A multilateral tax treaty: designing an instrument to modernise international tax law

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3 The prospects of a multilateral agreement for international taxation

3.1 INTRODUCTION

Without a doubt, the OECD has had, through its Model and Commentary, an enormous impact on international tax norms. By means of soft-law governance through the OECD MTC and Commentaries, the OECD has created consensus in the interpretation and application of tax treaties of its members.[1] The OECD MTC has influenced many of the tax treaties currently in force,[2] and that the OECD has played a very important role in developing international tax policy is almost an understatement.[3] In fact, as Christians notes, the OECD has been so successful with its multilateral soft law that a debate has ensued on whether its Commentary on the OECD MTC can arise to become legally binding on the parties to a tax treaty patterned on the OECD MTC, even for non-OECD members.[4]

But there are limits to the type of cooperation that currently takes place. By amending the OECD MTC, the OECD has hoped that its member countries conform to the latest MTC when concluding or revising their bilateral tax treaties. And when applying and interpreting the provisions of bilateral tax conventions based on the OECD MTC, the OECD has hoped that countries 'follow the Commentaries on the Articles of the Model Tax Convention, as modified

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1 OECD, International Regulatory Co-operation: Case Studies, Vol. 1: Chemicals, Consumer Products, Tax and Competition (2013) OECD Publishing, http://dx.doi.org/10.1787/9789264200487-en ('This type of flexible co-ordination has clear advantages. It greatly facilitates the relations between tax administrations involved in the negotiation, application and interpretation of bilateral tax treaties, whilst preserving the tax sovereignty of countries involved'), at p. 55.

2 M. Lang, et al. eds., The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties (Cambridge University Press 2012).

3 As Avi-Yonah for instance says, 'the freedom of most countries to adopt international tax rules is severely constrained, even before entering into any tax treaties, by the need to adapt to generally accepted principles of international taxation'. R.S. Avi-Yonah (2007) p. 3-4.

4 A. Christians, How Nations Share, 87 Indiana Law Journal 1407 (2012) p. 48. She obviously refers to S.C.W. Douma and F.A. Engelen eds., *The Legal Status of the OECD Commentaries* (IBFD 2008), and in particular to the work by Engelen in that book F.A. 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: The Legal Status of the OECD Commentaries (S. Douma and F.A. Engelen eds., IBFD 2008).

from time to time'.[5] But the OECD MTC and its Commentaries, used by the OECD to influence and update the contents of the network of bilateral tax treaties, are not legally binding.[6] This means that they are not enforceable on the international (inter-nation) and domestic (taxpayers and judges) levels, preventing the international tax system to quickly adapt to changing circumstances. Moreover, because states can depart from the OECD's models if they wish, they have been prevented from reacting in a coordinated way to address collective action problems that are now materializing under the BEPS Project. As a result, the international tax system has become outdated and unresponsive to present-day needs.

As to amendments to the OECD MTC: states are not committed to actually update their treaties to conform to the latest version of the OECD MTC. Indeed, as shown in section 3.2., implementing the changes to the OECD MTC in bilateral tax treaties takes a generation, as each and every one of the bilateral tax treaties needs to be revised. And as shown in section 3.3: unfortunately, 'rule-stretching' i.e. changing the interpretation of tax treaty terms by means of amending the OECD Commentary proves hardly effective either a method to modernise the international tax system, as courts disregard such efforts when applying and interpreting tax treaty rules to cases brought before them. Indeed, the willingness of domestic courts of OECD member countries to dynamically apply the OECD Commentary when interpreting a tax treaty varies greatly.

The loose-form of coordination under the OECD MTC and Commentaries causes another problem (section 3.4). Given that states are free to modify and

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5 OECD Council Recommendation (23 October 1997) C(97)195/FINAL, OECD. The text of the recommendation (emphasis added) holds:
'THE COUNCIL, (…)
TAKING NOTE of the Model Tax Convention and the Commentaries thereon (…), *which may be amended from time to time hereafter;*
I. RECOMMENDS the Governments of Member countries:
1. To pursue their efforts to conclude bilateral tax conventions on income and on capital with those Member countries, and where appropriate with non-member countries, with which they have not yet entered into such conventions, *and to revise those of the existing conventions that may no longer reflect present-day needs;*
2. When concluding new bilateral conventions or revising existing bilateral conventions *to conform to the Model Tax Convention, as interpreted by the Commentaries thereon;*
3. That their tax administrations *follow the Commentaries* on the Articles of the Model Tax Convention, *as modified from time to time*, when applying and interpreting the provisions of their bilateral tax conventions that are based on these Articles' (emphasis added).

