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Broekhuijsen, D.M.

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A Modern Understanding of Article 31(3)(c) of the Vienna Convention (1969): A New Haunt for the Commentaries to the OECD Model?

Dirk M. Broekhuijsen ^[1]

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In this article, the author examines whether or not article 31(3)(c) of the Vienna Convention of the Law of Treaties (1969) may justify recourse to the OECD Commentary when interpreting tax treaties.

1. Introduction

Public international law has not been idle. Developments have taken place, in particular, in the law of treaties, where renewed interest in article 31(3)(c) of the Vienna Convention of the Law of Treaties (1969) (the “Vienna Convention”) ^[1] has arisen.

Article 31(3)(c) of the Vienna Convention (1969) provides that:

there shall be taken into account, together with the context... (c) any relevant rules of international law applicable in the relations between the parties.^[2]

This article is thought to embody the principle of systemic integration and has come to be referred to as the “master key” to the house of international law.

Considering the renewed understanding of article 31(3)(c) of the Vienna Convention (1969), this provision could be the method for evolutionary interpretation by reference to materials not having a strong connection with a particular treaty. ^[3] In this light, it might be worthwhile re-examining the position of the OECD Commentary ^[4] with regard to treaty interpretation. This article explores whether or not the application of article 31(3)(c) of the Vienna Convention (1969) can justify recourse to the OECD Commentary when interpreting tax treaties.

The scope of article 31(3)(c) of the Vienna Convention (1969) is the central theme of this article. First, the setting in which the renewed attention to article 31(3)(c) of the Vienna Convention (1969) has manifested itself is examined in section 2. Section 3. then considers the scope of operation of article 31(3)(c), when placed in this setting. In particular, section 3. explores the materials to which article 31(3)(c) of the Vienna Convention (1969) can justify recourse. Section 4. extrapolates this evidence to the interpretation of tax treaties. Section 5. concludes the discussion.

* LLM and PhD candidate, Tax Law Department, Leiden University, writing a dissertation supervised by Prof. F.A. Engelen and Dr S.C.W. Douma. The author would like to thank Prof. J.P. Boer, Dr J. Vleggeert and Dr S.C.W. Douma for their valuable comments. He can be contacted at d.m.broekhuijsen@law.leidenuniv.nl.

1. UN Vienna Convention of the Law of Treaties (23 May 1969), Treaties IBFD.

2. Article 31(3)(c) of the Vienna Convention (1969) was considered to be customary international law in DJ/FR: ICJ, 2008, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, ICJ Reports 177.

3. The idea that article 31(3)(c) of the Vienna Convention (1969) might accommodate the need to interpret a treaty in the light of the normative environment of the present day is not discussed in this article. However, the concept of dynamic treaty interpretation is gaining more and more ground in public international law. See, in particular, the following articles by M. Fitzmaurice: *Dynamic (Evolutive) Interpretation of Treaties: Part I*, 21 Hague Y.B. Intl. L. (2008) and *Dynamic (Evolutive) Interpretation of Treaties: Part II*, 22 Hague Y.B. Intl. L. (2009). See also CR/NI: ICJ, 2009, *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, IJC Reports 213.

4. Most recently, *OECD Model Convention on Income and on Capital: Commentary* (22 July 2010), Models IBFD.

2. Setting the Scene: Renewed Attention to Article 31(3)(c) of the Vienna Convention (1969)

The revival of interest in article 31(3)(c) of the Vienna Convention (1969) has arisen, in particular, following the publication of a report of the Study Group of the International Law Commission (ILC) on the fragmentation of international law (the “Fragmentation Report 2006”) and the International Court of Justice’s (ICJ) decision in *Oil Platforms* (2003). ^[5]

Before the renewed interest in article 31(3)(c) of the Vienna Convention (1969), the provision was considered to be uninteresting in respect of public international law, “at least as regards explicit reliance on it”. ^[6] Unsurprisingly, most tax scholars considered the effect of article 31(3)(c) of the Vienna Convention (1969) to be limited as far as the discussion on the status of the OECD Commentary is concerned, as this discussion took place before the publication of the Fragmentation Report (2006) and the decision in *Oil Platforms*. ^[7]

The main idea in the Fragmentation Report (2006) is that treaties are not to be applied and interpreted in a vacuum. A treaty has a normative environment, or “system” which cannot be ignored. Indeed: “all international law exists in a systemic relationship with other law” and, therefore, no treaty application can occur without placing the relevant instrument in its normative environment. Therefore, the instrument must always be interpreted and applied in the context of its normative environment. ^[8]

