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

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Citation

Broekhuijsen, D. M. (2017, November 16). *A multilateral tax treaty: designing an instrument to modernise international tax law*. The Meijers Research Institute and Graduate School of the Leiden Law School of Leiden University. E.M. Meijers Institute, Leiden. Retrieved from <https://hdl.handle.net/1887/57407>

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

Date: 2017-11-16

8 | An evaluation of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

8.1 INTRODUCTION

This chapter evaluates the text of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter: BEPS Convention or BC) against the outcomes of the previous chapters. The BEPS Convention was adopted on the 24th of November 2016,¹ and may be called a remarkable achievement. As much as 100 countries² participated in drafting its text. As it will exist alongside the tax treaties brought under the ambit of the BEPS Convention on the basis of art. 2(1) BC (hereinafter: Covered Tax Agreements),³ the Convention will fundamentally alter the landscape of international tax law.

The evaluation, first of all, serves an *explanatory* purpose: can the theory set out in prior chapters of the book help us understand the BEPS Convention? As to the Convention's substantive obligations (see section 8.2.1), particularly Chapter 5 proves of value: it follows that the neoliberal institutionalist perspective on multilateral cooperation functions surprisingly well to explain the scope of the Convention's substantive multilateral commitments. Moreover, the Convention's procedural rules echo the rational design presumptions of section 5.4.5. This, however, inevitably introduces some of the issues discussed in Chapter 7, such as those related to reservations, *pacta de negotiando* and the relationship between bilateral tax treaties and the BEPS Convention (section 8.2.2).

But an evaluation of the Convention can also tell us something about the things it should have done better, which will be dealt with in section 8.3. This second line of enquiry is therefore *normative*. What other steps should have been taken, keeping in mind the idea of the 'multilateral agreement for international taxation', build up in the previous chapters?

1 The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (2016).

2 In the discussion below, the words 'party', 'state' and 'country' should be read so as to refer to 'contracting jurisdictions', as meant in art. 2 of the BEPS Convention, too.

3 According to art. 2(1)(a) BC, 'the term "Covered Tax Agreement" means an agreement for the avoidance of double taxation (...) that is in force between two or more (...) Parties (...) and (...) with respect to which each such Party has made a notification to the Depositary'.

As this chapter is most of all an exposition of points earlier made, repetition is avoided; instead, references are made to previous sections of the book. It is neither the point of the discussion below to provide an encyclopaedic analysis of all articles of the Convention, nor to add any arguments ‘new’ to the discussion. Only those articles are discussed that, in the light of the foregoing chapters, are of relevance to the research questions. For this reason, a discussion of the Convention’s rules on dispute resolution and arbitration is omitted, as well as an explicit consideration of, e.g., issues of treaty interpretation and of those related to the (implementation of) specific substantive obligations (see also section 7.1).

8.2 EXPLAINING THE BEPS CONVENTION

8.2.1 Articles 3-15 avoid distributive concerns

8.2.1.1 Introduction

The substantive obligations of the BEPS Convention can generally be explained by making use of the neoliberal institutionalist view on international tax cooperation. To accommodate diverging state interests in relation to its substantive commitments, the Convention applies three methods to relax distributive concerns. First, it makes use of ‘rules of the road’ (section 8.2.1.2). Second, parties under the Convention have explicitly agreed to engage in further bilateral negotiations (section 8.2.1.3). Finally, some of the obligations entered into avoid distributive concerns altogether; these involve commitments in which gains/losses are perceived as small (section 8.2.1.4).⁴ The discussion below reflects, in other words, the conclusions of Chapter 5.

8.2.1.2 Multilateral consensus on ‘rules of the road’

The Convention contains four provisions that are clear ‘rules of the road’ (see sections 5.4.3 and 7.10.3): article 3 and 6 BC, the PPT clause of article 7 BC, and article 10 BC.

The rule on hybrid mismatches (article 3 BC) is a clear rule of the road. As countries may be residence countries in one treaty relationship but source countries in another, the rule clearly depends on context. Asymmetric tax relationships may hence hide a clear distributive conflict, making the rule

4 It may further be pointed out that, despite the fact that some issues, such as triangular cases and issues of transparency, are best solved multilaterally, the text BEPS Convention is explicitly written to be applied to *bilateral* tax relations. This is not a drafting mistake: the need for interpretative flexibility (see section 5.4.6) was prioritised over a comprehensive multilateral approach, increasing the likelihood that the Convention is broadly supported.

feasible to be agreed upon in a multilateral convention. See for a further examination of this argument section 7.10.3.

Article 6 BC comprises a 'true' multilateral commitment, as it sets forth a minimum standard from which parties, after signing up to the BEPS Convention, cannot derogate. The preamble it adds to existing tax treaties sets out that tax treaties should eliminate double taxation, but not 'create opportunities for non-taxation or reduced taxation through tax evasion or avoidance' through, for instance, treaty shopping. In this regard, this 'new' purpose of bilateral tax treaties is worded in stronger or 'clearer' language than the purpose formulated in earlier amendments to the Commentary on article 1 OECD MTC (e.g., those of 2003).⁵ In addition to the 2003 Commentary, article 6 now also introduces the idea that tax avoidance and 'non-taxation or reduced taxation' are closely linked.

Its principle-like language suggests article 6 is a 'rule of the road'. Nevertheless, as its purpose is to influence the interpretation of tax treaties,⁶ it may also be perceived missing distributive effects altogether (it could, in other words, also have been discussed in section 8.2.1.4).

Article 7 BC presents another example to showcase the explanatory power of Chapter 5's neoliberal institutionalist perspective on international tax relations. Indeed, Chapter 5 suggests that avoiding treaty abuse may best be served by a PPT rather than a LOB clause. To the exclusion of Luxemburg and the Netherlands, most countries likely perceive it as a 'rule of the road' (see section 5.4.4). And indeed, the PPT embodies the Convention's minimum standard in relation to treaty abuse. It is therefore not surprising that it has come to function as *the* central commitment of article 7 BC: the text of the article only allows parties to file reservations to the PPT if they commit to concluding a detailed LOB in combination with a rule that addresses conduit financing structures in their tax treaties (see art. 7(15)(a) BC) or when parties cannot reach agreement on supplementing the PPT with a simplified LOB (art. 7(16) BC). The simplified LOB provision on its own is not able to fulfil the minimum standard settled upon in the negotiations on the Action 6 BEPS Final Report.

5 According to par. 7 of the OECD Commentary on Art.1, 'the principal purpose of double taxation conventions is to promote, by eliminating international double taxation, exchanges of goods and services, and the movement of capital and persons. It is also a purpose of tax conventions to prevent tax avoidance and evasion'.

