

## THE ROLE OF THE OECD IN THE CURRENT INTERNATIONAL TAX LAW: VOLUNTARY OR 'OBLIGATORY'?

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### ABSTRACT

Whereas currently the OECD's Model Tax Convention, Commentaries and Guidelines are being broadly utilised by many countries, there is no legal certainty regarding the extent to which they can constitute part of international tax law. It might be argued that despite the widespread practice by both the OECD Member states and non-member states conforming to the OECD's Model Tax Convention, Commentaries and Guidelines, the *opinio juris* is still difficult to prove. This means that the legal status of the OECD's Model Tax Convention, Commentaries and Guidelines has not necessarily evolved into binding customary international law.

However, this widespread practice by both the OECD member states and non-member states might still have a legitimising effect if the issue is considered from different perspectives. By recourse to general principles of international law and according to the settled case law of the International Court of Justice, this paper seeks to prove that *opinio juris* exists under certain circumstances. Countries which have voluntarily implemented or practised a norm regularly over time can be held to have acquiesced in those norms and practices (*acquiescence*) and therefore are bound to these rules. Even if there are some uncertainties regarding the parties' tacit acceptance of the OECD's Model Tax Convention, Commentaries and Guidelines, they are deemed to be estopped or precluded from denying such acceptance due to their regular practices (*estoppel*).

In international law these principles have specifically evolved to govern situations in which countries reasonably rely on the regular practices of each other. By scrutinising the relevance of these general principles of international law to cross-border tax matters, this article intends to clarify the extent to which legitimising international tax norms can emerge outside of the OECD Model Tax Convention, Commentaries, and Guidelines. It will discuss whether under current international tax law the OECD's pronouncements potentially constitute a part of international tax law or whether they should be regarded as mere guidance.

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## I INTRODUCTION

All international organisations are authorised to issue non-binding recommendations and guidelines to their members within their area of competence.<sup>1</sup> However, if practised comprehensively, these norms and standards may over time come to represent accepted international norms. In this context, the OECD's Model Tax Convention, Commentaries and Guidelines<sup>2</sup> are broadly observed by OECD countries and even many non-OECD countries. For example, many countries generally grant either an exemption for foreign-source income or a credit for foreign taxes paid, according to the OECD's Model Tax Convention. Nearly every country in the world claims to follow the arm's length transfer pricing guidelines of the OECD (Brazil being the only noticeable exception).<sup>3</sup> The non-discrimination norm embodied in Article 24 OECD Model Tax Convention, which provides that non-residents from a treaty country should not be treated worse than residents, is represented in almost all tax treaties. As a result, these cross-border tax norms have been quickly extended beyond the OECD member states' jurisdictions.

The OECD is a multilateral economic organisation of 34 countries, founded in 1961 to stimulate economic development and world trade.<sup>4</sup> According to the official website of the OECD, this organisation is a forum of developed countries which provides a platform for comparing policy experiences, looking for solutions for common economic problems, identifying good practices and coordinating domestic and international policies of its members.<sup>5</sup> The mission of the OECD is to develop policies which may enhance the economic and social well-being of nations around the world.<sup>6</sup> In addition, the OECD also works with governments to identify what drives economic, social and environmental change.<sup>7</sup> It establishes international standards in a variety of areas, from agriculture and tax, to the safety of chemicals.<sup>8</sup> It is accepted that similar to many international organisations, the early stages of the OECD were based on voluntary adherence of the member countries to its pronouncements.<sup>9</sup> However, this did not necessarily mean that the OECD had to remain as a "voluntary" organisation forever. For this reason, this article seeks to scrutinise the role of the OECD from the perspective of international law.

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<sup>1</sup> Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (Martinus Nijhoff Publishers, 3rd ed, 2001) 1218.

<sup>2</sup> The OECD Guidelines are recommendations that address different tax or trade issues, including, for example, the OECD Guidelines for Multinational Enterprises, the OECD Guidelines on Transfer Pricing Guidelines, the OECD Guidelines for the Testing of Chemicals, etc.

<sup>3</sup> Reuven Avi-Yonah, 'Tax Convergence and Globalisation' (2010) 6 *University of Michigan* 1, 7. Electronic copy available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1636299](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1636299), last visited 5 December 2014.

<sup>4</sup> The website of the OECD, available from <http://www.oecd.org/about/history/>, last visited 1 June 2015.

<sup>5</sup> The website of the OECD, available from <http://www.oecd.org/about/>, last visited 1 June 2015.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Yariv Brauner, 'An International Tax Regime in Crystallization' (2003) 56 *Tax Law Review* 259. Electronic copy available at: <http://scholarship.law.ufl.edu/facultypub/9>, last visited 1 December 2014.

International law is said to emerge from a variety of sources. International law commentators commonly define it as “a set of rules generally regarded and accepted as binding in relations between states and between nations”.<sup>10</sup> This definition is in conformity with a positivistic legal tradition which establishes that the legal validity of any legal system depends on its sources, not its merits.<sup>11</sup> According to legal positivism a sovereign State exists to posit laws governing subjects, and those sovereign States would shape international law, provided that there were some enforcement mechanisms.<sup>12</sup>

However, it is misleading to say that international law is shaped by States, through treaties and customs, both because this definition overlooks the increasing contribution of global or multilateral organisations to the process of international law-making and because a variety of non-State institutions increasingly play a role in international law-making.<sup>13</sup> Thus, other scholars argue that international law includes not only state law and practices but also it covers a rich tradition of societal and cultural customs, statements and pronouncements produced by States and their representatives, universal rights and duties, and other sources such as judicial declarations and commentaries.<sup>14</sup> This raises two questions: (1) whether the OECD’s Model Tax Convention, Commentaries and Guidelines may constitute a part of international law and have a legitimising effect, and (2) to what extent these pronouncements should be binding.