6 Most tax scholars agree on this. See e.g. K. Vogel (2000), F. Van Brunschot, The Judiciary and the OECD Model Tax Convention and its Commentaries, 59 Bulletin for International Fiscal Documentation 5 (2005) D.A. Ward, et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (International Fiscal Association 2005); H. Pijl, *The OECD Commentary as a Source of International Law and the Role of the Judiciary*, 46 European Taxation 216 (2006), 224; J.M. Mössner, *Klaus Vogel Lecture 2009 – Comments*, 64 Bulletin for International Taxation 16 (2010), 17; D.M. Broekhuijsen, *A Modern Understanding of Article 31(3)(c) of the Vienna Convention (1969): A New Haunt for the Commentaries to the OECD Model?*, 67 Bulletin for International Taxation September (2013).

postpone on implementing changes to the OECD MTC in their bilateral tax treaties, and that not all judges dynamically apply the OECD Commentary when interpreting bilateral tax treaties, a level playing field is absent in coordinating on the rules required to address the collective action problems, such as those related to tax competition and tax arbitrage. This makes coordinated action difficult if not impossible to organise, as states have an incentive to enjoy the benefits of non-cooperation ('free-ride') where others agree to restrict their rules.

Hence, the OECD has a reason to be worried. It has largely exercised its influence on the rules of bilateral tax treaties by amending the OECD MTC and Commentaries to the OECD MTC. As to the short run: the implementation of some of the Project's most important outcomes depends on states to agree to the BEPS Convention, as implementing the outcomes through the OECD MTC will take decades. Also, it depends on judges to apply the Commentaries (and transfer pricing guidelines) related to the Project's outcomes when interpreting tax treaties. But particularly in the long run, the outlook is unforgiving: the unsuitability of using the OECD MTC and its Commentaries to update the bilateral tax treaty system jeopardises the sustainability of the international tax system as a whole. A fundamental reconsideration of multilateral cooperation in international tax law is clearly necessary.

3.2 THE RELEVANCE OF THE OECD MTC IN MODERNISING THE TAX TREATY NETWORK

Tax treaties are rigid tools. Vann, for instance, argued in 1991 that the framework of bilateral tax treaties based on the OECD MTC had become irrelevant, as many of the pressing issues at the time were not dealt with by the tax treaties then in force.[7] Indeed, tax treaty negotiations can be lengthy, as they require friendly political relationships and the commitment of not one but two states. That makes it likely that a considerable amount of time – decades, not years – is required before new norms set out in an OECD MTC are incorporated into tax treaties.

Although the OECD MTC and the Commentary have proven to be quite successful,[8] as they have provided states with negotiation flexibility and have greatly uniformised and influenced the existing rules of international tax, governments do not have to follow the OECD MTC when (re)negotiate tax treaties. Instead, member countries can amend their bilateral tax treaties if they consider this 'opportune'.[9]

7 R.J. Vann (1991).
8 See e.g. M. Lang, et al. (2012).
9 OECD, Rules of Procedure of the Organisation (2013) art. 18(b).

Data from the IBFD's tax treaty database on tax treaties, in force on 1 January 2013,[10] shows that the average time (i.e., the 'estimated mean') it takes before an OECD-member country's tax treaty[11] is updated is 17,21 years (the data and calculations are taken up in *Appendix A*, which can be accessed online).[12] And this figure only takes into account the time between subsequent treaty updates of treaties that were *actually* amended. In other words: this figure excludes treaties that were never amended, as such treaties lack two subsequent amendment moments. Putting 1 January 2013 as a fictional amendment date on these treaties, the result would be 18 years.[13]

More specifically, the data shows that the content of tax treaties severely lags behind the content of the latest OECD MTC update. And every time the OECD introduces a new version of the OECD MTC, the gap widens.[14] Figure 1 below expresses this point. How many of the tax treaties in force before the introduction of a new OECD MTC version were actually amended or renegotiated in or after the year in which a new version of the OECD MTC was published? Surely, if a tax treaty has, since its conclusion, never been amended or renegotiated (i.e., by means of a new treaty or protocol), it is impossible that such a treaty could include any of the provisions of the OECD MTC adopted posterior to that treaty's conclusion.

Each of the three bars represents the total number of treaties in force anterior to the 1977, 1992 or 2003 versions of the OECD MTC, respectively. Only

10 The Tax Treaty Database can be found in the Tax Research Platform of the International Bureau of Fiscal Documentation (website: www.ibfd.org). The IBFD keeps records of the date of the conclusion of treaties and their protocols.

11 Only the treaties of the founding states of the OECD were taken into account. These are: the Republic of Austria, the Kingdom of Belgium, the Dominion of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of Greece, the Republic of Iceland, the Republic of Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Kingdom of Norway, the Portuguese Republic, the Kingdom of Spain, the Kingdom of Sweden, the Swiss Confederation, the Turkish Republic, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.The count includes tax treaties of these countries with non-OECD member countries.

12 Appendix A can be found online at DANS, the Netherlands Institute for Permanent Access to Digital Research Resources: D.M. Broekhuijsen, *A Multilateral Agreement for International Taxation: Designing an Instrument to Modernise International Tax Law.* DANS. http://dx.doi.org/10.17026/dans-x22-k8wh.