6 See OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6: 2015 Final Report* (2015), par. 73. The question comes up whether the Hoge Raad, had it faced a preamble of the type set out in article 6, would have decided differently in e.g., HR 15 December 1993, nr. 29 296, *BNB* 1994/259 or in HR 28 June 1989, nr. 25 451, *BNB* 1990/45. See e.g., in relation to the 'purpose' of tax treaties introduced by the 2003 Commentaries: J. Vleggeert, *Misbruik van belastingverdragen*, in: *Kwaliteit van belastingrechtspraak belicht* (J.P. Boer ed., SDU 2013).

Finally, article 10 of the BEPS Convention allows the source state to disregard the application of article 10, 11 and 12 OECD MTC.⁷ It is, as a consequence, obviously distributive and would be fraught with difficulties (e.g., parties may disagree on the applicable threshold rate, arbitrarily set at 60%).⁸ Nevertheless, a huge escape, in the form of a 'rule of the road', is taken up in article 10 BC's second paragraph. This exception holds that the first paragraph is not applicable when the income is 'derived in connection with or is incidental to the active conduct of a business carried on through the permanent establishment'. Moreover, paragraph 3 provides, as a last resort, at the request of the taxpayer, a 'discretionary relief' procedure in which the authorities of the source state consult the authorities of the residence state, further relaxing the application of article 10's first paragraph.

8.2.1.3 Agreement is facilitated by coordinated bilateral negotiations

From the neoliberal institutionalist perspective on international tax relations follows that detailed, hard-law rules that affect the allocation of passive income, such as the LOB clause or a rule that determines residence status under a tax treaty, emphasise disagreement (see section 5.4.4). Principled agreement on such clauses may be possible, provided that procedural agreements allow states to engage in additional bilateral fine-tuning.

The most exemplary provision of the Convention in this regard, is that on dual resident entities. Indeed, article 4 introduces a rule that requires parties to further bilaterally negotiate 'by mutual agreement'. Deferring 'breaking the tie' to later bilateral negotiations is a procedural obligation in the sense of section 7.14, making the rule politically acceptable for all parties concerned. The significant uncertainty it introduces for taxpayers may be seen as a conscious policy direction to deter taxpayers to enter into dual residence structures in the first place, but the rule may turn out to be broadly supported.

Adding a simplified LOB provision to tax treaties by means of a multilateral agreement will also require further bilateral negotiations. And indeed, from the text of the Convention follows that the simplified LOB applies only in addition to the PPT insofar as both parties to a tax treaty choose to apply it (art. 7(6) BC). If parties disagree, the Convention itself, in art. 7(7) BC, provides two standardised bilateral solutions. First, it is possible that, contrary to their initial decisions under paragraph 6, parties agree to apply the simplified LOB

7 The article can be invoked when the residence state attributes the income covered in those articles to a lowly-taxed PE situated in a third jurisdiction and subsequently exempts that income. The language of the convention is worded so as to include all forms of income ('any item of income') that can be attributed to a PE and for which the source state would be required to grant treaty benefits.

8 In this regard, the Explanatory Statement notes in paragraph 143 that the reference to the lower tax rate, 'to be determined bilaterally', was scrapped 'to avoid requiring bilateral negotiation of a tax rate'.

symmetrically (art. 7(7)(a) BC). Secondly, parties can agree to apply the simplified LOB *asymmetrically*. In the bilateral tax treaty relationship between, e.g., State A and B, State A would apply the PPT *and* the LOB, whereas State B would apply the PPT only (art. 7(7)(b) BC).

If parties fail to reach agreement on supplementing a PPT with a simplified LOB provision, article 7(16) BC enables the party that wished to supplement the PPT to completely opt out of article 7. Nevertheless, art. 7(16) BC places that party under the obligation to 'endeavour to reach a mutually satisfactory solution which meets the minimum standard for preventing treaty abuse'. Similarly, article 7(15)(a) BC allows parties that seek to satisfy the minimum standard by means of a 'detailed' LOB, to opt out of article 7 BC altogether. These parties are under an identical obligation to negotiate a future, satisfactory, agreement that meets the minimum standard. By using such 'pacta de negotiando' (see section 7.14 as well as section 8.2.2.5 below), the BEPS Convention recognises the need for further bilateral fine-tuning.

8.2.1.4 Provisions that avoid distributive concerns altogether

Multilateral norms can, finally, also be agreed upon when distributive concerns are, simply said, (perceived to be) absent. States have no problem agreeing on norms that are free of real consequences or perceived to involve small gains/losses only. We are speaking, in other words, about matters that can be placed in the left two quadrants of the figure set out in section 5.4.5. This classification does not imply that such norms are 'negotiation failures'. On the contrary: the point is that it should not be overestimated what multilateral agreements can achieve in the area of international taxation.

Article 5 of the BEPS Convention changes the operation of the relief mechanism for hybrid mismatch situations.⁹ To address the operation of the relief mechanism in mismatch situations, Options A and B both provide switch-over clauses, triggered on different conditions. Option A's switch-over clause is triggered by a rule similar to paragraph 4 of the 2014 OECD MTC. As regards Option B, the switch-over clause is linked to the source state's domestic treatment of the income.

9 The broad language of the provision is not particularly helpful in understanding what situations the provision is exactly meant to cover. Reading the Action 2 Final Report, however, it seems that the provision is drafted to address the operation of the relief mechanism in hybrid mismatch situations. Some tax treaties provide for an exemption (instead of a credit) for passive income. The phrase 'income derived or capital owned by a resident' should hence be construed so as to refer to Articles 10 and 11, and perhaps also to art. 12 OECD MTC. See the Explanatory Statement to the BEPS Convention as well as OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2: Final Report* (2015), par. 442-444.

The switch-over clauses of Option A and B mostly avoid distributive concerns. Indeed, these options are clearly not applicable on states that already provide for a credit for passive income in their bilateral tax treaties (see art. 5, paragraphs 3 and 5, BC). Moreover, article 5 BC explicitly covers exemptions provided on the basis of *bilateral tax treaties* only (see Art. 5, paragraphs 3, 5 and 7, BC). The article hence is, as such, not problematic for states exempting passive income on the basis of domestic corporate tax laws. For the states that *do* provide an exemption for passive income in their treaties (e.g., Germany), Options A and B are more difficult. Such states may be expected not to opt in (it is worth noting here that article 5 BC is an optional clause in the sense of section 7.10).

Such observations, however, do not hold for Option C, which clearly goes far beyond the more modest Options A and B. Given its broad language, it will potentially deliver a blow to the source-residence balance struck in tax treaties. Under option C, the exemption method would be simply replaced by the credit method of article 23B OECD MTC in respect of ‘income derived or capital owned by a resident of [a] Contracting Jurisdiction, which, in accordance with the provisions of the Covered Tax Agreement, may be taxed in the other Contracting Jurisdiction’ (see par. 7 to Art. 5 of the BEPS Convention). Further bilateral negotiations are likely inevitable, if Option C is opted for.

