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In this article, Prasad explains the difficulties of reaching multilateral agreements among jurisdictions with varying tax and economic policies, and he argues that bilateralism will remain prominent because it avoids those difficulties while still allowing negotiators to address their specific concerns.

Introduction

The OECD base erosion and profit-shifting project formulated 15 action plans, the latest one being a multilateral convention: "Developing a Multilateral Instrument to Modify Bilateral Tax Treaties." Some of the action plans have been implemented as part of domestic law antiavoidance provisions and others have been transformed into the multilateral instrument. By 2020 the MLI had become a reality in most of its signatory tax jurisdictions.

BEPS 2.0 focuses on addressing the tax challenges of the digital economy. The OECD/G20 inclusive framework formulated a two-pillar solution to address digital economy taxing rights for market jurisdictions and, under pillar 1, released a multilateral convention with supporting guidance material in October 2023. Multilateralism is holding center stage in the present international taxation landscape.

It is therefore appropriate to evaluate the relevance of a bilateral approach to treaty making and the importance of tax jurisdictions' sovereign rights regarding economic cooperation and the priorities of other countries. How does a sovereign country simultaneously balance its rights and obligations under bilateral and multilateral approaches in concluding and implementing tax treaties?

History of Multilateral and Bilateral Treaties

Post-World War I the International Chamber of Commerce (ICC) first addressed international double taxation as an impediment to international trade and commerce. The ICC created a committee on taxation consisting of private sector organizations from several countries, including Belgium, France, Italy, the Netherlands, the United Kingdom, and the United States.[1] It held meetings beginning in 1921 to negotiate the acceptable allocation of taxing rights between resident and source jurisdictions. Finding a single uniform formula for all countries could not be achieved because developed and developing nations' tax policy agendas varied drastically, leading to bilateral negotiations for the conclusion of tax treaties.

The disparities over taxing rights allocation rendered a bilateral approach to negotiating and concluding tax treaties the most suitable. Bilateralism has remained the order of the day for tax treaties.

The League of Nations established a fiscal committee to explore the possibility of a multilateral approach to tax treaties. Despite

[1] Resolution No. 11 of the ICC in the organizational meeting held in Paris on June 28, 1919.

several meetings, the committee was unable to achieve consensus from European countries on multilateralism. It made a final attempt in June 1933 to coax member countries to approve a multilateral approach. However, in its fifth session in 1935, it decided to give up the multilateral approach in the wake of low response from the majority of the countries that found a bilateral approach to be more appropriate for the negotiation and conclusion of tax treaties.[2] Multilateralism was abandoned; the fiscal committee turned to negotiating a model convention for bilateral double tax treaties. The first model was released at a Mexico City conference in 1943, supported by capital importing countries of Latin America such as Mexico. In 1946 the fiscal committee convened a meeting in London that released a new draft[3] model convention supporting residence-based taxation.

The London and Mexico City drafts were the fiscal committee's last contributions to the international tax landscape, with the U.N. replacing the League of Nations on October 24, 1945.[4] With its broad membership, including developing countries and Soviet bloc members, the U.N. could not formulate a model convention. At that point the United States pressured the United Kingdom to implement a foreign tax credit regime. This prompted the United Kingdom and the United States to conclude a tax treaty in 1945, before the publication of the fiscal committee's London draft. The treaty was a trendsetter in the postwar era promoting bilateralism in tax treaty negotiation and conclusion. The U.N.'s failure to formulate a model convention led to the 1948 establishment of the Organization for European Economic Co-operation (OEEC),[5] with membership including developed countries. The OEEC took the lead in creating a draft model convention for double tax treaties.

In 1961 the OEEC became the OECD and in 1963 published its first draft model double tax convention on income and capital, together with commentary.[6] In its report to the OECD council, the fiscal committee discussed the multilateral option and observed that it was not feasible because of the lack of consensus among member countries. It was observed that convergence of tax policies among member countries is critical to achieving a multilateral agreement. Since then, the OECD has continued to publish updated model conventions promoting only bilateralism.