13 In counting the amendments to tax treaties in force, terminated treaties which have not been followed up by a new treaty, abandoned treaties as well as treaties that were not ratified before 1-1-2013, were excluded. Moreover, all pre-war (1940) treaties were not considered.
A treaty was considered to be 'updated' if, within the same bilateral treaty party relationship: (1) a new bilateral treaty was concluded; (2) a protocol to a treaty was concluded or (3) when the exchange of notes, the records of discussions between parties, or a mutual agreement changed the wording of the tax convention in question.

14 This is also recognised by the OECD: OECD, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15: 2015 Final Report (2015), p. 9.

those treaties have been taken into account that were still in force on 1-1-2013 (i.e., treaties that were terminated before 2013 are not included in the figure). The number of treaties that have, as of those years, not been updated, have been depicted in light grey. Note also that the total amount of tax treaties increases over time (the reason is, simply, that countries have expanded their tax treaty networks over the second half of the 20th century).

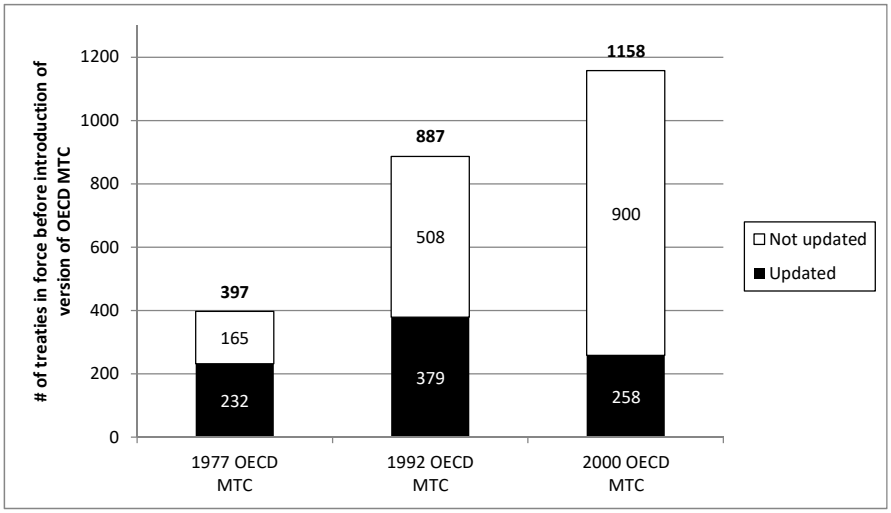

Figure 1: Have tax treaties of OECD founding members been updated since the introduction of the OECD MTCs of 1977, 1992 and 2000? Measured on 1-1-2013.

Figure 1 shows that, on 1 January 2013, 41% of the tax treaties in force before the 1977 version of the OECD MTC were not amended between 1977 and 2013. This signifies that many of the pre-1977 tax treaties currently in force do not even reflect the standards set out in 1977 Model. Similarly, 57% of the treaties in force before 1992 and 77% of the treaties in force before 2000 have not been changed since the years 1992 and 2000, respectively. Consequently, updates to the OECD MTC are barely reflected in tax treaties of the OECD Member countries. This clearly compels a reconsideration of the way tax treaties are amended. And note: in practice, the influence of the OECD MTC on bilateral tax treaties might be even worse, as changes to the contents/texts of tax treaties, effectuated, e.g., by protocols or by renegotiations, were not considered. I have merely reasoned that a tax treaty, unaltered after the introduction of a new version of the OECD MTC, can in no way include the rules of that OECD MTC.

3.3 THE RELEVANCE OF THE OECD COMMENTARIES IN MODERNISING THE TAX TREATY NETWORK

3.3.1 Introduction

What about the OECD Commentaries? Can they be used to 'update' the bilateral tax treaty network? After all, they are guidelines that may be used by courts, taxpayers and tax authorities in interpreting and applying tax treaties based on the OECD MTC. And whoever controls the interpretation of tax treaties, also controls their contents.

Nevertheless, the updates to the OECD Commentary are neither binding on the domestic judiciary nor enforceable by taxpayers or tax authorities before a court. Instead, the availability of multiple 'OECD-endorsed' interpretations of a tax treaty term brings up the question which meaning takes precedence: the 'old' interpretation, prevalent before the date of conclusion of a tax treaty, or the 'new' interpretation, introduced in the OECD Commentaries after a tax treaty's conclusion? The main argument to apply a 'newer' version of the OECD Commentary to interpret an older tax treaty depends on the degree to which it can be argued that states intended to give a tax treaty term the meaning that was set out in the OECD Commentaries that existed when the tax treaty was concluded.[15] Hence, the practice of using the OECD Commentaries to influence (or even alter) the contents of tax treaty terms may prove a quagmire.[16]

An analysis of relevant case law decided by courts in OECD member countries provides some (factual) insight in the way the OECD Commentary is used to 'modernise' the terms of a tax treaty through interpretative rule-stretching. The practice of international tax law is of course not limited to judicial decision-making; the OECD Commentary's role in influencing non-judicial (administrative) decisions should not be ignored. Nevertheless, for practical purposes, the analysis is limited to case law of courts only, distilling a general picture from a practice of tax law that is transparent and well-documented and, due

15 M. Lang and F. Brugger, The Role of the OECD Commentary in Tax Treaty Interpretation, 23 Australian Tax Forum 95 (2008) p. 108. See also the work of Hans Pijl, who sets out the dilemma of dynamically using the OECD Commentary in examples from practice, e.g. H. Pijl, *Interpretation of Article 7 of the OECD Model, Permanent Establishment Financing and Other Dealings*, 65 Bulletin for International Taxation 294 (2011).

