

The Role of the OECD in the Current International Tax Law: Voluntary or "Obligatory"?

Alireza Salehifar
PhD Candidate
University of Canterbury
Alireza.salehifar@pg.canterbury.ac.nz

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Whereas currently the OECD's Model Tax Convention, Commentaries and Guidelines are being broadly practised by many countries, there is no legal certainty regarding the extent to which they can constitute part of international tax law. To make it clear, even many non-OECD countries are applying the OECD's Model Tax Convention, Commentaries and Guidelines regularly. 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 is the only noticeable exception). As a result, these cross border tax norms are quickly disseminated beyond the OECD member states' jurisdictions. This raises the question of whether the OECD's Model Tax Convention, Commentaries and Guidelines may have a legitimising effect and to what extent they should be binding.

It might be argued that despite the widespread practice of both the OECD Member states and non-member states to conform 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 have not necessarily evolved into binding customary international law. However, if, due to the lack of *opinio juris*, we fail to prove that the OECD's Model Tax Convention, Commentaries and Guidelines have the status of customary international law, this absence might be remedied by recourse to some other principles of international law. To put it another way, this widespread practice by both the OECD Member states and non-member states might still have a legitimising effect if we consider the issue from different perspectives.

To make it clear, 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 practiced a norm regularly over time can be held to have acquiesced in those norms and practices (*acquiescence*). Even if there are some uncertainties regarding the parties' tacit acceptance of the OECD's Model Tax

Convention, Commentaries and Guidelines then they are deemed estopped or precluded from denying such acceptance due to their regular practices (*estoppel*). In the international arena these principles have specifically evolved to govern the 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 the matter, this contribution intends to clarify the extent to which legitimising international tax norms can emerge outside of the OECD's 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 inspiration or guidance.

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