As to article 8 BC: there is some evidence that article 8 BC avoids distributive problems altogether (i.e., perceived gains/losses involved are small). Indeed, the Explanatory Statement to article 8 BC notes that the purpose of the article is ‘not to change the substantive allocation of taxation rights’ between the parties to a bilateral tax treaty.¹⁰ What the Explanatory Statement means to say, is that the 365 day period is only a minor alteration to article 10 OECD MTC. More substantial amendments to article 10 OECD MTC, such as ‘language relating to the specific tax rate and ownership threshold provided by the model provision’¹¹ were, unsurprisingly (see sections 5.3.2 and 5.3.3) more problematic. Such types of amendments were, according to the Explanatory Statement, omitted from the text of the Convention.

The same may hold for article 9 BC, that amends article 13(4) OECD MTC¹² on a 365 day testing period as well as on an expansion of the scope of interest covered. However, it can only be said that article 9 avoids distributive concerns insofar as a Covered Tax Agreement already includes a provision similar to article 13(4) OECD MTC. If that is the not the case (this situation is addressed in article 9, paragraphs 3 and 4, BC), the article changes a distributive baseline,

¹⁰ See the Explanatory Statement to the BEPS Convention, paragraph 120.

¹¹ See *id.*

¹² Article 13(4) OECD MTC holds: ‘Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50% of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State’.

for which bilateral negotiations will be necessary (this is recognised in art. 9(8) BC).

The saving clause of Article 11 BC does not alter any distributions already agreed upon in bilateral tax treaties either. The saving clause, included in the BEPS Convention at the request of the United States, merely 'confirms the Contracting States' right to tax their residents (and citizens, in the case of the United States) notwithstanding the provision of the tax treaty except those, such as the rules on relief of double taxation, that are clearly intended to apply to residents'.¹³

Finally, as may be expected, articles 12-15 BC limit or extend the situations in which a PE exists under a tax treaty only to a very moderate degree. Indeed, 'hard-law' changes to the PE threshold will be fraught with political difficulties: perceived gains/losses involved are large, as the provision involves the allocation of business income. Consequentially, the rules of articles 12-15 BC have the character of 'clarifications' rather than 'modifications'.

Indeed, article 12 BC is aimed at achieving a 'better reflection' of the policy behind the commissionaire rule: an enterprise has sufficient taxable nexus in the source state when the activities of an intermediary result in the regular conclusion of contracts, to be performed by the principal in the residence state.¹⁴

The first three paragraphs of article 13 BC spell out that the 'specific activity exceptions' to the PE status of article 5(4) OECD MTC are available only for activities that are of a preparatory or auxiliary nature. Paragraph 4 prevents taxpayers from fragmenting one cohesive business into smaller, 'auxiliary' operations. The overall effect of article 13 is, therefore, that it 'clarifies' the PE threshold: the exceptions of art. 5(4) OECD MTC do not apply when they are, in fact, not of a 'preparatory or auxiliary character'. This interpretation, however, was already commonly accepted under the 1963 OECD MTC.¹⁵

Similarly, article 14 BC 'hardens' the interpretation that the splitting up of contracts runs against the object and purpose of art. 5(3) OECD MTC's twelve

13 OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6: 2015 Final Report* (2015), par. 61-63.

14 OECD, *Preventing the Artificial Avoidance of Permanent Establishment Status: Action 7 2015 Final Report* (2015) OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241220-en>, p. 15-16.

15 Paragraph 13 of the OECD Commentary on article 5(3) of the 1963 OECD MTC holds: 'In the first place, since it would be unreasonable to seek to claim that the list of examples quoted in paragraph 3 is, or in the nature of things could hope to be exhaustive, the last words of sub-paragraph e) ['or for similar activities which have a preparatory or auxiliary character for the enterprise'] are intended to cover any further examples (...) which are not listed among the exceptions in paragraph 3 but are nevertheless within the spirit of them. The words in question are, therefore, intended to make it unnecessary to attempt to produce an exhaustive list of exceptions which, even if it were comprehensive, would inevitably be of inordinate length and undesirable rigidity. (...) To put the matter in another way, the last words of subparagraph e) refine the general definition in paragraph 1'.

month period.¹⁶ Such behaviour has been determined ‘abusive’ by the OECD Commentary on art. 5(3) OECD MTC since 1992.

Finally, article 15 BC is related to articles 12-14 BC, as it includes a definition of ‘a person closely related to an enterprise’. As articles 12-14 BC avoid distribute concerns, such concerns are absent in article 15, too.

8.2.2 The Convention employs elements of the framework convention/protocol and the agreement to scope designs

8.2.2.1 *Introductory observations*

From the previous section follows that the BEPS Convention avoids distributive concerns by means of interpretative flexibility devices, such as ‘rules of the road’, coordinated bilateral negotiations, or simply by avoiding such concerns altogether.

The Convention’s ‘procedural’ obligations provide it with additional flexibility mechanisms, reflecting the presumptions of section 5.4.5. Indeed, on the one hand, the Convention has some of the elements of the framework convention/protocol design (reflecting substantive multilateralism), set out in Chapter 7B. For instance, once a party has decided that a tax treaty is covered by the obligations of the Convention, only a reservation can prevent such obligations to become applicable. And completely dressed down, the BEPS Convention requires states to adopt the minimum standard only, as all other requirements can be opted out/reserved upon. May future fine-tuning be necessary, the Convention provides for its amendment as well as for the adoption of protocols (see articles 33 and 38 BC). On the other hand, the Convention also has some of the elements of the ‘agreement to scope’ (reflecting formal multilateralism), set out in Chapter 7C. It explicitly recognises the importance of bilateral negotiations. This follows, most importantly, from article 2(1)(ii) BC: the Convention is only applicable on a bilateral treaty when ‘listed’ by a contracting state. This allows pairs of states to form groups (see section 7.1), encouraging multilateral convergence where the Convention best serves states’ interests, but allowing them to focus on bilateral negotiations when it does not. Similarly, some of the Convention’s provisions are ‘optional’, such as article 5 and 13 BC. These permit states to ‘opt in’ to pre-determined options, potentially ‘grouping’ states with similar interests.

16 See par. 18 of the OECD Commentary on art. 5(3) OECD MTC, that calls such behaviour ‘abusive’.

As a consequence, some of the issues, discussed in Chapters 7B and 7C, may be identified under the BEPS Convention as well.¹⁷ They are discussed below.