16 The occasional explicit reference to the OECD Commentary in the text or protocol of a tax treaty does not seem to change this conclusion. See C. West, References to the OECD Commentaries in Tax Treaties: A Steady March from "Soft" Law to "Hard" Law?, 9 World Tax Journal 117 (2017) at p. 159: 'Hard law reference to the OECD or UN Commentaries in the treaty or protocol to the treaty has, at best, ensured that the courts must consult the Commentaries, but use of the Commentaries by the judiciary will continue to vary'.

to precedential effects awarded to court decisions, influential. The analysis is included in *Appendix B*, which can be found online.[17]

To circumvent discussions about the 'status' of the OECD Commentary under international law and in the process of tax treaty interpretation – this issue is still under debate in tax law doctrine – the reasoning of the courts as to the interpretative relevance of the OECD Commentary was not considered in the analysis. Instead, it focuses on the Commentary's *effects* under five different groups of circumstances.

The general impression left by this outcome-oriented analysis is that courts of OECD Member countries, as between themselves, do not coherently deal with treaty-posterior versions of the OECD Commentary. Indeed, the analysis confirms that if the Commentary introduces a meaning that is of a 'gap-filling' or 'contradictory' nature in relation to the version existing at the time a specific bilateral tax treaty was concluded, its effect in courts of the OECD member countries varies greatly. This suggests that the dynamic application of the OECD Commentary is far from limitless,[18] and that ultimately, amendments to bilateral tax treaties cannot be effectively introduced by stretching the interpretation of the terms of the OECD MTC. Using the OECD Commentary to influence the contents of tax treaties is, in other words, problematic.

The methodology used in the research set forth in *Appendix B* was as follows.

3.3.2 Case selection

First, a group of relevant cases, all settled within the jurisdiction of OECD member countries, was selected by using a specific search query within the

17 Appendix B can be found online at DANS, the Netherlands Institute for Permanent Access to Digital Research Resources: D.M. Broekhuijsen, A Multilateral Agreement for International Taxation: Designing an Instrument to Modernise *International Tax Law*. DANS. http://dx.doi.org/10.17026/dans-x22-k8wh. It consists of a case law code book and a database.

18 The issue can be further complicated by the question of the retroactive effect of the OECD Commentary. To what extent can taxpayers rely on the expectation that an 'old' construction of a treaty provision would apply in the future? Indeed, the question comes up whether significant amendments to the OECD Commentary may be applied with retroactive effect to pre-existing ('old') facts or circumstances (i.e., in relation to situations that have their origin under an 'old' construction of a treaty provision, but continue to exist under a 'new' construction of a treaty provision, as is e.g. the case with the profits of a PE, capital gains, and interest). As Van der Velde and I have argued elsewhere, the retroactive application of OECD Commentary under circumstance 5b (see below) could harm a taxpayer's legitimate expectations, provided that the OECD Commentary is not introduced to counter an 'evident' lacuna in tax treaty law. See D.M. Broekhuijsen and K.M. Van Der Velde, The Retroactive Effects of Changes to the Commentaries on the OECD Model, 69 Bulletin for International Taxation 623 (2015).

database of the International Tax Law Reports.[19] The search function was applied on 1 January 2013 and brought up about 150 judgements in which the word 'interpretation' was found within the same paragraph[20] as the words 'tax treaty', 'tax agreement' or 'tax convention'.[21]

If a case included more than one interpretative issue, each issue was assessed as if it were an individual case. This was for instance the case when a judge clearly interpreted two distinct treaty terms, or when a judgement dealt with the application of more than one tax treaty.

From these 'cases', an additional selection excluded those which clearly fell outside the ambit of this research. Cases deselected were those in which the Commentary could clearly not have played a role, i.e., (1) those that dealt with the interpretation of domestic tax law rather than the term of a tax treaty; (2) those not related to a tax treaty on income and capital, but e.g., to inheritance tax treaties; (3) those that dealt with tax treaty provisions that were clearly not in conformity with the OECD MTC[22] and (4) those that dealt with the interpretation of treaty terms such as 'profits',[23] 'income' or 'gains', which require domestic law rules to be calculated or determined, rather than the interpretative rules of the OECD Commentary.[24]

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19 These are available through Lexis Nexis Academic. See: http://www.lexisnexis.co.uk/store/uk/International-Tax-Law-Reports/product.