To answer the question raised above the methodology adopted for the present research is based on traditional legal analysis involving different areas of law, including international law, public law and tax law. In order to shed light on the international law status of the OECD in current international tax law, different sources of law and materials, such as the OECD’s documentation, general principles of international law, international case law and scholarly articles, have been analysed. The elements of international law, including customary international law, acquiescence and estoppel, play a significant role in clarifying the current legal status of the OECD in the international tax law. The article is structured as follows: Section 2 is dedicated to defining international law and the process through which international norms are created. Section 3 provides a general overview of the legal status of the OECD pronouncements. Section 4 considers the characteristics of customary international law and investigates the relationship between the OECD Model Tax Convention, Commentaries and Guidelines and customary international law. Section 5 investigates how estoppel and acquiescence (as two concepts of customary international law) are applicable to cross-border tax situations and against tax authorities. Section 6 examines the enforcement of customary international law and Section 7 provides a summary of this whole paper.

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<sup>10</sup> Jeremy Sarkin, *Colonial Genocide and Reparations Claims in the 21st Century: The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia, 1904–1908*, (Greenwood Publishing Group, 1<sup>st</sup> ed, 2009) 68.

<sup>11</sup> Legal positivism is a school of thought of philosophy of law and jurisprudence, largely established by eighteenth and nineteenth-century legal theorists, most prominently, by works of Jeremy Bentham and John Austin.

<sup>12</sup> Sarkin, above n 10, 68.

<sup>13</sup> Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 1<sup>st</sup> ed, 2010) 87.

<sup>14</sup> *Ibid.*

## II INTERNATIONAL LAW AND THE CREATION OF INTERNATIONAL NORMS

Before illustrating the transformation of international norms in the body of international law in the form of customs, which occurs through the frequent practices of norms by countries, the article presents an overview of the creation of norms at a global level. International law<sup>15</sup> is a system of law which regulates the interrelationship of sovereign States and their rights and duties with regard to one another.<sup>16</sup> In the context of international law, there is no international parliament, similar to that in domestic law systems, for legislating binding rules. In addition, there is no international body, such as an international police force, in charge of sanctioning breaches of international law.<sup>17</sup> Instead, the international law originates from a variety of sources: (1) conventions and treaties; (2) international custom, in so far as this is evidence of a general practice of behaviour accepted as legally binding; and (3) the general principles of law recognised by civilised nations.<sup>18</sup>

A norm, in the context of international law, can be defined as “the shared expectations or standards of appropriate behaviour accepted by States and intergovernmental organisations that can be applied to States, intergovernmental organisations, and/or non-State actors of various kinds”.<sup>19</sup> Certain types of norms may become binding through the common practice of States which have accepted that practice as law. According to Lauterpacht:<sup>20</sup>

*This dependence on State practise is both the source and the reflection of the legal relevance of divergence from the normal ... Where there is a repeated divergence - a divergence is either widely accepted or, at any rate, is not widely disapproved of, then that deviation itself tends to become the norm and, therefore, the law.*

Generally speaking, norms are incorporated in the international community in four possible ways:

- *Legal norm setting*—International organisations and governments form norms through conventions, declarations, treaties, and so forth.
- *Multi-stakeholder initiatives*—Stakeholders from government, the private sector, international organisations, and civil society form norms through inclusive and deliberative processes.

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<sup>15</sup> International law is also known as public international law to distinguish it from private international law, which does not deal with relationships between states. See: Jonathan Law, *Oxford Dictionary of Law* (Oxford University Press, 8<sup>th</sup> ed, 2015) 333.

<sup>16</sup> Ibid.

<sup>17</sup> John McLaren, ‘The OECD’s ‘harmful tax competition’ project: Is it international tax law?’ (2009) 24 *Australian Tax Forum* 421, 430.

<sup>18</sup> Law, above n 15, 333.

<sup>19</sup> Johanna Martinsson, ‘Global Norms: Creation, Diffusion, and Limits’ (2011) *CommGAP Discussion Papers: the World Bank*, 2.

<sup>20</sup> Eric Lauterpacht, ‘The Inevitability of Change in International Law and the Need for Adjustment of Interests’ (1977) 51 *Australian Law Journal* 83, 84.

- *Global policy networks*—State and non-State actors jointly bring new issues and ideas into public discourse and complement policy making and international cooperation.
- *Transnational advocacy coalitions*—Non-State actors advocate norms through transnational campaigns and monitoring implementation.<sup>21</sup>

In the context of the OECD, legal norms are established through its pronouncements (legal norms setting). The following section will elaborate on how the process of legal norm setting takes place through the OECD pronouncements and how a legal norm can take the form of a custom and become legally binding.

### III GENERAL OBSERVATIONS REGARDING THE LEGAL STATUS OF THE OECD'S PRONOUNCEMENTS

According to the *Oxford Dictionary of Law* the term 'soft' law refers to:

*Guidelines of behaviours such as those provided by treaties not yet in force, resolutions of United Nations or international conferences, that are not binding in themselves but are more than statements of political aspirations. Soft law contrasts with hard law, i.e. those legal obligations, found either in treaties or customary international law that are binding in and of themselves.*<sup>22</sup>

*Black's Law Dictionary* refers to 'soft law' in similar terms:

1. *Collectively, rules that are neither strictly binding nor completely lacking in legal significance.*
2. *Guidelines, policy declarations or codes of conduct that set standards of conduct but are not legally binding.*<sup>23</sup>

Accordingly, 'soft law' refers to legal instruments which are not legally binding, or their binding force is weaker than the binding force of traditional law, often distinguished from 'hard law' because of its non-binding nature. Against this backdrop, the OECD Model Tax Convention, Commentaries and Guidelines can be considered to be soft law. These pronouncements are not meant to bind their members, let alone non-members which have not contributed to the formation of the contents of these pronouncements and do not have convention-based ties with this organisation. According to Article 5 of the Convention on the OECD:<sup>24</sup>

In order to achieve its aims, the organisation may:

- (a) Take decisions which, except as otherwise provided, shall be binding on all the Members;

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<sup>21</sup> Martinsson, above n 19, 3.

<sup>22</sup> Law, above n 15, 582.

<sup>23</sup> Bryan A. Garner (ed.), *Black's Law Dictionary*, (West Group Press, 8<sup>th</sup> ed, 2004), 1426.

<sup>24</sup> The Convention on the OECD (Paris, 14<sup>th</sup> December 1960) is, in fact, the constitution of the OECD and it should not be confused with the OECD Model Tax Convention.