Nevertheless, multilateralism did experience past limited success via multilateral treaties attempted on a regional basis. In South America, Bolivia, Chile, Columbia, Ecuador, and Peru signed a multilateral tax treaty (the Andean treaty) in November 1971; Venezuela joined later. The treaty eliminated double taxation by adhering to the source principle.[7] Denmark, Finland, Iceland, Norway, and Sweden signed a multilateral tax treaty, the current version of which dates to 1996.[8] In July 1994 eight countries of the Caribbean Community signed a multilateral treaty similar to the Andean treaty that addresses double taxation and supports the source taxation principle.

OECD BEPS Project

The 2008 financial crisis and economic slowdown led to the fall of large corporations in the United States. The adverse effect of the crisis quickly hit economies in Europe and other parts of the world. Revenue-starved governments began checking whether all legitimate taxes were being collected from corporations in their jurisdictions. In fact, large corporations were paying only a meager amount of tax (maybe 1 percent to 2 percent). Governments reviewed the efficacy of their existing tax rules. International tax rules were found to be out of date because

[2] League of Nations Fiscal Committee, Report to the Council on the Fifth Session of the Committee, Doc. C.252.M.124.1935.II.A. (1935).

[3] League of Nations Fiscal Committee, Report on the Work of the 10th Session of the Committee, Doc. C.37.M.37.1946.II.A (1946).

[4] The League of Nations ceased to exist after WWII, and the U.N. was founded in its place on October 24, 1945. United Nations, "The History of the U.N."

[5] The OEEC was founded April 16, 1948, to administer the Marshall Plan and bring economic recovery to Europe after World War II. OECD, "The Organisation for European Economic Co-operation (OEEC): From the Ashes of War to the Foundations for Lasting Co-Operation."

[6] OECD, Draft Double Taxation Convention on Income and Capital, C (63)87 (1963).

[7] The Andean multilateral treaty, *see Bolivia — Colombia — Ecuador — Peru Income and Capital Tax Treaty (Andean Community)* (unofficial translation) (16 Nov. 1971), Treaties & Models IBFD.

[8] Bravo, Nathalie, "A Multilateral Instrument for Updating the Tax Treaty Network," IBFD Doctoral Series, Vol. 52 (March 1, 2020).

they were designed to address brick-and-mortar business models. But technological advancement drastically changed the business models of large corporations. Corporations were able to conduct business in markets without establishing a physical presence. The OECD, with the support of the G20 nations, undertook the BEPS project to revamp international tax rules to stop tax avoidance using effective antiavoidance rules. BEPS includes 15 actions released in October 2015, with the 15th being the aforementioned "Developing a Multilateral Instrument to Modify Bilateral Tax Treaties."

Within the BEPS project, the OECD inclusive framework achieved consensus on minimum standards for each inclusive framework member. These are:

- action 5, which defines two minimum standards ("Countering Harmful Tax Practices More Effectively and Taking into Account Transparency and Substance");
- action 6 ("Preventing the Granting of Treaty Benefits in Inappropriate Circumstances");
- action 13 ("Transfer Pricing documentation and Country-by-Country Reporting"); and
- action 14 ("Making Dispute Resolution Mechanism More Effective").

The minimum standards broadly address prevention of treaty abuse and provide an effective dispute resolution mechanism for taxpayers. Action 1 targeted the challenges of the digital economy and was kept on hold.

Other action plans — action 3, dealing with CFC rules, and action 4, dealing with limitation of interest deductions — have been addressed through domestic antiavoidance laws within the jurisdictions. Actions 2, 6, 7, and 14 have been addressed by the MLI.

Actions 8 through 10 ("Aligning Transfer Pricing Outcomes with Value Creation") and action 13 ("Transfer pricing Documentation and Country-by-Country Reporting") appear in the 2017 revised OECD transfer pricing guidelines.

Action 5 is meant to counter harmful tax practices through the exchange of information and action 11 deals with measuring and monitoring BEPS. Action 12 addresses mandatory disclosure rules to stop abusive tax planning well in advance by bringing legislation into the domestic law of the respective inclusive framework members.

