How "Acquiescence" and "Estoppel" Can Operate to the Effect that the States Parties to a Tax Treaty are Legally Bound to Interpret the Treaty in Accordance with the Commentaries on the OECD Model Tax Convention

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1. Introduction

This paper considers the question of whether and, if so, under what circumstances the concepts of "acquiescence" and "estoppel" can operate to the effect that the states parties to a tax treaty are bound under international law to interpret and apply the treaty's provisions that are based on the OECD Model Tax Convention in accordance with the Commentaries thereon. [72] For this purpose, a distinction is made between (i) treaties between OECD Member countries; [73] (ii) treaties between OECD Member countries and non-member countries; and (iii) treaties between non-member countries. In addition, a distinction is made between the Commentaries existing at the time of the conclusion of the treaty, and later changes or additions to the Commentaries.

The questions of whether taxpayers are bound by the Commentaries or whether their legitimate expectations, if any, that the tax administration would indeed follow the Commentaries are protected, are not addressed in this paper. The answer to these questions depends on the contracting states' constitutional arrangements and administrative laws and practices, and may, therefore, vary from country to country. Moreover, the general principles of Community law may also be of relevance in this respect, in particular the principles of legal certainty and legitimate expectations.

2. Interpretation of tax treaties in accordance with the OECD Commentaries: a case for the application of "acquiescence" and "estoppel"?

2.1. Commentaries as such are not binding under international law

To begin with, it must be assumed that neither the OECD Model Tax Convention nor the Commentaries thereon are, as such, legally binding instruments. Although the OECD Council has, in a series of Recommendations adopted pursuant to Art. 5(b) of the 1960 Convention on the OECD, recommended that Member countries should conform to the Model Tax Convention, as interpreted by the Commentaries thereon, when concluding new or revising existing treaties, such recommendations are not intended to be legally binding, for otherwise the Council would have taken a decision to that effect in accordance with Art. 5(a), which is binding on the Member countries.

If the states parties to a tax treaty would, however, in connection with the conclusion of the treaty, agree in writing that the treaty's provisions that are based on the OECD Model Tax Convention must be interpreted and applied in accordance with the Commentaries thereon, they are bound under international law to apply the Commentaries, not because the Commentaries as such have risen to the level of binding instrument, but because they have so agreed. Indeed, according to Art. 31(2)(a) of the 1969 Vienna Convention on the Law of Treaties ("VCLT" or "Vienna Convention"), the "context" in which the terms of the treaty shall be given their "ordinary meaning" comprises such an agreement relating to the treaty and made in connection with its conclusion which, according to Art. 26 VCLT, is binding upon the parties to it and must be performed by them in good faith. [74]

It is submitted that the same is true for *tacit* agreements to follow the Commentaries for the purpose of the interpretation and application of the treaty, made in connection with its conclusion. Such agreements are equally binding under international law, and also come within the scope of Art. 31(2)(a) VCLT. [75]

2.2. The international law concept of acquiescence

In international law the silence or inaction of a state must in certain circumstances be interpreted as consent. This is the essence of the concept of acquiescence. According to the International Court of Justice in the *Gulf of Maine* case, "acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent." [76] However, as appears from its judgement in the *Temple of Preah Vihear* case, the silence or inaction of a state may be interpreted as consent only if the circumstances were such as

called for some reaction, on the part of the state, if it wished not to consent. This case concerned the question of whether the Temple of Preah Vihear situated in the border region of Cambodia and Thailand, belongs to the territory of Cambodia or that of Thailand.

On 13 February 1904, France (as the protecting Power of Cambodia, which was part of French Indo-China until she attained her independence in 1953) and Siam (as Thailand was then called) had concluded a boundary treaty. Art. 1 provided that the frontier would follow a watershed line that placed the Temple on Thai territory. According to Art. 3, the frontier was, however, to be delimited by Mixed Commissions composed of officers appointed by the contracting states. There was no evidence of the frontier surveyed and fixed by the Commission responsible for the region in which the Temple is situated. The documents before the Court did show, however, that Siamese representatives in the Commission had officially requested the French government to map the border region, because the Siamese government did not have sufficient technical means available for that purpose. In 1908, in total 11 maps, including the so-called "Annex I map", which placed the Temple on Cambodian territory, were communicated to the Siamese government by the French authorities, as being the maps requested by the latter. The question to be decided by the International Court of Justice more than half a century later was whether this map was binding on Thailand under international law.

Thailand argued before the International Court of Justice that it had not been established that the Mixed Commission responsible for the region in which the Temple is situated had formally approved the Annex I map; that this map was, therefore, not binding on Thailand; and that, without a delimitation of the frontier carried out by the Mixed Commission in accordance with Art. 3 of the Treaty, the watershed line set out in Art. 1 of the Treaty of 1904, which placed the Temple on Thai territory, had to be accepted as the frontier. In response to these arguments, the Court said:

> Being one of a series of maps of the frontier areas produced by French Government topographical experts in response to a request made by the Siamese authorities, printed and published by a Paris firm of repute, all of which was clear from the map itself, it was thus invested with an official standing; it had its own inherent technical authority; and its provenance was open and obvious. The Court must nevertheless conclude that, in its inception, and at the moment of its production, it had no binding character. [77]