- (b) Make recommendations to Members; and
- (c) Enter into agreements with Members, non-member States and international organisations.

Based on Article 5 of the Convention of the OECD it is clear that if the OECD seeks to require its members to be bound to follow a particular matter the OECD Council<sup>25</sup> may resort to a formal decision which is then obligatory on all member countries. However, this does not mean that the OECD's Model Tax Convention, Commentaries and Guidelines are totally without any legal weight for its Member States.<sup>26</sup> In other words, the fact that a particular measure or instrument is in itself not legally mandatory to its addressees does not mean it is without any legal consequence. When a State member thus refutes any import at all to each and every pronouncement issued by the OECD, it violates the legitimate expectations principle which is the basis of the international principles of estoppel and acquiescence.<sup>27</sup>

In this context, other Member States at least expect that a Member State shall give these pronouncements serious consideration.<sup>28</sup> In addition, the effectiveness of the international organisation is directly associated with the object and purpose of the convention founding it, as well as with the maxim *ut res magis valeat quam pereat*,<sup>29</sup> which is linked to the principle of good faith. This is to say that even the non-binding parts of the OECD pronouncements should not be ignored entirely.

In an article entitled "*The OECD's 'harmful tax competition' project: Is it international tax law?*", McLaren contends that the OECD makes soft international law and the norms made by this organisation are generally accepted by its member countries and even non-members as being part of the international tax law.<sup>30</sup> McLaren provides examples of a variety of the OECD policies and norms which have found their way into the Australian tax law and become part of the Australian domestic law, including: the OECD Model Double Taxation Agreement (DTA), Taxpayers Charter, Transfer Pricing Rules, Controlled Foreign Corporations (CFC), Foreign Investment Funds (FIF) and Transferor Trust Rules, the Non-deduction for bribes of foreign officials and Anti-Money Laundering and Counter Terrorist Financing Act 2007(Cth) and the Financial Action Task Force.<sup>31</sup> McLaren holds while these policies and norms are considered to be 'soft' international law, most of the OECD member countries are willing to follow many of the policies and norms developed by the OECD.<sup>32</sup>

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<sup>25</sup> Article 7 of the Convention on the OECD articulates: 'A Council composed of all the Members shall be the body from which all acts of the Organisation derive. The Council may meet in sessions of Ministers or of Permanent Representatives'.

<sup>26</sup> Edwin Van der Bruggen, 'The Power of Persuasion: Notes on the Sources of International Law and the OECD Commentary' (2003) 8/9 *Intertax* 229, 236. Available at: [http://www.dfdl.com/images/stories/The\\_Legal\\_Effects\\_of\\_the\\_OECD\\_Commentary\\_as\\_a\\_Non-Binding\\_Recommendation\\_Intertax\\_2003.pdf](http://www.dfdl.com/images/stories/The_Legal_Effects_of_the_OECD_Commentary_as_a_Non-Binding_Recommendation_Intertax_2003.pdf), last visited 3 December 2014.

<sup>27</sup> Estoppel and acquiescence, as two principles of international customary law, have emerged from the doctrine of legitimate expectation, which itself originates from English law.

<sup>28</sup> Van der Bruggen, above n 26, 242.

<sup>29</sup> Latin, meaning it is better for a thing to have effect than to be made void.

<sup>30</sup> McLaren, above n 17, 452.

<sup>31</sup> *Ibid* 439-45.

<sup>32</sup> *Ibid* 445.

The OECD member countries, in particular, are happy to adopt the OECD's pronouncements where these soft international laws directly assist them to be able to collect more revenue or safeguard existing revenue.<sup>33</sup> In the same vein, Christians maintains that although the OECD is not a supranational organisation, the harmful tax practice initiative demonstrates an area in which it has successfully formulated and disseminated tax norms that became law, within, and among, a number of States.<sup>34</sup>

The author, however, argues that in spite of its non-legally binding nature the contents of the OECD's Model Tax Convention, Commentaries and Guidelines might be, or become, binding either for member or non-member countries in several ways. In other words, there are some international law principles according to which the OECD pronouncements can be considered to have legitimising effects. In these cases the unilaterally practised norms by a country would not derive their binding force from the OECD pronouncement itself but, depending on particular conditions, they might be regarded as evidence of customary international law, estoppel or acquiescence. The following section will explain how the contents of some of the OECD pronouncements can be considered to be legally binding.

#### IV CUSTOMARY INTERNATIONAL LAW

Rules set out in the OECD's Model Tax Convention, Commentaries and Guidelines may be legally binding if they feature or are evidence of customary rules of international law. Customary international law can be defined as law that "results from a general and consistent practice of States followed by them from a sense of legal obligation".<sup>35</sup> In practice, some of the norms implied by the OECD's Model Tax Convention, Commentaries and Guidelines are consistently practised by many countries to such extent that it seems they are binding. However, whether one can term these norms as "customary international law" is a quite different issue. Some authors believe that these norms should be considered as customary international law.<sup>36</sup>

The founders of the International Court of Justice describe customary international law to be "international custom, as evidence of a general practice accepted as law."<sup>37</sup> Based on this definition, there are two prerequisites for a rule of customary international law:<sup>38</sup>

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<sup>33</sup> Ibid.

<sup>34</sup> Allison Christians, 'Hard Law and Soft Law in International Taxation' (2007) *University of Wisconsin Legal Studies Research Paper Series*, Paper No. 1049, 9.

<sup>35</sup> American Law Institute, *Restatement of the Law Third: The Foreign Relations Law of the United States* (1987), Sec. 102(2).

<sup>36</sup> See generally; Reuven S. Avi-Yonah, 'Tax Competition, Tax Arbitrage and the International Tax Regime' (2007) 61.4 *Bulletin for International Taxation* 130; Brian D. Lepard, 'Is the United States Obligated to Drive on the Right' (1999) 10 *Duke Journal of Comparative & International Law* 4.

<sup>37</sup> The Statute of the International Court of Justice, Article 38.

<sup>38</sup> Chantal Thomas, 'Customary International Law and State Taxation of Corporate Income: The Case for the Separate Accounting Method' (1996) 14.99 *Berkeley Journal International Law* 99, 117. Electronic copy available at: <http://scholarship.law.berkeley.edu/bjil/vol14/iss1/2>, last visited 23 November 2014.

