

The Interaction between Section 233 of the South African Constitution and the Commentaries to the OECD Model Tax Convention on Income and on Capital

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Abstract

The Commentaries to the OECD's Model Tax Convention on Income and on Capital are at times consulted by South African courts when double taxation agreements are interpreted. The question considered in this article is the nature of the interaction, if any, between these Commentaries and section 233 of the Constitution of the Republic of South Africa, 1996. Section 233 requires a court to prefer a reasonable interpretation of legislation that is consistent with international law over other interpretations that are not consistent with international law.

The contribution analyses various aspects of the wording of section 233, including the meaning of the phrase 'international law'. It points out the various roles that transnational sources may play with regard to section 233, for example these sources may either constitute the 'international law' to which section 233 refers, or they may be aids to the interpretation of those sources that constitute 'international law'. The contribution considers which of these roles the Commentaries are most likely to play for purposes of section 233.

Keywords: Commentaries; OECD; section 233; Constitution; international law; Model Tax Convention on Income and on Capital

Introduction

In many respects, South Africa generally models its double taxation treaties (DTTs) after the Model Tax Convention on Income and on Capital of the Organisation for Economic Cooperation and Development (OECD).¹ This model (OECD MTC) is accompanied by a set of commentaries (the Commentaries), which aim to assist with the interpretation of the provisions of the model.²

Today, the Commentaries are often, although not consistently,³ regarded by foreign courts as useful guides to the interpretation of DTTs that employ the same wording as the OECD MTC.⁴ South African courts too have referred to the Commentaries although, again, not consistently.⁵ Courts' willingness to refer to the Commentaries can be

¹ Johann Hattingh, 'South Africa' in Yariv Brauner and Pasquale Pistone (eds), *BRICS and the Emergence of International Tax Coordination* (IBFD 2015) 237. Despite South Africa not being an OECD member, it is included in the list of states that are allowed to note their positions on the articles of the OECD's model tax convention (OECD MTC) and the Commentaries. Hattingh (n 1) 238 and 240 points out that South African DTTs typically deviate from the OECD MTC with regard to those provisions in respect of which South Africa has noted such a position. He also notes that, in respect of these provisions, South Africa often, but not consistently, follows the United Nations Model Double Taxation Convention between Developed and Developing Countries (hereinafter the UN MTC). The commentaries to the UN MTC may thus also be relevant when interpreting South African DTTs but are beyond the scope of this article.

² OECD, *Introduction to the OECD MTC 2017* (OECD 2017) (hereinafter *Introduction OECD*) para 28.

³ As Craig West, 'References to the OECD Commentaries in Tax Treaties: A Steady March from "Soft" Law to "Hard Law"?' (2017) 9 World Tax J 119 notes, courts of some states are more willing to refer to the Commentaries, and attach weight to them, than others.

⁴ *ibid* para 29.3; Martti Nieminen, 'Dual Role of the OECD Commentaries - Part 1' (2015) Intertax 636; John Avery Jones, 'Treaty Interpretation' in Richard Vann (ed), *Global Tax Treaty Commentaries* (IBFD 2019) para 1.1.2.2.; Izelle du Plessis, 'Some Thoughts on the Interpretation of Tax Treaties in South Africa' (2012) SA Merc LJ 43.

⁵ In *ITC 1878* 77 SATC 349 (hereinafter *ITC 1878*) para 14, the court indicated that it would not be 'uncommon' to rely on the Commentaries where treaties include the same provisions as the OECD MTC. It also indicated at para 22 that the 'explanations provided in the Commentary are of immense value in understanding or interpreting any article.' Apart from this case, the most notable references to the Commentaries in South African case law include the following: the unreported judgment in *Case of LJ Downing* (No. 6737) (where the Natal Special Income Tax Court referred to the Commentaries on more than one occasion); on appeal, in *Secretary for the Inland Revenue v Downing* 1975 (4) SA 518 (A) 526 (hereinafter *Downing*) (where the court quoted a paragraph from the judgment of the Tax Court that dealt with an argument based on the Commentaries); in *ITC 1503* 53 SATC 342 (hereinafter *ITC 1503*) at 348 (although it should be noted that the court recorded at 345–346 that 'a written statement of facts on which the appeal was to be determined and agreed upon between the appellant and the Commissioner for Inland Revenue was handed in at the hearing of the appeal', with one of these 'facts' being that the 'parties are entitled to refer to the text and commentaries of the 1977 OECD Model agreement without any admissions being made as to the evidentiary value and subject to permission of the court'); *Krok v Commissioner, South African Revenue Service* 2015 (6) SA 317 (SCA) (hereinafter *Krok*) paras 37 and 38 (where the court mentioned that the taxpayer based his argument on, amongst other things, the Commentaries, but pointed out that in UK case law it was

ascribed to various reasons. First, courts generally acknowledge the ideal that all the parties to a treaty should interpret the treaty in the same way.⁶ In the case of DTTs, the principle of reciprocity also encourages contracting states to seek a common interpretation of treaty terms,⁷ which might, at least in some cases, increase the probability that the objects of the DTT be met.⁸ The Commentaries, which are often seen as reflecting the intention of the parties when the DTT was negotiated, may aid in ensuring such a common interpretation.⁹ Second, apart from the ideal that a treaty should be interpreted in the same way by the states that are party to the treaty, uniform

found that the Commentaries allowed for a different outcome than the one favoured by the taxpayer). There are, however, also notable examples of where South African courts refrained from referring to the Commentaries where the Commentaries arguably might have assisted in the interpretation of the relevant DTT. These include the following judgments: *Volkswagen of South Africa (Pty) Ltd v CSARS* 70 SATC 195; *Grundlingh v CSARS* 72 SATC 1; *The Oceanic Trust Co Ltd NO v Commissioner for the South African Revenue Service* 74 SATC 127 (where the court, in considering whether a declaratory order that the taxpayer had its place of effective management in South Africa should be granted, only indirectly referred at para 50 to the Commentaries by way of referring to UK case law in which the Commentaries were mentioned, and did not refer to the Commentaries at all in considering whether a declaratory order that the taxpayer had a permanent establishment in South Africa should be granted); *Commissioner for South African Revenue Service v Van Kets* (2011) 74 SATC 9; *Commissioner for the South African Revenue Service v Tradehold Ltd* 3 All SA 15 (SCA). See also the discussions by Du Plessis (n 4) 43, 45–48, Izelle du Plessis, ‘The Interpretation of Double Taxation Agreements: A Comparative Evaluation of Recent South African Case Law’ (2016) *Tydskrif vir die Suid-Afrikaanse Reg* 484 486–490; Johann Hattingh, ‘The Tax Treatment of Partnerships under Model-Based Bilateral Tax Treaties: Some Lessons from *Grundlingh v The Commissioner for the South African Revenue Service*’ (2010) 127 *South African LJ* 45, who also make the point that the Commentaries have not been referred to in a number of cases. Hattingh (n 1), writing in 2015, argues that ‘[r]eferences [by South African courts] to the OECD ... Commentary have been sparse and mostly confined to old cases.’

⁶ For a South African perspective, see *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) 164 and 167 and the discussions by Du Plessis (n 4) 50–51 and Charl du Toit and Johann Hattingh, ‘Beneficial Ownership and Double Tax Conventions’ in Alwyn de Koker and Emil Brincker (eds), *Silke on International Tax* (LexisNexis 2019) para 9.3. Anthea Roberts, ‘Comparative International Law? The Role of National Courts in Creating and Enforcing International Law’ (2011) 60 *International and Comparative L Quarterly* 83–84 notes, however, that the Vienna Convention, referred to in the main text accompanying (n 17), does not require such a common interpretation, but note her views at 84 on Art 31(3)(b) of the Vienna Convention on the Law of Treaties (1969) UN Doc. A/Conf. 39/27, fourth annex, UNTS 1155/331.

⁷ Brian Arnold, ‘The Interpretation of Tax Treaties: Myth and Reality’ (2010) 64 *Bulletin for Intl Taxation* 10–11. He also points out at 11 that there may be circumstances where parties to a DTT do not intend for terms to have a common meaning due to differences in their domestic tax laws with which the DTT has to relate.

⁸ Nabil Orow, ‘Comparative Approaches to the Interpretation of Double Tax Conventions’ (2005) 26 *Adelaide LR* 91.

⁹ *Re the Trevor Smallwood Trust; Smallwood v HMRC* [2008] STC (SCD) 629 (hereinafter *Smallwood*) para 98; Kevin Burt, ‘The OECD Commentaries: On What Legal Basis and to what Extent are They Relevant to Tax Treaty Interpretation’ (2017) 8 *Business Tax and Company L Quarterly* 19; Emil Brincker, ‘The Conclusion and Force of Double Taxation Agreements’ in De Koker and Brincker (n 6) para 12.11.2.

interpretation on a wider scale may also be desirable.¹⁰ Treaties dealing with the same subject matter may employ similar wording. It is often assumed that these treaties would be interpreted uniformly by all the states that are parties to treaties that share this common wording. It has accordingly been argued that DTTs based on the same model convention should, as far as possible, be interpreted uniformly across these DTTs.¹¹ Becerra justifies this approach by arguing that the meaning given to a treaty term internationally may be an indication of the meaning that was intended when the term was used in the DTT under consideration.¹² The Commentaries may be especially useful in establishing a uniform interpretation across DTTs that adopt the wording of the OECD MTC.¹³

Despite courts' general preparedness to refer to the Commentaries, questions on whether courts may or must refer or adhere to the interpretations provided for in the Commentaries abound amongst international¹⁴ and South African scholars.¹⁵ Many of these questions centre around finding a fit for the Commentaries within the public international law principles of interpretation that apply to the interpretation of DTTs,¹⁶ most notably the principles reflected in articles 31 and 32 of the Vienna Convention on

¹⁰ Philip Baker, *Double Taxation Conventions* (Sweet & Maxwell 2014) para E.27 explains the link between the considerations of a common and uniform interpretation as follows: 'Suppose there is a treaty between State A and State B. If the courts of State A have interpreted a provision of the treaty in a particular way, the revenue authority of State A should apply that interpretation to all taxpayers affected by that treaty. It is desirable that the authority of State B should, so far as possible, apply the same interpretation so that the treaty does not mean two different things in the two contracting states. If state A has other treaties (with states C, D, E, etc.) which contain the same terminology, it seems appropriate that the interpretation concerning the treaty with State B should also apply to those treaties. Similarly for State B's other treaties. From there it is a short step to the view taken ... that provisions in treaties based upon the OECD Model should, so far as possible, be given a uniform interpretation in all countries.'