8.2.2.2 Reservations and optional provisions

As we have seen, reservations, as interpretative flexibility devices, are indispensable for multilateral tax rules to be broadly acceptable. But although reservations can be ‘formulated’ at the time of signature or ratification (see art. 28(5)-28(8) BC), the Convention determines which reservations are authorised and which are not. Indeed, article 28(1) BC specifies that ‘no reservations may be made to this Convention except those expressly permitted’.

Why does the BEPS Convention expressly determine which reservations are authorised and which are not? It could have been possible to simply leave the issue of reservations to the practice of states.

In this regard, the system on reservations of the BEPS Convention serves one main purpose: to balance the symmetry of state interests (see on this section 7.10.2). In this regard, article 28(3)(a) of the BEPS Convention holds that a reservation shall ‘modify for the reserving Party in its relations with another Party the provision of this Convention to which the reservation relates to the extent of the reservation’. Article 28(3)(b) BC, vice versa, modifies the same provisions to the same extent for the other party in its relations with the reserving party. So, like the regime on reservations of the VCLT, reservations under the Convention function on the basis of reciprocity: they start off from the presumption that state interests are symmetrical. Yet, as clearly follows from section 5.3.2 and further explained in section 7.10.2, international tax relationships are often *not* symmetrical.

The detailed system of negotiated reservations, set out in each of the specific substantive articles of the BEPS Convention and summarised in article 28(1) BC, remedies that situation. As a general rule, a reservation apply to all Covered Tax Agreements of the reserving state. A fair number of the reservations authorised by the Convention are ‘excluding reservations’ (see section 7.10.2). Article 8(3)(a) BC, for instance, holds that ‘a Party may reserve the right (a) for the entirety of this Article not to apply to its Covered Tax Agreements’. Functioning in combination with ‘modifying reservations’ (see again section 7.10.2), such as article 8(3)(b) BC, parties to the Convention, by agreeing to allow specific reservations to the Convention only, created ‘package deals’. The system of reservations prevents states from choosing *parts* of the obligations set out in the Convention only (i.e., ‘cherry-picking’). Article 8(3) BC, for instance, does not authorise a party to choose a period longer or shorter than

17 In more detail: F.P.G. Pötgens and D.M. Broekhuijsen, *Het multilaterale instrument met zijn vele bilaterale schakeringen*, WFR 2017/76 and R.A. Bosman, *Formele aspecten van het multilaterale instrument*, MBB 2017/04.

the 365 day period. It must either bilaterally have negotiated an alternative period (art. 8(3)(b) BC), or opt out of article 8 BC *for all* its Covered Tax Agreements altogether. Other reservations are null or void.

In this way, reservations are generalised to the negotiation of the text of the provision, which, in turn, is generalised to the negotiation of the BEPS Convention as a whole. Agreeing to the list of ‘authorised reservations’, summarised in article 28 BC, is a *condicio sine qua non* of treaty participation. As pointed out in section 7.10.2, such negotiated ‘package deals’ make it more likely that a larger number of countries is willing to participate.

The Convention also includes some ‘optional provisions’ (see also section 7.10.2). Like reservations, the point of such rules is to provide for interpretative flexibility, increasing the chances that the Convention will be broadly accepted. And like reservations, the choice for an option, for which a party has to ‘notify’ the Depositary (see art. 29 BC), applies to *all* of a party’s Covered Tax Agreements. However, optional provisions function on the basis of *opt in* rather than *opt out*: the presumption of such provisions is, in other words, that no obligation is applicable on a state unless expressly agreed otherwise. Listing tax treaties under the Convention can also be seen as an ‘optional provision’ in this regard, as a signatory party has to *act* (i.e., notify the Depositary) in order to have a tax treaty covered by the Convention (see article 2(1)(a)(ii) BC). Other optional provisions are articles 5 and 13 BC and Part VI.

8.2.2.3 *How is the relationship between the BEPS Convention and the network of bilateral tax treaties governed?*

As the BEPS Convention has some of the elements of a ‘framework convention’, discussed in section 7.8, the question arises what the relationship is between the Convention and the network of bilateral tax treaties it seeks to amend. The Convention, although implicit, includes the three elements of a conflict clause, set out in section 7.9.3. As noted in section 7.9.3, a conflict clause usually contains three elements: (1) it regulates the relationship between the two relevant instruments; (2) it stipulates what happens should a conflict of norms arise and (3) it regulates/makes explicit the relationship with treaties of third (non-participating) states. Each of the three elements is discussed in a corresponding section below.

– *The relationship between the BEPS Convention and the bilateral tax treaty network*

The BEPS Convention aims to amend bilateral tax treaties. But it is not ‘automatically’ applicable on all inter-se tax treaties of participating states. States have to ‘list’ their tax treaties under article 2(1)(a) BC. As it is applicable only on ‘listed’ tax agreements (cf. articles 1 and 2(1)(a) BC), it does not automatically ‘look forward’, as it does not capture future tax conventions of parties. For

this, an explicit notification is required in the sense of article 29(5) (extending article 2(1)(a)(ii) BC's list of agreements).

But once covered by the Convention, it is, in the words of its Explanatory Statement, to be 'applied alongside existing tax treaties'.¹⁸ This first of all follows from the texts of the substantive amendments themselves, which are specifically designed with the purpose of determining their relationship with bilateral tax treaties. Secondly, article 2(2) BC ('interpretation of terms') implies that the Convention is to be applied alongside tax treaties. The article holds that 'as regards the application of this Convention at any time by a Party, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the relevant Covered Tax Agreement'.

What follows from these texts, in other words, is that the Convention and a Covered Tax Agreement should be interpreted and applied as a single instrument. In this interpretative exercise, 'connection language' (see section 7.9.3.2), set out in each of the Convention's substantive provisions, regulates the relationship between the two sets of rules – i.e., tax treaties and the Convention – in detail. For instance, article 3(1) holds: 'for the purposes of a Covered Tax Agreement (...) income derived (...) shall be considered income of a resident'; article 6(1) BC: 'A Covered Tax Agreement shall be modified to include (...)'; article 7(1) BC: 'Notwithstanding any provisions of a Covered Tax Agreement, a benefit (...) shall not be granted' and article 8(1) BC: 'provisions of a Covered Tax Agreement (...) shall apply only if (...)'.¹⁹

The process of interpreting both sets of rules as one single instrument is further influenced by the Convention's general rule of interpretation (article 2(2)), which incorporates the bilateral tax treaty meaning for the Convention's undefined terms, and hence, through provisions similar to article 3(2) OECD MTC, a domestic law meaning. The BEPS Convention, in other words, explicitly builds on the system of bilateral tax treaties. As *prima facie*, both sets of rules are equally applicable, it has to be kept in mind that the presumption against conflict applies (see section 7.9.2).