- 1 Practice requirement: The international law must be consistently practised by nations whose interests it clearly affects, with the tacit consent or acquiescence by those nations whose interests it does not;
- 2 Force of law requirement: The international law must carry the force of law. That is:
  - (a) States must clearly acknowledge an obligation to adhere to it; and
  - (b) A high probability of punitive action - which may include a wide range of negative responses - must attach to its violation by any State.

Practice shapes the foundation of customary international law, as without it the most highly practised legal norms cannot gain recognition as a binding rule of law. It is clear that a State's practice must be consistent and continuous in order to satisfy this constituent of customary international law. However, the other essential aspects of the "force of law requirement" remain ambiguous. In particular, much ambiguity concerns the required punitive action for non-compliance.

With regard to *opinio juris*, the International Court of Justice Statute defines customary international law in Article 38(1) (b) as "evidence of a general practice accepted as law".<sup>39</sup> There is no evidence to prove that these norms are "accepted as law". In addition, an essential element of custom, one of the four sources of international law as outlined in "the Statute of the International Court of Justice",<sup>40</sup> is that the custom should be regarded as State practice leading to a legal obligation, which distinguishes it from mere usage.<sup>41</sup>

Based on the above, it seems unconvincing to conclude that the force of law or *opinio juris* exists behind the OECD's pronouncements. It is comprehensively recognised that *opinio juris* refers to the sense of obligation that countries have towards an international rule which converts the rule into a law, as opposed to some other types of obligation such as motives of courtesy, fairness, or morality.<sup>42</sup> It is not true to say such an obligation exists for each and every country in the world. What is clear is that, to date, the universal sense of obligation to apply these norms as law is missing. This view is supported by Christians who observes that "the OECD's guidance seems to lack the general legal obligation (*opinion juris*) associated with customary law, because the guidance is by its terms commendatory rather than obligatory".<sup>43</sup>

The author is of the view that it is inaccurate to make a general comment regarding the legal status of the OECD. It is not true to say that the OECD pronouncements are entirely voluntary or they are entirely binding. In other words, while the OECD's Model Tax Convention, Commentaries and Guidelines lack the integral element for being termed as international customary law per se (that is *opinio juris*), under some particular situations, and in a case-by-case basis, the *opinio juris* or force of law is evident for certain countries. In these cases the norm in question will take the form of international customary law.

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<sup>39</sup> Website of International Court of justice, available at: <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>, last visited 25 November 2014.

<sup>40</sup> As stipulated by Chapter XIV of the United Nations Charter, 'The Statute of the International Court of Justice' is an important part of the United Nations Charter, which establishes the International Court of Justice.

<sup>41</sup> Law, above n 15, 435.

<sup>42</sup> Thomas, above n 38, 118.

<sup>43</sup> Christians, above n 34, 6.



Finally, in terms of punitive actions it is worth noting that some commentators believe that a common perception in international law is that the inclusion of punitive action into a definition of customary international law will destabilise much of what is now accepted as such.<sup>44</sup> The absence of punitive actions appears to stem mostly from the lack of effective enforcement of pronouncements that are regarded as international law.<sup>45</sup> Therefore, even though punishment of the transgressor is a well-established and an essential component in national legal systems, it is hardly articulated as an essential element of international law.<sup>46</sup>

In summary, from the perspective of customary international law it is difficult to prove that all countries are bound to follow the OECD's pronouncements in exactly the same way. But does it necessarily follow that these pronouncements should be considered as voluntary? In the following discussion, the author considers whether these norms might have binding effects on countries based on the principles of estoppel and acquiescence which are theoretically at least concepts of customary international law.<sup>47</sup>

## V ESTOPPEL AND ACQUIESCENCE

In some particular cases and over time some non-binding recommendations and norms can be regarded as a new source of international law. In this context, based on the general principles of international law and according to the settled case law of the International Court of Justice, countries which have voluntarily implemented or practised a norm over time can be held to have acquiesced to those norms and practices (*acquiescence*) and therefore, are legally bound to them. Actions inconsistent with acquiescence or tacit consent, in effect, can constitute the basis for legal claims. The Encyclopaedia of Public International Law describes acquiescence as: "... the far-reaching effect of creating legal obligation by silence and inaction which is an essential element in the promotion of stability in international relations, and is intended to prevent States from playing 'fast and loose' with situations affecting other States....".<sup>48</sup>

Yet, the important issue is that even though most authorities recognise that a country is not required to have explicitly consented to being bound by a rule of international law, almost all authorities agree that nations which object to one (or more) evolving rule of general customary international law can be exempted from its obligations.<sup>49</sup> This tolerance is known as the "persistent objector" exemption. The acceptance of the

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<sup>44</sup> Thomas, above n 38; Fernando Teson, *A Philosophy of International Law (New Perspectives on Law, Culture, and Society)* (Westview Press, 1<sup>st</sup> ed., 1998) 90. Teson believes that a customary norm is binding because it is the 'right, fair, or best rule'; J. L. Brierly, *The Basis of Obligation in International Law*, (Oxford, Clarendon Press, 1958). Brierly proposed that the obedience to a law is a moral matter: 'the ultimate basis of the obligation to obey the law cannot be anything but moral.' *Ibid*, 65.

<sup>45</sup> Thomas, above n 38, 120.

<sup>46</sup> *Ibid* 118.

<sup>47</sup> Sjoerd Douma and Frank A. Engelen, *Conflict of Norms in International Tax Law; the Legal Status of the OECD Commentaries* (IBFD, 1<sup>st</sup> ed., 2008) 29.

<sup>48</sup> Encyclopaedia of public international law, (Elsevier Science Publishers B.V 1981) 5. Electronic copy available from:

[http://samples.sainsburysebooks.co.uk/9781483257013\\_sample\\_815463.pdf](http://samples.sainsburysebooks.co.uk/9781483257013_sample_815463.pdf), last visited 20 November 2014.

