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Are the OECD and UNCTAD Codes Legally Binding?

Organization for Economic Cooperation and Development ("OECD")

There is considerable controversy as to when a code adopted by an international organization becomes legally binding. This article considers the question as it relates to actions of the OECD and UNCTAD.

The Convention establishing the OECD[1] included among its objectives the achievement of the highest sustainable economic growth and employment, a rising standard of living, and expansion of world trade. In pursuit of these aims, OECD members agreed to promote the efficient use of their economic resources, to pursue policies designed to achieve economic growth and internal and external financial stability, to avoid developments which might endanger their economies or those of other countries, and to pursue efforts to reduce or abolish obstacles to the exchange of goods and services. The Members agreed to furnish information, consult, cooperate, and, where appropriate, take coordinated actions.

The Convention provides that the OECD can "take decisions which, except as otherwise provided, shall be binding on all the Members" and that "no decision shall be binding on any Member until it has complied with the requirements of its own constitutional procedures." Decisions must be unanimous. When a Member abstains, a decision will not apply to it.

The United States Senate consented to the ratification of the OECD Convention "with the interpretation and explanation of the intent of the Senate that nothing in the Convention . . . confers any power on the Executive to bind the United States to substantive matters beyond what the Executive now has, or to

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[1]12 U.S.T. 1728, December 14, 1960, [1961] T.I.A.S. No. 4891.

bind the United States without compliance with applicable procedures imposed by domestic law."[2]

In the hearings prior to ratification, Secretary of the Treasury Dillon, referring to OECD "decisions" said, "while they are called decisions, they really are not decisions in the sense of the word that they are binding on a country until such time as a country agrees, in accordance with its constitutional procedures, that it wants to be bound."[3]

To this Undersecretary of State for Economic Affairs George W. Ball added:

> Let us suppose that the Congress had appropriated to the President of the United States some funds to promote tourism in the United States, and the OECD council met and voted unanimously to set up a group which would engage in tourist promotion . . . I would submit to you, sir, that . . . if the President has the power by Congress to act in a certain circumstance, and has the funds appropriated, then he can act, and he can agree with other nations to act in concert with them on something, unless there is something that precludes it. What this convention does is to establish a mechanism by which there can be consultation, and by which those agreements can be worked out, and that is all it does. It does not convey a single iota of additional power.[4]

Recently issued OECD guidelines do not purport to be anything other than voluntary guidelines addressed by OECD's member countries to multinational enterprises operating in their territories.[5]

United Nations Conference on Trade and Development ("UNCTAD")

The Charter of the United Nations places responsibility for international economic matters in the General Assembly and, under its authority, in the Economic and Social Council ("ECOSOC").[6] In 1962 a United Nations Conference on Trade and Development was convened.[7] Key items on its agenda were an increase in the trade of developing countries, financing such international trade, and establishing and stabilizing remunerative prices for primary commodities.[8] Subsequently, on December 30, 1964, a General Assembly resolution established UNCTAD as an organ of the General Assembly[9] and empowered it to formulate and promote principles and policies on international trade and development, to make proposals to effectuate those

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[2]*Id.* at 1751.

[3]*Hearings Before the Com. on Foreign Relations, U.S. Senate, on the Organization for Economic Cooperation and Development* (1961), at p. 23.

[4]*Ibid.*, p. 220.

[5]Declaration on International Investment and Multinational Enterprises, June 21, 1976, OECD.

[6]Charter, Articles 60 to 72.

[7]ECOSOC Resolution 917, 8/3/62.

[8]Assembly Resolution 1785 (XVII), 12/8/62.

[9]Assembly Resolution 1995 (XIX).

principles and policies, to review and facilitate coordination in trade and development matters with other United Nations and United Nations related bodies, to initiate negotiation and adoption of multilateral legal instruments in the field of trade, and to be a center for harmonizing governmental trade and development policies.