¹¹ *ibid* paras E-26–E-28; Edwin van der Bruggen, 'Unless the Vienna Convention Otherwise Requires: Notes on the Relationship between Article 3(2) of the OECD Model Tax Convention and Articles 31 and 32 of the Vienna Convention on the Law of Treaties' (2003) 43 *European Taxation* 150.

¹² Juan Becerra, *Interpretation and Application of Tax Treaties in North America* (2 edn, IBFD 2013) 124.

¹³ *ITC 1878* (n 5) para 15; Hans Pijl, 'The OECD Commentary as a Source of International Law and the Role of the Judiciary' (2006) 46 *European Taxation* 219; Klaus Vogel and Alexander Rust, 'Introduction' in Ekkehart Reimer and Alexander Rust (eds), *Klaus Vogel on Double Taxation Conventions Volume I* (Kluwer Law International 2015) 45 m.nr. 99; Burt (n 9) 14.

¹⁴ David Ward, John Avery Jones, Luc de Broe and others, *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (IFA (Canadian branch) and IBFD 2005) 18.

¹⁵ Du Plessis (n 4) 50; Du Plessis (n 5) 489–490.

¹⁶ According to Baker (n 10) para E.02 and the sources mentioned by Du Plessis (n 5) 492, courts generally favour the view that these principles also apply to DTTs that have been enacted into domestic law. Also see Burt (n 9) 12–13.

the Law of Treaties (the Vienna Convention).¹⁷ A court's view of where the Commentaries fit within these articles and their sub-paragraphs will have implications for whether the court is obliged to take the Commentaries into account when interpreting a DTT, as well as the weight attached to the Commentaries.¹⁸

This article does not aim to revisit these questions. Instead, it focuses on another issue relating to the use of the Commentaries in interpreting South African legislation (including DTTs that form part of such legislation). This issue has been mentioned by South African scholars before and relates to the interaction between the Commentaries

¹⁷ (1969) UN Doc. A/Conf. 39/27, fourth annex, UNTS 1155/331. The principles embodied in these paragraphs are generally accepted to comprise international customary law and are thus binding on South Africa despite South Africa not being a signatory to the Vienna Convention. *Krok* (n 5) para 27; Du Plessis (n 4) 42; Du Plessis (n 5) 491–492; Dire Tladi, 'The Interpretation and Identification of International Law in South African Courts' (2018) 135 South African LJ 715. The following scholarly writers and case law raise arguments for and against the Commentaries falling within the respective sub-paragraphs of Arts 31 and 32 and discuss the implications flowing from the respective approaches: Art 31(1), Ulf Linderfalk and Maria Hilling, 'The Use of OECD Commentaries as Interpretative Aids — the Static/Ambulatory — Approaches Debate Considered from the Perspective of International Law' (2015) Nordic Tax Journal 43–47; Nieminen (n 4) 642–643; Vogel (n 13) 48 m.nr. 105; Avery Jones (n 4) paras 3.11.2.3.–3.11.2.5; Peter Wattel and Otto Marres, 'The Legal Status of the OECD Commentary and Static or Ambulatory Interpretation of Tax Treaties' (2003) 43 European Taxation 226; Robert Danon, *Switzerland's Direct and International Taxation of Private Express Trusts with Particular References to US, Canadian and New Zealand Trust Taxation* (Schulthess Juristische Medien AG 2004) 332; Becerra (n 12) 124; also see the sources mentioned by Ward (n 14) 18–19 and 26; Art 31(2), see the sources mentioned at Ward (n 14) 23 and 24; see also the sources mentioned by Craig Elliffe, 'Cross Border Tax Avoidance: Applying the 2003 OECD Commentary to Pre-2003 Treaties'

<https://www.researchgate.net/publication/255855946_Cross_Border_Tax_Avoidance_Applying_the_2003_OECD_Commentary_to_Pre-2003_Treaties> accessed 26 January 2017 para 3.1.1; Art 31(3)(a), see the sources referred to at Ward (n 14) 24; Art 31(3)(b), Linderfalk (n 17) 45–47; Pijl (n 13) 220; Art 31(3)(c), Dirk Broekhuijsen, 'A Modern Understanding of Article 31(3)(c) of the Vienna Convention (1969): A New Haunt for the Commentaries to the OECD Model?' (2013) 67 Bulletin for International Taxation 7–8; Art 31(4), Vogel (n 13) 48 m.nr. 105; Avery Jones (n 4) paras 3.11.2.6.; Elliffe (n 17) para 3.1.1; the sources mentioned by Ward (n 14) 18; *UBS AG v HMRC* [2005] STC (SCD) 589 para 10, *Smallwood* (n 9) para 98; Art 32, Linderfalk (n 17) 46–47 and 49; Nieminen (n 4) 643–65.; Burt (n 9) 18–20; Brincker (n 9) para 12.11.2; the sources mentioned by Ward (n 14) 18, 24–25; *Crown Forest Industries Ltd. v Canada* [1995] 2 SCR 802 para 44 as discussed by Baker (n 10) para E.12; the Australian case law referred to by Elliffe (n 17) para 3.1.1. Avery Jones (n 4) paras 3.11.2.1–3.11.2.2. argues that the Commentaries may be regarded as 'context by analogy' or as being analogous to the material mentioned in Art 31(3)(c). Ward (n 14) 98 argues that it is not necessary to force the Commentaries to fit within any of these sub-paragraphs and articles since these are not a codification of all the guidelines and principles applicable to the interpretation of treaties.

¹⁸ West (n 3) 121 argues that 'the more relevant issue for the court is not whether to take the Commentaries into account, which the court may or may not do, but the weight to apply to the Commentaries when taken into account.'

and section 233 of the Constitution of the Republic of South African Constitution, 1996 (the Constitution).¹⁹ Section 233 provides as follows:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Oguttu and Van der Merwe argue that there is an interaction between the Commentaries and section 233 when the meaning of words typically used in South African DTTs is considered. They state, with reference to section 233, that ‘the OECD Commentary will be a strongly persuasive interpretational tool’ in the interpretation of South African DTTs. As reason for their argument they state that South African DTTs are mostly based on the OECD MTC.²⁰ Du Plessis points out that courts are not bound by section 233 either to consider the Commentaries, or to adhere to a meaning set out in the Commentaries.²¹ The reason for her view is that the Commentaries are not ‘international law’ for purposes of section 233.²²

This article considers the nature of the interaction between the Commentaries and section 233. The enquiry commences with a short overview of the sources of international law and some of the provisions of the Constitution dealing with international law. Thereafter, the wording of section 233 is analysed, paying attention to a possible interaction between this provision and the Commentaries. Finally, the various findings are collated in order to conclude the enquiry.

¹⁹ The Constitution of the Republic of South Africa, 1996.

²⁰ Annet Wanyana Oguttu and Beatrix van der Merwe, ‘Electronic Commerce: Challenging the Income Tax Base?’ (2005) *SA Merc LJ* 313. At 311, they also note, with reference to s 233, as follows: ‘The Constitution furthermore requires that domestic courts should consider international interpretations when construing national legislation.’ Also see Beatrix van der Merwe, ‘The Phrase “Place of Effective Management” Effectively Explained’ (2006) 18 *SA Merc LJ* 136, where that author notes with reference to s 233 (and s 232 of the Constitution) as follows: ‘The Commentary should at least have a strong persuasive influence upon the interpretation of the phrase [in the legislation] under discussion.’ Also see (n 1) above.

²¹ Du Plessis (n 4) 44 refers to the statement by Van der Merwe (n 20) 136 quoted in the previous footnote.

²² Du Plessis (n 4) 44; Du Plessis (n 5) 488.

International Law

The Sources of International Law

Article 38(1) of the Statute of the International Court of Justice (ICJ) is widely regarded as the most authoritative list of the sources of international law.²³ It provides as follows:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Of these, the main sources of rules of international law that are binding on states are treaties to which these states are parties²⁴ and international custom.²⁵ However, there may be additional sources of international law that are not included on the list.²⁶ States may, for example, by virtue of their membership of international organisations such as

²³ Malcolm Shaw, *International Law* (8 edn, Cambridge University Press 2017) 52.

²⁴ These thus do not include treaties to which states are not parties, as mentioned by John Dugard and Dire Tladi, 'Sources of International Law' in John Dugard, Max du Plessis, Tiyanjana Maluwa and Dire Tladi (eds), *Dugard's International Law A South African Perspective* (5 edn, Juta 2018) 30 and 44. The exception is if the treaty rules comprise customary international law. Engela Schlemmer, 'International Economic Law in South Africa' in Erika de Wet, Holger Hestermeyer and Rüdiger Wolfrum (eds), *The Implementation of International Law in Germany and South Africa* (Pretoria University Law Press 2015) 213. An example is Arts 31–32 of the Vienna Convention, mentioned at (n 17).

