the classic list of sources of international law of art. 38 of the Statute of the ICJ, needs revision⁹⁴⁸. Some argue that a new category of sources of international law, so-called “soft-law” should somehow be added to the list. This discussion can also be associated with the fundamental perception of international law as law, i.e. legally binding rules⁹⁴⁹. Authors as Klabbers argue that there can be no “non-binding law”, and that soft-law is a useless *contradictio in terminis*⁹⁵⁰. Others, such as Tunkin, introduce the notion of “international juridical system”, which would not only include legal but also “semi-legal” norms, closely

⁹⁴⁵ Schachter, O., “The twilight existence of non-binding (sic) international agreements”, 81 *AJIL* 1977, p. 301.

⁹⁴⁶ Kooijmans, P., *ibid.*, ft.930, p. 430.

⁹⁴⁷ See below.

⁹⁴⁸ Verzijl finds the fact that art. 38 of the Statute does not mention (binding) resolutions of international bodies “a serious lacuna”, J.H.W. Verzijl, *International Law in Historical Perspective*, Leyden, 1968, vol. 1, p. 74.

⁹⁴⁹ Jennings, R., *The Discipline of International Law*, ILA Report 57th Conference 1976, p. 620 at p. 631.

⁹⁵⁰ Klabbers, J., “The redundancy of soft law”, 65 *Nordic J.I.L.* 1995, p. 167.

interrelated⁹⁵¹. Indeed, it is often difficult to see the difference between non-binding instruments and formally “hard” treaty provisions formulated in terms as “best efforts”, “as far as possible” or “as far as is necessary”⁹⁵².

It is neither necessary nor useful to engage this debate in-depth for the purpose of analyzing the effect of the Commentary under international law *de lege lata*. It suffices to assert that at present, “soft-law” or another name given to legally non-binding instruments or acts is certainly not generally accepted as a “new” source of international law in the classic sense of the word. It remains, as Chinkin observes, controversial⁹⁵³, and Skubiszewski’s “no man’s land of quasi-legislation” still exists to this day⁹⁵⁴.

3. Recommendations are Not Legally Irrelevant

3.1 “Authoritative” vs. “Binding”

Even if non-binding instruments would not be a source of international law in the classic sense, this “does not mean that they are devoid of any legal import”⁹⁵⁵. The mere fact that some act or instrument is in itself not legally binding to its addressees does not make it without every legal effect. For starters, it is fairly undisputed that recommendations by an international organization bind that organization (and its organs) itself⁹⁵⁶. Based on that assertion, it seems uncontroversial that the OECD itself is bound by the OECD Commentary. Of course, the OECD is not a party to any DTA itself, but it is possible that the Committee on Fiscal Affairs is called upon by OECD-members or even non-Members to arbitrate a DTA-dispute. This possibility featured for some time even in the OECD Commentary⁹⁵⁷. In the course of such an international arbitration, it would thus seem that the organs or officials of the OECD in their official

⁹⁵¹ Tunkin, International law in the international system, *Receuil des Cours*, vol. 147, 1975-IV, p. 61 and 70.

⁹⁵² Chinkin, C., “Normative development in the international legal system” in *Commitment and Compliance*, *ibid.*, ft.929, p. 41.; Klabbers, J., *ibid.*, ft.950, p. 167.

⁹⁵³ Chinkin, C., *ibid.*, p. 24.

⁹⁵⁴ Skubiszewski, K., *ibid.*, ft.921, p. 80.

⁹⁵⁵ Kooijmans, P., *ibid.*, ft.930, p. 431.

⁹⁵⁶ Frowein, J., “The internal and external effects of resolutions by international organizations”, *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, 1989, p. 780

⁹⁵⁷ Commentary 25/46 and 47.

capacity have little choice but to adhere to the principles included in the Commentary.

Secondly, the constituting treaty of an international organization itself may, while still falling short of making the recommendation actually binding upon the addressees, provide in some obligation that enhances the likelihood of formal acceptance or even implementation. In the International Labor Organization, for example, recommendations adopted by the Conference are not binding but the members have the obligation to bring them before the competent authorities within the state⁹⁵⁸. Various international organizations also have reporting and monitoring-systems in place by which the members are required to inform the organization if and how recommendations were implemented and which give the international organization the authority to collect such information itself⁹⁵⁹.

Most authors also refer to the wealth of domestic and international decisions where non-binding acts or instruments of international organizations have been relied upon in some way or another⁹⁶⁰. In fact, the same –insofar domestic court decisions are concerned- can be said for the Commentary⁹⁶¹. As Schreuer wrote: “a look at international practice reveals a constant reliance on the recommendations-type of decisions of international organizations”⁹⁶². This circumstance does not render a non-binding recommendation binding, at least not *per se*, but it does allow us to conclude that “recommendations, though not binding in the sense of a municipal statute, exercise a considerable influence on the international decision-making process”⁹⁶³.

⁹⁵⁸ Art. 19 (6) ILO.

⁹⁵⁹ Sands, P. and Klein, P., *ibid*, ft.918, p. 287.; Wirth, D.A., “Compliance with non-binding norms of trade and finance”, in *Commitment and Compliance*, p. 331-344.

⁹⁶⁰ *Military and Paramilitary Activities in and against Nicaragua* (Merits), *ICJ Reports* 1986, p. 14 (where the ICJ saw UN Resolutions as evidence of *opinio juris*); According to Chinkin (“The challenge of soft law: development and change in international law”, 38 *ICLQ* 1989, p. 864-865), the ICJ “has furthered the development of soft law principles” with several other cases as well, including the *Fisheries Jurisdiction Case* (Merits) *ICJ Reports* 1974, p. 3.