20 And not e.g. in the editor's note to the case or in the case's summary.

21 The search function, which works on the basis of Boolean search logic, reads as follows: 'Interpretation W/p tax treaty OR tax agreement OR tax convention'. The search function has been applied in the Lexis Nexis database on the International Tax Law Reports on 1-1-2013.

22 Here I followed the approach of P. Baker, Double Taxation Conventions, a Manual on the OECD Model Tax Convention on Income and on Capital (Sweet and Maxwell 3d ed. 2001) at par. E-16 (a case-by-case interpretation is required to determine whether the difference in wording between treaty and OECD MTC also results in a different meaning between the two texts).

23 It has to be noted that the term 'profits' strictu sensu does not encompass the discussion on the *attribution* of profits (e.g. to a PE). Terms such as 'remuneration' also fit in this category.

24 Tax treaties merely allocate taxable income but do not regulate the calculation or determination of that income. For instance, in the proceedings of a seminar documented in B.J. Arnold, J. Sasseville and E.M. Zolt, Summary of the Proceedings of an Invitational Seminar on Tax Treaties in the 21st Century, 56 Bulletin for International Taxation 233 (2002), p. 243-244, participants observed 'that the tension between seeking a common interpretation of a treaty and referring to domestic law is not restricted to Art. 3(2). For example, determining the profits attributable to a permanent establishment requires reliance on the domestic law of each country; otherwise, treaties would have to contain detailed computational rules providing each and every detail (for example, depreciation rates and rules) for determining taxable profits. Therefore, it was argued, recourse to domestic law is necessary wherever the treaty is silent or unclear, irrespective of whether or not Art. 3(2) is included in the treaty. It was argued that, in the absence of reliance on domestic law, tax treaties or the Commentary to the OECD Model would have to be transformed into a complete tax code'. Closely related is the issue that Martin points out: domestic law is to be applied before a tax treaty can restrict the application of that domestic law, named the 'subsidiarity of

The use of the search function, in combination with the additional selection, resulted in a sample of 'neutral' cases (i.e., cases on tax treaty interpretation in which the Commentary could have been, but also in which it could *not* have been, of relevance). This allowed for the generalisation of the Commentary's relevance under a set of varying circumstances.

3.3.3 Coding and grouping

In accordance with the facts of a case, each case first coded on and then grouped within five categories of circumstances. The circumstances, here formulated in the form of questions, are:[25]

1. Was a reservation on the provisions of the OECD MTC or an observation on the Commentary submitted?
2. Was the relevant treaty term *not* defined in the treaty?
3. Was one of the treaty parties *not* a member of the OECD?
4. Did the Commentary exist before the conclusion of the relevant bilateral tax treaty?[26]

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tax treaties': see P. Martin, *Interaction between Tax Treaties and Domestic Law*, 65 Bulletin for International Taxation 205 (2011) at 206.

25 These circumstances are generally considered relevant in the literature on the interpretation of tax treaties. They also follow from the position of the OECD's Committee on Fiscal Affairs as set out in the Introduction to the Commentary. Literature from which these circumstances follow is: K. Vogel, Double Tax Treaties and their Interpretation, 4 International Tax and Business Lawyer 1 (1986); H.J. Ault, *The Role of the OECD Commentaries in the Interpretation of Tax Treaties*, 22 Intertax 144 (1994); M. Edwards-Ker, *Tax Treaty Interpretation* (In-Depth 1994); E. Reimer, *Interpretation of Tax Treaties*, 39 European Taxation 458 (1999); E. 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*, 43 European Taxation 142 (2003); F.A. Engelen, *Interpretation of Tax Treaties under International Law: A Study of Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties and their Application to Tax Treaties* (IBFD 2004); G. Maisto, *The Observations on the OECD Commentaries in the Interpretation of Tax Treaties*, in: A Tax Globalist, Essays in Honour of Maarten J. Ellis (H. Arendonk, F.A. Engelen and S. Jansen eds., IBFD 2005); M. Waters, *The Relevance of the OECD Commentaries in the Interpretation of Tax Treaties*, in: Praxis des Internationalen Steuerrechts, Festschrift für Helmut Loukota zum 65. Geburtstag (M. Lang and H. Jirousek eds., Linde Verlag Wien 2005); D.A. Ward, et al. (2005) H. Pijl (2011).

26 But what if the Court itself did not explicitly refer to the OECD Commentary? To answer question 4, I looked not only at the text of the judgement itself, but also at the arguments of parties. Coding rules were thus: if a court explicitly referred or cited a version of Commentary, I coded the year of that version. Where the court referred to two versions, I coded the version that has been published latest in time. Where a court did not explicitly refer to the Commentary, I coded the year of adoption of the version referred to by one of the parties to the dispute. Where neither the Court nor the parties referred to the OECD Commentary, I coded the year of the version to which an advocate general referred (if there was any). Where nothing in the judgement pointed at a Court's consideration of the Commentary, I answered this question with N.A.

