

# Kluwer International Tax Blog

## Multilateral Tax Treaty: if we build it, will they come?

Jonathan Schwarz (Temple Tax Chambers; King's College London) · Saturday, September 5th, 2015

In many respects a multilateral tax treaty represents an utopian view of international tax law: a wide consensus among nation states to submit themselves to a common set of rules that govern the levying of taxes across national boundaries.

While there have been several examples of attempts at multilateral double taxation treaties, such as the Nordic treaty (Multilateral Tax Agreement between Denmark, Finland, Iceland, Norway and Sweden), these have largely been limited to specific regional groupings (See a useful [McGill University collection of multilateral tax treaties](#)) where there are close linguistic, legal and cultural assumptions. The EU Arbitration Convention and the OECD/COE Mutual Assistance Convention both deal with limited aspects of international taxation, being confined to tax administration rather than the substantive rules for the imposition of tax.

The OECD recognised early in the BEPS process that collaboration and co-ordination are key to comprehensive international solutions that may satisfactorily respond to base erosion and profit shifting ([Addressing Concerns Related to Base Erosion and Profit Shifting OECD \(2013\)](#), Chapter 5).

### Implementation of BEPS treaty actions

The multinational instrument contemplated by [BEPS Action 15](#) is far from utopian. The goal of Action 15 is to streamline the implementation of the tax treaty-related BEPS measures. It is argued that the number of bilateral treaties in effect may make the self-imposed deadline very challenging if these measures are introduced treaty-by-treaty. The project is ambitious from a legal perspective since there is no precise precedent to follow. Most legal experience in the tax treaty field is also in relation to bilateral rather than multilateral agreements.

Unlike the existing multilateral double tax treaties, which essentially adopt a multi-party approach to OECD or UN style bilateral treaties, the proposed instrument will focus only on giving legal effect to BEPS treaty-related measures: hybrid instruments (Action 2), treaty abuse (Action 6), permanent establishments (Action 7), and possibly dispute resolution (Action 14). In this respect it also differs from the EU Arbitration Convention, which parallels article 25 of the OECD Model (mutual agreement procedure) and the OECD/COE Mutual Assistance Convention, which parallels articles 26 (exchange of information) and 27 (assistance in tax collection) of the OECD Model. It also differs from these multilateral treaties in that existing articles of bilateral treaties will be only partially amended. For example, the meaning of permanent establishment may be modified in relation to agency permanent establishments and in relation to preparatory and auxiliary activities

by the proposals in Action 7, but other parts of the definition will remain defined in accordance with, and governed by, bilateral treaties.

### **Technical challenges**

Inclusion of the work product of the treaty-related BEPS actions is likely to be the technically easiest part of the project. Improving dispute resolution mechanisms is likely to be more challenging. Dispute resolution is not a driver of the BEPS project but rather a consequence of recognition that more double taxation and thus more disputes are inevitable in light of the changes proposed. Perhaps only that double taxation and its effect on cross-border activity will drive future development of this aspect.

### **Who will come to the party?**

The ad hoc Group on this project has over 80 countries participating. The notable exception is the United States which is observing the negotiations only. Not all participants are committed to sign. At the 2015 IFA Congress in Basel it was reported that some 20 countries among the participants had indicated an initial willingness to sign a multilateral tax treaty. No doubt, the OECD/G20 sponsors will hope others will follow. Ironically, the treaty-related BEPS actions contain few genuine innovations. Outside Action 7 (permanent establishments), most proposals are found, albeit unsystematically, in existing treaties. At the IFA Congress it was said that the US is not participating because it already has the LOB which form the basis of the proposed LOB in Action 6 in its treaties, for example. Driven by the same political will, the 20 leading countries could likely amend their bilateral treaties with each other, well before they become bound by the proposed multilateral treaty, and with less difficulty. They would also face fewer risks that will inevitably flow from the legal innovation needed in drafting this complex instrument.

### **A new era**

Action 15 is however far more ambitious than merely a convenient device to facilitate rapid amendment of existing treaties. Conclusion of a multilateral treaty devoted to preventing tax avoidance will provide a bold political statement at the end of 2016 highlighting the achievement of the BEPS project. It will also usher in a new era in the field of tax treaties. Future bilateral treaty negotiations will need to take the multilateral treaty into account. Its conclusion may eventually lead to a widening of its scope, or show the way to multilateral treaties on other aspects of taxation where sufficient consensus has, until now, been elusive. Even if the multilateral treaty permits states to choose from a menu of options, it will lead to greater consistency of treaty language. It may also challenge the historic regional approach to setting international tax standards in multilateral agreements, or indeed, by way of directive in EU law (after all, tax treaty override is alive and well in many states, but EU directive override is impossible. It may enhance rather than reduce tax sovereignty in some cases).

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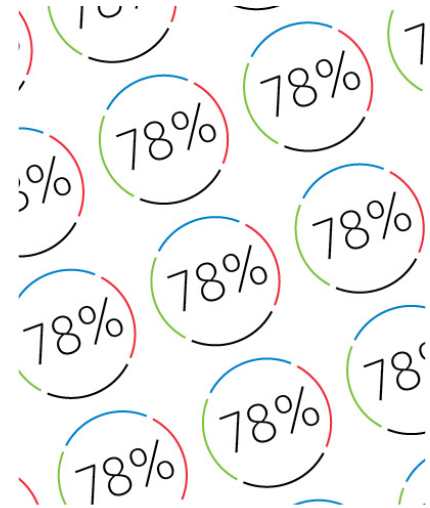
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