²⁵ Shaw (n 23) 52 and 81–83, but also see that author's qualifications regarding the binding nature of judicial decisions of the ICJ in certain circumstances. Note also his distinction at 84–85 between 'actual sources of rules, that is those devices capable of instituting new rules ... and ... those practices and devices which afford evidence of the existence of rules.' In this article, the word 'bind' and its derivatives convey the meaning of rules that have prescriptive authority in contrast to guidelines that merely serve as persuasive guides. See the distinction made by Lourens du Plessis, 'International Law and the Evolution of (Domestic) Human-Rights Law in Post-1994 South Africa' in André Nollkaemper and Janne Nijman (eds), *New Perspectives on the Divide between National and International Law* (Oxford University Press 2007) 312.

²⁶ Dugard (n 24) 28; Éric Suy, 'Some Unfinished New Thoughts on Unilateral Acts of States as a Source of International Law' (2001) 26 *J Juridical Science* 2.

the United Nations (UN) be obliged to adhere to certain decisions²⁷ of those organisations.²⁸

Apart from these sources, the so-called ‘soft law’ also requires consideration. ‘Soft law’ refers to an instrument that is not binding, but ‘its importance within the general framework of international legal development is such that particular attention requires to be paid to it’.²⁹ One of the most well-known examples is the 1948 UN Universal Declaration of Human Rights.³⁰

International Law in the South African Constitution

International law features prominently in the South African Constitution.³¹ This includes the first part of Chapter 14, which contains, under the heading ‘International Law’, sections 231, 232, and 233.

Section 231 deals with international agreements or treaties.³² It provides that treaties, signed by the Executive,³³ become binding on South Africa as a state at the international level with the approval of both Houses of Parliament (with some exceptions).³⁴ A treaty

²⁷ Michèle Olivier, ‘The Relevance of “Soft Law” as a Source of International Human Rights’ (2002) 35 CILSA 295–296.

²⁸ Shaw (n 23) 85; Suy (n 26) 2. Other decisions of international organisations, although not binding by themselves, may play a role in developing customary international law. Dugard (n 24) 37–38; Olivier (n 27) 290. Domestic legislation may also refer to obligations that arise due to a state’s membership of an international organisation. For example, according to s 3(a) of the South African Labour Relations Act 66 of 1995 (LRA), that Act must be interpreted to give effect to its primary objects, including to give effect to South Africa’s obligations as a member of the International Labour Organisation (s 1(b) of the LRA). See *Horn v LA Health Medical Scheme* 2015 JDR 0895 (CC) paras 58–59 and *Engen Petroleum Ltd v Commission for Conciliation, Mediation and Arbitration* (2007) 28 ILJ 1507 (LAC) (hereinafter *Engen Petroleum*) para 88 for a discussion of s 233 in the context of the LRA.

²⁹ Shaw (n 23) 87. Dugard (n 24) 41 describes it as ‘imprecise standards, generated by ... resolutions of international organisations, that are intended to serve as guidelines to states in their conduct, but which lack the status of “law”.’ Also see Olivier (n 27) 290.

³⁰ Olivier (n 27) 290; Sandra Liebenberg, *Socio-Economic Rights Adjudication under a Transformative Constitution* (Juta 2010) 105.

³¹ Neville Botha, ‘Justice Sachs and the Use of International Law by the Constitutional Court: Equity or Expediency?’ (2010) 25 SA Public L 236.

³² Section 231 uses the term ‘international agreements’, but in this article, ‘treaty’ is used in preference to ‘international agreement’. See more on the terminology used in s 231 in John Dugard and Andreas Coutsoudis, ‘The Place of International Law in South African Municipal Law’ in John Dugard, Max du Plessis, Tiyanjana Maluwa and Dire Tladi (eds), *Dugard’s International Law A South African Perspective* (5 edn, Juta 2018) 87–88.

³³ Section 231(1) of the Constitution.

³⁴ Section 231(2) of the Constitution; *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) (hereinafter *Glenister*) paras 180–181; *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) (hereinafter *Fick*) para 30. See Dugard (n 32) 80 regarding the need to also comply with the requirements set out in the treaty for ratification. Section 231(3) provides for exceptions to the rule in s 231(2). Izelle du Plessis, ‘The Incorporation of Double Taxation Agreements into South

will become law in South Africa, and can be relied on by persons for rights created in their favour under the treaty either,³⁵ in the case of self-executing treaties (or self-executing provisions in treaties), with no further action being required in terms of section 231(4) of the Constitution, or, in the case of treaties that are not self-executing, upon being ‘enacted into law by national legislation’ in terms of that provision. There are different views on whether DTTs are self-executing treaties, but for purpose of this article it is assumed (without presenting a view on this issue) that they are not. Based on this assumption, DTTs become law in South Africa by publication in the Government Gazette.³⁶

Section 232 provides that customary international law is binding unless it is inconsistent with the Constitution or an Act of Parliament. As the principles embodied in articles 31 and 32 of the Vienna Convention are customary international law, this section may thus also be relevant with regard to how the Commentaries are regarded by South African courts when South African DTTs are interpreted. However, as explained at the outset, the question of how, if at all, the Commentaries fit within these principles has been the subject of much debate and is not revisited in this article.³⁷

The last provision in this part of Chapter 14 is section 233. It is generally regarded as entrenching a presumption that formed part of South African law before the Constitution

African Domestic Law’ (2015) 18 Potchefstroom Electronic LJ 1189 argues that these exceptions do not apply to DTTs. Also see the discussion by Johann Hattingh, ‘Elimination and Avoidance of International Double Taxation’ in De Koker and Brincker (n 6) para 36.17.4.1.

³⁵ *Azanian People’s Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) (hereinafter *AZAPO*) para 26; Schlemmer (n 24) 214; Werner Scholtz, ‘A Few Thoughts on Section 231 of the South African Constitution, Act 108 of 1996’ (2004) 29 South African Yearbook Intl L 213.

³⁶ As provided for in s 108(2) of the Income Tax Act 58 of 1962 (ITA). For different views, refer to Hattingh (n 34) paras 36.17.4.2 and 36.17.7; Du Plessis (n 4) 33; Du Plessis (n 34) 1193–1194.

³⁷ See (n 17) above.

came into effect.³⁸ In terms of this presumption, it was presumed that the legislature did not intend to violate international law.³⁹

Another section in the Constitution that refers to ‘international law’ in the context of interpreting a legal instrument, is section 39(1)(b). This provision, which forms part of the Bill of Rights, provides that when a court interprets the Bill, it ‘must consider international law’.

The Constitution thus places, in different ways, an emphasis on international law. Yet, it trumps international law, including customary international law, as confirmed by section 232 itself, and obligations arising from treaties.⁴⁰ Therefore, the Constitutional Court explained, also with reference to sections 39(1) and 233, that courts are obliged ‘to integrate, in a way the Constitution permits, international law obligations into our domestic law.’⁴¹

Erasmus explains the importance of the above-mentioned provisions as follows:

[They serve as a] constitutional indication of how the Republic of South Africa wants to interact with the rest of the world; that national measures and municipal law have to be in harmony with the international legal obligations of the state.⁴²

³⁸ *S v Basson* 2005 (1) SA 171 (CC) para 100; JR de Ville, *Constitutional and Statutory Interpretation* (NBD 2000) 192. However, whereas according to Erasmus the presumption only applied in the case of ‘clear ambiguities’ in legislation and since this limitation does not seem to apply to s 233, the section has wider application than the presumption. Gerhard Erasmus, ‘The Incorporation of Trade Agreements and Rules of Origin: The Extent of Constitutional Guidance’ (2003) 28 *South African Yearbook Intl L* 157, 168 and 175. Botha (n 31) 236–237, fn 13 argues that s 233 is ‘more insidious and far-reaching’ than the presumption. Also see Lourens du Plessis ‘Interpretation’ in Stuart Woolman and Michael Bishop (eds) *Constitutional Law of South Africa* (2 edn, Juta 2013) 32–182, Tladi (n 17) 711 and Dire Tladi, ‘Interpretation of Treaties in an International Law-Friendly Framework: The Case of South Africa’ in Helmut Aust and Nolte Georg (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016) 138.

³⁹ Erasmus (n 38) 175; Dugard (n 32) 89; Lourens du Plessis, *Re-Interpretation of Statutes* (Butterworths 2002) 173.

⁴⁰ *Glenister* (n 34) para 205.

⁴¹ *ibid* para 202.

⁴² Erasmus (n 38) 158. Michèle Olivier, ‘Interpretation of the Constitutional Provisions relating to International Law’ (2003) Potchefstroom Electronic LJ 1 notes with reference to the Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), which did not include an equivalent of s 233, as follows: ‘The 1993 Constitution, for the first time in South African history accorded constitutional recognition to international law ... This step was a symbolic break from the apartheid legal system, which was closely associated with the violation of international law and indicated to the international community that South Africa was willing to abide by internationally accepted rules.’ [footnote omitted].

Below, section 233 is analysed, paying attention to its possible interaction with the Commentaries.