⁹⁶¹ For a recent overview of domestic courts referring to the Commentary, see Lang, M., (ed.) *Tax Treaty Interpretation*, Kluwer, 2001, p. 25-27, 50, 70-72, 83-84, 108, 135-138, 162-164, 188-189, 219, 234-236, 265-266, 287-293, 309-312, 347-351, 364-365.

⁹⁶² Schreuer, C., *Decisions of international institutions before domestic courts*, *ibid*, ft.939, p. 52.

⁹⁶³ Schreuer, C., *ibid*, ft.939, p. 52.

In fact, much of this discussion comes thus down to a confusion between “legally binding” and “authoritative”. A text does not necessarily have to be one to be the other. Legally binding texts are usually authoritative, but also non-legally binding texts may be authoritative. As Shelton noted, “correspondence of behavior is not the same as compliance”⁹⁶⁴. Domestic courts cannot normally be prevented from referring to sources or documents just because they are not formally binding, provided they thereby do not actually violate binding norms such as statutes or treaty provisions⁹⁶⁵. By the same token, the reliance of domestic tax courts upon the Commentary to decide tax treaty disputes does not per se mean that the Commentary must be legally binding.

3.2 Factors contributing to authority

In the study “Commitment and Compliance”, it was demonstrated that the circumstances surrounding the creation of a formally non-binding instrument have an influence on state compliance. Factors such as the degree of consensus, the costs involved with complying, the existence of monitoring mechanisms etc. all seem to have had an impact on the compliance with economic, financial, military and environmental “soft-law”⁹⁶⁶. Even within the same subject-matter, “determinants of implementation, compliance and effectiveness vary”, again according to Shelton, but one of the key-determinants of the Commentary is in this regard clearly that it is linked to a binding instrument in terms of contents, namely an actual DTA⁹⁶⁷. It is noteworthy in this respect that “in fields populated by international agreements, soft law instruments linked to a binding obligation were more likely to be complied with than those that were not so affiliated”⁹⁶⁸. The obvious material link between the Commentary and the provisions of many DTAs is thus doubtlessly one of the main factors that explain its authority. This material link is reflected in the at least theoretical possibility of invoking the Commentary as one of the elements or instruments of art. 31 or 32 VCLT⁹⁶⁹.

⁹⁶⁴ Shelton, D., “Law, non-law and the problem of soft” in *Commitment and Compliance*, Shelton, D., (ed.) Oxford University Press, p. 17.

⁹⁶⁵ Schreuer, C., *ibid*, ft.939, p. 50-67.

⁹⁶⁶ Brown Weiss, E. “Understanding compliance with soft law” in *Commitment and Compliance*, Shelton, D., (ed.) Oxford University Press, p. 535-557.; See also Skubiszewski, K., *ibid*, ft.921, p. 94.

⁹⁶⁷ Shelton, D., *ibid*, ft.964, p. 17.

⁹⁶⁸ Brown Weiss, E., *ibid*, ft.966, p. 536.

⁹⁶⁹ See below.

The *language* used in the recommendation is certainly another very significant factor with respect to compliance⁹⁷⁰. International organizations may formulate certain recommendations (or statements therein) in a recommendatory language while others employ language indicating a legal obligation. Drafting the contents of a non-mandatory instrument in mandatory language is in itself not problematic nor exceptional⁹⁷¹. Also, as a principle, mandatory language does not in itself make for a legally binding instrument⁹⁷². Normally, “the rule declared partakes in the recommendatory nature of the resolution”⁹⁷³. As was pointed out above, many statements in the Commentary are of a recommendatory nature, and will therefore be less likely to influence the behavior of state organs. In that case, the “rule” is a recommended one. The expectation by the OECD and its members that these recommendations in non-normative language will be followed, is simply lower. The same can be said for the statements where the language of the Commentary makes it clear that opinions are divided on the subject. State compliance with statements in the Commentary which are worded as binding obligations should normally be higher. Therefore and as a consequence thereof, the expectation by the members that the recommendation will be followed may be higher⁹⁷⁴.

The level of consensus by which the recommendation was adopted, is perhaps of little interest in OECD-practice, as nearly all recommendations of the Council are made in common accord. The frequent *reservations* to the OECD Model and its Commentary may perhaps shed more light on to which extent a member in fact agrees with the recommendation. However, the existence of reservations also strengthens the perception that if no reservation was made, the member’s legal position is in general accordance with the recommendation⁹⁷⁵. As Chinkin notes: “reservations

⁹⁷⁰ Skubiszewski, K., “The elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective” in *Annuaire De L’Institut de Droit International*, Vol. 6i, Tome I, 1985, p. 43-47.; Schreuer, C., Decisions of international institutions before domestic courts, *ibid*, ft.939, p. 60.; Chinkin, C., *ibid*, ft.929, p. 38.; Katz, S.I. raises this point also with respect to the Commentary in “Interpretation of Double Taxation Conventions”, *IFA Cahiers de Droit Fiscal International*, 78a, p. 638.

⁹⁷¹ Kooijmans, P., *ibid*, ft.930, p. 430-431.; Skubiszewski, K., *ibid*, ft.970, p. 36 (on the imaginary danger of usurpation by the General Assembly).

⁹⁷² Townsend, J.A., “Tax treaty interpretation”, *Tax Lawyer*, Vol. 55, No. 1, p. 235.; Roosenbloom, D.H., “The source of interest payments made by non-residents”, *Wayne Law Review*, 1984, p. 1035.

