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Multilateral Tax Treaties

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The international tax architecture is dominated by thousands of bilateral treaties. However, multilateral tax treaties (MTTs) are also present in growing numbers. Recent developments have pointed the way to a possible future growth in MTTs. This article examines the advantages and disadvantages of MTTs, and considers their possible future role.

1. Introduction

In April 1991, Richard Vann wrote in the *Bulletin for International Fiscal Documentation* as follows:

> One panacea that is often advanced for the ills of the bilateral treaty is the multilateral tax treaty. The 1963 OECD draft was put forward as a model for both multilateral and bilateral negotiations within the OECD … From the very beginnings of model treaties in the League of Nations, the possibility of a multilateral treaty was explored. Yet from then until today the general response of experts appointed to consider the possibility has been negative – and that response has been borne out in practice.
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> The history to date suggests that simple evolution will not lead to higher and better things for tax treaties (multilateralism). Evolution is as much about decay and disappearance as improvement. What is required (to continue the evolutionary metaphor) is that some fundamental shift in circumstances favourable to change must occur.[1]

This article seeks to examine the issue of multilateral tax treaties (MTTs) and to reconsider the position of MTTs in the 2020s, particularly in light of the first BEPS Project and the adoption of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("the MLI").[2] It examines the existing state of multilateralism in international taxation, considers the advantages and disadvantages presented by a multilateral approach to tax treaties, and ends with a short discussion of possible patterns for multilateral agreements and the current discussion of the taxation of the digitized economy.

As the quotation from Vann indicates, from the time that the *Bulletin* first appeared, consideration was already being given to multilateral agreements on international tax.[3] Despite this assumption of a move towards multilateralism, the current international structure at the time of the 75th jubilee anniversary of the *Bulletin* remains very largely bilateral, with well over 3,000 bilateral conventions in force between pairs of countries. Several authors have written on the topic, many of them pointing towards potential advantages (as well as some disadvantages) of MTTs.[4] Despite a move towards multilateralism in

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1. R. Vann, *A Model Tax Treaty for the Asian-Pacific Region?*, 45 Bull. Intl. Fiscal Docn. 3, p. 151 (1991). In 2006, the name *Bulletin for International Fiscal Documentation* was changed to *Bulletin for International Taxation*.
2. *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (24 Nov. 2016), Treaties & Models IBFD.
3. For example, in the early 1930s, the League of Nations produced a proposed model agreement for the adjustment of the business profits of enterprises operating in two or more countries, which was drafted under the guidance of Mitchell C. Carroll, and was intended to be a multilateral instrument. There was insufficient support for the adoption of that multilateral instrument, which was, in a sense, an early indication of the triumph of bilateralism.
4. There is an academic literature on MTTs, though it is not particularly extensive. In addition to the article by Richard Vann quoted above, there is a book edited by Michael Lang et al., *Multilateral Tax Treaties – New Developments in International Tax Law* (Kluwer, 1998), which considers a number of topics relating to MTTs, but particularly focuses on the possibility of the adoption of an MTT within the European Union, and contains a very good chapter by Helmut Loukota entitled "Multilateral Tax Treaty versus Bilateral Treaty Network". Articles include Victor Thuronyi, "International Tax Cooperation and a Multilateral Treaty", 26 Brooklyn Journal of International Law, pp. 1641-1681 (2001), and a comment on that paper by Diane Ring at pp. 1699-1709; Kim Brooks, "The Potential of Multilateral Tax Treaties" in Michael Lang et al. (editors), *Tax Treaties: Building Bridges between Law and Economics* (IBFD, 2010) pp. 2011-2036; Nils Mattsson, "Multilateral Tax Treaties – A Model for The Future?" (2000) 28 Intertax pp. 301-308 (which focuses on the Nordic multilateral treaty); and Guillermo Sanchez-Archidona Hidalgo, "Reflections on Multilateral Tax Solutions in a Post-BEPS Context" (2017) 45 Intertax pp. 714-721. There are also a number of articles describing some of the existing regional MTTs. *Klaus Vogel on Double Taxation Conventions* (4th edn., Wolters Kluwer 2015) discusses MTTs at Introduction paragraphs 19-27, and also lists some of the literature at paragraph 18.

international law and practice more generally,[5] international tax law remains very largely dominated by bilateral double taxation conventions at the present time.