However, although the Annex I map as such was not binding, the Court concluded that Thailand must be held to have acquiesced in the frontier indicated on the map so as to become bound by it. According to the Court:

> [...] the circumstances [of the production, publication and communication of the map by the French authorities] were such as called for some reaction, within a reasonable period [after the communication of the map to the Siamese authorities in 1908], on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset* [he who is silent is deemed to consent if he could speak and ought to have spoken]. [78]

Finally, the Court held:

> [...] that the acceptance of the Annex I map by the Parties caused the map to enter the treaty settlement and to become an integral part of it. It cannot be said that this process involved a departure from, and even a violation of, the terms of the Treaty of 1904, wherever the map line diverged from the line of the watershed, for, as the Court sees the matter, the map [...] was accepted by the Parties in 1908 and thereafter as constituting the result of the interpretation given by the two Governments to the delimitation which the Treaty itself required. In other words, the Parties at that time adopted an interpretation of the treaty settlement which caused the map line, in so far as it may have departed from the line of the watershed, to prevail over the relevant clauses of the treaty. [79]

It is submitted that the international law concept of acquiescence, as applied by the International Court of Justice in the *Temple of Preah Vihear* case, may also be relevant in deciding the question of the interpretation of tax treaties in accordance with the Commentaries on the OECD Model Tax Convention. Although this case concerned a boundary dispute, the scope of application in international law of the concept of acquiescence is not limited to boundary cases, as was suggested in a recent publication; [80] many authorities indeed regard it as a general principle of international law and, as such, it applies to the legal relations of states generally, including tax treaty relations. [81]

Thus, it may be said that if the circumstances of the conclusion of a tax treaty were such as called for some reaction, on the part of the contracting states, if they wished not to interpret and apply the treaty's provisions that are taken from the OECD Model Tax Convention in accordance with the Commentaries thereon, and they

remained silent, they must be held to have acquiesced in the interpretation of those provisions adopted in the Commentaries. It may furthermore be said that this causes the Commentaries to enter the treaty settlement and to become an integral part of it. According to Art. 31(2)(a) VCLT, the context for the purpose of the interpretation of the treaty indeed comprises such a tacit agreement relating to the treaty and made in connection with the conclusion of the treaty. In this respect, it should be emphasized that the Commentaries may nevertheless prove to be of little or no interpretative value, e.g. if they merely set out two or more alternative interpretations without adopting one of them as the correct meaning.

2.3. The international law concept of estoppel

If the circumstances of the conclusion of the treaty would leave any serious doubt as to the contracting states' tacit acceptance of the Commentaries for the purpose of the interpretation and application of treaty provisions that are based on the OECD Model Tax Convention, they may nevertheless be estopped or precluded from later denying such acceptance. Indeed, the concept of estoppel provides for specific protection of legitimate expectations and operates to the effect that a person who represents a fact to another, who in turn alters his position in reliance upon such representation, is not allowed to deny that the fact exists.

According to the International Court of Justice in the *Gulf of Maine* case, "estoppel is linked to the idea of preclusion", [82] and in the *Land, Island and Maritime Frontier Dispute* it described the "essential elements required by estoppel" as "a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it." [83] In the words of Sir Gerald Fitzmaurice in his Separate Opinion in the *Temple of Preah Vihear* case, the statement or representation "must have brought about a change in the relative positions of the parties, worsening that of the one, and improving that of the other, or both." [84] In the latter case, the International Court of Justice applied the international law concept of estoppel to hold that:

> Even if there were any doubt as to Siam's acceptance of the [Annex I] map in 1908, and hence of the frontier indicated thereon, [...] in the light of the subsequent course of events, [...] Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map. [...] It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it. [85]

In this context, the Court analysed a number of events that had occurred in the diplomatic relations between Thailand and Cambodia in the years following the communication of the map to the Siamese authorities in 1908, which, according to the Court, should have induced the Thai government to protest if it had not been willing to accept the map. Incidentally, by pointing out that Thailand had, for more than half a century, enjoyed all advantages derived from the Treaty of 1904, including the benefit of a stable frontier, and would continue to do so in the future as well, the Court appears not to have placed too strict conditions in this case on one of the "essential elements required by estoppel", i.e. that the party acting in reliance upon a statement or representation made by another did so to his detriment or to the advantage of that other party, or both.

Even though the concept of estoppel is sometimes difficult to distinguish from the concept of acquiescence as far as its legal effects are concerned, because both may result in a state being no longer allowed to deny a certain obligation, they are based on different legal reasoning. The concept of acquiescence is based on the assumption that the circumstances of the case are such as to justify the conclusion that a state has accepted the obligation, whereas the concept of estoppel assumes that it has not, but that the circumstances are such that it can no longer deny the obligation. Or, as Sir Gerald Fitzmaurice so eloquently put it in his Separate Opinion in the *Temple of Preah Vihear* case:

> [...] in those cases where it can be shown that a party has, by conduct or otherwise, undertaken, or become bound by, an obligation, it is strictly not necessary or appropriate to invoke any rule of preclusion or estoppel [...]. Thus it may be said that A, having accepted a certain obligation, or having become bound by a certain instrument, cannot now be heard to deny the fact, to blow "hot and cold". True enough, A cannot be heard to deny it; but what this really means is simply that A is bound, and being bound, cannot escape from the obligation simply by denying its existence. [...] if the denial can be shown to be false, there is no room or need for any plea of preclusion or estoppel. Such a plea is essentially a means of excluding a denial that might be correct. [...] It prevents the assertion of what might in fact be true. [...] The real field of operation, therefore, of the rule of preclusion or estoppel, *stricto sensu*, [...] is where it is possible that the party concerned did not give the undertaking or accept the obligation in question (or there is room for doubt whether it did), but where that party's subsequent conduct has been such, and has had such consequences, that it cannot be allowed to deny the

existence of an undertaking, or that it is bound." [86]

Thus, if the circumstances of the conclusion of a treaty would leave room for doubt as to a contracting state's tacit acceptance of the Commentaries for the purpose of the interpretation and application of the provisions that are taken from the OECD Model Tax Convention, its silence, in the course of the negotiation of the treaty and in circumstances where silence can be regarded as a representation of such acceptance, operates to preclude it from later denying it, or operates as a waiver of its original right not to accept the Commentaries for that purpose, irrespective of whether it can be shown that such denial would be correct, if the other state has agreed to conform to the OECD Model Tax Convention by relying in good faith upon such representation, and would not have agreed to that, or not without further negotiation, had it been informed of the intention of the state making it not to apply the Commentaries.

In this way, international law protects, in accordance with the requirements of the fundamental principles of good faith and equity, [87] the legitimate expectation of a contracting state that treaty provisions that are based on the OECD Model Tax Convention shall be interpreted and applied in accordance with the Commentaries thereon. Indeed, the principle of good faith is of particular importance for the interpretation and application of treaties; [88] according to the rule *pacta sunt servanda* codified in Art. 26 VCLT, which, according to the International Court of Justice in the *Nuclear Tests* case, [89] itself is derived from the principle of good faith, every treaty in force must be performed in good faith; according to the provisions of Art. 31(1) and (3)(c) VCLT, a treaty must also be interpreted in good faith, taking into account, together with the context, any relevant rules of international law applicable in the relations between the parties, including the rule of estoppel.

3. Treaties between OECD Member countries

3.1. Commentaries existing at the time of the conclusion of the treaty

It is submitted that, if the states parties to a tax treaty are OECD Member countries which have voted in favour of the (series of) Recommendation(s) of the Council to conform to the OECD Model Tax Convention, *as interpreted by the Commentaries thereon*, when concluding new or revising existing treaties, [90] and insofar as the treaty actually incorporates the Model provisions and neither state has inserted an observation on the Commentaries thereon to indicate that it is unable to concur in the interpretation given to those provisions, the circumstances of the conclusion of the treaty were such as called for some reaction, on the part of the contracting states, if they wished *not* to interpret and apply the Model provisions adopted in the treaty in accordance with the Commentaries thereon existing at the time of its conclusion. Consequently, if the contracting states did not expressly indicate, in the course of the negotiation of the treaty, that it was their intention not to follow the Commentaries, when interpreting and applying the treaty's provisions that are based on the OECD Model Tax Convention, they must be held to have acquiesced in the interpretation put forward in the Commentaries (*qui tacet consentire videtur si loqui debuisset ac potuisset*), which causes that interpretation to enter the treaty settlement so as to become an integral part thereof. Indeed, according to Art. 31(2)(a) VCLT, the context for the purpose of the interpretation of the treaty comprises such a (tacit) agreement to follow the Commentaries existing at the time of the conclusion of the treaty, when interpreting and applying its provisions that are taken from the OECD Model Tax Convention; it is binding on the parties under international law and must be performed by them in good faith (*pacta sunt servanda*).

In this respect, due consideration has been given to the legal status of the (series of) Recommendation(s) concerning the OECD Model Tax Convention, made by the Council pursuant to Art. 5(b) of the 1960 Convention on the OECD. The latest Recommendation, adopted on 23 October 1997, C(97)195/Final, reads as follows:

> I. [THE COUNCIL] RECOMMENDS the Governments of Member Countries:
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> 1. To pursue their efforts to conclude bilateral tax conventions on income and on capital with those Member countries, and where appropriate with non-member countries, with which they have not yet entered into such conventions, and to revise those of the existing conventions that may no longer reflect present-day needs;
> 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 follow 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. [91]

It is true that the (series of) Recommendation(s) concerning the OECD Model Tax Convention are not legally binding on the Member countries; this is not to say, however, that they have no legal relevance. [92] They are

adopted within the legal framework of the OECD and emanate from the Council, being an intergovernmental body composed of Ministers or of Permanent Representatives of the Member countries. According to Art. 6 of the 1960 Convention on the OECD, recommendations are made by mutual agreement, each Member country having one vote and the right to abstain from voting, in which case they are applicable to the other members, but not to the abstaining member. In addition, Member countries have the possibility to enter "reservations" on the provisions of the OECD Model Tax Convention, and to insert "observations" on the Commentaries thereon "to usefully indicate the way those countries will apply the provisions of the Article in question" where they "are unable to concur in the interpretation given in the Commentary on the Article concerned." [93] Regarding the legal effect of reservations, the Introduction to the OECD Model Tax Convention states:

> 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. [94]

The fact that all the OECD Member countries have expressed reservations (310) on the OECD Model Tax Convention as well as observations (67) on the Commentaries thereon clearly indicates that, in the absence of such reservations and observations, they would not feel free to deviate, without good reason, from the Model, when concluding new or revising existing treaties, and the Commentaries thereon, when interpreting and applying treaty provisions that are based on the Model. Indeed, according to Rule 18(b) of the OECD's Rules of Procedure, Member countries are obliged to consider whether implementation of recommendations of the Council, made in accordance with Arts. 5, 6 and 7 of the 1960 Convention on the OECD, is "opportune"; an obligation which must be fulfilled in good faith; a complete and wilful disregard of such recommendations may constitute an abuse of the legal right not to implement them (a right which must be exercised in good faith) if this is not considered opportune. In the words of Sir Hersh Lauterpacht in his Separate Opinion in the case concerning the *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*:

> The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith. If [...] it decides to disregard it, it is bound to explain the reasons for its decisions. These obligations appear intangible and almost nominal when compared to the ultimate discretion of the [state]. They nevertheless constitute an obligation. [...] Both principle and practice would thus appear to suggest that the discretion which is vested in the Members [of the Organization] in respect of [recommendations made by its principal organ], is not a discretion tantamount to unrestricted freedom of action. It is a discretion to be exercised in good faith. Undoubtedly, the degree of application of good faith in the exercise of full discretion does not lend itself to rigid legal appreciation. This fact does not destroy altogether the legal relevance of the discretion thus to be exercised. This is particularly so in relation to a succession of recommendations on the same subject [...]. Whatever may be the content of the recommendation and the circumstances of the majority by which it has been reached, it is [...] a legal act of the principal organ of the [Organization] which Members of the [Organization] are under a duty to treat with a degree of respect appropriate to a [recommendation of the Organization]. [A state] may not be acting illegally by declining to act upon a recommendation or series of recommendations on the same subject. But in doing so it acts at its peril when a point is reached when the cumulative effect of the persistent disregard of the articulate opinion of the Organization is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter. Thus, [a state] which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organization, in particular in proportion as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction. [95]

It is, therefore, only fair and equitable to assume that, if the states parties to a tax treaty are OECD Member countries, and insofar as the treaty's provisions are based on the OECD Model Tax Convention, the parties intended to comply with the Recommendation made by the Council "to conform to the Model Tax Convention, as interpreted by the Commentaries thereon", unless they inserted an observation on the Commentaries to indicate that they are unable to concur in the interpretation set out therein, or expressed a different intention in the course of the negotiation of the treaty. Thus, in the given circumstances, the fundamental principles of good faith and equity, from which, according to the International Court of Justice in the *Gulf of Maine* case, [96] the international law concepts of acquiescence and estoppel are derived, impose on the contracting states an obligation to speak or act, in the course of the negotiation of the treaty, if they intended *not* to follow the Commentaries for the purpose of the interpretation and application of the treaty's provisions that are taken from the OECD Model Tax Convention; if they failed to do so, they must be held to have acquiesced in the

Commentaries so as to become bound by them. In any event, if the circumstances set out above were to leave any serious doubt as to the contracting states' (tacit) acceptance of the interpretation given in the Commentaries existing at the time of the conclusion of the treaty, they are estopped or precluded from later denying such acceptance. In the given circumstances the failure, on the part of a contracting state, to inform the other contracting state, in the course of the negotiation of the treaty, of its intention not to follow the Commentaries, when interpreting and applying the treaty's provisions that are based on the OECD Model Tax Convention, can be regarded by the other state as a representation of acceptance of the interpretation put forward in the Commentaries. Consequently, assuming that the other state has, in reliance upon such representation, agreed in good faith to incorporate in the treaty the provisions of the OECD Model Tax Convention on the assumption that they must be interpreted and applied in accordance with the Commentaries thereon, and would not have agreed to that without further negotiation as to the meaning to be given to the terms of those provisions, had it known of a different intention of the state making the representation, that state cannot be allowed to deny its acceptance of the meaning adopted in the Commentaries, irrespective of whether such denial would have been correct. In this way, it may be said that international law provides for specific protection of the legitimate expectation that the provisions of a treaty that are based on the OECD Model Tax Convention must be interpreted and applied in accordance with the Commentaries thereon existing at the time of the conclusion of the treaty.

The question arises whether the contracting states could prevent a finding of acquiescence by simply pointing out that the Commentaries *as such* are not intended to be legally binding - in fact, according to the Introduction to the OECD Model Tax Convention, the Commentaries are "not designed to be annexed in any manner to the conventions signed by Member countries, which unlike the Model are legally binding international instruments"; they are of "great assistance", rather than legally binding, "in the application and interpretation of the conventions and, in particular, in the settlement of any disputes" [97] - and that it would, therefore, be contrary to principles of logic and good sense to impose on them an obligation to confirm, in the course of the negotiation of the treaty, the non-binding character of the Commentaries; on the contrary, if the contracting states would consider that the Commentaries are legally binding, they should expressly say so, and not *vice versa*. It is, however, respectfully suggested that such reasoning fails to appreciate that a finding of acquiescence does not imply that the Commentaries *as such* rise to the level of a legally binding instrument of international law; it rather means that, in the absence of any evidence to the contrary, by incorporating in the treaty the provisions of the OECD Model Tax Convention, which as such are not legally binding either, the contracting states must in all reasonableness be held to have accepted the meaning given to those provisions in the Commentaries thereon existing at the time of the conclusion of the treaty, as well, in accordance with the (series of) Recommendation(s) of the OECD Council "to conform to the Model Tax Convention, as interpreted by the Commentaries thereon". The same reasoning applies mutatis mutandis to a finding of estoppel or preclusion.