⁹⁷³ Skubiszewski, K., *ibid*, ft.970, p. 43.

⁹⁷⁴ Skubiszewski, K., *ibid*, ft.970, p. 62.

⁹⁷⁵ Vogel, K., *Double Taxation Conventions*, 3rd edition, Kluwer, 1997, p. 45

and interpretative declarations are other ways of denying or undermining legal obligations drafted in treaties and even soft law instruments. The latter suggests that states are reluctant to rely upon the legalistic assertion that they have incurred no binding obligation through acceptance of a non-binding instrument”⁹⁷⁶. In other words, if states feel the need to make reservations, they must accept that the recommendation may have some legal relevance notwithstanding its non-binding character. The Commentary itself does not clearly state what is the function and effect of the reservations to the Model by members. It only mentions, somewhat cryptically, that “it is understood that insofar as a member country has entered reservations, the other member countries, in negotiating bilateral conventions with the former, will retain their freedom of action in accordance with the principle of reciprocity”⁹⁷⁷. Besides the incomprehensible reference to the principle of reciprocity in this context, this sentence seems to indicate that in absence of a reservation, the member state loses its “freedom of action”, which is probably exaggerated. With respect to the observations on the Commentary itself, the OECD states that they “have sometimes been inserted at the request of Member countries that are unable to concur in the interpretation given in the Commentary on the Article concerned. These observations thus do not express any disagreement with the text of the Convention, but usefully indicate the way in which those countries will apply the provisions of the Article in question”⁹⁷⁸. The level of consensus can also to a certain extent be associated with the negotiating-history of a recommendation. The fact that some soft law instruments are exhaustively negotiated, in much the same way as many treaties, may reflect on their authority.

The fact that an international organization is *composed out of states* and its main organs by representatives of states, is generally seen as a factor that strengthens the authority of its recommendations. In this respect it is to be noted that the OECD is an intergovernmental organization, and that the Commentary is drafted and voted upon by state representatives in the Council. Its UN counterpart does not have the same characteristics. The members of the UN Ad Hoc Group of Experts function in a personal capacity, and not as a state representative. This difference was not given much consideration by the ICJ in the *Applicability of the Privileges and Immunities Convention (Mazilu case)*. The case concerned a treaty closely related to the UN Charter, namely the Convention on the

⁹⁷⁶ Chinkin, C., *ibid*, ft.929, p. 40.

⁹⁷⁷ Commentary, Introduction, par. 31.

⁹⁷⁸ *Ibid*, ft.977, par. 30.

Privileges and Immunities of the United Nations. The ICJ referred in that case to information from the Secretary-General on the term “experts on mission” in sec. 22 of the Convention. The Secretary-General specifically included in his answer practice by some committees whose members serve in a personal capacity, as experts, and not as representatives of states⁹⁷⁹. Thirlway recalls on this subject however that “it was not clear whether the practice relied on was a practice of those bodies”⁹⁸⁰. That experts and not formal state representatives were involved in drafting the contents of a recommendation does not in my view jeopardize the authority of the recommendation (in fact the better the quality, the more authority), because states and international organizations must be deemed free to choose who they will contract to perform services to them. But the fact that the UN Commentary was never the subject of a vote by actual state representatives may disqualify the UN Commentary from constituting state practice⁹⁸¹.

Impartiality is also an important factor of compliance. State compliance will be significantly curtailed if the impression exists that a recommendation by an international organization benefits one party much more than another party⁹⁸². At the level of the Commentary, this issue plays a role as well. The Commentary is in essence drafted and approved by representatives of governments without much intervention by taxpayers or courts⁹⁸³. In such a situation, the legitimate expectation –and therefore its authority- towards compliance by the independent courts of the members must be affected. Especially on issues that are very controversial between taxpayers and tax administrations, such as the application of domestic anti-avoidance measures in treaty-situations, statements in the Commentary must in these circumstances be deemed much less authoritative.

3.3 Recommendations must at least be taken into consideration

The treaty establishing an international organization which form the ultimate basis for the recommendations, is an international obligation

⁹⁷⁹ Applicability of the Privileges and Immunities Convention (Mazilu case), *ICJ Reports* 1989, p. 194 par. 48. The information supplied by the Secretary-General is found in the *Pleadings*, p. 186-188.

⁹⁸⁰ Thirlway, H., *The law and procedure of the ICJ*, part 8, *BYIL* 1996, p. 26.

⁹⁸¹ Juillard, P., *ibid*, ft.934, p.120-122.

⁹⁸² Juillard, P. *ibid*, ft.934, p. 110.; Seidl-Hohenveldern, I., “International economic soft law”, 163 *H.R.* 1979/II, p. 173-178 and 203.

⁹⁸³ Steichen, A., “Tax treaty interpretation in Luxembourg” in (M.Lang ed.) *Tax Treaty Interpretation*, p. 234

which must be observed in *good faith*⁹⁸⁴. When a state thus denies any effect at all to each and every recommendation issued by the international organization under a treaty to which the state is a party, it violates the legitimate expectations of the treaty partner, which may at least expect that the state shall give the recommendations some serious consideration⁹⁸⁵. Furthermore, it hampers the application of the treaty, namely the effective functioning of the international organization. The first consideration –legitimate expectations– is closely associated with the principle of good faith. The comparison with a *pactum in contrahendo* is not farfetched. The second consideration –effectiveness of the international organization– can be linked to the object and purpose of the convention establishing it, as well as with the maxim *ut regis valeat quam pereat*, which is also associated with the principle of good faith. If the convention provides the existence of recommendations, it may not be in accordance with the principle of effectiveness to deny them any effect what so ever⁹⁸⁶. Even a legal effect, as other members may vote to remove members for reasons that may include a systematic refusal to even consider recommendations made by the organization⁹⁸⁷. It is noteworthy that the ECJ followed this approach when it decided that, although “recommendations” under art. 189 of the EC Treaty are not binding, “it must be stressed that the measure in question cannot therefore be regarded as having no legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes

⁹⁸⁴ Schreuer, C., Decisions of international institutions before domestic courts, Oceana, London, *ibid.*, ft.939, p. 63 (“the addressees, usually state-organs including domestic courts, are at least under a duty to consider them in good faith”); Chinkin, C., *ibid.*, ft.929, p. 26.; Ingelse, C., “Soft law”, 20 *Polish Yearbook of International Law*, 1993, p. 75.; It is unclear if that would also apply if there were no legal basis at all to “attach” the non-binding instrument to, as in the case of recommendations by international organizations, the constituting treaty of that organization. Virally argues, for example, that the principle of good faith also applies to not legally-binding arrangements between states (Virally, M., *Annuaire IDI*, 1983, p. 95) which is hard to bring in accordance with the ICJ’s dictum that the principle of good faith can only apply to an underlying legal obligation (*Nicaragua Case*, *ICJ Reports*, 1986, p. 14)

⁹⁸⁵ Higgins, R., The Development of International Law Through the Political Organs of the United Nations, *PASIL*, 1967, p. 123 et seq.; Schreuer, C., “Recommendations and the traditional sources of international law” in *German Yearbook Of International Law*, *ibid.*, ft.939, p. 117-118.

⁹⁸⁶ Thirlway, H., (*ibid.*, ft.980, p. 21) noted that in the *ICAO Appeal Case*, the ICJ made “a special application of the principle of effectiveness, regarded as referable to the effectiveness of the organization, as a whole, [...]” (*ICJ Reports*, 1962, p. 159.; See also the ICJ’s reference to the “purpose to function effectively” of the *United Nations in the Falsa* (UNAT Judgment No. 158) Case, *ICJ Reports*, 1973, p. 172-173.

⁹⁸⁷ Lauterpacht, D.O. to the South West Africa – Voting Procedure Advisory Opinion, *ICJ Reports*, 1955, p. 120.

submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement Community provisions”⁹⁸⁸.

There are however limits to this effectiveness-approach. As Seidl-Hohenveldern pointed out, “weak” means of an international organization cannot be turned into stronger ones using the doctrine of implied powers⁹⁸⁹. Any implication of powers has to be a necessary implication⁹⁹⁰.

It goes without saying that under this approach –which is linked to the treaty constituting the organization- a non-member of the international organization that issued the recommendation does not incur any obligation at all, not even a good faith-effort to take the recommendation into consideration. From a non-OECD member that concludes a DTA (with an OECD-member or a non-OECD member) it can on this basis not be legitimately expected that it would at least consider to follow the OECD Model. Likewise, for treaty interpretation, the constituting treaty of the OECD can obviously not serve as a legal basis for a non-member to apply the Commentary. It is true however that the UN Ad Hoc Group of Experts has reproduced large parts of the OECD Commentary, thus in theory bringing its contents to a larger consensus. Still, for other reasons which were explained above, the UN Commentary lacks the same authority as its OECD counterpart, at least under international institutional law.

4. Recommendations *Can* be Binding

4.1 Recommendations and the classic sources of international law

The search for the legal justification of the significance of recommendations may also lead us to the various classic sources of international law. Unilateral acts of states, treaties and customary international law have all been called upon to justify that the contents of some recommendations may be legally binding after all. They would in that case not derive their binding force from the recommendation itself, but could depending on the circumstances be regarded, for example, as evidence of customary international law. Both elements of customary rules, namely practice and *opinio juris*, can be linked to recommendations

⁹⁸⁸ *Case C-322/88 Grimaldi vs Fonds des maladies professionnelles*.

⁹⁸⁹ *Berichte der Deutschen Gesellschaft für Volkerrecht*, 11. Tagung 1969, Heft 10, p. 223; *IDI*, p. 35.

⁹⁹⁰ *Reparation for Injuries Case*, *ICJ Reports*, 1949, p. 182.

of international organizations. The casting of a vote by state representatives in support of a recommendation can, depending on the circumstances, sometimes be regarded as a form of state practice, or as an expression of *opinio juris*⁹⁹¹. The ICJ held in the Nicaragua case, for example, that the *opinio juris* of states with respect to the prohibition of the use of force could be deduced from their attitude towards the relevant resolutions of the General Assembly of the UN⁹⁹². The positive vote of a state with respect to a recommendation may be seen as “an expression of its legal position” as Sands and Klein put it, provided it is indeed drafted in normative rather than recommendatory language⁹⁹³. As such, a recommendation (or a state’s approval of it) may have consequences under international law, although not every approval will constitute *opinio juris*, as Kooijmans points out⁹⁹⁴. As a matter of fact, some states may only approve of a (statement in a) recommendation precisely because it is not legally binding⁹⁹⁵. If the Commentary were to be legally binding (for example if it would be given the format of a “decision” of the OECD Council instead of a recommendation), it is very doubtful indeed if sufficient approval could be found among the members.

However, the perception of recommendations by international organizations purely from the perspective of the votes and statements by their members is, as Schreuer notes, not without difficulties: “[t]o regard the international organ as nothing more than a trading center for the statements and votes of individual states would not do justice to its express competence to pass resolutions in its capacity as an international body. The international organ would thus be seen purely as a permanent conference of states. Its resolutions would be nothing more than the aggregate of the communications of states represented in it”⁹⁹⁶.