Section 233: ‘any legislation’

Section 233 applies to the interpretation of ‘any legislation’.⁴³ DTTs that have been enacted into South African domestic law have a dual nature; they are at the same time domestic and international law.⁴⁴ For purpose of this article, it is accepted (without presenting a view on this issue) that a DTT that has been enacted into domestic law is ‘legislation’ for purposes of section 233.⁴⁵ Based on this assumption, in the field of tax law ‘any legislation’ in section 233 could refer to DTTs that have been published in the Government Gazette, as well as legislation that does not have its origin in a treaty, such as the Income Tax Act (meaning those parts of the Act other than DTTs published in the Government Gazette).⁴⁶

Section 233: ‘must prefer’

Section 233 applies if there are more than one possible reasonable⁴⁷ interpretations of legislation,⁴⁸ always bearing in mind that interpretation is a ‘unitary exercise’.⁴⁹ According to the wording of the section, a court ‘must prefer’ one such reasonable interpretation over another or others.

⁴³ Also see *Fick* (n 34) para 69 with regard to the application of s 233 in the context of the development of the common law.

⁴⁴ Tracy Gutuza, ‘Tax Treaties, the Income Tax Act and the Constitution — Trump or Reconcile’ (2016) 29 SA Merc LJ 485.

⁴⁵ As argued by Van der Merwe (n 20) 135. Also see Oguttu (n 20) 313 and Annet Oguttu, *International Tax Law: Offshore Tax Avoidance in South Africa* (Juta 2015) 569.

⁴⁶ Van der Merwe (n 20) 135.

⁴⁷ *Engen Petroleum* (n 28) para 88; *Mzeku v Volkswagen SA* (2001) 22 ILJ 771 (CCMA) (hereinafter *Mzeku*) 783. Chris Cilliers, ‘Anti-Avoidance’ in De Koker and Brincker (n 6) para 46.34 argues that the inclusion of the word ‘reasonable’ in s 233 thus gives courts ‘some decisional leeway’. In *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) para 144; *Jacobs v Department of Land Affairs* 2017 JDR 0079 (LCC) para 18 it was confirmed that, if there is no reasonable interpretation of the legislation that is consistent with international law, international law cannot by virtue of s 233 trump the legislation.

⁴⁸ *Mzeku* (n 47) 783; *Association of Meat Importers and Exporters v International Trade Administration Commission* 2013 JDR 2041 (SCA) para 61; Erasmus (n 38) 175.

⁴⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 19, quoting *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 para 21. Also see the South African court’s description of this process in para 18, which has received the approval of the Constitutional Court in *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC) para 136. As noted by Christin Gowar, ‘The Status of International Treaties in the South African Domestic Legal System: Small Steps towards Harmony in light of Glenister?’ (2011) 36 South African Yearbook Intl L 307, fn 36, international law should thus always be considered, not only in the case of ‘ambiguous legislation’. Also see (n 38) above.

The word ‘prefer’ means in dictionary terms ‘[t]o favour (one person or thing) in preference or to another; to like better’.⁵⁰ The word ‘must’ is usually ‘*construed* [in legislation] *as peremptory* rather than directory unless there are other circumstances which negate this construction’.⁵¹ Read together, the phrase thus indicates that it is peremptory (rather than merely directory) for a court to favour a reasonable interpretation of legislation consistent with international law over other reasonable interpretations.

The phrase ‘must prefer’ may furthermore be contrasted with the wording used in that other section of the Constitution that concerns the role of international law in the interpretation of a legal instrument, namely section 39(1)(b). This section provides that, when a court interprets the Bill of Rights, it ‘*must consider* international law’ and ‘*may consider* foreign law’.⁵² The word ‘consider’ means amongst other things ‘to think over, meditate or reflect on, ... take note of.’⁵³

Sections 39(1) and 233 thus use different verbs: ‘consider’ in section 39(1) and ‘prefer’ in section 233. The usual assumption would be that these two sections give rise to different duties when interpreting the respective legal instruments to which each refers. Of the two, the verb ‘prefer’ seems to impose a much stronger duty, that is ‘to favour’ a reasonable interpretation consistent with international law, than the verb ‘consider’, that is ‘to take note of’ international law.⁵⁴

The second observation emanating from a comparison of these two sections is that section 39(1) distinguishes between international law and foreign law: the first-mentioned ‘must’ be considered and the latter ‘may’ be considered. The word ‘may’ sometimes means ‘must’ in legislation.⁵⁵ However, in section 39(1), where ‘may’ and ‘must’ are used within the same section to deliberately contrast international law and foreign law, this seems an unlikely interpretation. The reverse is also true; it is unlikely

⁵⁰ ‘prefer, v.’ in *Oxford English Dictionary* (Oxford University Press).

⁵¹ *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism v Smith* [2003] 4 All SA 1 (SCA) para 32 [emphasis added]. Also see Tladi (n 38) 138.

⁵² Comparable provisions are also found elsewhere in South African law, e.g., s 5(2) of the Companies Act 71 of 2008. Also see the examples mentioned by Dugard (n 32) 99, who states that such a provision is strictly speaking unnecessary in light of s 233.

⁵³ ‘consider, v.’ in *Oxford English Dictionary* (Oxford University Press). Also see Lourens du Plessis “‘Transnasionale Konteks’ in die Regspraak van die Konstitusionele Hof in Suid-Afrika: ’n Variasie op die Tema van Grondwetsvertolking’ (2013) 10 *LitNet Akademies* 1 para 3.1, where he refers to the dictionary definition of ‘consider’ as ‘weighing the merits of’.

⁵⁴ Also see Botha (n 31) 236–237, fn 13.

⁵⁵ See the examples mentioned by Michael Bishop and Jason Brickhill, ‘In the Beginning was the Word: The Role of Text in the Interpretation of Statutes’ (2012) 129 *South African LJ* 689.

that ‘must’ (in ‘must consider’) means ‘may’.⁵⁶ Possibly, given the fact that both sections 39(1) and 233 deal with the interpretation of legal instruments, the use of ‘must’ (instead of ‘may’) in section 233 is indicative that ‘must’ is also intended to be peremptory, rather than directory in that section.⁵⁷

The use of ‘consider’ and ‘prefer’ in sections 39(1) and 233 respectively is reflective of the different roles played by each section in the Constitution. The former forms part of the Bill of Rights in Chapter 2 of the Constitution and the heading to the section, ‘Interpretation of Bill of Rights’, emphasises its role as an interpretational clause with regard to the Bill of Rights. It recognises the important role played by various ‘transnational sources’⁵⁸ in the drafting of the Bill of Rights and, therefore, also the continuous role that these sources may play in providing guidance to the interpretation of the Bill of Rights.⁵⁹ Its role, however, is arguably not primarily⁶⁰ to ensure that South Africa fulfils its international law obligations.⁶¹ For that reason, international law is merely one of several elements (albeit an important one) to be taken into account when interpreting the Bill of Rights.⁶²

The heading to section 233 is ‘Application of international law’ and the heading to the part of Chapter 14 to which the provision belongs, ‘International Law’. As indicated earlier, the other two sections included in this part are sections 231 and 232, which

⁵⁶ Tladi (n 17) 711 states that s 39(1) ‘lays down an obligation, not a choice, to consider international law.’ Tladi (n 38) 138, fn 12 also argues that an analysis of the Constitution supports the interpretation that ‘must’ in s 39(1)(b) means the same as ‘shall’, which he notes is often regarded as the more ‘obligatory’ of the two.

⁵⁷ Note also the emphasis placed on the word ‘must’ in *Nelson Mandela Foundation Trust and Another v Afriforum NPC and Others (Johannesburg Pride NPC and Another as amici curiae)* [2019] JOL 45471 (EqC) (hereinafter *Nelson Mandela Foundation Trust*) paras 110 and 152.

⁵⁸ The phrase is adopted from Du Plessis (n 53) and used throughout this article.

⁵⁹ Du Plessis (n 53) para 3.1. De Ville (n 38) 241, quoting from Lourens du Plessis and Hugh Corder, *Understanding South Africa’s Transitional Bill of Rights* (Juta 1994) 119, describes the inclusion of the provision as ‘an attempt to encourage the South African courts to break with their previous “unimaginative” attempts at interpreting Bills of Rights.’

⁶⁰ Although, see *AZAPO* (n 35) para 26. *AZAPO* (n 35) dealt with the Interim Constitution, which had a comparable provision to s 39(1) (s 35(1) of the Interim Constitution), but not s 233. Note also (n 101) below.

⁶¹ Juha Tuovinen, ‘The Role of International Law in Constitutional Adjudication: *Glenister v President of the Republic of South Africa*’ (2013) South African LJ 668 notes as follows: ‘Since international law may be regarded as giving value to the reasoning process of courts through greater engagement with what may be considered the norms of international society, such engagement should be encouraged where possible. This is especially so given that the consideration of international law does not oblige a court necessarily either to reject or accept those norms.’

⁶² *ibid.* Juha Tuovinen, ‘What to Do with International Law? Three Flaws in (2014) *Glenister*’ Constitutional Court Review 443, fn 40 raises the question whether there is a presumption that a court must, when considering international law under s 39(1)(b), give preference to an interpretation consistent with international law. Also (n 60) above.

concern treaties and customary international law respectively. This part thus establishes which international legal rules are binding (on South Africa at the international level and/or within South Africa at the domestic level).⁶³ Furthermore,⁶⁴ this part addresses conflict that may arise between (domestic) legislation and international law.⁶⁵ The inclusion of section 233 in the Constitution is possibly due to the view that in the period preceding the current constitutional democracy, legislation was at times interpreted without sufficient regard for international law.⁶⁶ The Constitution, by virtue of section 233, signals that South Africa places a very high premium on ensuring that it fulfils its international law obligations, and is thus 'able to take its rightful place as a sovereign state in the family of nations'.⁶⁷ Therefore, a very strong injunction in section 233 not to disregard international law when interpreting legislation is called for; a mere 'consideration' of international law, or presumption that the legislature does not intend to violate international law,⁶⁸ would not suffice.