The common understanding at the inception of UNCTAD was that its actions could not be binding. In his address to the opening of UNCTAD's Third Session (Santiago, Chile, April 13, 1972), the Secretary-General said, "UNCTAD has no power whatsoever to enforce its recommendations and decisions. The executive power is elsewhere. It rests with governments."[10]

At the same Session, the Group of 77 (the lesser developed countries) submitted a draft resolution calling for adoption of a "charter of the economic duties and rights of States" because "the Principles adopted at the first session of the Conference governing international trade relations and trade policies conducive to development were no longer sufficient to protect weaker countries against foreign economic power. The principles had to be converted into internationally legal instruments in order to make it possible for the Governments of the countries concerned to invoke their rights."[11]

UNCTAD has pressed for adoption of codes of conduct. For example, the UNCTAD Resolution[12] on a Code of Conduct for the Liner Conference System resolved that there was an urgent need for adopting and implementing a universally acceptable code of conduct for liner conferences, and requested the General Assembly to convene a conference of plenipotentiaries to adopt a code to be adopted by the Governments of all countries, and to be implemented in a manner that is binding on them and suitably enforceable. The resolution further requested that the General Assembly establish a preparatory committee to draft a multilateral legal instrument on the code.

No UNCTAD resolution or other action nor any treaty, agreement or code formulated by UNCTAD has purported to have binding force in the absence of the traditional requirement of international law, the consent of the parties.

The Binding Effect as International Law of an OECD or UNCTAD Code Embodied in a Treaty or Convention

The extent to which treaties expand the body of international law is a subject which has been receiving increased attention. A nation is generally not considered to be bound by a treaty until it has expressed its consent to be bound.[13] However,

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[10]TD/151.
[11]TD/180, Vol. 1, p. 35.
[12]66(III), 5/19/72.
[13]Article 2, par. 1(g) of the 1969 Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf.

the International Court of Justice in the *North Sea Continental Shelf Cases*[14] found that the Continental Shelf Convention expressed the concept of the continental shelf that had become part of general international law.[15] Judge Tanaka's dissent explained that "The Geneva Convention of 1958 on the Continental Shelf, first *lex ex contractu* among the States parties, has been promoted by the subsequent practice of a number of other States through agreements, unilateral acts and acquiescence to the law of the international community which is nothing else but world law or universal law."

The Court recognized that by clearly setting forth previously unclear legal principles, provisions in treaties can have "a fundamentally norm-creating character such as could be regarded as forming the basis for a general rule of law."[16] Of course, where a provision in a treaty sets forth a widely accepted principle of customary international law, then that provision is to be regarded as declaratory of accepted law and, as such, binding on nations that have not accepted the treaty.

The Binding Effect as International Law of a Code Embodied in a United Nations General Assembly Resolution

Article 11 of the United Nations Charter provides that the General Assembly may "consider the general principles of cooperation in the maintenance of international peace and security" and "discuss any questions relating to the maintenance of international peace and security." But Article 11(a) provides that "[A]ny . . . question (of international peace and security) on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion."[17]

It has been the view of the United States that under the United Nations Charter the General Assembly may discuss and make recommendations, but it is not a lawmaking body and its resolutions, no matter how solemnly expressed or characterized, nor how often repeated, do not make law or have binding effect.[18] The contrary view is that the General Assembly produces norms that functionally

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39/11 Add.2: "party means a State which has consented to be bound by the treaty and for which the treaty is in force."

[14]Judgment of Feb. 20, 1969 (Fed. Rep. of Germany/Denmark; Fed. Rep. of Germany/Netherlands), 1969 I.C.J. Rep. 3.

[15]The Court voted 11 to 6, and only six judges were directly associated with the Judgment.

[16][1969] I.C.J. Rep. 3, at 43.