By interpreting both instruments as one, the obligations of the BEPS Convention will, in accordance with the Convention's 'connection language', be read in relation to the obligations set out in a bilateral tax treaty.

– The consequences of conflict

What to do if the interpretative exercise leads to a conflict between the text of the BEPS Convention and that of a bilateral tax treaty? In this regard, article 1 of the BEPS Convention, in combination with each of the 'compatibility clauses' set out in the Convention's substantive provisions, comprises the *second* element of an 'implicit' conflict clause, discussed in section 7.9.3.3.

18 See paragraph 13 of the Explanatory Statement.

It is up to the interpreter of both instruments to identify a conflict of norms. Without a conflict of norms, there is no need to turn to the provisions regulating such conflict. The Explanatory Statement notes in this regard that:

‘many of the provisions of the Convention overlap with provisions found in Covered Tax Agreements. In some cases, they can be applied without conflict with the provisions of Covered Tax Agreements’.¹⁹

A conflict for instance does not arise when the Convention expressly stipulates that its norms are not applicable. An example is the last sentence of article 4(2) of the BEPS Convention, a ‘compatibility clause’, which holds that ‘paragraph 1 *shall not apply*, to provisions (...) specifically addressing the residence of companies participating in dual-listed company arrangements’.

But more often than not, *prima facie* conflicts of norms cannot be reconciled by adopting an integrative interpretation. For these situations, the Convention includes a set of detailed conflict rules. A general rule on the conflict of norms is provided in article 1, which sets out that the ‘scope’ of the BEPS Convention is to ‘modify’ all covered tax agreements. Indeed, article 1 BC suggests that, once leaving the realm of ‘interpretation’, the norms of the BEPS Convention are to be prioritised over (‘modify’) those of bilateral tax treaties. Compare, in this regard, article 1’s language to that of conflict clauses used in other multilateral treaties, such as counterterrorism treaties, set out in section 7.9.3.3. But regardless of the operation of article 1 BC, the BEPS Convention includes detailed ‘compatibility clauses’, specifically drafted to address conflicts of norms. The Convention leaves, in other words, little room for doubt. In the words of the Explanatory Statement:

‘Where the provisions of the Convention may conflict with existing provisions covering the same subject matter, however, this conflict is addressed through one or more compatibility clauses which may, for example, describe the existing provisions which the Convention is intended to supersede, as well as the effect on Covered Tax Agreements that do not contain a provision of the same type’.²⁰

Compatibility clauses operate in conjunction with notification clauses. The aim of these notification clauses is to provide additional clarity as to the operation of the BEPS Convention in relation to the bilateral tax treaties it covers.²¹ They require parties to identify whether a bilateral tax treaty pro-

¹⁹ Paragraph 15 of the Explanatory Statement.

²⁰ Explanatory Statement, p. 5.

²¹ It is important to distinguish the notifications under compatibility clauses from: (1) notifications reflecting choices of optional provisions and (2) the ‘formulation’ of reservations, for which no ‘notifications’ are required. See arts. 28 and 29 BC as well as p. 5 of the Explanatory Statement.

vision is 'within the objective scope of the compatibility clause',²² and notify the Depositary accordingly. The objective scope of a compatibility clause describes the tax treaty provisions the BEPS Convention seeks to amend. For instance, art. 4(2) BC holds that the mutual agreement procedure for dual resident entities replaces provisions of Covered Tax Agreements that:

'provide rules for determining whether a person other than an individual shall be treated as a resident of one of the Contracting Jurisdictions in cases in which that person would otherwise be treated as a resident of more than one Contracting Jurisdiction'.

The legal effects produced by the system of compatibility clauses depend on two elements: (1) have both states made a matching notification on whether the relevant provision of their Covered Tax Agreement 'is within the objective scope of the compatibility clause?', and (2) the category of indicator used in the compatibility clause. As to (1), the lack of a matching notification would imply that the parties to a Covered Tax Agreement interpret the obligations therein differently, disagreeing on the Covered Tax Agreement's compatibility with the relevant provision of the BEPS Convention. As to (2), four categories of indicators exist: (1) 'in place of'; (2) 'applies to' or 'modifies'; (3) 'in the absence of' and (4) 'in place or in the absence of'. Each indicator has distinct legal effects, summarised on p. 6 of the Explanatory Statement.²³

For instance, if a compatibility clause holds that an obligation of the BEPS Convention applies 'in place of' a provision of a Covered Tax Agreement, it applies, much like a protocol to the Covered Tax Agreement, *entirely* 'in place of' that provision, provided that both parties identified the provision to be within the objective scope of the compatibility clause and notified the Depositary accordingly. If the two parties did not make a matching notification, the provision does *not* apply within the ambit of that specific Covered Tax Agreement.²⁴ Likewise, where a provision applies 'in place or in the absence of' a provision in a Covered Tax Agreement, a matching notification would *entirely* replace the provision of a Covered Tax Agreement (if it exists) by the text of the provision of the BEPS Convention. In the absence of a matching notification, the text of the relevant provision of the BEPS Convention would come to exist alongside that of the relevant provision of the Covered Tax Agreement, 'superseding it to the extent that it is incompatible with the rel-

22 Explanatory Statement, p. 5. Parties do so on the basis of 'their best efforts'; the exercise to identify the tax treaty provisions that are within the 'objective scope' of a compatibility clause is, therefore, preceded by the process of interpretation described in the previous paragraph.

23 These indicators, which are used in compatibility clauses (e.g., art. 4(2) BC) should be distinguished from 'connecting language', used in the substantive provisions themselves (e.g., art. 4(1) BC).

24 Par. 15 of the Explanatory Statement.

evant provision of the Convention'.²⁵ In this case, the compatibility clause leaves it to the interpreter to determine to what extent the BEPS Convention prevails.

By means of the notification procedure related to compatibility clauses, the drafters of the Convention have, therefore, smartly circumvented some of the implementation problems associated with applying multilateral rules on different bilateral tax treaties. After all, tax treaties may be worded differently from the OECD MTC, or in a language different from English or French (the BEPS Convention's authentic languages). For instance, art. 4(2) BC, the compatibility clause of the BEPS Convention's rule on dual resident entities, uses indicator (4). A matching notification under art. 4(4) BC would have the result that a Covered Tax Agreement's corporate tie-breaker (formulated e.g., in Dutch), would be completely replaced by the text of the mutual agreement procedure of art. 4(1) BC (formulated in English and French). Absent such a notification, the English/French texts of art. 4(1) BC would come to exist alongside the Dutch text of the corporate tie-breaker. As the provision of the BEPS Convention supersedes the corporate tie-breaker rule to the extent that it is incompatible,²⁶ it is left to the interpreter to read the two texts as one and apply this rule on conflict.