This principle, as expressed in article 31(3)(c) of the Vienna Convention (1969), is called the principle of systemic integration. It must be kept in mind when interpreting treaties. All that the principle requires is “the integration into the process of legal reasoning – including reasoning by courts and tribunals – of a sense of coherence and meaningfulness”. ^[9]

The principle of systemic integration, as embodied in article 31(3)(c) of the Vienna Convention (1969) was applied by the ICJ in *Oil Platforms*, where it was of pivotal importance. In an application to the ICJ, Iran contended that the destruction of three Iranian offshore oil platforms in the Persian Gulf by the US Navy constituted a breach of the provisions of the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States. The United States, on the other hand, asserted that it had had to take measures to protect its essential security interests, ^[10] and it could do so because it had the right to self-defence on the basis of article XX of the Treaty, which justified the use of force. In interpreting article XX of the Treaty, the ICJ stated:

[I]nterpretation must take into account “any relevant rules of international law applicable in the relations between the parties” (Art. 31, para 3 (c)). The Court cannot accept that Article XX, paragraph 1(d) of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force... The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation. ^[11]

To determine the interpretation of article XX of the Treaty, the ICJ found that reference to the provisions of the Charter of the United Nations as well as to the customary international law was justified. ^[12] On this basis, the ICJ concluded that the actions of the United States could not be justified by article XX of the Treaty.

5. ILC, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, A/CN.4/L.682 (2006), available at http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf (the ILC is a UN commission that promotes and develops public international law and its codification) and IR/US: ICJ, 2003, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Reports 161.

6. R. Gardiner, *Treaty Interpretation* p. 265 (OUP 2008).

7. Wattel and Marres held in 2003 that “post-treaty changes cannot be regarded as ‘relevant rules of international law’”. See P.J. Wattel & O.C.R. Marres, *The Legal Status of the OECD Commentary and Static or Ambulatory Interpretation of Tax Treaties*, 43 Eur. Taxn. 7, sec. 2.4.5. (2003), Journals IBFD. Ward and others have regarded article 31 Vienna Convention (1969) as being inadequate to deal with the *OECD Model: Commentary*. See D.A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model*, pp. 18-31 (IFA 2005).

8. ILC, *Fragmentation of International Law*, *supra* n. 5, at sec. 432.

9. *Id.*, at sec. 419.

10. Article XX, para. 1(d) of the Treaty states: “the present Treaty shall not preclude the application of measures ... necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests”.

11. *Case Concerning Oil Platforms* (2003), *supra* n. 5, at sec. 41.

12. *Id.*, at sec. 42.

This modern understanding of the operation of article 31(3)(c) of the Vienna Convention (1969) as a “master key to the house of international law” can best be explained by examining the place and position of article 31(3)(c) within the process of interpretation. It is there that the provision makes itself evident.

3. The Operation of Article 31(3)(c) of the Vienna Convention (1969)

3.1. The place of article 31(3)(c) of the Vienna Convention (1969) within the process of interpretation

Article 31(3)(c) of the Vienna Convention (1969) must be placed within the general rule of interpretation as embodied by article 31. It has a clear link with the other elements that article 31 of the Vienna Convention (1969) refers to and cannot be seen to act on a stand-alone basis. Indeed, article 31(3)(c) of the Vienna Convention (1969) operates in combination with the context, object and purpose and ordinary meaning of a treaty phrase. This is expressed by the general rule of interpretation that article 31 of the Vienna Convention (1969) provides. ^[13]

Article 31(3)(c) of the Vienna Convention (1969) has three basic requirements. It requires that the extraneous material is a relevant (1) rule of international law (2) that is applicable in the relations between parties (3). Although it is recognized that these three conditions constitute the main parameters which determine application of article 31(3)(c) of the Vienna Convention (1969), it is submitted that these parameters must be read as an integrated whole.

