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Multilateral Negotiation of Bilateral Treaties

Jonathan Schwarz (Temple Tax Chambers; King's College London) · Tuesday, February 21st, 2017

Tax treaty negotiators in 100 countries will be tied up over the next few months with the challenge to evaluate their positions on the BEPS Multilateral Convention (BEPS Convention) with a view to participation in the signing ceremony scheduled for 7 June 2017 in Paris. The many options offered by the BEPS Convention make it likely that the end result will be a great variety in the contents of bilateral treaties. The OECD committed itself to a multilateral treaty as the preferred mechanism to amend many bilateral treaties at the stroke of a pen at the outset of the BEPS project. It will take some time for the smoke to clear and to see the direction in which tax treaties are going, and, in particular, whether consistent patterns emerge.

Much however can be learned from treaties concluded by participating states since the publication of the BEPS final reports in October 2015. The OECD recommendations for amendment to the Model Tax Convention in BEPS Actions 2, 6, 7 and 14 were settled at that time. It might have been expected that, if these recommendations reflected a consensus, bilateral treaties concluded since then would often reflect those proposals.

A quick review of United Kingdom tax treaties concluded since the BEPS final reports does not reveal a wide take up of the anti-BEPS ideas in those reports. The Columbia- UK Treaty signed on 2 November 2016 includes several key anti-BEPS proposals, but others signed in 2016 do not. Colombia has been engaged in accession discussions with the OECD.

Hybrid treaty

The Columbia- UK Treaty is something of a hybrid. It contains some elements of the OECD 2014 Model, elements of the UN Model and some BEPS Actions elements. BEPS elements include the right of each state to tax its own residents (BEPS Convention Article 11), with limited exceptions (Article 1(3)) and, the BEPS Principal Purpose Test (BEPS Convention Article 7) which is adopted as a general anti-abuse rule (Article 22(1) and (2)). In contrast, neither provision is found in the United Arab Emirates-UK Treaty signed on 12 April 2016.

Permanent establishment

Article 5(5) and (6) of the Columbia- UK Treaty includes the anti-fragmentation rule proposed in BEPS Action 7, (BEPS Convention Article 13(4)) although the revised agency permanent establishment language designed to include commissionaire and similar arrangements has not been incorporated. It also includes a services permanent establishment (Article 5(7)), while the definition of permanent establishment in the United Arab Emirates-UK treaty follows the 2014

OECD Model. Business profits in the Columbia- UK Treaty is in line with the latest OECD version of Article 7 but the United Arab Emirates-UK treaty adopts the pre-2010 OECD Model

Specific anti-abuse rules

None of the BEPS Action 6 rules applicable to specific distributive articles are found in either treaty. These include dividend transfer transactions (BEPS Convention Article 8), the rule for capital gains from alienation of shares or interests of entities deriving their value principally from immovable property (BEPS Convention Article 9), and the anti-abuse rule for permanent establishments situated in third jurisdictions BEPS Convention Article 10).

Dispute resolution

Neither the of UK's treaties with Columbia or the United Arab Emirates makes provision for arbitration to resolve disputes (BEPS Convention Part VI) Article 24(1) of the Columbia- UK Treaty does include the BEPS Action 14 minimum standard provision that cases for the Mutual Agreement Procedure may be presented to either state (BEPS Convention Article 16(1)) while the United Arab Emirates-UK treaty continues to require the case to be presented in the state of residence (Article 23(1)).

Convergence and divergence

Both treaties adopt the BEPS Action 2 rule for dual resident entities (BEPS Convention Article 4(1)) that removes resolution in favour of the place of effective management and instead permits the competent authorities to endeavour to determine residence by mutual agreement. This has however been UK treaty policy since 2008.

The United Arab Emirates-UK treaty does not authorise mutual assistance in collection of taxes while the Columbia- UK Treaty does (Article 26).

Two tax treaties negotiated roughly at the same time and during a period when the BEPS treaties related actions were well developed, differ in fundamental ways. Perhaps the treaty with Columbia is the more surprising in one respect since it is clearly influenced by BEPS. The treaty with the United Arab Emirates shows no such influence and, in this respect it is similar to other treaties signed in 2016 by the United Kingdom, including with Uruguay (signed 24 February 2016), Turkmenistan (signed 10 June 2016) and with Lesotho (signed 3 November 2016).

What is apparent in each case, is that each treaty is individually negotiated and reflects the particular interests of the contracting states in their dealings with each other. The Uruguay-UK Treaty, for, example is the only one in this series that includes provision for arbitration to resolve disputes (Article 25(5)). The Lesotho-UK treaty places restrictions on relief for permanent establishments in relation to dealing with the head office in computing PE profits (Article 7(3)) patterned on the UN model (Article 7(4)). In each case, the treaty concluded represents an overall balance that is acceptable to the contracting states.

The BEPS Convention differs from most multilateral conventions in that its entry into effect will not produce a broad consensus that establishes international legal norms. Instead it is a shortcut to amending many bilateral treaties. The limited minimum standards (Part III), which are, in effect, the mandatory parts of the Convention, themselves offer choices. Indeed, the parties may even sign the Convention, but not apply the mandatory parts on the basis that they are already included in

their treaties (see, for example, Article 7(15)).

Mass renegotiation of bilateral treaties

This unusual multilateral treaty is therefore best seen as a mass renegotiation of bilateral treaties on a limited range of issues and limited to a series of predetermined options. What effect will it have on the overall balance of individual treaties? Unlike a protocol where limited items are agreed to amend an existing treaty, participating states will have no choice about the language, or opportunity to tailor the provisions to meet specific requirements. Similarly, issues not on the agenda cannot be added to maintain or restore overall balance in any given case.

States, it will be under considerable time pressure to deal with their entire treaty networks. Their initial position on the BEPS Convention will need to be in place at the time of signature and finalised at the time of ratification (Article 29). This is considerably less time than is typically spent negotiating a single treaty. States may therefore be slow to ratify or enter maximum reservations initially. This would at least provide a breathing space for a degree of negotiation with treaty partners. If the result is that states are quick to sign but slow to ratify, it does beg the question whether early adoption of a revised OECD Model, leaving states to upgrade their treaty networks at their own pace would have produced an easier, and possibly quicker result. Only time will tell.

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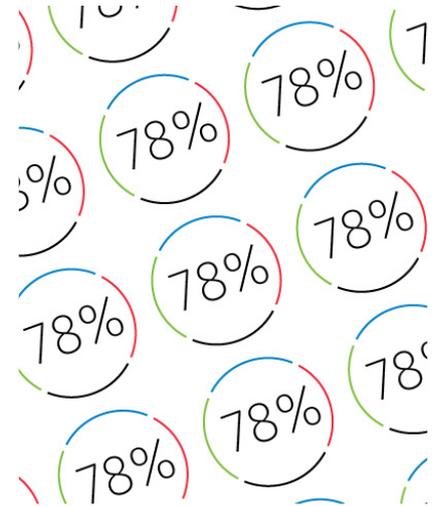
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