The Explanatory Statement further notes that, would disagreements between parties arise as to whether 'existing provisions are within the scope of a compatibility clause',²⁷ parties can resort to the mutual agreement procedure, or refer the matter to the Conference of the Parties.²⁸

Finally, there is one, less obvious, conflict clause in the treaty, relating to future abrogation by mutual consent: article 30 BC. It holds: 'the provisions in this Convention are without prejudice to subsequent modifications to a Covered Tax Agreement which may be agreed between the Contracting Jurisdictions of the Covered Tax Agreement'. This is, as noted in section 7.9.3.2, in accordance with consensual system of international obligation set out in article 30(2) VCLT: parties can always change their minds in the future by mutual consent. The same result would have been achieved without an explicit clause to that effect.²⁹

- *The relationship between the BEPS Convention and treaties with third states*
As noted in section 7.9.3.4, conflict clauses sometimes include an explicit statement of the VCLT's *pacta tertiis* rule: a multilateral treaty cannot influence

²⁵ Par. 15 of the Explanatory Statement.

²⁶ See in this regard art. 4(4) BC.

²⁷ Par. 18 of the Explanatory Statement.

²⁸ Such disagreements may materialise by means of the notification procedure, i.e., when one of the parties notifies the Depositary a compatible tax treaty provision exists, and the other party does not. The notification procedure, therefore, exposes the situations in which further bilateral fine-tuning is necessary.

²⁹ Article 30(3) VCLT. Also: A. Orakhelashvili (2011) p. 786.

treaties with non-signatory states. Article 2(1)(a) of the BEPS Convention defines the term 'Covered Tax Agreement'. Any agreement it covers has to be in force between two or more parties. As article 1 BC determines that the Convention modifies Covered Tax Agreements only, the Convention includes a *pacta tertiis* rule. The BEPS Convention, in sum, includes the three elements of a conflict clause, as identified in section 7.9.3.

8.2.2.4 Adoption of protocols

Article 38 holds that the Convention may be supplemented by one or more protocols. Parties to the Convention can join a protocol if they wish (art. 38(3) BC). However, in order to join a protocol, parties have to join the Convention (art. 38(2) BC).

This element of the Convention is central to the idea of the framework convention-protocol design. Usually, framework conventions are general, procedural type of commitments, in which substantive commitments are further fleshed out in protocols. In this way, Conventions may build momentum, trust and generate knowledge. Moreover, under the framework convention-protocol design, new rules can be dynamically and gradually agreed to by parties (see section 7.8.1).

And indeed, when completely dressed down, the BEPS Convention has the *aspects* of a framework convention. However, its efficacy *as* a framework convention can be questioned (see section 8.3).

8.2.2.5 Obligations to reach agreement: *pacta de negotiando*

Article 7(15)(a) BC and article 7(16) BC contain clauses that may be termed 'pacta de negotiando': parties agree to 'endeavour to reach a mutually satisfactory solution which meets the minimum standard'. As pointed out in section 7.14.1, such clauses are part of an 'agreement to scope', as it requests parties to engage in further bilateral coordination.

As noted in section 8.2.1.3, 'pacta' are used to forge agreement on the minimum standard agreed upon during the negotiations on the BEPS Project. The texts of the 'pacta' of the BEPS Convention require states to 'endeavour to reach a mutually satisfactory solution which meets the minimum standard [for preventing treaty abuse]'.³⁰ States are not obliged to actually *arrive* at such an agreement. A pactum requires states to *negotiate, in good faith*, a measure that meets the minimum standard.

The notification procedure required by compatibility clauses is based on a similar type of legal obligation. Compatibility clauses require states to notify the Depositary whether the provisions of their bilateral tax treaties are compat-

30 See article 7(15)(a) and 7(16) BC. The part quoted between brackets appears in art. 7(16) BC only.

ible with the Convention (see p. 6 and 7 of the Explanatory Statement). Implicit in this notification procedure lies a requirement of good faith:

‘Parties are generally required to make a notification (...). It is expected that Parties would use their best efforts to identify all provisions that are within the objective scope of the compatibility clause. It is therefore not intended that Parties would choose to omit some relevant provisions while listing others. (...)

(...) It is expected that Parties would use their best efforts to identify all provisions that are within the objective scope of each compatibility clause. This should reduce to a minimum situations in which a relevant existing provision is not identified by the Contracting Jurisdictions to a Covered Tax Agreement. Such situations are not impossible, however, either because the Contracting Jurisdictions to a Covered Tax Agreement disagree about whether a particular provision is within the scope of a compatibility clause; or because both Contracting Jurisdictions agree that there is a relevant provision, but disagree about which provision it is. (...) To the extent that [such disagreements] nevertheless arise, [they] could be settled through the mutual agreement procedure provided for in the Covered Tax Agreement’.³¹

8.2.2.6 Amendments to the Convention

Article 33(1) of the BEPS Convention stipulates that ‘any Party may propose an amendment to this Convention by submitting the proposed amendment to the Depositary’. To consider the amendment, a Conference of the Parties may be convened (article 33(2) BC). Any proposed amendment will require acceptance on two levels. First, at the level of the Conference of the Parties, for which consensus is likely required (the Conference of the Parties ‘considers’ the proposed amendment).³² Secondly, acceptance is required at the level of each participating state, so that the text of the Convention becomes binding on them. This has the drawback that the multilateral convention will prove notoriously hard to change. See for further comments section 7.11.1.

8.3 THE BEPS CONVENTION: A STRUCTURAL SOLUTION TO MODERNISING INTERNATIONAL TAX LAW?

The BEPS Project has been sceptically evaluated in academic literature. It may indeed safely be assumed that the BEPS Convention will not completely solve

³¹ The first-mentioned quote is from par. 15; the second from par. 18 of the Explanatory Statement.

³² The Convention does not contain any detailed amendment rules or any rules on a decision procedure. Such rules may however be adopted by the Conference of the Parties. Lang considers that a 2/3 majority voting rule is accepted state practice, see M. Lang, *Die Auslegung des multilateralen Instruments*, Steuer & Wirtschaft International 2017/11.

the problem tax avoidance.³³ Nevertheless, from the analysis above follows that the obligations of the BEPS Convention are in conformity with what, in accordance with the neoliberal institutionalist perspective of Chapter 5, may be expected of multilateral tax cooperation. Also, in line with the presumptions of section 5.4.5, the Convention employs elements of both the framework convention-protocol design as well as the 'agreement to scope' (see Chapter 7). Clearly, given the restrictions to multilateral negotiation posed by states protecting/pursuing their self-interests, it should not be overestimated what a multilateral agreement can do.