After initiating the BEPS project, the inclusive framework countries expedited the exchange of information among themselves to combat tax evasion and double nontaxation. In this direction, the inclusive framework members concluded the Multilateral Agreement on Administrative Cooperation in Tax Matters and the Common Reporting Standard.

Rights and Obligations Under the MLI

All MLI signatories have committed to implementing the minimum standards in actions 5, 6, 13, and 14. The MLI provides flexibility for the signatory countries to propose amendments through bilateral negotiations at a subsequent time for certain categories as per article 30 ("Subsequent Modifications of Covered Tax Agreements"). Minimum standards are expected to be followed and honored in the future. The MLI's explanatory statement[9] clarifies that it should be applied alongside existing bilateral treaties, modifying their application to facilitate tax treaty measures related to BEPS.

The MLI approach to implementing the BEPS agenda is the recommendation of a group of experts as an effective and swift way to amend bilateral treaties to come into accordance with BEPS measures. The term "modification" was deliberately chosen after in-depth discussion among the experts. The MLI's sole objective is modifying antiavoidance measures within existing bilateral tax treaties. It does not address the allocation of taxing rights as concluded in existing bilateral tax treaties termed "covered tax agreements" (CTA). From the perspective of the BEPS measures, the 2020 MLI in most jurisdictions is not a true multilateral convention because it does not deal with the allocation of taxing rights.[10]

Consequently, because of its mix of procedural and substantive rules, the MLI is best characterized as a framework agreement for the modification of bilateral tax treaties. This

[9] OECD, "BEPS Multilateral Instrument."

[10] Reuven Avi-Yonah and Eran Lempert, "The Historical Origins and Current Prospects of the Multilateral Tax Convention," 15(3) *World Tax J.* 379 (2023).

characterization also captures the MLI's hybrid nature, which straddles the line between pure bilateralism and true multilateralism by adding elements of the latter to a system that remains characterized primarily by the former.[11]

BEPS 2.0 — Digital Economy Challenges

Advancements in information and communication technology have changed the business models pursued by multinational enterprises. The internet revolution enabled business entities larger and speedier interaction with customers. It has encouraged MNEs to reach out to the global markets on a real-time basis. The resulting digitalized MNE business models can be characterized with the following features as per the OECD interim report of 2018:[12]

- **Cross-jurisdictional scale without mass:** Digitalization allows MNEs to take part in the economic life of a jurisdiction without any (or any significant) physical presence.
- **Reliance on intangible assets, including intangible property:** Digitalized MNEs are characterized by a growing emphasis on investment in IP, especially IP assets owned by the MNE or leased from a third party. The intense use of IP assets such as software and algorithms supporting platforms, websites, and other functions are central to the business models.
- **Data, user participation, and IP synergies:** Data, user participation, network effects, and the provision of user-generated content are commonly observed in the business models of digitalized businesses. The benefits from data analysis also increase with the amount of collected information linked to a specific user or customer. An example of the important role that user participation can play is social networks. Without the data, network effects, and user-generated content in social networks, MNEs would not exist as we know them today. In addition, user participation can be divided into two categories: active and passive. However, it does not necessarily correlate with the degree of digitalization. For example, cloud computing can be considered a more highly digitalized business tool but involves only limited user participation.

The digital business model transformation has created challenges for tax administrations in locating the nexus for taxation and the corresponding value creation. MNEs pursuing these models can earn huge revenue in markets without a physical presence. This undermines existing international tax rules that operate only when an MNE has a physical presence in the market or source jurisdiction. It has created a gap exploited by MNEs in avoiding taxes in market jurisdictions. In response, the OECD inclusive framework initiated the BEPS 2.0 project with the goal of properly taxing MNEs in the context of their digital presence.