5. If question 4 was answered with *no* (i.e. the Commentary was adopted *after* the conclusion of the relevant bilateral tax treaty), was that Commentary:
   a. similar to;
   b. expounding on;
   c. gap-filling in relation to;
   d. or contradictory to Commentary existing at the time of conclusion of a treaty?[27]

For each case, questions 1 to 4 were answered with either 'yes' or 'no', question 5 with 'a'; 'b'; 'c' and 'd'. The answers were coded per case in a codebook and its related Excel database, which can be found in *Appendix B.* If a question could be answered with 'yes', that case was placed in that group. If a case could be placed in more than one group, it was.

3.3.4 Analysis

Subsequently, the influence of the Commentaries in all of the cases selected was determined, distinguishing between three possible entries: either the Commentary was used by the court, and therefore of relevance, or it was not used or disregarded by the court, and therefore not of relevance. In some cases, the Commentary's influence could not be determined or established. These cases were coded 'N.A ('not applicable'). For each circumstance, this then resulted in a list of cases in which the Commentary was of relevance, a list of cases in which the Commentary was not of relevance, and a list of cases in which the relevance of the Commentary could not be determined.

The gradual normative influence of the Commentary on each decision (e.g., decisive, supplementary, etc.) was not considered: coding the relative influence of the Commentary proved too problematic (one of the problems was that in most decisions, courts do not give explicit reasons for their use of the Commentary).

3.3.5 Outcomes

The outcome of the analysis is expressed in the following table. For each circumstance, the table shows the number of cases in which courts have, and have not, used the OECD Commentary.

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27 In this regard, I followed M. Waters (2005). As to the issue of anti-abuse rules, I followed the approach of B.J. Arnold and S. Van Weeghel, The Relationship between Tax Treaties and Domestic Anti-Abuse Measures, in: Tax Treaties and Domestic Law (G. Maisto ed., IBFD 2006).

Table 2: the relevance of the OECD Commentary under varying circumstances in courts of OECD member countries

Circumstance	*Total number of case issues in group*	*The Commentary was relevant*	*The Commentary was not relevant*	*N.A. (unable to determine)*	*% of cases in which OECD Commentary was irrelevant*
1. An observation or reservation has been submitted	8	4	4	0	50%
2. The relevant treaty term is not defined in the treaty	26	15	10	1	38%
3. One of the parties is not a member of the OECD	14	12	2	0	14%
4. The Commentary existed before the conclusion of the relevant treaty	11	9	2	0	18%
5a. The Commentary was adopted after the conclusion of a treaty, and that commentary was similar to (a) or expounding on (b) the version existing at the time the treaty was concluded	40	35	5	0	12%
5b. The Commentary was adopted after the conclusion of a treaty, and that Commentary was gap-filling in relation to (c) or contradictory to (d) the version existing at the time the treaty was concluded	20	12	8	0	40%
Total number of case issues selected	84	57	26	1	31%

From the analysis follows that the Commentary is generally complied with by courts when it does not introduce significant changes to the versions that

existed at the time the relevant treaty was concluded. Indeed, the general picture is that the OECD Commentary is followed and used by courts in circumstances 4 and 5a in 82% and 88% of the cases considered, respectively.

But courts of OECD Member countries are more careful in applying Commentary that contains gap-filling or contradictory guidance in comparison to versions existing at the time the relevant treaty was concluded. Indeed, under circumstance 5b, courts disregard the OECD Commentary in 40% of the cases. This figure deviates significantly from the Commentary's record under the other circumstances. For instance, the situation that one of the treaty parties is not an OECD-member country seems to be of limited relevance in courts' considerations to use the Commentary: it was still used in 86% of the cases, despite the fact that non-OECD member countries have had no or little influence in drafting the Commentary.

In the light of the current need for coherent action in the international tax field, the figure of 40% compels a reconsideration of the way the OECD seeks to dynamically influence the application and interpretation of bilateral tax treaties. This figure expresses that newly drafted OECD Commentary, e.g., following from the BEPS Reports, may only have a moderate effect in practice. If the OECD Commentary on BEPS is disregarded in 40% of all cases brought to court in OECD Member countries' jurisdictions, that would make the implementation of the OECD's work in addressing BEPS vulnerable. After all, absent an international adjudicator, domestic courts have the 'final say' on the contents of tax treaty law in each jurisdiction.

What are the consequences? First of all, there is the problem of implementation effectiveness. Should the latest transfer pricing guidelines (i.e., the outcomes of BEPS Actions 8-10) not be applied in OECD jurisdictions, the effect of changes to the transfer pricing guidelines would be severely limited. Moreover, the analysis above includes cases decided by courts of OECD member countries only. The question therefore arises: what about the effect of the OECD Commentary in courts of non-OECD member countries? Literature suggests a lower level of compliance in court decisions in these jurisdictions, as non-OECD Member countries have not had a similar degree of influence in formulating the OECD Commentary (and OECD MTC).[28]

Secondly, the reluctance of one court to apply the latest version of the OECD Commentary could jeopardize the BEPS Project as a whole (the importance of a level playing field, see also 3.4).