It is thus disputed if the vote cast by a member of an international organization in support of a recommendation may be seen as an actual expression of consent to adhere to its contents. In any event, the creation of a recommendation in common accord should not be equated with the

⁹⁹¹ Schreuer, C., *ibid.*, ft.939, p. 107 (with further references).

⁹⁹² Military and Paramilitary Activities in and against Nicaragua (Merits), *ICJ Reports* 1986, p. 14; See also Institut de Droit International, 13th Commission, *Annuaire de Droit International*, vol. 61, I, p. 68-69.

⁹⁹³ Sands, P. and Klein, P., *ibid.*, ft.918, p. 289.

⁹⁹⁴ Kooijmans, P., *ibid.*, ft.930, p. 434.

⁹⁹⁵ Fitzmaurice, G., The future of public international law and of the international legal system in the circumstances of today, in *IDI, Livre du Centenaire 1873-1973*, p. 269.; Skubiszewski, K., *ibid.*, ft.970, p. 41.

⁹⁹⁶ Schreuer, C., *ibid.*, ft.939, p. 109.

conclusion of an international agreement, which was a position that was earlier defended by certain authors⁹⁹⁷. By voting the states do not create an agreement between themselves or between them and the organization⁹⁹⁸. As Schermers and Blokker put it: [m]embers vote in their capacity as elements of the organization, as contributors to the development of legal rules, not as contracting parties. Accordingly, their vote expresses their desire to help establish a rule which is equally applicable to all members. Unless a member expressly declares otherwise, its vote cannot be interpreted as representing an undertaking by the state to adhere to the rule thus established⁹⁹⁹. Similarly, Chinkin notes: “formal means of adherence to a treaty serve to identify parties, but this does not apply to soft law instruments”¹⁰⁰⁰.

The formal acceptance of a recommendation as binding by a state attaches the per se non-binding recommendation to another source of international obligations, namely unilateral acts. As the ICJ pointed out in the *Nuclear Tests Case*, a unilateral act may have international legal consequences. In that respect, several authors note that members may accept a recommendation officially, “in which case their act of acceptance creates a legal obligation”¹⁰⁰¹. A good example of that is the Codex Alimentarius Commission, a joint body of the FAO and the WHO. It is to be emphasized however, that voting in favor of a recommendation, or even acting in accordance with it, does not in itself amount to formal acceptance of it as a binding norm upon the state. With respect to the Commentary, I know of no state that has formally accepted the OECD Model or its Commentary as a binding norm.

Rules featured in recommendations of international organizations may also be legally binding because they reflect or are evidence of customary rules of international law. It serves in my view little purpose to try to associate the Commentary with norms of customary international law, because it so obviously refers to the application and interpretation of treaty provisions. The question could also be asked if the guidance and rules in the Commentary are not “too precise” to be associated with customary rules. More general principles, such as “source-taxation for

⁹⁹⁷ Kelsen, H., *Principles of International Law*, New York, 1952, p. 366; (and more cautious: Tammes, A., “Decisions of international organs as a source of international law”, *Hague Recueil*, vol. 94 1958-II, p. 90.

⁹⁹⁸ Detter, p. 391-392 (as quoted by Sands and Klein); Schermers and Blokker, *ibid*, ft.927, par. 1225.

⁹⁹⁹ Schermers and Blokker, *ibid*, ft.927, p. 760.; Skubiszewski, K., *ibid*, ft.921 p. 84.

¹⁰⁰⁰ Chinkin, C., *ibid*, ft.929, p. 39.

¹⁰⁰¹ Schermers and Blokker, *ibid*, ft.927, p. 760.

non-residents and worldwide taxation for residents” of the OECD Model itself, are perhaps more appropriate in this regard¹⁰⁰².

4.2 Recommendations and treaties in particular

a) *General remarks*

There are several ways in which recommendations by international organizations may relate to treaties. Acts of international organizations often relate to the interpretation of the constitutive convention of that organization. In that sense, their acts interact with treaty interpretation¹⁰⁰³. As Thirlway noted, “the manner in which the organs concerned have consistently interpreted the text in practice [...] may be regarded as a logical extension of the recognized role of the subsequent practice of the parties in determining interpretation, as contemplated by art. 31 (3) (b) of the Vienna Convention”¹⁰⁰⁴. The ICJ has repeatedly interpreted the treaty establishing an international organization with due regard for the practice by an organ of that organization¹⁰⁰⁵. Of course, the Commentary does not concern the interpretation of the treaty establishing the OECD.

Recommendations may also constitute a stage of development, where statements are later transformed into treaty commitments¹⁰⁰⁶. A non-binding recommendation is often preparatory to the conclusion of a treaty on the subject¹⁰⁰⁷. Although this is certainly not the case for the main parts of the Commentary, it has been known to happen that interpretations set forth in the Commentary are later included in Model text and imported into actual bilateral DTAs. More commonly, the Commentary provides in model-treaty provisions which are not included in the Model itself, but which may be adopted in bilateral negotiations if parties see the need to do so.

With respect to the Commentary, the material link to treaties is thus clearly the most obvious one in terms of classic sources of international law. The Commentary essentially describes how the Model should be interpreted and applied according to the OECD. It is important but self-

¹⁰⁰² American Law Institute, Restatement of the Law Third, Vol. I., par. 411-412.