[17]Article 25 of the Charter provides that "The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

[18]G.W. Haight, *The New International Economic Order and the Charter of Economic Rights and Duties of States*, 9 INT'L LAW. 591 (Fall, 1975).

operate as law, even though they are not formally binding. "There is discernible a trend from consent to consensus as the basis of international legal obligations," and certain General Assembly resolutions can be said to express a consensus of the world community on specific issues.[19] According to this view the conditions which a General Assembly resolution must meet in order to express a consensus of the world community and be a source of customary international law are that structurally it have a generality of language and a declaratory format, that it be adopted overwhelmingly with the support of all major powers and groups, and that there be some pattern of support for the resolution after its adoption.

Professor Jorge Castaneda, formerly Chief Director in the Mexican Ministry of Foreign Affairs, considers that the General Assembly can and does make binding decisions. He views "the transitional phase that sometimes precedes the creation of international . . . law, in which there is already an awareness that changing needs and situations call for new solutions" as a phase when a catalyst such as an International Court of Justice decision "can hasten the birth of new law."[20] There is, he asserts, no clear demarcation between legislative and judicial functions in international law. "Customary rules and general principles of law are not vested with any formal . . . sign that . . . proves their existence. In many cases, the distinction between creation of new law and recognition of pre-existent laws, as essentially distinct acts, loses much of its meaning and importance."[21]

Custom has accepted that recommendations in the form of resolutions are appropriate General Assembly actions, such as the Uniting for Peace Resolution and the Congo Resolution urging Members to provide military forces in Korea and the Congo. From this, he argues that those resolutions had binding force temporarily to suspend the Charter obligation of United Nations members to refrain from the use of force against any state.[22] "An Assembly resolution can be proof that a customary rule is no longer one. If the majority of members . . . reject . . . a customary rule, it is evident that that rule lacks the element of *opinio juris.*"[23]

A review of the *travaux préparatoires* to the United Nations charter would appear to indicate that only decisions of the Security Council on matters that are a "threat to the peace", as provided in Article 39 of the Charter, were considered to be binding on the Members.[24] It is doubtful that those matters

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[19]R.A. Falk, *On the Quasi-Legislative Competence of the General Assembly,* 60 A.J.I.L. 782 (1966).

[20]LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS (1969).

[21]*Ibid.* at 39.

[22]*Ibid.* at 108 and 109; U.N. Charter Art. 2(4).

[23]*Id.* at 171.

[24]GOODRICH & HAMBRO, CHARTER OF THE UNITED NATIONS 293 (3d ed. 1969).

which would be covered by an OECD or UNCTAD code would be considered as subjects of that nature.

The Effect on United States Law of an OECD or UNCTAD Code

There are three probable methods by which a United States court could be called upon to test the binding nature, or legal enforceability, of an OECD or UNCTAD code: (1) a direct enforcement action by the OECD or United Nations, or an agency or organ of either of them, (2) a suit by private parties claiming rights under a code, or (3) United States Government action to enforce a code. So far as judicial proceedings by a United Nations organ are concerned, under the United Nations Participation Act of 1945,[25] the organization has been designated by Executive Order as entitled to the privileges, including access to the courts, conferred by the International Organization Immunities Act.[26]

On the other hand, as noted above, it appears that the OECD could not enforce any code it adopted on the United States or its citizens, unless the code had been adopted in accordance with United States constitutional procedures. Therefore, a United States court should hold that any OECD code or guideline is voluntary and not self-executing.

With respect to the standing of private individuals to claim rights under United States treaty obligations (pursuant to which a code might be alleged to be self-executing under United States law), there have been some recent decisions on the rights of private litigants claiming directly or indirectly under the United Nations Charter. The first of these, *Diggs v. Schultz,*[27] involved an action for declaratory and injunctive relief in respect of the withdrawal (and possible violation of the United Nations Charter) by the United States from the embargo ordered by the United Nations on trade with Rhodesia. It held that no tenable claim existed because Congress had the power to enact a statute which detached the United States from the boycott which had been implemented by Executive Orders.