Section 233 must also be read in conjunction with section 39(2),⁶⁹ which decrees that courts must 'promote the spirit, purport and objects of the Bill of Rights' when interpreting legislation.⁷⁰ Therefore, the Supreme Court of Appeal has on occasion declared that the Constitution requires that legislation 'be construed in a way that gives effect to South Africa's international law obligations and the spirit, purport and objects of the Bill of Rights'.⁷¹

The above supports the argument that section 233 places a substantial duty on a court not to depart from a reasonable interpretation of legislation that is consistent with international law in favour of one that is not consistent with international law. This

⁶³ Tladi (n 17) 710 notes that these sections '[are] in many ways, pure constitutional law and addresses itself to questions of, for example, the separation of powers.'

⁶⁴ Tladi (n 38) 137, fn 8 refers to ss 231 and 232 as 'law-making provisions' and s 233, together with s 39, as 'interpretative provisions'. See also Tladi (n 17) 710. Botha (n 31) 236 uses the categories 'hard law' and "'softer" interpretation provisions' respectively.

⁶⁵ Du Plessis (n 4) 40; Gutuza (n 44) 486 and 505.

⁶⁶ See the statement from Olivier (n 42) 1. Also see Botha (n 31) 235, who notes that '[t]he courts' application of international law was subject to so wide a range of municipal exceptions that it was largely unrecognisable as an expression of the views of the international community which it was intended to reflect and serve.' Of course, South Africa was party to far fewer treaties, notably human rights treaties, during that period, as pointed out by Erika de Wet, 'The Reception of International Law in the South African Legal Order: An Introduction' in Erika de Wet, Holger Hestermeyer and Rüdiger Wolfrum (eds), *The Implementation of International Law in Germany and South Africa* (Pretoria University Law Press 2015) 26.

⁶⁷ Preamble to the Constitution.

⁶⁸ Refer to the main text accompanying (n 38).

⁶⁹ Also note s 39(3).

⁷⁰ As Bishop (n 55) 685 points out, the phrase 'the spirit, purport and objects of the Bill of Rights' in s 39(2) is not limited to the individual provisions in the Bill but refers to 'broader values and norms'.

⁷¹ *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 (3) SA 317 (SCA) (hereinafter *Minster of Justice*) para 95.

understanding finds support in the words of the Constitutional Court, which has indicated that the section ‘requires’ a court to interpret legislation ‘in line with international law’.⁷² The Labour Appeal Court has also held that, under this section, a reasonable interpretation consistent with international law ‘must be adopted’ in preference to one that is not consistent with international law.⁷³

Section 233: ‘international law’

Section 233 requires a court to compare reasonable interpretations of the legislation with ‘international law’. With regard to the phrase ‘international law’, a court must thus both identify what constitutes (relevant) ‘international law’ for purposes of section 233, and interpret this international law in order to establish a meaning that can be compared with the reasonable interpretations of the legislation.⁷⁴ Accordingly, transnational sources may play different roles with regard to section 233. For example, they may be the ‘international law’ to which section 233 refers, or they may be aids to the interpretation of the ‘international law’.

Unfortunately, courts do not always find it necessary to distinguish clearly between these two roles, as illustrated in *Seton Co v Silveroak Industries*.⁷⁵ In this case, the court was tasked with interpreting provisions in South African legislation, which enacted a treaty into South African domestic law.⁷⁶ The relevant provisions of that treaty and the South African legislation were similarly worded, as were comparable provisions in

⁷² *S v Okah* 2018 (1) SACR 492 (CC) para 38.

⁷³ *Engen Petroleum* (n 28) para 88. In *Minister of Justice* (n 71) para 86 the Supreme Court of Appeal held that s 233 entails that an interpretation resulting in non-compliance with South Africa’s international obligations ‘is to be avoided if possible’. In *Nelson Mandela Foundation Trust* (n 57) para 113 the court concluded that ‘South African law in general must be interpreted in a manner which complies with international law, if such an interpretation is a reasonable one.’ The examples in this, and the previous footnote, must be contrasted with the Constitutional Court’s more diluted statement in *Justice Alliance of South Africa v President of the Republic of South Africa and others* 2011 (5) SA 388 (CC) at para 37 that s 233 ‘requires courts to draw guidance from international law in the interpretation of legislation.’ [emphasis added].

⁷⁴ Tladi (n 17); Tladi (n 38) 138; Michèle Olivier, ‘International Law in South African Municipal Law: Human Rights Procedure, Policy and Practice’ (Doctor of Laws, University of South Africa 2002) 262.

⁷⁵ *Seton Co v Silveroak Industries Ltd* 2000 (2) SA 215 (T) (hereinafter *Seton*). Tladi (n 17) 717 makes a similar argument with regard to the use of transnational sources in s 39(1) of the Constitution. With reference to *S v Makwanyane* 1995 (3) SA 391 (CC) (hereinafter *Makwanyane*), where the court relied on decisions of the Human Rights Committee and judgments of the European Court of Human Rights, Tladi (n 17) 717 asks: ‘Are they being relied upon on as a source of international law in their own right? Are they means for the interpretation of the respective treaties?’

⁷⁶ The court in *Seton* 228 noted that the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 was enacted due to South Africa being a party to the ‘New York Convention’.

English arbitration legislation. The court noted,⁷⁷ based on these similarities,⁷⁸ and with reference to section 233, that the interpretation of the treaty by courts in the UK would have ‘persuasive authority’ in South Africa.

Botha and Olivier comment on the court’s statement as follows:

[The court’s approach] *leaves the impression that international law is to be found in ... court decisions on international law*⁷⁹ and is regrettable in one of the first judgments to consider the application of section 233 of the Constitution.⁸⁰

This illustrates the difficulties that are often involved in distinguishing between the ‘international law’ referred to in section 233 (the treaty, in the case of *Seton*) and aids to the interpretation of the ‘international law’ (foreign case law, in the case of *Seton*) for purposes of section 233.

One may ask why it is important to make this distinction. If the material is in itself the ‘international law’ referred to in section 233, section 233 provides that a court must refer to it and must adopt a reasonable interpretation of the legislation that is consistent with that international law. However, if the material is not the ‘international law’ referred to in section 233, but merely an aid to the interpretation of that international law, the use of that material is not governed by section 233. Instead, it is governed by the principles of interpretation applicable to the interpretation of international law, including those provided for in the Vienna Convention mentioned earlier.⁸¹

For purpose of this article it is thus important to make the following distinction between the roles that the Commentaries may play under section 233: they may either constitute the ‘international law’ referred to in the section; alternatively, they may be aids to the interpretation of those sources that constitute ‘international law’ (such as DTTs to which South Africa is a party). Each of these possibilities is discussed below.

⁷⁷ *Seton* (n 63) 229. Also see *MV COS Prosperity Phoenix Shipping Corporation v DHL Global Forwarding SA (Pty) Ltd* 2012 (3) SA 381 (WCC) para 59 and note the reference to foreign case law in the context of s 233 in *S v Patel* 2016 (2) SACR 141 (GJ) para 51.

⁷⁸ Du Plessis (n 39) 173 notes with reference to *Schlumberger Logelco Inc v Coflexip SA* 2000 (3) SA 861 (SCA) para 9 that, quite apart from s 233, it is not unusual for a court when interpreting words in legislation to consider the meaning given to those same words in treaties on which the legislation is based.

⁷⁹ Dugard (n 24) 45 explains that judicial decisions ‘do not themselves constitute rules of international law but are only a way of identifying the rules of international law.’ Also see (n 25).

⁸⁰ Neville Botha and Michèle Olivier, ‘Ten Years of International Law in the South African Courts: Reviewing the Past and Assessing the Future’ (2004) 29 South African Yearbook Intl L 65–66 [emphasis added].

⁸¹ See the main text accompanying (n 17).

The first possibility is that the Commentaries may constitute the ‘international law’ referred to in section 233. The legal nature of the Commentaries is firstly briefly analysed in order to establish whether they give rise to rules that are binding on South Africa. Thereafter, the meaning of the phrase ‘international law’ in section 233 is considered with a view to establish whether ‘international law’ in this section is limited to rules that are binding on South Africa at the international level.

When analysing the legal nature of the Commentaries, it is important to note that the Commentaries are not themselves treaties.⁸² Furthermore, the OECD’s constitution does not oblige its members (or South Africa) to adhere to the Commentaries. That is because the Commentaries are in the nature of ‘recommendations’ of that organisation only.⁸³

A possible basis on which the Commentaries could give rise to rules that are binding on states, is if the Commentaries (or at least parts thereof) constitute customary international law.⁸⁴ There is some support for this view amongst scholars both internationally⁸⁵ and in South Africa.⁸⁶ If this argument is accepted, South African

⁸² *Introduction OECD* (n 2) para 29; Pijl (n 13) 217; West (n 3) 120; Baker (n 10) para E.15. There are only a few South African DTTs and protocols that expressly refer to the Commentaries. For the status of the Commentaries where they are referred to in treaties, see Nieminen (n 4) 640–641; West (n 3) heading 3. Due to the limited number of these references, they are not considered in this article.

⁸³ Nieminen (n 4) 636; Pijl (n 13) 217–219; Edwin van der Bruggen ‘The Power of Persuasion: Notes on the Sources of International Law and the OECD Commentary’ (2003) *Intertax* 261–262.

⁸⁴ For a legal rule to be regarded as international customary law, it must be settled practice among states (*usus*). Tladi (n 17) 715; Dugard (n 24) 31–36; Ward (n 14) 40. Also see West (n 3) 122–126. A second requirement is that states must believe that they are legally obliged to follow the rule (*opinio iuris sive necessitates*, or *opinio iuris* for short). Therefore, even if a rule is frequently (or habitually) followed by states, but they do not believe that they are legally obliged to do so, the rule will not form part of customary international law. This latter requirement is especially difficult to prove. Tladi (n 17) 715; Dugard (n 24) 36–37.