<sup>49</sup> Thomas, above n 38, 118.

persistent objector is specifically due to the fact that custom eventually is contingent upon the consent of nations.<sup>50</sup> This principle is based on the fact that States are bound to a certain norm of international law through custom and action showing their obligation to be bound (*opinio juris*).

In contrast, while acquiescence is manifested by unilateral and voluntary conduct, estoppel (preclusion) is manifested by precluding the party which keeps silent towards a particular treatment of another party. In the context of cross-border taxation, estoppel can occur when one State keeps silent and does not protest against a regularly practised tax principle of another country. By tacitly recognising those practices, States are prevented (estopped) from later denying the legitimacy of such tax norm. This principle, which supplements *pacta sunt servanda*,<sup>51</sup> the keystone of international law obliging all States to maintain contractual obligations,<sup>52</sup> is known as estoppel. Estoppel is rising to the rank of one of the key general principles of law recognised by civilised nations.<sup>53</sup> It establishes one of the sources of international law under Article 38(l) (c) of the Statute of the International Court of Justice.

In terms of estoppel, there are two main categories of estoppel: equitable estoppel and legal estoppel. Each category of estoppel has different sub-categories.<sup>54</sup> The author will only focus on equitable estoppel, which protects one party from being harmed by another party's voluntary conduct. Voluntary conduct may include an action, silence, acquiescence, or concealment of material facts.

Equitable estoppel occurs when a State gives the impression of going along with a particular practice or rule (possibly by not protesting against it when it was convenient for the State to do so).<sup>55</sup> This State should not be permitted later to disavow the practice or the rule. The main question is whether equitable estoppel can be applied against the tax authorities of a State in a cross-border tax situation? In the literature there is little discussion on the application of estoppel in international taxation. However, there are a few arguments regarding the application of estoppel against governments in purely domestic cases, which are also helpful for the purpose of this study.<sup>56</sup> Generally, there are two main approaches towards this matter.

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<sup>50</sup> Ibid 116.

<sup>51</sup> Latin for 'agreements must be kept.'

<sup>52</sup> Phil C.W. Chan, 'Acquiescence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited' (2004) 3 *Chinese Journal of International Law* 421, 424.

<sup>53</sup> Ibid.

<sup>54</sup> Franco Ferrari and Stefan Kröll (eds.), *Conflict of Laws in International Arbitration*, (European Law Publishers, 1<sup>st</sup> ed, 2011), 166.

<sup>55</sup> Anthony, D' Amato, 'Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law' (2010) *Northwestern University School of Law, Faculty Working Papers No. 102*, 8. Electronic copy available at: <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/102>, last visited 2 December 2014.

<sup>56</sup> E.g.: Dean R. Knight, *Estoppel (principles?) in public law: the substantive protection of legitimate expectations*, (Master Thesis in Law, the University of British Columbia, 2004); Alexandra O'Mara, 'Estoppel against public authorities: is Australian public law ready to stand upon its own two feet?' (2004) 42 *Australian Institute of Administrative Law Forum* 1; Renata Petrylaite, 'Can the doctrine of equitable estoppel be applied against a government?' (2004) 1.2 *International Journal of Baltic Law* 97.

### **A. THE TRADITIONAL APPROACH**

The traditional approach considers that the doctrine of equitable estoppel does not have any place in the areas of governments' relations with private entities due to three major factors, namely:

Protection of public interests

Governments act for the benefit of the public. The interests of the public will be served better if responsibilities and duties in areas such as taxation or police power are granted to the government. As a result, a government must benefit from certain immunities, one of which is immunity against estoppel, to make sure that public interests will not be damaged.<sup>57</sup>

Performance of governmental functions

Governments represent the State and its people. So that society can function properly certain duties and responsibilities have been assigned to the discretion of government. Only the government is responsible to impose additional taxes or cancel some of them, to develop infrastructure of the State and to exercise the police powers. Such spheres of social life are considered to be of vital significance. For that reason, governmental functions and the doctrine of sovereign immunity<sup>58</sup> are linked together, and when acting in governmental or sovereign capacity, the government should be immune from estoppel.<sup>59</sup>

Ultra vires conduct of governmental officers

When governmental agents act wholly beyond their power and authority, a government cannot be estopped. This is because the government cannot be able to secure perfect performance from all its numerous employees. It would be unfair to consider the government responsible for every misstatement of its agents as to do otherwise will waste public funds.<sup>60</sup>

### **B. The Modern Approach**

This approach tends to estop a government and maintains that one should not differentiate between private and governmental bodies in application of estoppel rules. According to this approach, estoppel as an equitable doctrine may concern itself with elemental fairness to the private citizens dealing with their governments. The arguments in favour of the application of the doctrine of equitable estoppel against governmental authorities are based upon some key factors, for instance:

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<sup>57</sup> Petrylaite, above n 57, 103–4.

<sup>58</sup> The doctrine of sovereign immunity is a legal doctrine which holds that a State or nation, as the case may be, possessed of its own independent powers, cannot be sued and therefore be made accountable to others for exercising those powers in an allegedly unlawful manner. See: State Sovereign Immunity: Melvyn R. Durchslag, A Reference Guide to the United States Constitution, (Praeger, 1<sup>st</sup> edn, 2002), 3.

<sup>59</sup> Petrylaite, above n 57, 101–3.

<sup>60</sup> Ibid 104–6.

(1) *Protection of private interests*

The interests of individuals dealing with the governmental agencies should be protected. The rule of no estoppel where public interests are concerned cannot protect the rights of individuals because sometimes the public interest itself requires estopping the government. Although, the public and private interests are closely interconnected, it is not always easy to make a distinction between them. Instead of striving to precisely draw the line between public and private interests it is more efficient to consider carefully what would be a fair and just solution to a particular problem and then employ the doctrine of equitable estoppel where justice demands it.<sup>61</sup>

(2) *Justice and fairness*

Another important consideration favouring estoppel against the government is justice and fairness. The very concepts of justice, equity and fairness are by themselves sufficient to balance the interests of public and private sectors.<sup>62</sup> Equitable estoppel, when applied to a particular situation, will ensure that both private and public interests are balanced and unnecessary harm to any of them is avoided.<sup>63</sup> Yet, the issue of estoppel against governments should be decided on a case-by-case basis involving investigating the circumstances precisely and applying only one test, a test of justice and fairness.<sup>64</sup>