¹⁰⁰³ Thirlway, H., *ibid.* ft.980, p. 26-30.; Skubiszewski, K., *ibid.* ft.921, p. 98.

¹⁰⁰⁴ Thirlway, H., *ibid.* ft.980, p. 22.

¹⁰⁰⁵ *Certain Expenses Case, ICJ Reports* 1962, p. 159 et seq.; *IMCO Maritime Safety Committee Case, ICJ Reports*, 1960, p. 166 et seq.; *Applicability of Privileges and Immunities Convention Case, ICJ Reports* 1989, p. 194.

¹⁰⁰⁶ Kooijmans, P., *ibid.* ft.930, p. 427.

¹⁰⁰⁷ Skubiszewski, K., *ibid.* ft.921, p. 97.

evident that when a recommendation –which is by definition not per se legally binding- inscribes rules which *are* legally binding for some reason or another, these rules do not lose the binding character they already had¹⁰⁰⁸. When the Commentary thus confirms a rule or an interpretation which is binding in itself (for example because it is an inescapable consequence of another provision of the DTA or of another treaty), the fact that the Commentary has the form of a not-binding recommendation of the OECD, clearly does not result in that rule or interpretation becoming merely “recommendatory”.

b) The “treaty-link” strengthens authority

Above it was already mentioned that a close association to a binding treaty may strengthen the voluntary compliance by states with normally non-binding recommendations¹⁰⁰⁹. Schreuer also concludes that “recommendations are of particular importance where other legal considerations do not yield a clear and satisfactory answer. Especially in the interpretation of applicable legal prescriptions like treaty provisions [...], recommendations can be an important help. In such a situation a decision which is in accordance with the policies expressed by an authoritative recommendation is to be preferred”¹⁰¹⁰. He particularly notes the value of the Universal Declaration of Human Rights to interpret human rights treaties, the European Convention on Human Rights and extradition treaties¹⁰¹¹. Chinkin distinguishes, along the same lines, the category of “elaborative soft law, that is principles that provide guidance for the interpretation, elaboration or application of hard law. This may be envisaged by a treaty as such or simply refer back to treaty obligations with the interference that the hard and soft law are interdependent and that the latter derives authority from and extends the meaning of, the former”¹⁰¹².

¹⁰⁰⁸ Dehousse, F., GAOR, 3rd Sess., 1st Part, 3rd Committee, 108th Mtg, 20 October 1948, p. 200.; Skubiszewski, K., *ibid*, ft.930, p. 46.

¹⁰⁰⁹ Brown Weiss, E., “Conclusions: understanding compliance with soft law”, *ibid*, ft.966, p. 536.; Compare Schreuer, C., Decisions of international institutions before domestic courts, *ibid*, ft.939, p. 55.: “[...] it is difficult why they [recommendations that derive their material contents from treaty provisions] should fundamentally differ in their authority from other recommendations which also lie within the functions of the organization”.

¹⁰¹⁰ Schreuer, C., *ibid*, ft.939, p. 118.; See also Fitzmaurice, G., “The law and procedure of the ICJ 1951-1954”, *BYIL*, 1958, p. 5.

¹⁰¹¹ Schreuer, C., *ibid*, ft.939, p. 54.

¹⁰¹² Chinkin, C., *ibid*, ft.929, p. 30.; See also Skubiszewski, K., *ibid*, ft.970, p. 70 (on “interpretation of treaties by resolution”).

c) *Can the Commentary incorporate treaty provisions?*

Above it was already pointed out that when states vote in support of a recommendation in an organ of an international organization, this is not to be equated with the conclusion of an international agreement between the states or between the state(s) and the organization. In itself, therefore, a recommendation is not an international agreement, and statements in the Commentary on which all members seem to agree cannot be seen as an international agreement.

However, in international law, as well as in EU law¹⁰¹³, normally the *form* or denomination of an act is not relevant to determine its legal effect on the international level. The ICJ's decision in the *Qatar vs. Bahrein case* confirmed this for as far as necessary¹⁰¹⁴. There is no reason to subject contents to form. Put another way, to judge what legal effect any act may have, its denomination or form is not per se determinative, although it is of course an important indication. As Chinkin noted, "form is determinative in the sense that a formally concluded treaty between states is per se legally binding under international law, while an institutional resolution or agreement between non-state actors is not. Form is not determinative in that binding obligations can be created in numerous ways, for example through oral agreements, unilateral statements, minutes of a meeting, exchange of letters and even through an intermediary"¹⁰¹⁵. Even the intention of the parties is in this respect not determinative. When parties did not mean to create a legally binding agreement, but did, this is the end of the matter¹⁰¹⁶. Along the same lines, it can be noted that states are by no means obliged to put their entire agreement in writing in an explicit manner to be binding between them. Implied obligations should not be lightly assumed but when established are naturally just as binding as any written text. These two related observations should be kept in mind when considering the interpretation and application of treaties as well.

Thus, as "states are free to bind themselves in any form whatsoever"¹⁰¹⁷, it cannot be excluded completely that states do indeed conclude an international agreement by means of a "recommendation" by an

¹⁰¹³ *Binderer v Commission*, [1985] ECR 257 ("the choice of form cannot alter the nature of the measure").

¹⁰¹⁴ *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrein*, ICJ Reports 1994, p. 6.

¹⁰¹⁵ Chinkin, C., *ibid*, ft.929, p. 37-38.

¹⁰¹⁶ *Ibid*, ft. 929.