By analogy, in the *Temple of Preah Vihear* case, the International Court of Justice found that the circumstances of the production, publication and communication of the Annex I map by the French authorities in 1908 were such as called for some reaction, on the part of Thailand, if it wished to disagree with the map; it did not do so, and was, therefore, held to have acquiesced in the frontier indicated on the map so as to become bound by it; Thailand could not prevent a finding of acquiescence, or a finding of estoppel for that matter, by simply pointing out that the Annex I map *as such* was not legally binding, because it had not been formally adopted by the Mixed Commission in accordance with the provisions of the Treaty of 1904, and that there was, therefore, no need to express, within a reasonable period following the communication of the map, its intention not to be bound by the map and hence by the frontier indicated thereon.

The conclusion that, in the circumstances set out above, the contracting states must be held to have acquiesced in the Commentaries so as to become bound by them for the purpose of the interpretation and application of the provisions of the treaty that are based on the OECD Model Tax Convention existing at the time of the conclusion of the treaty is not undisputed. For example, it is the view of David Ward et al. "that the OECD Commentaries do not give rise to binding obligations in international law by virtue of the application of the principles of good faith, acquiescence and estoppel or protection of legitimate expectations." [98] If their view relates to the question of whether, in the given circumstances, the (series of) Recommendation(s) made by the Council concerning the OECD Model Tax Convention can rise to the level of legally binding instruments, through the application of the international law concepts of acquiescence and estoppel, it is undoubtedly correct. But if it relates to the question of whether the contracting states must be held to have acquiesced in the meaning given in the Commentaries on the provisions of the OECD Model Convention so as to become bound by it for the purpose of the interpretation and application of the corresponding provisions of the treaty, it must be rejected. In this respect, it is interesting to note that according to these prominent scholars:

> Where the parties to a bilateral tax treaty are both members of the OECD and as such are represented

> on the CFA [Committee on Fiscal Affairs], applying principles of logic and good sense, there may be reasonable presumption, in the absence of evidence to the contrary, that by adopting a provision of the Model convention, they intended that the provisions in the tax treaty negotiated by them should be interpreted on the same basis as set out in the relevant commentaries that were current to them at the time that they are negotiating the particular treaty. [99]

Is this not tantamount to saying that, in the given circumstances, the contracting states must be held to have acquiesced in the interpretation put forward in the Commentaries existing at the time of the conclusion of the treaty, and that this causes that interpretation to enter the treaty settlement negotiated by them, so as to become an integral part of it? It is respectfully suggested that this is indeed so.

3.2. Later changes or additions to the Commentaries

The question of the legal effect of changes or additions to the Commentaries made after the conclusion of a particular treaty on the interpretation of its provisions that are based on the OECD Model Tax Convention is far more difficult to answer.

The legal relation between existing tax treaties and later changes or additions to the Commentaries first came up for discussion in the Committee on Fiscal Affairs (CFA) - a subsidiary body of the Council established pursuant to Art. 9 of the 1960 Convention on the OECD, which is composed of the governmental experts of the Member countries - in the context of the revision of the first Draft Double Taxation Convention on Income and on Capital, adopted in 1963 and replaced in 1977 by the Model Tax Convention. The position taken at that time by the CFA is explained in some detail in the following paragraphs of the Introduction to the Model"

> 33. When drafting the 1977 Model Convention, the Committee on Fiscal Affairs examined the problems of conflicts of interpretation that might arise as a result of changes in the Articles and Commentaries of the 1963 Draft Convention. At that time, the Committee considered *that existing conventions should, as far as possible, be interpreted in the spirit of the revised Commentaries*, even though the provisions of these conventions did not yet include the more precise wording of the 1977 Model Convention. It was also indicated that Member countries wishing to clarify their positions in this respect could do so by means of an exchange of letters between competent authorities in accordance with the mutual agreement procedure and that, even in the absence of such an exchange of letters, these authorities could use mutual agreement procedures to confirm this interpretation in particular cases.
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> 34. The Committee believes that the changes to the Articles of the Model Convention and the Commentaries that have been made since 1977 should be similarly interpreted.
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> 35. Needless to say, amendments to the Articles of the Model Conventions and changes to the Commentaries that are a direct result of these amendments are not relevant to the interpretation and 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.*
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> 36. Whilst the Committee considers that changes to the Commentaries *should be relevant in interpreting and applying conventions concluded before the adoption of these changes*, it disagrees with any form of *a contrario* interpretation that would necessarily infer from a change to an Article of the Model Convention or to the Commentaries that the previous wording resulted in consequences different from those of the modified wording. Many amendments are intended to clarify, not change, the meaning of the Articles or the Commentaries, and such *a contrario* interpretations would certainly be wrong in those cases.
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> 36.1 Tax authorities in Member countries follow the general principles enunciated in the preceding four paragraphs. Accordingly, the Committee on Fiscal Affairs considers that taxpayers may also find it useful to consult later versions of the Commentaries in interpreting earlier treaties. [100]