(3) *Governmental agents acting intra vires*

There is a general rule in private law that a principal is bound by the acts of its agent. The same rule applies to the government. If its agents and officers act within the scope of their authority, the government is bound by such acts and representations and, consequently, it is estopped from denying the validity of such conduct.<sup>65</sup>

In Anglo-American domestic case law, particularly by studying the case law of Australia, New Zealand, the United Kingdom and the United States, it is difficult to arrive at a single answer to the dilemma posed by the question of whether estoppel should lie against public authorities in domestic cases. In brief, there is considerable inconsistency in looking at English and Australian courts and how they have dealt with estoppel against public authorities.<sup>66</sup> A proper balance needs to be struck between the rights of individuals and the free exercise of discretion by public authorities.<sup>67</sup> The overall approach in New Zealand has tended to place a greater emphasis on public bodies' obligations to protect expectations.<sup>68</sup> However, this approach has not been consistent or coherent through the range of cases.<sup>69</sup> The US case law seems to be more receptive towards the application of equitable estoppel to governmental authorities since the US courts are increasingly

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<sup>61</sup> Ibid 108–10.

<sup>62</sup> Ibid 112–13.

<sup>63</sup> Ibid 111–13.

<sup>64</sup> Ibid 113.

<sup>65</sup> Ibid 110–11.

<sup>66</sup> O'Mara, above n 57, 18.

<sup>67</sup> Ibid.

<sup>68</sup> Knight, above n 57, 55–63.

<sup>69</sup> Ibid.

willing to apply this doctrine to relations in which one party is a governmental entity.<sup>70</sup> Nevertheless, still many courts in the US, including the Supreme Court, are influenced by the traditional view<sup>71</sup> favouring the doctrine of sovereign immunity.

However, with regard to the application of estoppel against States at the international level, there is a little doubt. The International Court of Justice has clearly illustrated the fundamental elements required by estoppel in cross-border issues 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".<sup>72</sup> It is internationally accepted that estoppel is a general principle of international law leaning on principles of good faith and consistency.<sup>73</sup> The essence of estoppel is the element of conduct which leads to the reliance of the other party on that conduct, to detrimentally change its position or to bear some prejudice.<sup>74</sup> According to the Encyclopaedia of Public International Law, estoppel requires that:<sup>75</sup>

*The party invoking estoppel must have been induced to undertake legally relevant action or abstain from it by relying in... good faith upon clear and unambiguous representations by the other State. Reliance must prejudice the addressee, i.e., subsequent deviation from the original representation must cause damage to the relying State, or result in advantages for the representing State. The typical effect of the doctrine is that, under such requirements, a representing party is barred ("estopped" or "precluded") – without regard to truth or accuracy – from adopting successfully different subsequent statements on the same issue.<sup>76</sup> Clear and unequivocal representation, prejudice and detriment are not simply addenda; they trigger the very justification for specific protection of settled expectations.*

In cross-border tax matters, this principle of international law signifies that a State may be precluded from applying an act to taxpayers once it has exercised its determination as to how the taxing statute should be applied to a particular set of facts, so it can be precluded from doing so a second time and in a different manner. In other words, generally, where a State has made a misrepresentation of fact upon which taxpayers have detrimentally relied, the State will be precluded from acting differently in the future according to these principles of international law. So, in this context, either the OECD Member States or non-member States are bound to those comprehensively practised rules of the OECD.

Nevertheless, it should be noted that estoppel and acquiescence are two different notions. The International Court of Justice in the *Gulf of Maine Area (Canada v. United States)*<sup>77</sup>

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<sup>70</sup> Petrylaite, above n 57, 113.

<sup>71</sup> Ibid.

<sup>72</sup> International Court of Justice Reports 1990, 118.

<sup>73</sup> Megan L. Wagner, 'Jurisdiction by Estoppel in the International Court of Justice' (1986) 74 *California Law Review* 1777, 1778.

<sup>74</sup> Ian Brownlie, *Principles of Public International Law* (Clarendon Press, 5<sup>th</sup> ed, 1998) 646.

<sup>75</sup> Encyclopaedia of Public International Law, above n 23, 116.

<sup>76</sup> Ibid 117.

<sup>77</sup> Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), International Court of Justice Reports 1984, 246.

clearly distinguished between acquiescence and estoppel. According to the International Court of Justice:

*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. They are, however, based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion.*<sup>78</sup>

Article 38(1) of the Statute of the International Court of Justice identifies the typical sources of international law. Among them, the Court acknowledges the applicability of general principles of law and equity. In equity, one of those principles is estoppel. Estoppel pervades the international law system through the use of the general principles of law to solve international conflicts.<sup>79</sup> Estoppel seeks to give substantive protection to people's expectations arising from their dealings with public bodies and officials.<sup>80</sup> Today there can be no doubt that the doctrines of acquiescence and estoppel are significantly operating in international law.<sup>81</sup>

Whether or not countries accept estoppel and acquiescence in their domestic law, many international authorities have already considered acquiescence and estoppel as general principles of international law originating from the principles of good faith and equity in general and the related conception of protection of legitimate expectations in particular. For instance, the World Trade Organisation (WTO) Panel, in *Guatemala — Cement II*,<sup>82</sup> appears to have recognised the notion of international estoppel and dealt with it accordingly. In this case, Guatemala claimed that Mexico was estopped from alleging certain violations of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement),<sup>83</sup> because Mexico had not made these allegations at the earliest opportunity. In defining estoppel, the WTO Panel stated that 'where one party has been induced to act in reliance on the assurances of another party, in such a way that it would be prejudiced were the other party later to change its position, such a change in position is "estopped", that is precluded.'<sup>84</sup>

In addition, the International Court of Justice has applied these notions where States have voluntarily made a clear and unambiguous statement upon which another State has detrimentally relied.<sup>85</sup> The doctrine has historically been reflected in the jurisprudence of

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<sup>78</sup> International Court of Justice Reports 1984, 305.

<sup>79</sup> Jessica M. Guevara, 'Equity in MERCOSUR: The use of Estoppel in a Customs Union Created for and by Countries of the Civil System of Law' (2014) 20 *Law and Business Review of the Americas* 303, 303.