⁸⁵ Franciscus Engelen, ‘How “Acquiescence” and “Estoppel” Can Operate to the Effect that the States Parties to a Tax Treaty are Legally Bound to Interpret the Treaty in Accordance with the Commentaries on the OECD Model Tax Convention’ in Sjoerd Douma and Franciscus Engelen (eds), *The Legal Status of the OECD Commentaries*, vol 1 (IBFD 2008) 202. Also see the sources mentioned by Nieminen (n 4) 638, fn 11.

⁸⁶ Lynette Olivier and Michael Honiball, *International Tax: A South African Perspective* (5 edn, SiberInk 2011) 312 argue that at least some parts of the Commentaries ‘probably’ constitute customary international law. For a similar view, see Oguttu (n 45) 569; Davis Tax Committee, *Second and Final Report on Base Erosion and Profit Shifting* (2016) (hereinafter *The Final Report on BEPS*) 24. Alternatively, the view of these authors is not that the Commentaries themselves are customary international law in the sense that they give rise to binding rules, but rather that there is binding rule of interpretation that the Commentaries must be considered when interpreting DTTs adopting the wording of the OECD MTC. Note, for example, the statement made in Olivier (n 86) 42 with reference to s 232 of the Constitution that ‘South African courts would *take cognisance* of ... commentaries.’ Note also the statement in the *Final Report on BEPS* (n 86) 24 that the Commentaries are not ‘legally binding’, which would in light of s 232 of the Constitution mean that it is unlikely that the Davis Tax Committee regarded the Commentaries as customary international law.

courts would be obliged under section 232 of the Constitution to adhere to the Commentaries subject only to the qualifications that they not be inconsistent with the Constitution or an Act of Parliament. In none of the reported judgments in which the Commentaries were considered by South African courts⁸⁷ was reference made to the Commentaries as customary international law;⁸⁸ or was it held that courts are obliged to consult, or adhere to, the Commentaries.⁸⁹ Furthermore, many scholars reject the view that the Commentaries qualify as customary international law.⁹⁰ It is especially questioned whether the requirement, *opinio iuris*, can be proved with regard to the Commentaries.⁹¹

Another basis on which the Commentaries could give rise to rules that are binding (although not as clearly in the case of South Africa, not being a member of the OECD) is expressed by Engelen. He argues that the Commentaries may, in appropriate circumstances, be binding on OECD members as part of the ‘general principles of international law’.⁹² Engelen refers to the principles of ‘acquiescence’ and ‘estoppel’:

⁸⁷ See (n 5) above.

⁸⁸ Olivier (n 86) 312 argues with regard to the *usus* requirement (see (n 84)), that this is proved by the Commentaries’ ‘general use as an interpretative aid for treaties’, and with regard to the *opinio iuris* requirement, by the Commentaries’ ‘acceptance in South African case law’. The only South African case law referred to in this part of their book, at 311, is *Downing* (n 5). In respect of this case, they state that it is authority for ‘South African courts having accepted that the Commentaries may be used in interpreting tax treaties.’ Others have argued that *Downing* (n 5) is authority for South African courts being ‘required’ to take cognisance of the Commentaries. Annet Oguttu, ‘The Challenges that E-Commerce Poses to International Tax Laws: “Controlled Foreign Company Legislation” from a South African Perspective (Part 1)’ (2008) 20 SA Merc LJ 356. The Davis Tax Committee refers in its *Final Report on BEPS* (n 86) 24 to *ITC 1503* (n 5) and stated that it was held in that case that ‘a treaty must be interpreted according to ... the OECD Commentary.’ It is agreed that *Downing* probably serves as authority for the view that a South African court may consider the Commentaries when interpreting DTTs. However, it is doubtful whether it is authority for the view that South African courts are legally obliged to do so (see also the list of decisions in (n 5) where the Commentaries were not considered); or to follow an interpretation set out in the Commentaries. With regard to *ITC 1503* (n 5), note the context provided in (n 5) above regarding the use of the Commentaries in that case.

⁸⁹ Du Plessis (n 5) 488.

⁹⁰ Nieminen (n 4) 639; Elizabeth García, ‘The Single Tax Principle: Fiction or Reality in a Non-Comprehensive International Tax Regime?’ (2019) *World Tax J* 3 para 3.3; Avery Jones (n 4) para 3.11.3; West (n 3) 120; Du Plessis (n 5) 488; Pijl (n 13) 216–217; Ward (n 14) 41–42; Cilliers (n 47) para 46.34.

⁹¹ Nieminen (n 4) 639; Avery Jones (n 4) para 3.11.3.; Pijl (n 13) 216 and 217; Ward (n 14) 41–42 and the sources mentioned by Elliffe (n 17) para 3.1.2. Note also the discussion by García (n 90) heading 3.3 of *opinio necessitatis* and her arguments as to why *opinio necessitatis* is also lacking with regard to the Commentaries.

⁹² Franciscus Engelen, ‘Some Observations on the Legal Status of the Commentaries on the OECD Model’ (2006) 60 *Bulletin for Intl Taxation* 109. He also argues at 109 that this means that the Commentaries should be considered under Art 31(2)(a) of the Vienna Convention, mentioned in the main text accompanying (n 17). However, Linderfalk (n 17) 43 points out that, had the Commentaries been binding, it would not have been necessary to refer to Art 31(2).

the failure of an OECD member state to note observations to the Commentaries is either an indication of that state having ‘acquiesced’ to the interpretation expressed in the Commentaries, or it may estop that state (based on the principles of estoppel and legitimate expectation) from departing from the interpretation set out in the Commentaries.⁹³ According to Ward,⁹⁴ Engelen’s view does not enjoy wide support. The main criticism against his view is that the Introduction to the OECD MTC itself indicates that the Commentaries are non-binding⁹⁵ and that there thus cannot be an obligation on states to declare that they do not consider themselves to be bound by the Commentaries, failing which they will be bound.⁹⁶

There thus does not seem to be any widely accepted basis for viewing the Commentaries as a source of binding international law.⁹⁷ However, the Commentaries are sometimes described as ‘soft law’,⁹⁸ as they are in the nature of recommendations, ‘directed to the member states [of the OECD] and as such have great authority and are often complied with’.⁹⁹ Assuming that the Commentaries may also constitute ‘soft law’ with regard to non-OECD members such as South Africa, who routinely base their DTTs to a large extent on the OECD MTC, it must next be considered whether ‘international law’ in section 233 also includes soft law. If so, the Commentaries could possibly be regarded as ‘international law’ for purposes of this section.

In order to address this issue, it may be instructive first to consider the meaning of the phrase ‘international law’ in section 39(1) of the Constitution. In *S v Makwanyane*¹⁰⁰ Chaskalson P stated that, in the context of this section 39(1), ‘public international law would include non-binding as well as binding law.’¹⁰¹ The implication of this statement

⁹³ Engelen (n 92) 109 and the sources mentioned by Ward (n 14) 48 and 51–52.

⁹⁴ David Ward, ‘Access to Tax Treaty Benefits’ Research Report Prepared for the Advisory Panel on Canada’s System of International Taxation <<https://www.fin.gc.ca/access/tt-it/apcsit-gcrf/pdf/RR12%20-%20Ward%20-%20en%20-%20final%20-%20090618.pdf>> accessed 28 December 2019 at 13.

⁹⁵ *Introduction OECD* (n 2) paras 29 and 29.1.

⁹⁶ Linderfalk (n 17) 42–43; Pijl (n 13) 216, 218 and 222; Ward (n 14) 48–53. Also see Avery Jones (n 4) para 3.11.2.7.1.

⁹⁷ Du Plessis (n 5) 488; Pijl (n 13) 218; Ward (n 14) 38. Also see the list of authors supporting this view provided by Elliffe (n 17) para 3.1.

⁹⁸ See the sources mentioned by Ward (n 14) 38; L Marvel, ‘Tax Litigation in the Federal Courts of the United States: The Role of Precedent in a Changing Legal Environment’ (2019) 73 *Bulletin for Intl Taxation* 436. Vogel (n 13) 47 m.nr. 101 argues that the Commentaries give rise to a “‘soft” obligation’ for OECD member states.

⁹⁹ Ward (n 14) 38.

¹⁰⁰ *Makwanyane* (n 75).

¹⁰¹ *ibid* para 35. Although s 35(1) of the Interim Constitution was considered in *Makwanyane* (n 75), the comments made by Chaskalson P are likely to apply also to s 39(1) of the (final) Constitution. Du Plessis (n 53) para 2.1; Tladi (n 17) 715; Dugard (n 32) 90.

(and others in judgments of the Constitutional Court since then)¹⁰² is that ‘international law’ in section 39(1) is not restricted to international law that is binding within South Africa at a domestic level under sections 231(4) or 232.¹⁰³ It also includes international law that is binding on South Africa at the international level, for example, treaties (not being self-executing treaties) to which South Africa is a party and which have not been enacted into South African domestic law.¹⁰⁴ It is, however, uncertain to which extent transnational sources that are not binding on South Africa at the international level are to be included in ‘international law’ in section 39(1).