Subsequently, in *Saipan v. U.S.,*[28] an action to enjoin implementation of a lease on public land located in the Trust Territory of the Pacific Islands in alleged violation of the United Nations Charter duties of trustees of trust territories, it was held that citizens of the Trust Territory had legal rights under the Trusteeship Agreement between the United States and the United

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[25]59 Stat. 620, *as amended,* 22 U.S.C. § 287 *et seq.*
[26]22 U.S.C. § 288(a).
[27]470 F.2d 461 (D.C. Cir. 1972), *cert. denied,* 411 U.S. 931 (1973).
[28]502 F.2d 90 (9th Cir. 1974).

Nations which could be asserted and judicially enforced.[29] However, it was the codification of the Trusteeship Agreement as the basic constitutional document of the Trust Territory that made the plaintiff's rights judicially enforceable.

A recent case on standing of private individuals to claim rights under United States treaty obligations, *Diggs v. Deut,*[30] involved an attempt to block permits under the Marine Mammal Protection Act of 1972 which would have been in alleged violation of the United Nations Charter and Security Council Resolutions 276 (1970) and 301 (1971) condemning importation by member states of goods from Namibia. It was held that the plaintiffs had standing to sue, but that no vested rights existed which they could assert in court because the United Nations Charter is not self-executing.

Enforcement of an OECD or UNCTAD Code as International Law

Early in United States history, a decision written by Mr. Justice Story held piracy to be a capital offense under international law enforceable by the United States and by its courts even though the offense was committed outside the territorial waters of the United States and neither the pirate ship, the target ship, the pirates nor the victims were American nationals.

> The crime of piracy is defined by the law of nations with reasonable certainty [as] ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law . . . And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offense against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offense is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment.[31]

Describing the development of international law from the former establishment of frontier boundaries at the geographic middle of rivers to the current establishment at the Thalweg (middle of the shipping channel), Mr. Justice Cardozo wrote,

> Treaties almost contemporaneous, which were to be followed by a host of others, were declaratory of a principle that was making its way into the legal order. International law . . . at times, like the common law . . . [has] a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its jural quality.[32]

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[29]Trusteeship Agreement for the former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301 [1947]; T.I.A.S. No. 1665.

[30]No. 74-1292 (D.C. D.C. 5/13/75) (memorandum decision reported at 14 *I.L.M.* 797 (1975)).

[31]United States v. Smith, 5 Wheat (U.S.) 153, 158 (1820).

[32]New Jersey v. Delaware, 291 U.S. 363, 381 (1933).

Conclusions

If an OECD or UNCTAD code or guideline were so universally accepted as to rise to the level of international custom having the force of international law, that could result in the code becoming enforceable in the United States as a part of international law. But the nations of the world do not universally agree on most subjects that an OECD or UNCTAD code could cover. Neither privately owned corporations such as most multinational enterprises, nor private ownership rights such as the right to require payment of royalties for the use of proprietary technology, nor a competitive economic system such as the OECD favors[33] is customarily regarded as desirable by all, or almost all, the nations of the world.

OECD Members generally are countries which do not conduct most economic activities through state agencies and which have developed economies. OECD's limited and specialized membership makes it unlikely that an OECD code or guideline could constitute customary international law. The drafts typically submitted to UNCTAD by lesser-developed countries[34] also make it unlikely that an UNCTAD code will reflect a consensus of the world community. Obviously, if a number of nations do not accept a code, national practices subsequent to "adoption" will not demonstrate that the code is viewed as part of international law.

The final decision on whether or not an OECD or UNCTAD code is legally binding under United States law probably would have to be made by the United States Supreme Court. Its decision most probably would be based pragmatically on the facts and circumstances before it. As a common law court, the Supreme Court can rely on anything it deems relevant as a source of law or the interpretation of law.

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[33] *Supra*, note 4.

[34] TD/B/C.6/AC.1/L.1/Rev. 1,5/16/75 and TD/B/C.6/AC.1/L.6, 11/25/75 (the latter is the preamble).