This relates to the fact that interpretation, as a justified heuristic process, does not follow strict formal rules. Instead, interpretation is the means by which a judge comes to a justifiable decision on the problem brought before him. This process consists of two phases. On the one hand, interpretation requires that a judge (or any other individual seeking to apply the law) must “find” the law’s true meaning. This, also referred to as the heuristic process, is often the “unconscious” or creative part of interpretation. However, the heuristic process may not lead to inventing the law. Therefore, at the same time, this heuristic process must be justified: the judge must account for the rule that underlies his decision. ^[14]

The heuristic and justification phases are closely linked: only those decisions which can be legitimately justified using standards that are accepted by others in the field can be used by judges. Alternatively, what cannot be logically found cannot be logically justified. ^[15]

It is submitted that it is within this process that article 31(3)(c) of the Vienna Convention (1969) has a role to play. Some solutions to interpretative problems can be found within close proximity of a treaty. These solutions are often justified by reference to a treaty’s language, context or object and purpose. Alternatively, other solutions, in particular those for questions that the treaty does not itself resolve, are provided by the normative environment of a treaty, which, under certain circumstances, simply cannot be ignored in the heuristic process.

In other words: in the latter situation, the other elements of article 31 of the Vienna Convention (1969), such as the treaty’s text, context and object and purpose, cannot provide the interpreter with an argument to take into account the normative environment of a treaty, which lies beyond the close proximity of an instrument. ^[16] In such a situation, recourse to article 31(3)(c) of the Vienna Convention (1969) may be made in order to proceed in a reasoned way. ^[17] Success or failure in this respect is measured by how others in the legal field view the solution. ^[18]

13. This follows from the ILC’s Commentaries on the *Vienna Convention* (1969): “Thus, article 27 is entitled ‘General rule of interpretation’ in the singular, not ‘General rules’ in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule”. See ILC, *Draft Articles on the Law of Treaties with Commentaries* p. 202 (1966), available at http://untreaty.un.org/ilc/texts/1_1.htm.

14. See, for instance, H.L.A. Hart, *The Concept of Law*, 2nd ed., p. 127 (Clarendon Press 1994). For another explanation on justification and heuristics, see C.E. Smith, *The Rhetoric of Justification*, in *The Rhetoric of Sincerity: Cultural Memory in the Present* (E.T. Alphen, M.G. van Bal & C.E. Smith eds., Stanford U. Press 2009).

15. Hart, *supra* n. 14, at p. 127.

16. ILC, *Fragmentation of International Law*, *supra* n. 5, at sec. 423.

17. See, for example, C. McLachlan, *The Principle of Systemic Integration and Article 31 (3)(c) of the Vienna Convention*, 54 Intl. & Com. L. Quart. 2 (2005); I. van Damme, *Some Observations about the ILC Study Group Report on the Fragmentation of International Law: WTO Treaty Interpretation against the Background of Other International Law*, 17 Fin. Y.B. Intl. L. (2006); P. Merkouris, *Article 31(3)(c) of the VCLT and the Principle of Systemic Integration* (QMUL 2010); and M. Samson, *High Hopes, Scant Resources: A Word of Scepticism about the Anti-Fragmentation Function of Article 31(3)(c) of the Vienna Convention on the Law of Treaties*, 24 Leiden J. Intl L. 3 (2011). In the field of international taxation, this principle has been discussed in an excellent article on the relationship between tax treaties and EU law. See F. Avella, *Using EU Law To Interpret Undefined Tax Treaty Terms: Article 31(3)(c) of the Vienna Convention on the Law of Treaties and Article 3(2) of the OECD Model Convention – The Case for an EU Approach to Beneficial Ownership and Other Tax Treaty Issues*, 4 World Tax J. 2 (2012), Journals IBFD.

As is shown in sections 3.2. and 3.3., there is evidence to support the view that article 31(3)(c) of the Vienna Convention (1969) can justify recourse to both binding and non-binding norms that make up the normative environment of a treaty.

3.2. Justification in article 31(3)(c) of the Vienna Convention (1969) for recourse to the binding normative environment of a treaty

It is clear from the ICJ decisions as well as from the opinions of most authors that article 31(3)(c) of the Vienna Convention (1969) justifies recourse to *binding* relevant rules of international law external to a treaty in all cases.