¹⁰¹⁷ Skubiszewski, K., *ibid*, ft.970, p. 332.

international organization they are a member of. Such would be the case if the contents of the recommendation would be incorporated into a treaty. A DTA could in theory provide that the Commentary constitutes an integral part of the treaty, but it is hard to imagine how this would work in practice as no actual treaty will be completely in conformity with the OECD Model the Commentary is based upon. Certain DTAs concluded by Austria refer in a Protocol to the OECD Commentary as a supplementary means of interpretation. Another issue is if treaty rules could not be incorporated into the recommendation. This is in any event quite rare¹⁰¹⁸, and would of course deprive the “recommendation” of its essence, namely its non-binding character.

5. Recommendations and Domestic Law

5.1 General remarks

Without wishing to discuss theories on monism and dualism it suffices for the purposes of this contribution to note that international law and municipal law are interconnected but fundamentally autonomous, each one superior in its own field, each one prescribing the rules that govern the relationship between them. From the perspective of international law, for one, municipal law is not really “law” in a sense that it contains binding rules of conduct, as states themselves cannot be bound by municipal law. On the international field, municipal laws and regulations are just facts that need to be proofed on their legality under international law. A municipal law expropriating the property of a foreign investor, for example, can constitute a breach of international law. The legality or illegality of an international rule under municipal law is not a principal concern for international law. The way states effectuate their international obligations in the municipal legal order is usually not a matter of international law either, although it is of course possible in an international treaty to impose upon a state to bring about a certain type of implementation.

From the perspective of municipal law, international law only becomes binding within its own domestic legal order under the rules and conditions it describes, such as in its constitution. Even if, for example, an international treaty is granted priority over municipal laws, that is only so because municipal law has so provided. There is no reason why the municipal legislator cannot change its mind and provide otherwise for the

¹⁰¹⁸ Skubiszewski, K., *ibid*, ft.970, p. 331-332.

future. Most of the time, municipal law will organize the effectuation of international law, and thus naturally refers to its accomplishments and notions, such as treaties. Likewise, the status of customary international law, resolutions of international organizations and decisions of international courts are subject to regulation by municipal law within the municipal order. Along the same lines, municipal courts operate within the restrictions of municipal law, sometimes having no other choice but to break international law because their municipal constraints leave them no other choice.

5.2 Transformation of acts by international organizations

As a principle, with the well known exception of the European Union and Communities, acts by international organizations must be transformed into domestic law for their contents to become binding in the municipal legal order¹⁰¹⁹. This is for example the case with the UN Universal Declaration on Human Rights, which has inspired much domestic human rights-legislation. In other cases, the implementation can be explicitly foreseen in the recommendation itself. Lacking such an implementation, a state cannot enforce the contents of a non-binding instrument before domestic courts. When a company fails to comply with the OECD Guidelines for Multinational Enterprises, for example, it cannot be prosecuted before domestic courts¹⁰²⁰.

One of the issues that plays here is the constitutional organization on a certain subject-matter within the state. It may very well be that the government lacks the constitutional power to enforce certain international recommendations without parliamentary approval. It may also be that the government does not have the authority to conclude binding agreements on certain matters without the approval of parliament, which –as Kooijmans noted- may be the reason why was chosen to organize the matter as a non-binding recommendation¹⁰²¹.

This, however, does not mean that a domestic court is prevented from invoking the recommendation altogether. As Schreuer notes with respect to the UN Declaration on Human Rights¹⁰²², the lack of its legally binding

¹⁰¹⁹ Skubiszewski, K., *ibid*, ft.921, p. 85 and p. 105-106; Skubiszewski, K., *ibid*, ft.941, p. 198 et seq.

¹⁰²⁰ Seidle-Hohenveldern, I., *International Economic Soft Law*, 163 *Hague Recueil* 1979-II, p. 199.; Schwartz, R., “Are the OECD and UNCTAD Codes Legally Binding”, *International Lawyer*, vol. 11, 1977, p. 530.

¹⁰²¹ Kooijmans, P., *ibid*, ft.930, p. 429.

¹⁰²² Schreuer, C., *ibid*, ft.939, p. 50-53.

force did apparently not prohibit most domestic courts from taking it into account anyway. Seidl-Hohenveldern also points out that: “domestic tribunals might apply soft rules concerning international economic relations, even if such rules have not been adopted or transformed into the domestic law of the forum state”¹⁰²³.

5.3 No transformation of acts by international organizations

With respect to *decisions* of international organizations which constitute interpretations of a treaty –such as the interpretative decisions by organs of certain international financial organizations- it should be noted that no (separate) implementation of the recommendation is necessary. The decision has in that case effect in the domestic legal order by force of the already implemented treaty. As Skubiszewski notes “interpretative decisions of the World Bank, the International Monetary Fund or the International Finance Corporation have the same place in municipal law of member states as the treaties under which these agencies function”¹⁰²⁴.

6. Final Observations

As a principle, a recommendation by an international economic organization does not bind its addressees, let alone its non-members. This should also be the starting point for an examination into the effects under international law of the Commentary. This truism, however, represents far from the full picture. Notwithstanding its non-legally binding character, it is clear that the OECD Model and Commentary does have legal consequences for OECD members even without appealing to other, new (soft law) or classic (art. 31 or 32 VCLT) sources of international law. In first instance, it binds the organs and officials of the OECD itself. Furthermore, it seems generally accepted that a systematic refusal by a member state to even take a recommendation into consideration may be considered a breach of that state’s duty to perform the OECD-treaty in good faith. There may, depending on the circumstances, thus be a legitimate expectation by the members of the international organization that recommendations issued by its organs are normally followed. With respect to the Commentary, the language used in a certain statement, the lack of reservation by a member on relevant treaty text or Commentary, and the level of consensus displayed are logically important factors in the formation of this legitimate expectation. By the same token, they

¹⁰²³ Seidl-Hohenveldern, I., *ibid*, ft.1020, p. 200.