This conclusion underscores the relevance of the central argument of this book: a multilateral agreement for international taxation should function as a robust 'managerial' framework that facilitates interaction, enabling the system to progressively transform and develop *over time*. Certainly, the purpose of the BEPS Convention is different from that of the 'multilateral agreement for international taxation' of Chapter 7.³⁴ The BEPS Convention's purpose: 'implementing the BEPS Project', is more limited and 'instrumental' than that of the multilateral agreement for international taxation. Nevertheless, the question: 'does the BEPS Convention satisfy the central claims of the book?' is relevant. To what extent have tax policy makers, knowing that the rules of the BEPS Project might not be sufficient to completely put an end to the issues of tax avoidance and tax competition, been able to forge agreement on a more structural multilateral solution for international taxation?

Where the previous discussion was *explanatory*, the discussion here, consequently, takes a normative turn. What are, in the light of the arguments set out in this book, the Convention's problems and promises?

1. *A robust institutional framework* (see section 6.3.2 and Chapter 7A).

The BEPS Convention does not install a structural framework for continuous discussion.

Article 31 provides for parties to call an international conference, in which they can discuss the obligations and operation of the Convention. This allows them, for instance, to discuss questions of interpretation.³⁵ It is, for instance not unthinkable that questions as to the correct interpretation of compatibility clauses may arise.³⁶ Also, the Conference may be called to discuss the amendment of the Convention (article 33 BC) as well as to supplement the Convention by one or more protocols, for which participation by all parties to the Convention is not deemed necessary (article 38 BC). The fact that the Convention mentions the possibility to call

³³ See the text and footnotes of section 5.4.4.

³⁴ The BEPS Convention is, according to its preamble, aimed at the 'swift, coordinated and consistent implementation of the treaty related BEPS measures'.

³⁵ See article 32 of the BEPS Convention.

³⁶ See par. 18 of the Explanatory Statement.

an international Conference of the Parties, which can adopt protocols and enact amendments to the Convention, should be applauded, and is a step in the right direction of further integrative cooperation in international taxation.

However, articles 31, 33 and 38 BC are hollow promises: parties have not agreed to organise any *recurring* or *continuous* forms of interaction. Continuous deliberation, first of all, is necessary for the norms of today to remain in line with social criteria of the future. Without it, there is no way to ensure that outcomes reached will be considered 'fair' (see, in particular, section 4.2.3). In addition, ad-hoc conferences can be called on all types of issues, if this serves states' interests. For 'tit-for-tat' to occur, however, a forum in which the cooperative game can be played indefinitely is needed (see, in particular, sections 6.3.2 and 6.3.5). Without a forum in which parties agree to repeatedly reciprocate, interaction will continue on an ad-hoc basis. This, in turn, may mean that parties will not be able to forgo short term-interests and opportunism over long-term goals. As has been repeatedly argued (see e.g., section 3.4), much is at stake: neither a chaos of overlapping unilateral anti-abuse rules nor the complete redundancy of income tax systems is, due to increased tax competition, a more welcome alternative to recurring and continuous multilateral cooperation.

The Convention, moreover, does not mention any organisational structure needed to deal with issues on a more holistic basis, such as a secretariat. It also fails to mention any explicit powers and duties (e.g., financial, organisational, etc.) or rules of procedure of the Conference of the Parties (see the discussion in sections 7.3.2. and 7.3.3 as well as articles 6 and 7 of the Draft Conventions of the Annex). Although the Convention mentions the OECD as 'Depositary', which is usually a function performed by secretariats,³⁷ functions exercised by depositaries relate to the formalities involved with signing a treaty and keeping custody of the treaty's text.³⁸

The issue of the absence of structural institutional rules, however, might be a minor one, given the important role of the OECD in forging international tax policy. This does, however, lead us to the matter discussed next.

2. *Transparent, open and equal discussions* (see sections 4.2.3, 5.4.7, 6.3.3 and 7.3).

The BEPS Convention does not deal with the question of how future rules of international tax law are adopted. Lacking any institutional framework (see above), it may be expected that the OECD will take the lead in forging new tax rules, whether in relation to the BEPS Convention (i.e., amendments

³⁷ See H.G. Schermers and N.M. Blokker (2011), par. 457.

³⁸ See article 76-77 of the VCLT.

or protocols),³⁹ or to any future international tax policy affair. Negotiators have, perhaps, deemed this issue irrelevant, as the outcomes of the BEPS Project were already produced.

Transparency, openness and equality are, however, at a fundamental level, absent from law-making processes within the OECD (see section 4.2.3). Fair procedure, however, is not only necessary for 'fair' international tax rules in the future (Chapter 4), but is also indispensable for parties to build shared understandings and/or 'learn' (see section 6.3.3).⁴⁰ As argued, such elements are crucial for dealing with collective action problems over time.

3. *Guiding principles* (see sections 6.3.4 and 7.4).

The BEPS Convention is, first and foremost, an instrument to modify bilateral tax treaties on the BEPS Project's outcomes. As a result, it does not expressly and consciously define or determine ideals to which international tax law can develop in the future. But the BEPS Convention is not completely free of commonly identified ideals and/or 'new' shared beliefs on international tax law either. It contains some evidence that not only interests, but values matter too in international tax law.

Indeed, from the perspective of section 6.3.4, the BEPS Convention can be seen as a (first) step forward in the direction of addressing tax avoidance and tax competition. Its publicized legal commitments, once implemented and ratified, may come to function as focal points around which future discussion and hence progression can gravitate. This may, in turn, mean that the BEPS Convention, once successfully implemented and entered into

³⁹ But see the discussion under point 1.

⁴⁰ The Explanatory Statement includes the 'agreed understanding of the negotiators with respect to the Convention' (see par. 11 of the Explanatory Statement), and could, consequently, be seen to reflect the understandings of *all* parties to the Convention. In this regard, the Explanatory Statement may be said to be an 'agreement' or 'instrument' made in connection with the conclusion of the treaty in the sense of article 31(2) VCLT. Of particular importance is that the Explanatory Statement is 'agreed' between *all* the Parties. See for a discussion: F.A. Engelen (2004), sections 6.7.3 and 6.7.4. The BEPS Final Reports and OECD Commentaries related to the measures of the BEPS Convention, however, have all been crafted within the closed-door environment of the OECD. It may therefore be questioned whether these documents can be said to express the intentions of parties to the Convention, if these parties have not had a real and tangible influence in preparing and creating these rules within the OECD. For interpreting the multilateral obligations of such parties, international law suggests that the BEPS Final Reports may not be used as preparatory work or 'travaux préparatoires' within the ambit of article 32 VCLT. See: PCIJ *Case Concerning the Jurisdiction of the International Commission of the River Oder* (Order of 20 August 1929), PCIJ Rep, Series A, No 16, in which the Court held at p. 42: 'Whereas three of the Parties concerned in the present case did not take part in the work of the Conference which prepared the Treaty of Versailles; as, accordingly, the record of this work cannot be used to determine, in so far as they are concerned, the import of the Treaty'. See also: S. Rosenne, *Travaux Préparatoires*, 12 *International & Comparative Law Quarterly* 1378 (1963). But see: U. Linderfalk, *On the Interpretation of Treaties: the Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) p. 241-242.

effect, will in fact turn out to be an important step in the direction of solving the issues of tax avoidance and tax arbitration.