One possibility is that ‘treaties that have not been ratified by South Africa or that have not entered into force’ may also be included.¹⁰⁵ Another possibility is the inclusion of the other sources listed in the Statute of the International Court of Justice, meaning here treaties to which South Africa is not a party and the sources mentioned in (c) and (d) of that list.¹⁰⁶ Under both these options ‘soft law’ would be excluded.¹⁰⁷

There is also a third possibility, which is that ‘soft law’ is included in ‘international law’ in section 39(1). There is support in both case law and amongst scholars for this third possibility. The support is based on the statement in *Makwanyane* mentioned earlier,¹⁰⁸ as well as on the purported role of ‘international law’ as providing mere guidance to the

¹⁰² Most notably, *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (hereinafter *Grootboom*) para 26, as understood by Du Plessis (n 39) 32–180; Du Plessis (n 53) para 3.5 and Du Plessis (n 25) 330–331. This was more recently confirmed by the Constitutional Court in *Glenister* (n 34) para 178, fn 28.

¹⁰³ Du Plessis (n 53) paras 3.2 and 3.5.

¹⁰⁴ *Women's Legal Centre Trust v President of the Republic of South Africa* 2018 (6) SA 598 (WCC) (hereinafter *Women's Legal Centre Trust*) para 165; Neville Botha, ‘Lessons from Harksen: A Closer Look at the Constitutionality of Extradition in South African Law’ (2000) 33 CILSA 288, fn 66.

¹⁰⁵ Tladi (n 17) 716; Tladi (n 38) 142.

¹⁰⁶ This is the manner in which Olivier (n 42) 4–5 understands the judgment of Chaskalson P in *Makwanyane* (n 75). Also see Botha (n 80) 46.

¹⁰⁷ Tladi (n 17) 716; Tladi (n 38) 142; Olivier (n 42) 5. According to West (n 3), there are scholars who support the view that the Commentaries can be brought within para (d) of the Statute of the International Court of Justice (ICJ) list mentioned in the main text accompanying (n 23). If this view is correct, the second possibility may be applicable. Then the discussion that follows in the main text relating to the Commentaries as ‘soft law’, applies equally since the categorisation of the Commentaries as falling within para (d) does not transform them into rules that are binding on states.

¹⁰⁸ See the main text accompanying (n 101). According to Du Plessis (n 53) para 3.5, the inclusion of soft law in ‘international law’ in s 39(1) was endorsed in *Grootboom* (n 102) paras 26 and 29. Also see Tiyanjana Maluwa, ‘The Incorporation of International Law and its Interpretational Role in Municipal Legal Systems in Africa: An Exploratory Survey’ (1998) 23 South African Yearbook Intl L 59–60; De Wet (n 94) 44; Liebenberg (n 30) 102. Also see the argument raised by Botha (n 80) 75 and Du Plessis (n 53) para 3.4 that s 39(1) would serve no purpose if it only refers to transnational sources that are binding (at the domestic level). Tladi (n 17) 716 also indicates that, in practice, courts frequently rely on soft law when interpreting the Bill of Rights. Also see Tladi (n 38) 142, fn 35. For a discussion of some of the soft-law instruments that have been considered by South African courts, see De Wet (n 94) 45–46.

interpretation of the Bill of Rights rather than directing a court to adhere to international law.¹⁰⁹

Assuming that ‘international law’ in section 39(1)(b) does, indeed, include ‘soft law’, the question remains whether ‘international law’ in section 233 also includes soft law. This question is considered next, keeping in mind that ‘soft law’ here does not include international law rules that are binding on South Africa at the international level. These rules are included in the ‘international law’ referred to in section 233, irrespective of whether they are binding within South Africa at the domestic level.¹¹⁰ An example would be (not self-executing) treaties to which South Africa is a party and that have not been enacted into South African domestic law under section 231(4). The implication is that, when interpreting legislation, a court must prefer a reasonable interpretation of the legislation that is consistent with these treaties.¹¹¹

Turning now to the question whether case law provides clarity on whether ‘soft law’ is included in ‘international law’ in section 233, the answer is negative. There are various reasons for this, including the fact that courts often present sections 39(1)(b) and 233 as a single interpretational tool without clearly distinguishing between these sections.¹¹² When soft law is considered in these judgments, it thus becomes difficult to ascertain whether this was done with regard to both these sections, or section 39(1)(b) only. Also, as pointed out earlier,¹¹³ it is not always clear whether soft law is referred to because it is considered as ‘international law’, or for a different reason, such as being an aid to the interpretation of ‘international law’.

Below, two judgments of the Constitutional Courts are considered that seemingly present different answers as to whether ‘soft law’ constitutes ‘international law’ in the context of section 233. The first judgment was delivered in the case of *S v Baloyi*.¹¹⁴ In this case the Constitutional Court considered whether a provision in the Prevention of

¹⁰⁹ See the main text accompanying (n 138).

¹¹⁰ *Women's Legal Centre Trust* (n 90) para 165; *Bridon International GmbH v International Trade Administration Commission* 2013 (3) SA 197 (SCA) para 13; Dugard (n 32) 91–92; Scholtz (n 35) 213; Botha (n 104) 288; Gowar (n 49) 313; WA Joubert, ‘Constitutional law: Structures of Government’ in *Law of South Africa* 5(3) (2edn, LexisNexis 2012) para 330. Also see *National Commissioner of Police v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC) (hereinafter *National Commissioner of Police*) para 24.

¹¹¹ Tladi (n 17) 731 argues that the same can be said for rules of customary international law that are not binding at the domestic level due to the qualifications in s 232 relating to the circumstances under which customary international law is not law in South Africa.

¹¹² See, e.g., the statements by the Constitutional Court in *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* 2009 (7) BCLR 637 (CC) para 75 and *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 13, fn 8.

¹¹³ See the discussion in the main text accompanying (n 74).

¹¹⁴ *S v Baloyi* 2000 (1) SACR 81 (CC) (hereinafter *Baloyi*).

Family Violence Act¹¹⁵ was unconstitutional. The court explained that this Act was drafted in order to comply with ‘South Africa's international obligations’ and that ‘freedom from fear is one of the fundamental rights identified in the preamble to the Universal Declaration of Human Rights’. It also referred to the ‘Declaration on the Elimination of Violence Against Women’ (a United Nations General Assembly Resolution),¹¹⁶ the ‘Convention on the Elimination of Discrimination Against Women’ (which has been ratified by South Africa),¹¹⁷ and the ‘African Charter on Human and Peoples' Rights’ (which has been ratified by South Africa).¹¹⁸ The court then stated that ‘these injunctions’ are relevant for purposes of section 233.¹¹⁹ As ‘these injunctions’ include soft law, the court seemingly accepted that soft law is included in the ‘international law’ referred to in section 233.

Against *Baloyi* one has to consider the more recent decision by the Constitutional Court in *National Commissioner of Police v Southern African Human Rights Litigation Centre*.¹²⁰ In this case the Constitutional Court had to decide whether the South African Police was under a duty to investigate an alleged crime of torture carried out outside South Africa. The case concerned the interpretation of the Implementation of the Rome Statute of the International Criminal Court Act (the ICC Act),¹²¹ which enacts a treaty to which South Africa is a party into South African domestic law and which regulates the jurisdiction of courts in South Africa with regard to international crimes.¹²² The National Commissioner of Police argued that the ICC Act provided that a crime could only be investigated in South Africa if the suspect was present in South Africa.¹²³

The Constitutional Court made the following statement:¹²⁴

The Constitution provides that (a) customary international law is part of our domestic law insofar as it is not inconsistent with the Constitution or an Act of Parliament; (b) international treaty law only becomes law in the Republic once enacted into domestic legislation; and (c) national legislation should, in turn, be interpreted in the light of international law *that has not been domesticated into South African law by national legislation but that is nonetheless binding upon it*.

¹¹⁵ 133 of 1993.

¹¹⁶ *Baloyi* (n 114) para 13, fn 25.

¹¹⁷ *ibid* para 13, fn 28.

¹¹⁸ *ibid* para 13, fn 30.

¹¹⁹ *ibid* para 13.

¹²⁰ *National Commissioner of Police* (n 110).

¹²¹ 27 of 2002.

¹²² *National Commissioner of Police* (n 110) para 33. The treaty is referred to in *National Commissioner of Police* (n 110) fn 20 as the ‘Rome Statute of the International Criminal Court, 1 July 2002’.

¹²³ *ibid* para 45.

¹²⁴ *ibid* para 24 [emphasis added and footnotes omitted].

In support for its statement, the court referred to the paragraph regarding binding and non-binding law from *S v Makwanyane* quoted earlier,¹²⁵ as well as a paragraph from the decision by the Supreme Court of Appeal in *Progress Office Machines CC v South African Revenue Service*.¹²⁶ In the case of the latter, the court, referencing section 233, referred to treaties that were ratified by South Africa, but not enacted into South African domestic law.¹²⁷ As pointed out earlier,¹²⁸ it is uncontroversial that these treaties, which are binding on South Africa at the international level, are included in ‘international law’ in section 233.

Later in the judgment, the Constitutional Court concluded:

The SAPS ... has misconstrued the meaning of its legal duty in terms of the ... ICC Act. It has failed to recognise that the crime of torture has been domesticated into our law by the ICC Act in terms of s 231(4) of the Constitution and that it is law in the Republic in terms of s 232 of the Constitution due to its status as a peremptory norm of customary international law. The SAPS has further failed to recognise that we are required to interpret all national laws in accordance with *binding* international law as prescribed by s 233 of the Constitution.¹²⁹

It thus seems that the court adopted the view that ‘international law’ for purposes of section 233 refers to sources that are binding on South Africa at the international level,¹³⁰ and not soft law. That is not to say that non-binding material was not considered by the court. For example, during the course of the judgment and whilst interpreting the ICC Act, the court considered non-binding material as an aid to the interpretation of the treaty that was enacted into South African domestic law by the ICC Act,¹³¹ this treaty being “international law” for purposes of section 233.