A detailed chronologic list of related OECD documents is listed below:[13]

- January 2019: Delivery of Policy Note
- February-March 2019: Public Consultation
- May 2019: Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalization of the Economy
- November 2019: Public Consultation — Secretariat Proposal for a "Unified Approach" under Pillar One
- December 2019: Public Consultation — Global Anti-Base Erosion (GloBE) Proposal under Pillar Two
- January 2020: Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalization of the Economy
- October 2020: Statement by the OECD/G20 Inclusive Framework on BEPS and delivery of the reports on the Blueprints of Pillar One and Pillar Two, and the Economic Impact Assessment

[11] Werner C. Haslehner, "A Multilateral Interpretation of the Multilateral Instrument (and Covered Tax Agreements)?" 74(4/5) *Bull. for Int'l Tax'n* (2020).

[12] OECD, "Tax Challenges Arising From Digitalisation — Interim Report 2018" (Mar. 16, 2018).

[13] OECD, "Base Erosion and Profit Shifting (BEPS), Policy Issue," (July 1, 2024).

- October-December 2020: Public Consultation — Reports on the Pillar One and Pillar Two Blueprints
- January 2021: Public Consultation Meetings — Reports on the Pillar One and Pillar Two Blueprints
- July 2021: Statement on a Two–Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy
- October 2021: Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy
- December 2021: Global Anti-Base Erosion Model (GloBE) Rules — Pillar Two
- March 2022: Commentary to the Global Anti-Base Erosion Model Rules (Pillar Two), First Edition
- Early 2022: Public consultations on the implementation aspects of Pillar One and Pillar Two
- July 2022: Public consultation on the Progress Report on Amount A under Pillar One
- October 2022: Public consultation on the Progress Report on the Administration and Tax Certainty Aspects of Amount A under Pillar One
- December 2022: Public consultation on Amount B under Pillar One
- December 2022: Public consultation document on Pillar One — Amount A: Draft Multilateral Convention Provisions on Digital Services Taxes and Other Relevant Similar Measures
- December 2022: Implementation package for Pillar Two
- February 2023: Agreed Administrative Guidance for the Pillar Two GloBE Rules
- July 2023: Outcome Statement on the Two–Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy
- July 2023: Public consultation on Amount B under Pillar One
- July 2023: Agreed Administrative Guidance for the Pillar Two GloBE Rules
- July 2023: GloBE Information Return (Pillar Two)
- July 2023: Subject to Tax Rule (Pillar Two)
- October 2023: Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule (STTR MLI)
- October 2023: Minimum Tax Implementation Handbook (Pillar Two)
- October 2023: Multilateral Convention to Implement Amount A of Pillar One
- December 2023: Agreed Administrative Guidance for the Pillar Two GloBE Rules
- December 2023: Update to Pillar One timeline by the OECD/G20 Inclusive Framework on BEPS
- February 2024: Pillar One — Amount B
- May 2024: Pillar One — Statement by the Co-Chairs of the OECD/G20 Inclusive Framework on BEPS
- June 2024: Pillar One — Amount B (supplementary elements)
- June 2024: Agreed Administrative Guidance for the Pillar Two GloBE Rules
- December 2024 — OECD released fact sheet and Automatic Tool for Pillar One Amount B

As of June 2024, around 147 countries and jurisdictions have joined the two-pillar solution to reform international taxation rules and ensure that MNEs pay a fair share of tax wherever they operate.

In October 2023 a multilateral convention to implement amount A of pillar 1 began consideration by stakeholders of proposed taxing rights for market jurisdictions.

Bilateral Negotiations vs. the MLI: New CTA Preambles

With the MLI modifying in-force CTAs, it is helpful to discuss the treaty partners' original understanding and the context in which the CTA was originally concluded. In other words, whether the CTA's new preamble inserted per article 6 of the MLI erases the context originally agreed upon by the treaty partners. Otherwise, is it to be interpreted that the original context under which the CTA was agreed upon and the new context under which the MLI-based preamble was inserted coexist harmoniously? The new preamble reads in part:

> Noting the need to ensure that existing agreements for the avoidance of double taxation on income are interpreted 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 (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions); . . .