28 D.A. Ward, et al. (2005), p. 35-36: 'the presumption that the [Non-OECD member] parties have a common intention is (…) much weaker, as the non-OECD member country would not have had the opportunity to participate in the discussions and the drafting of the relevant Commentary'. From the extensive study by M. Lang, et al. (2012) follows that this position is (often implicitly) taken in e.g. Brazil (see p. 172-173); China (p. 262); Colombia (p. 295); India (p. 552-554); Peru (p. 798); Russia (p. 919). It goes without saying that if the relevant tax treaty is not based on the OECD Model, the question is irrelevant.

So, in terms of effectiveness, amending the OECD Commentary so as to influence the contents of bilateral tax treaties may be questioned. But that is not all: the practice of influencing the contents of bilateral tax treaties in this deficient way is not without costs. The uncertain relevance of the OECD Commentary in courts of OECD member countries under circumstance 5b negatively impacts the ability of taxpayers to know their obligations under tax treaty law. Indeed, the uncertainty introduced by substantial OECD Commentary amendments leaves practitioners clueless on whether the latest version compels them to enter into costly restructurings. An indication of the relevance of this observation is that taxpayers' legitimate expectations may be harmed when OECD Commentary of type '5b' (see the table above) is applied with retroactive effect to facts and circumstances pre-dating an update to the OECD Commentary.[29]

Hence, the problems of 'modernizing' the tax treaty network by means of the OECD Commentary are numerous. The case law analysis clearly shows that the current 'system' to influence the contents of bilateral tax treaties is not without limits. A multilateral agreement has the potential to address these concerns. Indeed, Parliaments, not judges or a creative executive, are best placed to implement new norms in tax treaties.[30]

3.4 A LEVEL PLAYING FIELD

The loose-form of coordination under the OECD MTC and Commentaries creates another problem: it does not allow states to coordinate on the parallel amendment of bilateral tax treaties. This greatly reduces the ability of international tax policy makers to coordinate on international tax rules in an integrative way. Because states coordinate on the avoidance of double taxation by means of soft law, they are free to postpone, modify, or disregard etc. that soft law when negotiating or amending their bilateral tax treaty relations. Indeed, the loose type of coordination has not been able to prevent the many collective action problems now addressed in the BEPS Project. Tax competition is, in other words, structurally 'built in' in the method by means of which states cooperate in international tax law. This prevents states to reach common, more optimal and fairer solutions than those currently reached. In sum: under the current coordination system, every single nation, or group of nations, has the dominant strategy to compete with others to attract investors. Without a level playing

29 D.M. Broekhuijsen and K.M. Van Der Velde (2015).

30 See also E. Kemmeren, De rol van het OESO-Commentaar bij de uitleg van belastingverdragen en het Europese recht: Trias politica onder toenemende druk?, in: Principieel belastingrecht: Liber Amicorum Richard Happé (H. Gribnau ed., Wolf Legal Publishers 2011), who argues that the dynamic application of changes to the OECD MTC not supported by the text of a tax treaty, upsets the balance between lawmaker, judge and executive.

field, collective action problems like BEPS will just shift to the countries ('free-riders') that have not accepted certain treaty amendments.[31] This incentive exists, as some countries may foresee a larger inflow of foreign direct investment (FDI) if others restrict their rules.

This is also recognised by the OECD in its report on drafting a multilateral instrument. The OECD considers that 'some provisions of the treaty-based portion of the BEPS Project require broad state participation in order to successfully address BEPS concerns'.[32] And the explanatory statement to the final BEPS package states that some minimum standards were agreed upon 'in particular to tackle issues in cases where no action by some countries would have created negative spill overs (including adverse impacts of competitiveness) on other countries'.[33] Countries have recognised the need to level the playing field in the areas of preventing treaty shopping, country-by-country reporting, fighting harmful tax competition and improving dispute resolution.[34] And indeed, most of those areas are reflected in the BEPS Convention, in which the parties are 'conscious of the need to ensure swift, co-ordinated and consistent implementation of the treaty-related BEPS measures in a multilateral context'.[35]

What is at stake? The lack of a level playing field may cause participating states to take unilateral action (for instance by means of unilateral anti-abuse or CFC rules),[36] or lead them to continue relaxing their tax rules and engage in further tax competition, undermining common, multilateral solutions. Neither of these two alternatives are more attractive in the long run. Increased and enduring tax competition may mean that tax systems will become increasingly redundant. Alternatively, international tax law may end up as a 'global tax chaos' due to the uncontrolled growth of domestic anti-abuse rules. A level playing field created by a multilateral agreement may therefore be perceived as an attractive solution in between these two extremes.