Scholars agree that “any relevant rules of international law” include rules deriving from any formal source of public international law, such as an international agreement, a rule of customary international law or a general principle of international law. ^[19]

That article 31(3)(c) of the Vienna Convention (1969) refers to *binding* rules of international law was confirmed by the ICJ in *Oil Platforms*. Additionally, in the case *Mutual Assistance in Criminal Matters* (2008), the ICJ considered that the 1977 Treaty of Friendship and Cooperation could bear on obligations of another treaty in force between the same parties: the 1986 Convention on Mutual Assistance in Criminal Matters. In this respect, the ICJ reasoned that:

In the view of the Court, Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties... is pertinent as regards this matter.... The provisions of the 1977 Treaty of Friendship and Co-operation are “relevant rules” within the meaning of article 31, paragraph 3 (c), of the Vienna Convention.... [the 1986 Convention] must nevertheless be interpreted and applied in a manner which takes into account the friendship and co-operation which France and Djibouti posited as the basis of their mutual relations in the Treaty of 1977. ^[20]

In conclusion, it is clear that article 31(3)(c) of the Vienna Convention (1969) enables courts, when interpreting treaties, to refer to the *binding* norms of public international law that make up the normative environment of a treaty.

However, as the guidance set out in the OECD Commentary is soft law, ^[21] a more thought-provoking question arises: is it also possible that article 31(3)(c) of the Vienna Convention (1969) refers to the non-binding materials that make up the normative environment of a treaty?

3.3. Justification in article 31(3)(c) of the Vienna Convention (1969) for recourse to the non-binding normative environment of a treaty

3.3.1. The current debate

Whether or not non-binding materials may legitimately influence interpretation through article 31(3)(c) of the Vienna Convention (1969) is still open to debate. ^[22]

The main argument for the possibility of recourse to non-binding materials under article 31(3)(c) of the Vienna Convention (1969) in the interpretation of treaties is advanced by Bruno Simma, a former ICJ judge. Simma and Kill (2009) consider that, as article 31(3)(c) of the Vienna Convention (1969) does not use the term “in force” or “binding” but, rather, “applicable” with regard to the “rules” at hand, flexibility is allowed in the interpretation of article 31(3)(c). ^[23] Whereas the concept of “binding” introduces a precise legal content, the concept of “applicability” does not. Indeed, article 31(3)(c) of the Vienna Convention (1969) should not be interpreted too narrowly and, perhaps, includes non-binding rules. ^[24]

18. ILC, *Fragmentation of International Law*, *supra* n. 5, at secs. 419-420.

19. M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 433 (Nijhoff 2009); Gardiner, *supra* n. 6, at pp. 267-268; McLachlan, *supra* n. 17, at pp. 290-291; and ILC, *Fragmentation of International Law*, *supra* n. 5, at secs. 425-426.

20. *Certain Questions of Mutual Assistance in Criminal Matters* (2008), *supra* n. 2, at secs. 112-113.

21. That the *OECD Model: Commentary* can be considered to be soft law is set out in K. Vogel et al., *Klaus Vogel on Double Taxation Conventions* Introduction, 3rd ed., sec. 80 (Kluwer L. Intl. 1997).

22. Gardiner, *supra* n. 6, at p. 268.

23. B. Simma & T. Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology?* in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, pp. 697-698 (C. Binder et al. eds., OUP 2009). See also J. Arato, *Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law*, 37 Brooklyn J. Intl. L. 2, p. 131 (2011).

24. Simma & Kill, *supra* n. 23, at p. 696.

This approach conforms to the position of article 31(3)(c) of the Vienna Convention (1969) in the process of interpretation. Article 31(3)(c) of the Vienna Convention (1969) can be used to justify recourse to the normative environment of a treaty when the heuristic process leads the interpreter to consider this external material and no other interpretive means can justify such a course of action.

Nevertheless, other authors are cautious with regard to the scope of article 31(3)(c) of the Vienna Convention (1969) in relation to non-binding materials. Specifically, Orakhelashvili (2008) considers that article 31(3)(c) of the Vienna Convention (1969):

covers only established rules of international law, to the exclusion of principles of uncertain or doubtful legal status, so-called evolving legal standards, policy factors or more generally related notions.^[25]

Villiger (2009) holds that “the term ‘applicable’ leaves no room for doubt: *non*-binding rules cannot be relied upon”.^[26] However, as Simma and Kill (2009) note, these authors fail to address the issue of “applicability” *as such*: when textually analysed, the term “*applicable*” allows for more flexibility than “in force” or “binding” would. Undeniably, none of these authors have critically addressed the potential relevance of the term.^[27]

The decisions of the European Court of Human Rights (ECtHR) also support the ideas advocated by Simma and Kill (2009). These decisions show that the approach adopted by Simma and Kill (2009) is not only a hypothetical possibility, but that it is also used in practice. The course set by the ECtHR is exemplary with regard to the use of article 31(3)(c) of the Vienna Convention (1969) in referring to non-binding norms external to a treaty.^[28]