Double nontaxation should not be encouraged or allowed. In many Indian post-MLI CTAs, the original preamble supporting economic cooperation between the treaty partners in the words "with a view to promote economic cooperation between two countries" is retained along with the text of the new preamble. In promoting economic cooperation between the treaty partners reduced taxation or nontaxation is often agreed upon. It is unclear whether this understanding would continue to be protected under the new preamble.

The new preamble is directly linked to the principal purpose test under MLI article 29. It provides for a carveout of treaty benefits in line with the object and purpose of the relevant provisions of the treaty. Any reduced taxation or nontaxation that may result from mutual economic cooperation of the treaty partners is to be understood as forming part of the original context and purpose of the treaty and is covered by a carveout of the principal purpose test rule. Accordingly, the preamble does not permit an interpretation of the tax treaty to avoid double nontaxation beyond what is clearly expressed in its terms. Only cases of double nontaxation that result from structured tax evasion or avoidance, including through treaty shopping, are intended to be caught.[14] In the absence of an abusive arrangement, a denial of treaty benefits because of double nontaxation would override the terms of the treaty and would be in breach of article 31 of the 1969 Vienna Convention.[15]

The MLI is therefore not part of a CTA within article 31(2) of the Vienna Convention. Similarly, it is not a subsequent agreement made by the parties in connection with the conclusion of a CTA within article 31(3)(a) of the Vienna Convention. Article 6(1) of the MLI preamble text is not a CTA preamble. It is unclear how the preamble text relates to the interpretation of those provisions of the CTA unmodified by the MLI. The preamble's penultimate paragraph explains the reason for article 6(1). But its status in relation to the MLI itself is unclear, because it is neither a preamble to the MLI itself, nor does it impose specific rights and obligations on the contracting states to a CTA. Exceptionally, it may be preamble-like to the extent that the MLI modifies the CTA. Thus, it forms part of the context in interpreting MLI provisions that modify a CTA, including mandatory article 7(1) and other provisions that parties may select.[16]

In *Alta Energy Luxembourg S.A.R.L. v. The Queen*, 2018 TCC 152, Tax Court of Canada's supernumerary justice Robert Hogan observed that:

> A tax treaty is a multi-purpose legal instrument. The preamble of the Treaty states that the two governments desired "to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital." While indicative of the general purpose of the Treaty, this statement remains vague regarding the application of specific articles of the Treaty. Under the [general antiavoidance rule] analysis, the Court must identify the rationale underlying Article 1, 4 and 13, not a vague policy supporting a general approach to the interpretation of the Treaty as a whole.

Justice Hogan noted that the preamble was indicative of the treaty's general purpose but vague regarding the application of specific articles. He ruled that the analysis of whether there is abuse, whether granting the benefit is in

[14] Luc De Broe, "Role of the Preamble for the Interpretation of Old and New Tax Treaties and on the Policy of the Prevention of Treaty Abuse," 74(4/5) *Bull. for Int'l Tax'n* (2020).

[15] *Id.*

[16] Jonathan Schwarz, "The Impact of the New Preamble on the Interpretation of Old and New Treaties and on the Policy of Abuse Prevention," 74(4/5) *Bull. for Int'l Tax'n* (2020).

accordance with the object and purpose of the relevant treaty, must identify the rationale underlying the specific articles. A vague policy supporting a general approach to the interpretation of the treaty as a whole did not suffice for this purpose.[17]

Professor Jonathan Schwarz of King's College in London observes:

> The central issue in considering the impact of the new preamble is whether the language of the new preamble would produce a different meaning for any of those articles. The new language refers to not "creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements)". In the author's view, the only article that this language may have any bearing on is article 4 (fiscal domicile). However, there is nothing in the definition of residence for treaty purposes in that article that helps to explain when a person who otherwise meets the definition of a resident of a contracting state should or should not be denied treaty benefits as a result of treaty shopping. The author agrees with Justice Hogan that if preventing treaty shopping is the objective, then a U.S.-style limitation on benefits (LOB) that grants benefits only to qualifying residents [22] would give effect to the stated purpose in the preamble to article 6(1) of the MLI.[18]

"The difficulty is that while the preamble may assist in interpreting the language of the [principal purpose test] itself, it is less helpful in interpreting the specific treaty article whose purpose must be considered in order to decide when there is an abuse of the treaty."[19]

The ruling of tax court in *Alta Energy* was endorsed by Canada's federal court of appeal,[20] and in turn by the Supreme Court of Canada[21] on November 26, 2021.