31 F.A. Engelen and A.F. Gunn, Het BEPS-project: een inleiding, *WFR* 2013/1413 par. 4.2.
32 OECD, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties (2014), p. 17.
33 OECD, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15: 2015 Final Report (2015), p. 6.
34 OECD, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6: 2015 Final Report (2015) OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241688-en., p. 6.
35 Preamble to the BEPS Convention.
36 H. Loukota (1998) p. 88.

3.5 CONCLUSION: THE PROSPECTS OF A MULTILATERAL AGREEMENT FOR INTERNATIONAL TAXATION

From the previous chapter follows that agreement on a 'comprehensive' multilateral tax treaty might never be achieved, and that any effort for multilateral agreement has to take the bilateral tax treaty system as a given.

At the same time, a 'new move in tax coordination' is becoming increasingly urgent and necessary for international tax law. The collective action problems of tax avoidance and tax evasion are high on the political agenda, yet, as follows from this chapter, the loose type of coordination currently practiced by the OECD is lacking in terms of its ability to dynamically influence and modernise the bilateral tax treaty network in line with present-day needs. Indeed, amending the OECD MTC so as to influence the norms of bilateral tax treaties is unsuited as a way to modernise international tax law: states rarely amend their tax treaties, and if they do, they are not compelled to conform to the most recent version of the OECD MTC. Likewise, stretching the interpretation of a tax treaty rule by amending the OECD Commentary is not very effective either, as courts of varying OECD Member countries are reluctant to apply new interpretative rules to older tax treaties.

Moreover, the loose type of coordination provided by the OECD MTC fails at addressing collective action problems that relate to the interests of the international community as a whole.[37] Although essentially a multilateral structure from which states deviate in their bilateral tax treaty relations, the OECD MTC does not compel states to undertake coordinated action. States can, after all, decide to postpone the implementation of the latest version of the OECD MTC in their treaties, or disregard updates to the OECD MTC completely.

For these reasons alone, thinking about a 'new' style multilateral agreement for international taxation is a necessary step in addressing the common action problems such as those related to tax arbitrage and tax competition. First of all, the binding nature of a multilateral agreement would take care of amending bilateral tax treaties in one go.[38] In the words of the OECD:

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37 See: A. Christians, et al. (2007). For the argument that a comparable shift has taken place in in relation to international law in general: B. Simma, From Bilateralism to Community Interest in International Law, in: Recueil des Cours: Collected Courses of The Hague Academy of International Law 1994 IV (Martinus Nijhoff 1995).

38 There is however a very important underlying assumption in the OECD's rhetoric. The OECD considers that a multilateral agreement to amend bilateral tax treaties is able to 'overcome the hurdle of cumbersome bilateral negotiations and produce important efficiency gains'. The assumption, in other words, seems to be that a decrease in procedural hurdles will quicken tax treaty amendments. OECD, Action 15: A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS (2015) OECD/G20 Base Erosion and Profit Shifting Project, http://www.oecd.org/ctp/beps-action-15-mandate-for-development-of-multilateral-instrument.pdf, p. 15. On the question whether a multilateral negotiation *will* actually be quicker than all those bilateral negotiations, see further Ch. 5 and 6..

> 'If undertaken on a purely treaty-by-treaty basis, the sheer number of treaties in effect may make such a process very lengthy, the more so where countries embark on comprehensive renegotiations of their bilateral tax treaties'.[39]

> 'the simple reality [is] that only a multilateral instrument can overcome the practical difficulties associated with trying to rapidly modify the 3000+ bilateral treaty network'.[40]

Secondly, a multilateral agreement has the potential to provide a level playing field, which enables states to coordinate on common policy goals. In the words of the Action 15 – deliverable:

> 'to ensure a level playing field and fairly shared tax burdens, flexibility and respect for bilateral relations will need to be balanced against core commitments that reflect new international standards that countries are urged to meet and for which the multilateral instrument is a facilitative tool'.[41]

So, there is a need for a legal instrument that fundamentally increases the role of multilateralism in swiftly adapting or changing the rules contained in bilateral treaties in a binding manner. And introducing these adaptations and changes in a coordinated way will create a level playing field in which states can reach collective outcomes on collective action problems. In this regard, the multilateral agreement built upon in this book should be seen as a method:

1. to make (OECD) coordination outcomes binding, so that they have direct impact on the texts and/or the interpretation of bilateral treaties, potentially providing for a more expeditious tax treaty amendment process;
2. that assists states in agreeing to tax treaty amendments in a more structural, complete and uniform manner.[42]

The BEPS Convention, evaluated in Chapter 8, is a good first step. Yet, as we will see, a more fundamental multilateral solution for international taxation will be necessary to address the collective action problems of today as well as those of tomorrow.

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39 OECD, BEPS Action Plan (2013) (2013) at p. 23-24.
40 OECD, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties (2014), p. 16.
41 Id. at para. 17.
42 Inspired on: A. Miller and A. Kirkpatrick (2013) p. 685.