3.3.2. ECtHR practice in referring to the non-binding normative environment of treaties on the basis of article 31(3)(c) of the Vienna Convention (1969)

Indeed, the ECtHR has made use of article 31(3)(c) of the Vienna Convention (1969) to refer to both binding as well as non-binding norms.^[29] In that regard, the ECtHR “marches far beyond the border of the list of [formal sources of international law]” as codified in the statute of the ICJ. This is evidence of the breadth of the possible application of article 31(3)(c) of the Vienna Convention (1969).^[30]

The most illustrative demonstration of the ECtHR’s reliance on non-binding materials through article 31(3)(c) of the Vienna Convention (1969) is the landmark case of *Demir and Baykara v. Turkey* (2008).^[31] This case concerned a civil service trade union that had entered into a collective agreement with a Turkish municipality. The agreement was breached by the municipality and declared defunct by the Turkish courts. Members of the union complained to the ECtHR that

25. A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* p. 366 (OUP Press 2008).

26. Villiger, *supra* n. 19, at p. 433.

27. Simma & Kill, *supra* n. 23, at pp. 696-697.

28. Although the ECtHR has decided the most exemplary cases, decisions of other judicial bodies also provide evidence that the non-binding normative environment of a treaty is to be included in treaty interpretation. With regard to case law of the World Trade Organization (WTO) Appellate Body, see *US Shrimp: United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report 1998 (WT/DS58/AB/R) where the term “exhaustible natural resources” was interpreted by making use of similarly worded provisions of other treaties, such as the UN Convention on the Law of the Sea. The treaties relied on by the Appellate Body were not signed by all parties to the dispute and thus not binding on them. Additionally, one of the judges on the Permanent Court of Arbitration (PCA) has considered in a dissenting opinion that a non-binding treaty was informative in the interpretation of a treaty article: “Contrary to the majority I conclude that the Aarhus Convention falls within the definition of applicable law and Article 31(3)(c) of the Vienna Convention as a legal source that possesses some normative and evidentiary value to the extent that regard may be had to it to inform and confirm the content of the definition of information contained in Article 9(2) of the OSPAR Convention”. See IE/UJK: PCA, 2 July 2003, Dissenting Opinion of Judge Griffith QC, *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)* p. 19, available at http://untreaty.un.org/cod/riaa/cases/vol_XXIII/59-151.pdf.

29. The Vienna Convention (1969) is a starting point in interpretation for the ECtHR, “which over time seems to have become a complementary tool in the interpretative process”. See M. Forowicz, *The Reception of International Law in the European Court of Human Rights* p. 24 (OUP 2010). For more information on the ECtHR’s mechanism of treaty interpretation, see H. Golsong, *Interpreting the European Convention of Human Rights Beyond the Confines of the Vienna Convention on the Law of Treaties*, in *The European System for the Protection of Human Rights* (R.S.J. Macdonald et al. eds., Martinus Nijhoff 1993); T. Barkhuysen & M.L. van Emmerik, *Ongebonden binding: Verwijzing naar soft law-standaarden in uitspraken van het EHRM*, 35 NJCM-Bull. 7, p. 829 (2010); and D. Rietiker, *The Principle of “Effectiveness” in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty Sui Generis*, 79 Nordic J. Intl. L. 2, pp. 271-275 (2010).

30. Arato, *supra* n. 23, at p. 376.

31. TR: ECtHR, 12 Nov. 2008, *Demir and Baykara v. Turkey*, Judgement No. 34503/97. For a discussion on the ECtHR’s use of soft law in this case, see Arato, *supra* n. 23, at pp. 365-371.

this was in violation of article 11 (freedom of assembly and association) of the European Convention of Human Rights (ECHR).

The ECtHR considered this argument and held that, on the basis of article 31(3)(c) of the Vienna Convention (1969), it was obliged to take into account other relevant rules and principles of international law.^[32] Therefore:

[W]hen [the Court] considers the object and purpose of the Convention provisions, it also takes into account the international law background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty.^[33]

In addition:

The consensus emerging from specialised international instruments... may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.^[34]

In deciding whether or not Turkey had breached its obligations under article 11 of the ECHR as it had completely neglected the collective agreement, the ECtHR relied on: soft law materials of the International Labour Organization (ILO), an international organization with which the ECtHR has no institutional connection whatsoever;^[35] European Union recommendations; the European Social Charter, which is not ratified by Turkey; and the interpretations attributed to this charter by the Charter's Committee of Independent Experts.^[36]

Thus, the ECtHR in *Demir and Baykara* did not have any problems invoking the normative non-binding environment of the ECHR when interpreting the ECHR.