<sup>80</sup> Knight, above n 57, ii.

<sup>81</sup> Frank Engelen, 'Some Observations on the Legal Status of the Commentaries on the OECD Model' (2006) *Tax Treaty Monitor* 105, 106.

<sup>82</sup> *Guatemala — Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WTO Doc WT/DS156/R (24 October 2000) (Report of the Panel) ('*Guatemala — Cement II*').

<sup>83</sup> Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1876 UNTS 3 (entered into force 1 January 1995), annex 1A (Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994) 1868 UNTS 201.

<sup>84</sup> However, the WTO Panel rejected Guatemala's claim of estoppel since Mexico was under no obligation to object immediately to the violations.

<sup>85</sup> Wagner, above n 75, 1803–4.

the Court,<sup>86</sup> for instance, in *Eastern Greenland*,<sup>87</sup> the *Fisheries Case*,<sup>88</sup> the *Temple Case*<sup>89</sup> and the *Nuclear Tests Case*.<sup>90</sup>

## VI HOW CAN CUSTOMARY INTERNATIONAL TAX LAW BE ENFORCED?

One may question whether international tax law is a fully-fledged concept. If so, how national tax authorities can, in practice, be compelled to comply with these unwritten international tax rules where they are not explicitly set out in any treaty. This important question is not only peculiar to the enforcement of international tax law. It is “an old and rather tiresome matter in international law”,<sup>91</sup> not only because it is asked so frequently, but also because of the crucial assumption it contains; the assumption that international law cannot be enforced.<sup>92</sup> This problem becomes more serious, especially for a country with a dualistic method. It is worth noting that the enforcement of international tax law is a broad area of study which involves different areas of law including international law, tax law and administrative law, among others. However, I will briefly consider the main issues surrounding the implementation of customary international tax law.

At this point, it needs to be explained that from the perspective of domestic law, international law only becomes mandatory within its own national legal order under the rules and circumstances it determines, such as, a State’s constitution. In this respect, a distinction is usually made between *monism* and *dualism*. These terms are meant to describe two different theories of the relationship between international law and domestic law. There are two ways in which international law can become part of a State’s national law: either due to the operation of incorporation, a monist approach, or by transformation, a dualist approach.<sup>93</sup> In a monist system treaties can become law without incorporation, given their provisions are regarded to be adequately self-explanatory.<sup>94</sup> This approach holds that international law is part of a nation's law and that international law has priority.<sup>95</sup> The theory of monism is based on the doctrine of incorporation of international law.<sup>96</sup> According to this doctrine a specific rule of international law becomes part of the domestic law without the need for express adoption of that rule.<sup>97</sup> In other words, the international law is said to be self-executing.<sup>98</sup> Consequently, the national

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<sup>86</sup> Ibid.

<sup>87</sup> Denmark v. Norway, 1933 P.C.I.J. (ser. A/B) No. 53 (April 5).

<sup>88</sup> UK v. Norway, 1951 I.C.J. 116 (Dec. 18).

<sup>89</sup> Cambodia v. Thailand, 1962 I.C.J. 6 (June 15).

<sup>90</sup> Australia v. France, 1974 I.C.J. 253 (Dec. 20).

<sup>91</sup> Frederic L. Kirgis, ‘Enforcing International Law’ (1996) 1 American Society of International Law Newsletter (ASIL), 165. Electronic Copy available from: <http://www.asil.org/insights/volume/1/issue/1/enforcing-international-law> last visited 6 December 2014

<sup>92</sup> Ibid.

<sup>93</sup> John McLaren, above n 17, 437.

<sup>94</sup> Anthony Aust, *Modern Treaty Law and Practice*, (Cambridge University Press, 3<sup>rd</sup> ed., 2007) 147.

<sup>95</sup> John McLaren, above n 17, 437.

<sup>96</sup> John Gillespie and Pip Nicholson, *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform*, (the Australian National University (ANU) Press, 1<sup>st</sup> ed, 2005) 299.

<sup>97</sup> Ibid 300.

<sup>98</sup> Ibid.

courts are required to apply a certain rule of international law even if there is no explicit contradicting piece of law or judgment.

Differently from monism, dualism is based on the theory of transformation. The doctrine of transformation states that, rules of international law do not become part of national law until they have been expressly adopted by the State.<sup>99</sup> The difference between the incorporation and transformation doctrines is that the incorporation doctrine suggests adoption of international law into national law because it is international law, while the transformation theory necessitates an express act on the part of the State concerned. It is to be determined by the national law of concerned countries, usually their constitutions, whether to adopt the incorporation or transformation doctrine. Dualists emphasise the distinction between national and international law, and require the translation of international law into domestic law. International law does not exist as law if this transformation does not take place. International law must be national law too; otherwise, it is not law. In some countries, such as the Netherlands and France the monist approach prevails. In a minority of nations led by the United Kingdom, and most nations of the Commonwealth, a transformation approach is adopted and the dualist view is prevalent.<sup>100</sup> In this context, international law can be considered as national law only when it is translated in their national law. In Australia, for instance, international agreements only become part of the Australian domestic law once the Australian Parliament has 'transformed' the international law into Australian law.<sup>101</sup> There is no automatic incorporation of international law into Australian domestic law.<sup>102</sup> A mixed monist-dualist mechanism is being used in the United States. International law applies directly in United States courts in some cases. In implementing international law in national law, most States are to some extent monist and somewhat dualist.<sup>103</sup>

I return to the question posed at the beginning of this discussion as to how national tax authorities can be forced to follow the customary international tax rules. Practically, according to the general rules of international law, whenever there is no overarching authoritative law enforcer, such as an International Tax Organisation (ITO),<sup>104</sup> to enforce particular international rules, consequences for non-compliance will operate in different

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<sup>99</sup> Ibid 301-2.

<sup>100</sup> Ibid 301.

<sup>101</sup> John McLaren, above n 17, 437.

<sup>102</sup> Ibid.

<sup>103</sup> Lanre Adedeji, 'the Application of International Law in Domestic Courts', available online from: <http://thelawyerschronicle.com/the-application-of-international-law-in-domestic-courts/>, last visited 27 November 2014.