MLI Minimum Standards and Subsequent Bilateral Negotiations

MLI article 30 reads:

> 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.

Article 30 provides flexibility to the contracting jurisdictions of a CTA for any subsequent modifications. It is to be analyzed whether the contracting jurisdictions may do away with minimum standards through subsequent bilateral negotiations. It has been argued in academic literature that these modifications can only be valid if they do not undermine the minimum standard of the MLI, that is, they do not change the provisions that a party cannot opt out of when adopting the MLI.[22] The contrary view holds this position doubtful because of the clear wording of article 30 and the fact that the MLI minimum standard does not have any legal obligations beyond those the MLI explicitly imposes.[23]

Is Multilateralism Sustainable and Practical?

History shows that countries rejected multilateralism several times because a sovereign nation would need to compromise on difficult issues as part of a multilateral group agreement. The flexibility and advantages that a sovereign nation enjoys in the bilateral approach would be missing in terms of country-specific interests in the multilateral approach. Country-specific agenda disparities arise from varying levels of economic progress reflected in the respective countries' tax policies, limiting or eliminating

[17] *Id.*

[18] Schwarz, *supra* note 16.

[19] Schwarz, *supra* note 16.

[20] *Alta Energy Luxembourg S.A.R.L. v. The Queen*, 2020 FCA 43.

[21] *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49.

[22] Nathalie Bravo, "Future Changes to Covered Tax Agreements and of the Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent BEPS" in *The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects* 243-248 (2018).

[23] Andreas Langer, "The Legal Relevance of the Minimum Standard in the OECD/BEPS Project" in *The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects* 89 and 103 (2018).

convergence of tax policies between developed and developing countries, or capital importing and capital exporting countries. To achieve success with a multilateral agreement, member countries would need identical tax policies — an unrealistic and impractical proposition.

The agreement released by the OECD in October 2023 for discussion is a multilateral convention expected to be accepted and signed by inclusive framework member countries. It is part of the pillar 1 taxing rights for market jurisdictions.[24] The focus of pillar 1 is to facilitate taxation of MNEs in the market jurisdictions in which they do business. But pillar 1 is contrary to the existing PE tax rules and the arm's-length principle under transfer pricing regulations. The traditional PE rule and transfer pricing regulations (before amendments) were unable to fix MNE taxation in market jurisdictions, despite substantial expansion of the MNE user base in new market jurisdictions.

The U.S. Senate has to approve this new taxing rule under pillar 1 — amount A — to make the multilateral convention a reality. However, acceptance is unlikely because the new rule would erode the U.S. tax base to some extent.[25] Opposition would remain to any multilateral tax treaty dealing with the taxation rights of several developed and developing countries. History confirms that achieving success with a multilateral tax agreement is unlikely.

Conclusion

It is imperative for a sovereign jurisdiction to avoid compromising its tax policy. It is preferable to negotiate a bilateral tax treaty with another sovereign country to achieve a win-win situation. To promote economic cooperation, what India did for its India-Mauritius tax treaty (before the treaty's 2016 amendment) was a deliberate decision to invite foreign direct investment. This was upheld by India's Supreme Court in the *Azadi Bachao Andolan* case.[26] It seems that multilateralism would have only limited success and relevance in the global treaty network while bilateralism will continue to hold its significance and relevance in the years to come. ■

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[24] Avi-Yonah and Lempert, *supra* note 10.

[25] Robert Goulder and Mindy Herzfeld, "The Fight for Pillar 1 Approval in Congress," Tax Notes Talk: In the Pages (Aug. 4, 2021).

[26] *Union of India v. Azadi Bachao Andolan*, 263 ITR 706.