There are other cases in which the ECtHR has cited international non-binding materials on the basis of article 31(3)(c) of the Vienna Convention (1969). In *Saadi v. United Kingdom* (2008), the ECtHR invoked article 31(3)(c) of the Vienna Convention (1969) in order to be able to rely on soft law materials such as United Nations High Commissioner for Refugees (UNHCR) guidelines, Council of Europe recommendations and a recommendation of the UN Working Group on Arbitrary Detention.^[37]

Similarly, in *Al-Adsani v. The United Kingdom* (2001),^[38] the ECtHR invoked article 31(3)(c) of the Vienna Convention (1969) so as to be able to rely on rules of state immunity, as “the Convention cannot be interpreted in a vacuum”.^[39] Thus, it referred to the Universal Declaration of Human Rights (a statement of governments and not part of binding international law) as well as to a decision of the International Criminal Tribunal for the Former Yugoslavia.^[40]

In these cases, the ECtHR explicitly referred to article 31(3)(c) of the Vienna Convention (1969) to rely on the non-binding normative environment of a treaty.

There are also cases of the ECtHR where authors presume that the ECtHR indirectly resorted to article 31(3)(c) of the Vienna Convention (1969).^[41] For instance, in *Öneryildiz v. Turkey* (2004),^[42] a case regarding the explosion of an Istanbul scrap yard, which resulted in several casualties, the ECtHR relied on various non-binding instruments of the

32. *Demir and Baykara v. Turkey* (2008), *supra* n. 31, at sec. 67.

33. *Id.*, at sec. 76.

34. *Id.*, at sec. 85.

35. *Id.*, at secs. 101-102. See also Arato, *supra* n. 23, at p. 377.

36. *Demir and Baykara v. Turkey* (2008), *supra* n. 31, at secs. 45-51 and 103-105.

37. UK: ECtHR, 29 Jan. 2008, *Saadi v. The United Kingdom*, Judgement No. 13229/03, secs. 29-37. The ECtHR held that it “must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties” (secs. 62 and 65).

38. UK: ECtHR, 21 Nov. 2001, *Al-Adsani v. United Kingdom*, Judgement No. 35763/97.

39. *Id.*, at sec. 55.

40. *Id.*, at sec. 60.

41. See A. Mowbray, *The Creativity of the European Court of Human Rights*, 5 Human Rights L. Rev. 1 (2005) and F. Ost, *The Original Canons of Interpretation of the European Court of Human Rights*, in *The European Convention for the Protection of Human Rights: International Protection Versus National Restriction* p. 288 (M. Delmas-Marty ed., Martinus Nijhoff Publishers 1992).

42. TR: ECtHR, 30 Nov. 2004, *Öneryildiz v. Turkey*, Judgement No. 48939/99.

Council of Europe to construct the extent of the obligations of the government of Turkey under article 2 of the ECHR. ^[43] Additionally, in the case of *Oluic v. Croatia* (2012), the ECtHR interpreted article 8 of the ECHR (private and family life) by making use of the non-binding “Guidelines for Community Noise” issued by the World Health Organization (the applicant in the case lived over a noisy café against which the government had failed to take action). ^[44]

4. Justifying Recourse to the OECD Commentary on the Basis of Article 31(3)(c) of the Vienna Convention (1969)

The cases mentioned in section 3.3.2. show that it is possible to justify recourse to the non-binding normative environment of a treaty by virtue of article 31(3)(c) of the Vienna Convention (1969). Can this evidence be extrapolated to the interpretation of tax treaties, and, in particular, to the interpretation of tax treaties by means of the OECD Commentary?

A positive answer to this question would be consistent with the concept that, where appropriate, rules not strictly related to the treaty in question should be included in judicial decisions to give due regard to the normative environment of a treaty. This recognition has also arisen outside the case law of the ECtHR and the ICJ. ^[45] Central themes to this development are: the unification and the harmonization of international legal systems. These themes are also central to the avoidance of double (non-)taxation.