It is recalled that in its latest Recommendation concerning the OECD Model Tax Convention, adopted on 23 October 1997, the OECD Council recommends that the tax administrations of Member countries "follow 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." Clearly, this recommendation is, as such, not legally binding on the OECD Member countries, but the question arises of whether a finding of acquiescence or estoppel in relation to the Commentaries for the purpose of the interpretation and application of the provisions of a treaty between OECD Member countries that are based on the OECD Model Tax Convention applies mutatis mutandis to the principles enunciated in the Introduction

concerning later changes or additions to the Commentaries. In this respect, it should be noted that none of the OECD Member countries have inserted an observation to indicate that they are unable to concur in these principles. Thus, in circumstances where the contracting states must be held to have accepted the Commentaries for the purpose of the interpretation and application of the provisions of the treaty that are based on the OECD Model Tax Convention, or are estopped or precluded from denying such acceptance, must they be held to have accepted the principles enunciated in the Introduction concerning later changes or additions to the Commentaries, as well, or are they also estopped or precluded from denying such acceptance, so as to become "automatically" bound by such later changes or additions, unless they inserted an observation to indicate that they are unable to concur in them? Although this is certainly possible as a matter of international law, it is doubtful whether the given circumstances would justify such a finding of acquiescence or estoppel at the time of the conclusion of the treaty in relation to any changes or additions to the Commentaries that may be adopted after the conclusion of the treaty.

It is, however, striking that the paragraphs of the Introduction cited above, and in particular the *italicized* passages, deal not so much with the interpretation and application of the provisions of the OECD Model Tax Convention itself, but with the consequences of changes or additions to the Commentaries thereon for the interpretation and application of the provisions of actual treaties that are based on the Model and concluded before their adoption. This may be explained by the fact that those treaties are concluded against the background of the (series of) Recommendation(s) of the Council that Member countries should conform to the OECD Model Tax Convention, as interpreted by the Commentaries thereon, when concluding new or revising existing treaties; indeed, it is implicit in the cited paragraphs that, if the contracting states have incorporated in the treaty provisions of the OECD Model Tax Convention, they are presumed to have intended that those provisions must be interpreted and applied in accordance with the Commentaries thereon. The fact remains, however, that the CFA is, as such, not competent to decide on the interpretation of actual treaty provisions; it is only competent to decide on the interpretation given in the Commentaries on the provisions of the OECD Model Tax Convention; the interpretation of actual treaty provisions is a matter for the contracting state to decide. This raises the question of whether the states represented on the CFA acted, not in their capacity of OECD Member countries, but in their capacity of contracting states, when adopting the cited paragraphs. The fact that later changes or additions to the Commentaries are said to govern the interpretation and application of existing treaties that are based on the OECD Model Tax Convention, "because they reflect the consensus of the OECD Member countries as to the proper interpretation of existing provisions and their application to specific situations", suggests that the cited paragraphs indeed reflect an agreement between the OECD Member countries, meeting within the CFA, but acting as states parties to the treaties concluded between them; such an agreement would be binding on the OECD Member countries under international law and should be performed by them in good faith. It should, however, not be readily assumed that the OECD Member countries represented at the CFA acted as contracting states, when adopting the cited paragraphs of the Introduction to the OECD Model Tax Convention; indeed, in the absence of strong evidence to the contrary, the presumption must be that the OECD Member countries acted as such, and it is questionable whether the cited paragraphs provide such evidence. But could it, then, be said that, because later changes or additions to the Commentaries "reflect the consensus of the OECD Member countries as to the proper interpretation of existing provisions and their application to specific situations", the principle of good faith in any event imposes on the OECD Member countries, in their capacity of states parties to the treaties in force between them at the time of their adoption, the obligation to inform each other, within a reasonable period, if they intended not to follow the amended Commentaries, when interpreting and applying the provisions of those treaties that are based on the OECD Model Tax Convention? If so, and if they did not do so, they must be held to have accepted the amended Commentaries, or are estopped or precluded from denying such acceptance, so as to become bound by them in their bilateral treaty relations. But, again, although this is possible as a matter of international law, it is open for debate whether the circumstances would justify such a finding of acquiescence or estoppel.

Finally, it is noted that the tax authorities of OECD Member countries are said to follow the general principles enunciated in the cited paragraphs of the Introduction, in accordance with the latest Recommendation of the Council, which is evidence of a subsequent practice of the OECD Member countries in the application of the treaties in force between them. It is, however, doubtful whether this constitutes sufficient evidence to find an agreement within the meaning of Art. 31(3)(b) VCLT, to the effect that the provisions of those treaties that are based on the OECD Model Tax Convention must generally be interpreted in accordance with changes or additions to the Commentaries thereon adopted after their conclusion, as explained in the cited paragraphs.