<sup>104</sup> See; e.g. Adrian Sawyer, *Developing a World Tax Organisation: The Way Forward* (Fiscal Publication, 1<sup>st</sup> ed. 2009); Dale Pinto, 'A Proposal to Create a World Tax Organisation' (2003) 9 *New Zealand Journal of Tax Law and Policy* 145; Vito Tanzi, *Taxation in an Integrating World, Integrating National Economies Series* (Washington, DC: Brookings Institution, 1<sup>st</sup> ed, 1995).



ways. In this situation common legal tactics that can be used include reciprocity,<sup>105</sup> collective action,<sup>106</sup> and shaming,<sup>107</sup> by other States against a Transgressor State.<sup>108</sup>

Apart from these general punitive mechanisms, regional trade organisations may also play a significant role to ensure the effective compliance of customary international law. For instance, the European Union (EU) law strictly requires all the EU Member States to adhere to customary international law. Customary international law is considered as a limit on State jurisdiction and powers. No derogation from a customary international rule on the ground of the public policy is permitted.<sup>109</sup> The European Court of Justice has for many years taken rules of customary international law into account.<sup>110</sup> Provisions of EU legislation have to be interpreted, and their scope limited, in accordance to the relevant rules of customary international law.<sup>111</sup> The national courts within the EU jurisdiction have explicitly relied on customary international law to test the validity of national law actions and even the rules of EU institutions.<sup>112</sup>

Some authors have argued that existing organisations are able to enforce and monitor the application of cross-border tax rules. Slemrod and Avi-Yonah suggest that the WTO is probably an appropriate organisation to rely upon for this task especially because it has a developed decision making mechanism.<sup>113</sup> Avi-Yonah considers the WTO as an appealing candidate for ITO since it has a much broader membership than any other organisation and because developing countries are much better represented.<sup>114</sup> Brauner believes that the OECD is the best organisation for this as it has proven expertise in tax.<sup>115</sup> Some other scholars have advocated for a stand-alone international tax body, since the OECD and the WTO, among other international organisations, do not have the necessary attributes, expertise or core objectives that would enable incorporation of an ITO within themselves.<sup>116</sup>

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<sup>105</sup> Reciprocity is a type of enforcement by which states are assured that if they violate a rule in detriment of another State; the other State will react by returning the same conduct.

<sup>106</sup> Through collective action, some countries act collectively to produce a punitive outcome against the Transgressor State.

<sup>107</sup> The risk of shaming a State with public statements concerning their violating conduct is an effective enforcement mechanism.

<sup>108</sup> International Law and Organizations (Carnegie Project, University of North Carolina Wilmington), at 4–5. An electronic Copy is also available from: <http://www.csb.uncw.edu/people/eversp/classes/BLA361/Intl%20Law/Required%20Readings/1.International%20Law%20&%20Organizations.Globalization%20101.Carnegie%20Project.pdf>, last visited 20 December 2014.

<sup>109</sup> Jan Wouters and Dries Van Eeckhoutte, 'Giving Effect to Customary International law through European Community Law', *Institute for International Law*, Working Paper No 25 (2002) 7–11.  
<sup>110</sup> Ibid 3–6.

<sup>111</sup> Case C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.* [1992] European Court Reports (hereinafter ECR) I-6019. In this case, the European Court of Justice for the first time clearly maintains that 'the European Community must respect international law in the exercise of its powers'.

<sup>112</sup> Case T-115/94 *Opel Austria GmbH v Council* [1997] ECR II-39; Case C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECR I-3655.

<sup>113</sup> See; Joel Slemrod and Reuven Avi-Yonah, '(How) Should Trade Agreements deal with Income Tax Issues?' (2002) 55 *Tax Law Review* 533.

<sup>114</sup> See; Reuven Avi-Yonah, 'Bridging the North-South Divide, International Redistribution and Tax Competition', (2004). 26 *Michigan Journal of International Law* 371.

<sup>115</sup> Brauner, above n 9, 316.

<sup>116</sup> See Wouters and Dries Van Eeckhoutte (2002) above n 109.

## VII CONCLUSIONS AND THOUGHTS FOR THE FUTURE

On the foregoing analysis, the OECD's Model Tax Convention, Commentaries and Guidelines do not bind their members, let alone non-members. In the context of international taxation, some commentators, such as McLaren and Christians, have contended the OECD policies and norms may constitute parts of international soft law. However, it was argued in this article that the unilateral practice of the OECD norms by countries may have binding effects on them. This legitimising effect would not derive its force from the OECD's pronouncements themselves but, based on particular conditions, they might be regarded as evidence of customary international law (estoppel or acquiescence). In addition, the traditional view which suggests that the OECD's pronouncements are entirely voluntary is an inaccurate perception. In other words, on a case-by-case basis, the *opinio juris* or force of law might be evident for certain countries following the OECD's Model Tax Convention, Commentaries and Guidelines. Nevertheless, the main concern is over the effective enforcement of customary international law in the area of taxation. It is doubtful if the power of customary international law is truly adequate to compel national tax authorities, especially in dualistic countries, to comply.

As observed, there is no doubt that the OECD pronouncements in certain situations can rise to the level of "custom", which is recognised as one of the main sources of international law. However, to effectively enforce these customs, it seems that new measures should be offered, whether in the form of creation of a new enforcement body such as an ITO, or in the form of giving the required mandate to one of the existing organisations such, as the OECD or the WTO. Another effective way to successfully enforce cross border customary tax rules enshrined in the OECD pronouncements is to draw attention to the significant role of regional trade organisations.<sup>117</sup>

In order to see how the enforcement of customary international rules can be handled effectively, a good place to start looking for ideas could be the legal systems of regional trade organisations, especially, the EU. Application of estoppel and acquiescence in domestic law is also another interesting topic for future research. In addition, the same investigations made in this study as regards the legal status of the OECD can be performed in respect to the United Nations Model Tax Convention. But all of these areas are topics for future research.

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<sup>117</sup> E.g. the ASEAN Free Trade Agreement (AFTA), European Union (EU), and North American Free Trade Agreement (NAFTA).