Nevertheless, the evidence taken from case law of the ECtHR can, perhaps, not be directly extrapolated to the interpretation of tax treaties. That the ECtHR uses article 31(3)(c) of the Vienna Convention (1969) does not always mean that this article can be relied on under other treaties so as to interpret those treaties in accordance with non-binding norms. Gardiner (2008), for instance, holds that the broad potential attributed by the ECtHR to article 31(3)(c) of the Vienna Convention (1969) is not to be taken as something that applies automatically to treaties in general. ^[46]

The main argument here is that the ECHR has the character of a constitution which gives effect to moral standards. These standards require a flexible approach to treaty interpretation in order to protect them under varying circumstances. Therefore, the ECHR opens the door to a more far-reaching approach to treaty interpretation than would be possible under treaties that are reciprocal in nature. ^[47]

An additional argument against extrapolating such evidence to tax treaties is that judges are somewhat restricted to introduce non-binding rules to interpretation through “the back door” that article 31(3)(c) of the Vienna Convention (1969) provides for. ^[48] This argument is closely related to the concept of state sovereignty and, in particular, to the consent of treaty parties, which plays a role in the generation of international legal obligations.

Nevertheless, it is clear that within the jurisdictions of OECD member countries, the OECD Commentary is a widely used guide in the interpretation of tax treaties: it is submitted that the OECD Commentary is in many cases clearly part of the heuristic process. ^[49] Moreover, considering the numerous efforts of authors to give the OECD Commentary the position within one of the rules of interpretation of the Vienna Convention (1969) it “deserves” ^[50] and considering the lack

43. Id., at secs. 59 and 71.

44. HR: ECtHR, 20 May 2012, *Oluic v. Croatia*, Judgement No. 61260/08, at secs. 29-30. See also Barkhuysen & Van Emmerik, *supra* n. 29, at pp. 833-834.

45. See, for instance, D. French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 Intl. & Com. L. Quart. 2, p. 302 (2006) and McLachlan, *supra* n. 17, at p. 280.

46. Gardiner, *supra* n. 6, at p. XXV. See also H. Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989: Part Three*, 62 Brit. Y.B.b Intl. L., p. 58 (1991). Villiger, *supra* n. 19, at p. 433, concludes that “the term ‘applicable’ leaves no room for doubt: non-binding rules cannot be relied upon”.

47. See Fitzmaurice, *Part II*, *supra* n. 3, at pp. 15-16 and Barkhuysen & Van Emmerik, *supra* n. 29, at pp. 834-835. For more information on the distinction, see M. Craven, *Legal Differentiation and the Concept of the Human Rights Treaty in International Law*, 11 Eur. J. Intl. L. 3 (2000).

48. For this argument, see IR/US: 2003, ICJ, Separate Opinion of Judge Buergenthal, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Reports 270, sec. 28.

49. Numerous court decisions from OECD member countries can be mentioned to substantiate this claim. See, for example, AU: HCA, 1990, *Thiel v. Federal Commissioner of Taxation*, 171 CLR 338, Tax Treaty Case Law IBFD; NL: HR, 2 Sep. 1992, no. 27525, BNB 1992/379; UK: Special Commissioners, 2005, *UBS AG v. Revenue and Customs Commission*, 7 ITLR 893, SpC 480, Tax Treaty Case Law IBFD; CA: FCA, 2009, *Prévost Car Inc. v. R.*, 11 ITLR 757, (2009) FCA 57, Tax Treaty Case Law IBFD; and NO: SC, 2011, *Dell Products (NUF) v. Tax East*, 14 ITLR 371, HR-2011-2245-A, Tax Treaty Case Law IBFD. Moreover, the OECD itself recognizes that the *OECD Model: Commentary* is a widely accepted guide for taxpayers, administrations and courts in the interpretation of tax treaties. See para. 29, Introduction, *OECD Model* (2010).

50. K. Vogel, *The Influence of the OECD Commentaries on Treaty Interpretation*, 54 Bull. Intl. Fisc. Doc. 12 (2000), Journals IBFD; Wattel & Marres (2003), *supra* n. 7; F. Van Brunschot, *The Judiciary and the OECD Model Tax Convention and its Commentaries*, 59 Bull. Intl. Fisc. Doc. 1 (2005), Journals IBFD; Ward et al., *supra* n. 7; and S. Douma & F.A. Engelen eds., *The Legal Status of the OECD Commentaries* (IBFD 2008).

of undisputed and available methods in justifying reliance on the OECD Commentary,^[51] the evidence of a legitimate recourse to external, non-binding norms on the basis of article 31(3)(c) of the Vienna Convention (1969) can supply tax courts with a possible method of justification when these courts rely on the OECD Commentary in the construction of tax treaty obligations.^[52] If other interpretative means (i.e. text, context, object and purpose) do not offer a suitable method for reliance on the OECD Commentary, article 31(3)(c) of the Vienna Convention (1969) at least provides an opportunity to proceed in a reasoned way. Any form of justification is surely better than none.