4. Other treaties

4.1. The position of associated countries

The influence of the OECD Model Tax Convention has extended far beyond the OECD territories; according to

the Introduction:

> It has been used as a basic document of reference in the negotiations between Member and non-Member countries and even between non-Member countries, as well as in the work of other worldwide or regional organisations in the field of double taxation and related problems. Most notably, it has been used as the basis for the original drafting and the subsequent revision of the United Nations Model Double Taxation Convention between Developed and Developing Countries, which reproduces a significant part of the provisions and Commentaries of the OECD Model Convention. [101]

In accordance with Art. 12(c) of the 1960 Convention on the OECD concerning the possibility of inviting non-member countries and other international organizations to participate in the OECD's activities upon such terms and conditions as the Council may determine, the ongoing process of revising and updating the OECD Model Tax Convention has been opened up to benefit from the input of non-member countries, other international organizations and other interested parties. [102] Moreover, the CFA decided in 1996 to organize annual meetings allowing the governmental experts of OECD Member and non-member countries to discuss issues related to the negotiation, interpretation and application of tax treaties. It also decided that participating non-member countries should have the possibility of identifying the areas where they are unable to agree with the provisions of the OECD Model Tax Convention or with the Commentaries thereon, and to date 25 countries have determined and recorded their position ("associated countries"). [103] In this respect, the Introduction to the Non-Member Countries' Positions on the OECD Model Tax Convention states:

> Whilst these countries generally agree with the text of the Articles of the Model Tax Convention and with the interpretations put forward in the Commentary, there are for each country some areas of disagreement. For each Article of the Model Tax Convention, the positions that are presented in this document indicate where a country disagrees with the text of the Article and where it disagrees with an interpretation given in the Commentary in relation to the Article. As is the case with the observations and reservations of Member countries, no reference is made to cases where a country would like to supplement the text of an Article with provisions that do not conflict with the Article, especially if these provisions are offered as alternatives in the Commentary, or would like to put forward an interpretation that does not conflict with the Commentary. [104]

The question arises, therefore, whether the parties to a tax treaty between an OECD Member country and an associated country, or between associated countries, are legally bound to interpret and apply the treaty's provisions that are based on the OECD Model Tax Convention in accordance with the Commentaries thereon, through the application of the international law concepts of acquiescence and estoppel, in circumstances where they did not express, in the course of the negotiation of the treaty, their intention not to follow the Commentaries, and have not inserted an observation on the Commentaries either to indicate that they are unable to concur in the interpretation set out therein. It is suggested that insofar as a tax treaty between an OECD Member country and an associated country, or between associated countries, adopts provisions of the OECD Model Tax Convention, it is indeed reasonable to assume that, in the absence of evidence to the contrary, the parties also intended to adopt the interpretation given to those provisions in the Commentaries thereon, and that the principle of good faith imposes on the parties an obligation to speak or act, in the course of the negotiation of the treaty, if they wished not to follow the Commentaries; if they did not do so, they must be held to have accepted the interpretation put forward in the Commentaries, or are estopped or precluded from denying such acceptance; this is particularly true where it can be established that the OECD Model Tax Convention was used as the basis for the negotiation of the treaty, although the case for a finding of acquiescence and estoppel is less strong than in relation to treaties between OECD Member countries which are represented on the CFA and have an obligation to consider in good faith the (series of) Recommendation(s) of the Council to conform to the Model, "as interpreted by the Commentaries thereon." In any case, a finding of acquiescence or estoppel only extends to the interpretation put forward in the Commentaries existing at the time of the conclusion of the treaty, and not to later changes or additions to the Commentaries.

4.2. The position of third countries

Different considerations apply, however, to treaties concluded by non-member countries that have not formally determined and recorded their position on the OECD Model Tax Convention and the Commentaries thereon ("third countries"). It is undoubtedly true that there may be circumstances in which also third countries must be held to have accepted the Commentaries for the purpose of the interpretation and application of treaty provisions that are based on the OECD Model Tax Convention, or are estopped or precluded from denying such acceptance - for example, where a third country, in full knowledge of the fact that the other contracting state intended to follow the Commentaries, when interpreting and applying the Model provisions incorporated

in the treaty, agreed to adopt those provisions without informing that other state that it had a different intention - but it is suggested that the mere fact that the treaty includes provisions that are identical to those of the Model is insufficient for a finding of acquiescence or estoppel.

5. Conclusions

In circumstances where the parties to a tax treaty are OECD Member countries, and the parties have neither indicated, in the course of the negotiation of the treaty, that they intended not to follow the Commentaries, when interpreting and applying the provisions of the treaty that are based on the OECD Model Tax Convention, nor inserted an observation on the Commentaries to indicate that they are unable to concur in the interpretation set out therein, and in the absence of any other evidence to the contrary, they must be held to have accepted that interpretation, or are estopped or precluded from denying such acceptance, so as to become bound by it under international law. The same considerations apply mutatis mutandis to treaties concluded between OECD Member countries and associated states, and treaties concluded between associated states, although the case for a finding of acquiescence or estoppel is stronger in relation to treaties concluded between OECD Member countries, which cannot be seen in isolation of the (series of) Recommendation(s) of the Council, made in accordance with the provisions of the 1960 Convention on the OECD, that expressly calls upon those countries to conform to the OECD Model Tax Convention, as interpreted by the Commentaries thereon. The mere fact that a treaty concluded by a third country includes provisions of the OECD Model Tax Convention is, however, insufficient for a finding of acquiescence or estoppel. In any case, a finding of acquiescence or estoppel only extends to the Commentaries existing at the time of the conclusion of the treaty, and not to later changes or additions to the Commentaries.