In terms of focal points, particular article 6 could prove of relevance. Surely, the article could turn out to reflect nothing more but the result of 'simple' reciprocal bartering of interests, reflecting a negotiation outcome that suits countries seeking to protect their source interests (see section 5.3.2 and 5.3.3). But given its general language, and the fact that it is a 'minimum standard', agreed to by the negotiators of around 100 jurisdictions: may it also be said that article 6 is a substantive, principle-like multilateral commitment of a multilateral convention?

It may indeed be argued that article 6 BC's codification was driven by normative rather than 'material' concerns (see section 5.2 on the distinction between constructivism and neoliberal institutionalism). If this argument is accepted, then one may also accept that article 6's wording ('intending to eliminate double taxation with respect to the taxes covered by this agreement *without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance*')⁴¹ codifies the idea of the single tax principle as a principle of international tax law, much like Avi-Yonah has argued.⁴² This may then – taking the argument a step further – imply that the article encompasses an implicit, shared understanding between the Convention's parties of what international tax law *is about*. If this is true, then, over time, article 6 BC may come to inform future negotiations in the area of international tax law, directing the way in which substantive norms of international tax law should further develop. The BEPS Convention, by presenting a widely supported idea that international tax law is not only about preventing double taxation, but also about preventing double non-taxation, may hence influence negotiations in international tax law. The BEPS Convention may, in other words, turn out to be evidence of, and of relevance to, gradually changing views on the interests at stake in international taxation.

4. *Network effects* (see section 7.5).

From the perspective of the design strategy presented in Chapter 6, 'network effects' are of importance, as these may lead to a more widespread use, development, and acceptance of the agreement's norms in tax treaties not covered by the Convention.

The Convention, however, is clearly not applicable on agreements of non-participatory states or jurisdictions (see art. 2(1)(a)(i) BC). It neither contains the 'pactum de agendo' of section 7.5.2.3; a conscious design option to influence treaties with non-participatory states. Moreover, as the Convention explicitly applies to 'covered' bilateral tax treaties only, which

41 Article 6(1) of the BEPS Convention (emphasis added).

42 See in particular: R.S. Avi-Yonah (2007), p. 8-10, also: section 7.4.2.

need to be 'listed' by states, it seems unlikely that the Convention may bear on tax treaties by becoming a binding obligation through estoppel or acquiescence (see section 7.5.2.1). Indeed, for estoppel or acquiescence to arise, a clear and provocative statement of one of the two parties to a tax agreement is required. But even if a party to a tax agreement, participating in the BEPS Convention, makes a statement that it interprets or applies a bilateral tax agreement in line with the Convention, the Convention clearly holds that, for it to become applicable, *each* party to a tax agreement 'has made a notification to the Depositary listing the agreement'.⁴³ Consequently, it seems difficult to maintain that if one party makes a statement to the effect that it interprets and applies a tax agreement in line with the obligations of the Convention, and the other party to that tax agreement fails to react to this statement, the first-mentioned party may interpret such inaction, against a clear rule to the contrary set out in the same Convention the first-mentioned party itself seeks to apply, as consent.

The most likely scenario in which the Convention may bear on tax treaties with third states is through article 31(3)(c) VCLT. In particular, the article on the interpretation of treaties requires the interpreter to take into account the normative environment of a tax treaty when interpreting and applying it. Indeed, as argued in section 7.5.2.2, the Convention, by 'being there', can influence the interpretation of tax treaties with non-participatory states. Again, particularly article 6 of the Convention could prove of relevance in providing the normative environment of international tax law, also for treaties with non-participatory states.⁴⁴

8.4 SUMMARY AND CONCLUSIONS

The obligations set out in the BEPS Convention generally follow the neoliberal institutionalist perspective on multilateral tax cooperation of Chapter 5. Indeed, the substantive obligations of the BEPS Convention avoid distributive concerns: they are 'rules of the road', they encourage further bilateral negotiations, or they avoid departing from existing distributive baselines altogether (section 8.2.1). Moreover, the Convention employs some of the aspects of the 'agreement to scope' as well as the 'framework convention-protocol design' as set out in Chapter 7 and the Annex, underscoring the need for flexibility mechanisms in international tax law (section 8.2.2). As was pointed out in section 7.1, the distinction between both design options should not be perceived as strict. But the need for flexibility (in the sense of sections 5.4.5 and 5.4.6) introduces

⁴³ See art. 2(1)(a)(ii) of the BEPS Convention.

⁴⁴ See, in this regard, also the outcomes under 'circumstance 3 ('One of the parties is not a member of the OECD') of Table 2 ('The relevance of the OECD Commentary under varying circumstances in courts of OECD member countries') of section 3.3.5.

questions related to e.g., reservations, conflict clauses and 'pacta', discussed throughout Chapters 7B and 7C.

In 8.3, the evaluation then turned to the question to what extent the BEPS Convention mirrors the 'multilateral agreement for international taxation' argued for in this book. This question is relevant: assuming that the BEPS Convention will not 'solve' the issues of tax avoidance and tax arbitration, the focus must turn to the future, and hence, to the Convention's institutional aspects. Classifying the Convention's substance as 'flawed' is, as follows from earlier chapters, fruitless. What may be expected of a multilateral treaty for the area of international taxation, should not be overestimated.

The main point resulting from section 8.3's evaluation of the Convention's 'institutional' aspects is that the BEPS Convention is not suitable to modernise international tax law. It lacks a 'fair' and robust forum for continuous discussions. Also, it misses explicit guiding principles to guide and inform future negotiation efforts. By focusing on the short term, it is, in other words, above all an 'instrument' to implement the outcomes of the BEPS Project.

Nevertheless, the Convention has some aspects to be excited about. It is, after all, a multilateral convention. And as a multilateral convention, it will undoubtedly set new focal points and horizons to guide the development of the international tax regime as a whole. In particular, there is some evidence that the Convention contains changing views on what international taxation *is about*. This may, in turn, influence tax treaty interpretation, practice and negotiations in the years to come.