The concept that article 31(3)(c) of the Vienna Convention (1969) could function so as to legitimately justify recourse to the OECD Commentary might particularly hold true in a situation where the tax treaty being interpreted is in conformity with the OECD Model and where the treaty parties are OECD member countries. The former circumstance could function as an argument that says something about the OECD Commentary's "relevance" in the interpretation of a tax treaty. If a tax treaty is based on the OECD Model, this clearly signals the existence of a contextual connection between the OECD Commentary and the interpretative problem under a provision of the tax treaty.^[53] The latter circumstance could perhaps function as an argument for the OECD Commentary's "applicability in the relations between parties". This relationship is possibly best expressed by the OECD recommendation in which the OECD advocates to its members, the practice of using the guidance set out in the Commentary. None of the OECD member countries have objected to this practice.^[54]

5. Conclusions

In conclusion, when the context of article 31(3)(c) of the Vienna Convention (1969) is considered (which particularly involves the Fragmentation Report 2006, the case of *Oil Platforms* and the case law of the ECtHR), it seems plausible to give an interpretative argument on the basis of article 31(3)(c) in order to justify recourse to the non-binding normative environment of a treaty.

Considering the unique position of the OECD Commentary – it is clearly part of the heuristic process of courts of OECD jurisdictions when interpreting tax treaties – reliance on article 31(3)(c) of the Vienna Convention (1969) may prove to be an acceptable and legitimate way to justify recourse to the OECD Commentary. This might particularly hold true when the OECD Commentary is used to interpret a tax treaty that follows the OECD Model and where the tax treaty is concluded between two OECD member countries. In any case, article 31(3)(c) of the Vienna Convention (1969) provides an opportunity to proceed in a reasoned way if an interpretative argument on (one of the other) elements of article 31 proves to be unsuccessful.

However, it has to be kept in mind that arguments exist to the effect that the evidence of the ECtHR's broad application of article 31(3)(c) of the Vienna Convention (1969) works only under human rights treaties. Moreover, article 31(3)(c) of the Vienna Convention (1969) gives rise to the problem of norms being introduced in interpretation that are not explicitly consented to by parties. With regard to these objections, the development of the issues underlying article 31(3)(c) of the Vienna Convention (1969) might be able to clarify the functioning of article 31(3)(c) in the future.

Nevertheless, it seems that a modern understanding of article 31(3)(c) of the Vienna Convention (1969) is fully equipped to function as a key to the door of the OECD Commentary's new home within the realm of international taxation.

51. Some authors consider the influence of the interpretative rules of the *Vienna Convention* (1969) to be of minor influence when using the *OECD Commentary* in the interpretation of tax treaties. See Ward et al., *supra* n. 7.

52. *OECD Model: Commentary* has been relied upon on the basis of art. 31(3)(c) *Vienna Convention* (1969) in CA: TCC, 2006, *MIL (Investments) S.A. v. Canada*, 9 ITLR 25, (2006) TCC 460, Tax Treaty Case Law IBFD: "Article 31(1)(c) of the Vienna Convention states 'there shall be taken into account, together with the context, any relevant rules of international law applicable in the relations between the parties.' I interpret that to mean that one can only consult the OECD commentary in existence at the time the treaty was negotiated without reference to subsequent revisions". It has to be noted that the Court referred to article 31(1)(c), but must have meant article 31(3)(c) of the *Vienna Convention* (1969).

53. See U. Linderfalk, *On the Interpretation of Treaties: the Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* p. 262. (Springer 2007), who holds that a "relevant" rule is a rule that "governs the state of affairs in relation to which the interpreted treaty is examined". An exception to this argument could occur when it is clear that one of the parties has filed a reservation to the *OECD Model* or an observation on a paragraph of the *Commentary* with respect to a particular interpretative problem.

54. OECD, *Council Recommendation*, 23 Oct. 1997, C(97)195/FINAL. The recommendation does not mention an abstention by any of the OECD member countries. Should any of the OECD member countries have abstained, this would have been noted in one of the footnotes.