As case law is not clear, it may be useful to turn to some theoretical arguments in favour of including ‘soft law’ in section 233. The first argument is that, as the same wording (‘international law’) is used in both sections 39(1) and 233, presumably the phrase should have the same meaning in both. Strengthening this argument is a statement of

¹²⁵ See the main text accompanying (n 101).

¹²⁶ *Progress Office Machines CC v South African Revenue Service* 2008 (2) SA 13 (SCA).

¹²⁷ *ibid* para 6.

¹²⁸ See the main text accompanying (n 110).

¹²⁹ *National Commissioner of Police* (n 110) para 77 [emphasis added].

¹³⁰ For a similar view (but possibly rather (or also) with regard to s 39(1)), expressed with reference to the paragraph regarding binding and non-binding law from *Makwanyane* (n 75) para 35 quoted earlier in the main text accompanying (n 101), see *Glenister* (n 34) para 178 and the comment made in response thereto by Neville Botha, ‘Public International Law’ (2011) Annual Survey of South African L 1184.

¹³¹ *National Commissioner of Police* (n 110) para 77 paras 46–47. See also *National Commissioner of Police* (n 110) para 39, fn 45.

the Constitutional Court in *Kaunda v President of the Republic of South Africa (Kaunda)*.¹³² In that case, the court held as follows:

[Section 233] must apply equally to the provisions of the Bill of Rights and the Constitution as a whole. Consistently with this, s 39(1)(b) of the Constitution requires courts, when interpreting the Bill of Rights, to consider international law.¹³³

Du Plessis argues that the implication of this statement is that ‘international law’ should have the same meaning in both sections 39(1) and 233.¹³⁴ According to this view and assuming that ‘international law’ in section 39(1) includes soft law, ‘international law’ in section 233 should thus similarly include soft law. However, it is not clear that giving the same meaning to ‘international law’ in sections 39(1) and 233 places sufficient emphasis on the differences in the wording employed in these sections and the roles that they play in the Constitution. As argued earlier, section 39(1) obliges a court only to ‘consider’ international law, whereas section 233 compels a court to choose a reasonable interpretation of legislation consistent with international law unless excellent reasons exist for not doing so.¹³⁵ It must be remembered that the statement made in *Makwanyane* (that non-binding transnational sources is also ‘international law’ for purposes of section 39(1)) was succeeded by the statement that although courts ‘can derive assistance from public international law and foreign case law, ... [they] are in no way bound to follow it.’¹³⁶ Viewed in isolation, the last part of this sentence (to the effect that public international law is not binding) may somewhat underemphasise South African courts’ constitutional obligations,¹³⁷ as pointed out by Rautenbach and Du Plessis in the following statement:

What Justice Chaskalson [in *Makwanyane*] fails to say, however, is that a court may indeed be *bound* to follow certain precepts of international law because it is *required* to

¹³² *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) (hereinafter *Kaunda*).

¹³³ *ibid* para 33.

¹³⁴ Du Plessis (n 39) 32-182–32-183. He argues that the statement in *Kuanda* (n 132) would ‘render [s 39(1)(b)] superfluous, since ... s 233 applies to the Bill of Rights too. There are three possible ways of avoiding this consequence. (I) First, section 233 can be understood to refer to ‘binding’ international law only. (II) Second, the section can be understood as applying to the interpretation of legislation only (and not to interpretation of the Final Constitution too). (III) Third, and by virtue of the maxim *generalalia specialibus non derogant*, s 39(1)(b) can be understood as a specific prior provision, pertaining to the Bill of Rights (only), and therefore left unaffected by ... s 233, a general provision similar in substance but pertaining to the Final Constitution as a whole. What the Constitutional Court said about ... s 233 in *Kaunda* rules out (II), does not rule out but also does not strongly support a possibility as restricted as (I) above, and is most likely to be understood as suggesting a preference for (III).’ Also see Du Plessis (n 53) para 3.7.

¹³⁵ Also see Tladi (n 17) 725.

¹³⁶ *Makwanyane* (n 75) para 39.

¹³⁷ Also see Botha (n 80) 47; Botha (n 31) 239, fn 26.

do so by constitutional provisions other than sections 39(1)(b)—for instance sections 231-233 of the Constitution. ...

[S]ome international law may well be as binding or prescriptive as domestic law.¹³⁸

Tladi therefore proposes that ‘international law’ in sections 39(1) and 233 may not necessarily have the same meaning. He argues that the difference in the duties placed on courts might call for a narrower meaning being given to ‘international law’ in section 233, ‘since international law, in the context of s[ection] 233, has more far-reaching implications’.¹³⁹ This also accords with the argument made earlier in this article that sections 39(1) and 233 play different roles within the Constitution. It was argued that section 39(1) recognises the important part played by transnational sources in the drafting of the Bill of Rights, and, therefore, also the continuous role that these sources may play in providing guidance to the interpretation of the Bill.¹⁴⁰ Many of these transnational sources were instruments to which South Africa was not a party at the time of the drafting of the Bill, and to which it would never be able to become a party. It is thus not surprising that these instruments, and other instruments that are not binding on South Africa, continue to provide valuable guidance (but not more than that) to the interpretation of the Bill.

Section 233, on the other hand, is included in Chapter 14, in a part of the Constitution that is entitled ‘International Law’. This part includes only two other sections: section 231, which deals with treaties (which were ‘negotiated’ by the Executive and which might have become binding on South Africa at the international level and, in some cases, also became binding within South Africa as domestic law)¹⁴¹ and section 232, which deals with customary international law. This already provides some textual context for what might be included in ‘international law’ in section 233: those sources mentioned in sections 231 and 232. It was also argued earlier that, by including section 233, the drafters of the Constitution signalled that South Africa places a very high premium on fulfilling its international law obligations.¹⁴² However, there is a much less clear need for instruments that are not binding on South Africa to be included here. After all, South Africa cannot be expected to ‘apply’ international law that is not binding on it. Furthermore, there are other provisions in the Constitution that ensure that, at least to

¹³⁸ Christa Rautenbach and Lourens du Plessis, ‘In the Name of Comparative Constitutional Jurisprudence: The Consideration of German Precedents by South African Constitutional Court Judges’ (2013) 14 German LJ 1552–1553 [emphasis added]. Also see Du Plessis (n 53) para 2.2.

¹³⁹ Tladi (n 17) 725. Dugard (n 32) 91 argues that ‘[w]hile a court must consider treaties to which South Africa is not a party in interpreting the Bill of Rights [under s 39(1)], no such rule exists in respect of treaties to which South Africa is not a party where the Bill of Rights is not in issue.’ This statement thus clearly distinguishes between the transnational sources that must be considered under these two sections.

¹⁴⁰ Du Plessis (n 53) para 3.1.

¹⁴¹ Section 231(1) and (4).

¹⁴² See the main text accompanying (n 66).

the extent that the Bill of Rights is relevant, ‘international law’, including possibly soft law, must be considered when interpreting the legislation.¹⁴³

Therefore, ‘international law’ in section 233 arguably does not include soft law such as the Commentaries. A court, when interpreting legislation, is thus not under a duty to prefer a reasonable interpretation of such legislation that is consistent with the Commentaries.

Section 233 does, however, oblige a court to prefer a reasonable interpretation of legislation that is consistent with international law, where relevant. An example of such international law would be DTTs to which South Africa is a party. This, in turn, requires the court to interpret those DTTs, taking into account the principles embodied in articles 31 and 32 of the Vienna Convention as customary international law.¹⁴⁴ Therefore, if the Commentaries are taken into account under these principles in the interpretation of the international law (the DTTs, in the above example), there may be an interaction between section 233 and the Commentaries in this more indirect manner.

Conclusion

Du Plessis refers to section 233 as an ‘underutilised’ provision.¹⁴⁵ The question considered in this contribution is whether this provision may be utilised to bring the Commentaries into play when interpreting South African legislation, where relevant. This query requires consideration of the interaction between the Commentaries and section 233.

An interpretation of section 233 supports the view that the provision places a substantial duty on courts to give preference to a reasonable interpretation of legislation that is consistent with international law over others that are not consistent with international law. This view is confirmed in various judgments by South African courts.

In order to discharge this duty, a court must have identified and interpreted relevant ‘international law’. Transnational sources may place different roles with regard to section 233 in that they may themselves be the ‘international law’ referred to in section 233, or they may be aids to the interpretation of those sources.

Although case law is not clear on whether ‘international law’ in section 233 includes soft-law instruments such as the Commentaries, a recent decision by the Constitutional Court seems to go against such an interpretation. This is arguably also the view that better serves the role played by section 233 in the Constitution.

¹⁴³ See the main text accompanying (n 69).

¹⁴⁴ See the main text accompanying (n 17).

¹⁴⁵ Du Plessis (n 53) para 3.7, where he uses the Afrikaans ‘onderbenutte’.

Therefore, when interpreting legislation, a South African court is neither obliged to refer to, nor adhere to, the Commentaries in furtherance of its duty under section 233. However, it is obliged to consider, where relevant, international law. The international law may include DTTs to which South Africa is a party. The court also needs to interpret those DTTs and is bound under section 232 to apply the principles of interpretation embodied in articles 31 and 32 of the Vienna Convention. The court will therefore have to consider whether these principles require it to take into account the Commentaries, and the weight to attach thereto. Questions regarding the manner in which the Commentaries fit into the Vienna principles are still very much unanswered and best left for another discussion. However, to the extent that the Commentaries are taken into account under these principles, there is, in this indirect manner, an interaction between the Commentaries and section 233.

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