¹⁰²⁴ Skubiszewski, K., *ibid*, ft.941, p. 88.

contribute to the authority of the Commentary, which is founded on the textual links between DTAs and the Model, and on the purpose of achieving some degree of international uniformity of interpretation.

The authority of the Commentary is thus only partly connected to its possible capacity to actually bind OECD-members. Domestic courts in particular are usually not prevented from taking non-legally binding instruments into account provided these do not directly conflict with domestic statutes or international (“hard”) obligations. Put another way, a frequent reference by domestic courts to a recommendation can thus be explained without negating its essentially non-binding nature. Vice versa, a non-binding instrument does not necessarily become binding because state organs have acted in accordance with it. There is indeed a difference between harmony and compliance, between legislation and authority. With respect to the Commentary more specifically, the above implies that the use and authority of its contents by domestic courts *can* under international law also be explained without including the Commentary somewhere in the elements and instruments of art. 31 and 32 VCLT.

Approaching the Commentary from this perspective, and not from the perspective of the law of treaty interpretation, has several important consequences. In first instance, with respect to the effects of recommendations by international economic organizations, it is important whether or not a particular state is a member of that organization. Member states may normally not legitimately expect non-members to act in accordance with recommendations which are not addressed to them. Those states have normally in no way participated in the creation of the contents of the recommendation, and do not have the proper conventional relationship with the organization issuing it¹⁰²⁵. If the Commentary is seen as an element of treaty interpretation, it is primarily important if the

¹⁰²⁵ It must be noted, however, that –in accordance with art. 12 of the OECD Convention- the organization has promoted its interactions with non-members also with respect to the Model and the Commentary, and has asked and obtained official positions by many non-member states on the contents of this recommendation. In my view, the replies of these non-members however fall short of a unilateral formal acceptance of all statements in the Commentary for which no specific reservation was formulated, as is indicated by the circumstances surrounding the reply and their contents. Nevertheless, non-member states are by no means barred from acting in accordance with the recommendation and may in fact choose to do so mostly based on its authority. The existence and publication of a document such as the “non-member country positions” may certainly help to “connect” the organs of a non-member state to the contents of the Model and Commentary, and thus further develop its authority for a particular state.

text of the treaty in dispute is indeed based on the OECD Model, regardless of its parties.

Another consequence of the perspective chosen in this contribution is that in terms of the legal effect of recommendations by international economic organizations, it is possible to distinguish somewhat between different organs of states. The legitimate expectation of compliance of the members may vary in terms of the different state organs which are addressed by the recommendation. Formally, the Commentary is addressed to the member states as a whole. However, the contents of the Commentary is drafted by representatives of governments and in accordance with what was noted above on the influence that the factor “impartiality” has on authority¹⁰²⁶, it seems to me that the expectation of compliance by the OECD and its members is normally higher with respect to tax administrations than with respect to independent domestic courts. This issue would not arise when the Commentary is seen as an element of treaty interpretation, in which case certain parts of its contents would be “equally binding” upon courts and administration.

Finally, by approaching the Commentary in this way, it becomes largely irrelevant what the chronological relationship is between the recommendation and an actual treaty that requires interpretation. Whereas it is at best complicated and perhaps even impossible to interpret DTAs in accordance with subsequent changes to the Commentary under art. 31 and 32 VCLT¹⁰²⁷, this factor alone plays little role in terms of the authority of a recommendation of an international economic organization, provided the actual text of the earlier treaty does not make the interpretation which is subsequently proposed in the Commentary, impossible.

All this does not mean that the contents of a recommendation cannot be or become binding. This can occur in several ways. A state is for example free to formally accept a recommendation, and to establish a unilateral international legal obligation to comply with it. In absence of such an undertaking, some statements included in the Commentary may be binding because they merely confirm the law, although normally with much more detail than would be the case with the more general rules of international law such as art. 31 and 32 VCLT. Vice versa, an actual DTA may, explicitly or by implication, integrate one or more statements from the Commentary.

¹⁰²⁶ See above, point 5.2.

¹⁰²⁷ Avery Jones, J., “The effect of changes in the OECD Commentaries after a treaty is concluded”, *Bulletin for International Fiscal Documentation*, 2002, p. 102-110.

Also, but this does not go without saying, there does not seem to be any rule in international law which would *ipso facto* prevent the contents of a non-binding recommendation by an international organization from becoming or constituting context (or an instrument which is comprised in the context for purposes of interpretation) to a treaty or to constitute a subsequent agreement in the sense of 31 (3) VCLT. Both are not necessarily mutually exclusive. The acts of international organizations may in certain circumstances also constitute evidence of subsequent practice of the parties in the sense of 31 (3) VCLT, but it remains to be seen if the practice can indeed be seen as “establishing the agreement of the parties regarding the interpretation of the treaty”. It is not even excluded that a recommendation includes “relevant rules of international law” in the sense of art. 31 (3) (c) VCLT which are applicable to a particular treaty. Finally, as long as it is relevant to the treaty, it does not seem farfetched that the contents a recommendation may constitute a supplementary means of interpretation for that treaty. These questions are largely outside of the scope of this contribution. That it may not be impossible for the Commentary to be indeed characterized as one or more of these elements or instruments of art. 31 and 32 VCLT *as well*, should however not allow us to forget that perhaps in first instance, its “status” under international law is that of a recommendation by an international economic organization.