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72. See Engelen, *Interpretation of Tax Treaties under International Law* (IBFD Doctoral Series Vol. 7, 2004), at 10.9., pp. 439-473. See also Engelen, "Some Observations on the Legal Status of the Commentaries on the OECD Model", 60 *Bulletin for International Taxation* (2006), pp. 105-109.

73. The OECD Member countries are: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea (Rep.), Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

74. For a recent example see Art. I(1) of the Protocol to the 2006 Convention between the Kingdom of the Netherlands and Barbados for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, which reads: "It is understood that both Contracting States will follow the OECD Commentary when applying and interpreting the provisions of this Convention that are substantially the same as those in the OECD Model Convention."

75. See Engelen, Interpretation of Tax Treaties under International Law, at 6.7.3.2., pp. 195-199.

76. Case concerning delimitation of the maritime boundary in the Gulf of Maine area (Canada v. United States), *ICJ Reports 1984*, p. 305.

77. Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), *ICJ Reports 1962*, p. 21.

78. *ICJ Reports 1962*, p. 23: interpolations added.

79. *ICJ Reports 1962*, pp. 33-34.

80. See Pijl, "The OECD Commentary as a Source of International Law and the Role of the Judiciary", 46 *European Taxation* (2006), p. 223: "[...] in boundary cases, world peace requires a more lenient approach with regard to 'bindingness'. In tax cases, this requirement is not present."

81. See Engelen, "Some Observations on the Legal Status of the Commentaries on the OECD Model", 60 *Bulletin for International Taxation* (2006), p. 106 and the references in footnote 9.

82. *ICJ Reports 1984*, p. 305.

83. Case concerning the land, island and maritime frontier dispute (El Salvador/Honduras), *ICJ Reports 1990*, p. 118.

84. *ICJ Reports 1962*, p. 63.

85. *ICJ Reports 1962*, p. 33: interpolation added.

86. *ICJ Reports 1962*, p. 63.

87. In the *Gulf of Maine* case, the International Court of Justice said that "in any case the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity". *ICJ Reports 1984*, p. 305. Cheng, *General Principles of Law* (Cambridge, 1987 (reprint)), at 350, observes that the concept of estoppel "is yet another instance of the protection which law accords to the faith and confidence that a party may reasonably place in another, which, as mentioned before, constitutes one of the most important aspects of the principle of good faith". O'Connor, *Good Faith in International Law* (Dartmouth Publishing Company, 1991), at 124, presents the following definition of the principle of good faith international law: "The principle of good faith in international law is a fundamental principle from which the rule *pacta sunt servanda* and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by the compelling standards of honesty, fairness and reasonableness prevailing in the international community at that time."

88. See in particular Engelen, On values and norms. The principle of good faith in the law of treaties and the law of tax treaties in particular (Kluwer, 2006).

89. Nuclear Tests (Australia v. France), *ICJ Reports 1964*, p. 268.

90. Recommendations concerning the OECD Model Tax Convention have been made by the Council in 1963, 1977, 1992, 1994, 1995 and 1997.

91. Emphasis added.

92. Schermers and Blokker, *International Institutional Law* (Martinus Nijhoff Publishers, 2003), Para. 1220, note that the mere fact that recommendations of an international organization do not bind the Member countries of the organization "does not mean that they have no effect on them. The existence of a legal obligation provides merely one of the many reasons for observing a rule and indeed, in international law, where sanctions often prove to be illusory, the legal obligation may not even be the prime motivation behind norm compliance. A number of factors can be seen to plead in favour of giving effect to recommendations." On these factors, see Paras. 1221-1243.

93. Para. 30 of the Introduction to the OECD Model Tax Convention. Regarding the legal effect of observations on the Commentaries, see Maisto, "The Observations on the OECD Commentaries in the Interpretation of Tax Treaties", 60 *Bulletin for International Taxation* (2006), pp. 14-19.

94. Para. 31.

95. *ICJ Reports*, pp. 118-120: interpolations added.

96. *ICJ Reports 1984*, p. 305.

97. Para. 29.

98. David Ward et al., The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model (IBFD, 2005), p. 52.

99. Ibid., p. 34: interpolation added.

100. Emphasis added.

101. Para. 14.

102. See Para. 10 of the Introduction to the OECD Model Tax Convention.

103. See Paras. 1-3 of the Introduction to the Non-Member Countries' Positions on the OECD Model Tax Convention. The non-member countries that have determined and recorded their position on the OECD Model Tax Convention are: Albania, Argentina, Belarus, Brazil, Bulgaria, China (People's Rep.), Croatia, Estonia, Gabon, Israel, Ivory Coast, Latvia, Lithuania, Malaysia, Morocco, the Philippines, Romania, Russia, Serbia and Montenegro, Slovenia, South Africa, Thailand, Tunisia, Ukraine and Vietnam.

104. Para. 5.

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