2. Existing MTTs

This is not to say that MTTs have not begun to make inroads into the bilateral treaty network. When one comes to consider that network, there are a growing number of MTTs, particularly in relation to administrative cooperation between revenue authorities.[6]

Existing MTTs can be divided into those dealing with substantive international tax law (that is, the relief of international double taxation and related matters) and those focused exclusively on administration cooperation. Within each category, the existing MTTs can be further subdivided into regional instruments (that have been concluded with the intention that they will be available only to members of a particular regional grouping) and global instruments (that are intended to be open to all countries). Finally, there is the MLI, which is sui generis, and which may prove to be a game changer in the development of MTTs.

So far as substantive MTTs are concerned, there is a surprisingly long list of regional instruments, although perhaps relatively few of them are particularly significant in practice. The earliest regional, substantive MTT dates back to 1922 and the Direct Taxes Convention between Hungary, Italy, Poland, Romania and Yugoslavia. Existing regional instruments that remain in force include the following: the 1973 Council of Arab Economic Union Income Tax Treaty (7 countries); the 1977 Comecon Personal Income and Property Tax Agreement (14 countries); the 1978 Comecon Corporate Income and Property Tax Agreement (14 countries); the 1990 EU Arbitration Convention (27 countries);[7] the 1990 Arab Maghreb Union Income Tax Convention (5 countries); the 1994 Caricom Tax Invention (12 countries); the 1996 Nordic Countries Income and Capital Tax Convention (originally concluded in 1983 – 6 countries); the 2004 Andean Community Income and Capital Tax Convention (4 countries); the 2005 South Asian Association for Regional Cooperation Income Tax Agreement (7 countries); and the 2008 West African Economic and Monetary Union Income and Inheritance Tax Convention (8 countries).[8] In terms of MTTs intended to have a global reach, however, the score is much lower. In 1931, the League of Nations drafted a Motor Vehicle Convention (which was signed by 43 countries), and this was continued in 1956 by the UN Road Vehicle Conventions (the convention on vehicles for private use has 19 treaty parties). There is also the 1979 UNESCO and WIPO Copyright Royalties Convention (which has only eight states that have become parties to the convention, and requires one more ratification to enter into force). Aside from the regional MTTs, therefore, the field of substantive international tax law has remained largely bilateral.

Turning to administrative cooperation between revenue authorities, there are both regional instruments and a global, multilateral instrument of major significance. Regional instruments include the Benelux Administrative Assistance Conventions of 1952 and 1964, and a more recent Benelux tax cooperation agreement of 2019; the 1991 Nordic Countries Competent Authority Agreement; the 1999 Commonwealth of Independent States Mutual Assistance Convention (12 countries), and the 2017 BRICS Memorandum of Cooperation (involving 5 countries: Brazil, Russia, India, China and South Africa).

However, it is in the realm of administrative cooperation that an MTT with global reach has had the most significant impact. The Multilateral Convention on Administrative Assistance (MCAA) began life in 1988 as a draft prepared jointly between the OECD and the Council of Europe and was initially open only to members of those two bodies. Opening it to all countries in 2010 has made it the first truly successful, global MTT, with some 144 countries currently participating in the Convention. It has also spawned the 2014 OECD Multilateral Agreement on Automatic Exchange of Information (111 countries involved) and the 2016 Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (90 countries). The growth in acceptance of the MAA has undoubtedly been assisted by developments arising out of the OECD's Harmful Tax Competition project in the late 1990s, with its emphasis on exchange of information and administrative cooperation to identify cooperative and non-cooperative jurisdictions. That project developed into the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes and the introduction of the Common Reporting Standard for automatic exchange of information in tax matters.

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5. For example, the move from bilateral trade agreements to the GATT and GATS, and from bilateral treaties on consular and diplomatic relations to global conventions.
6. Much of this discussion of existing MTTs is based on a search for "multilateral instruments" in the Tax Notes database of Worldwide Tax Treaties. This contribution relies on that database for information as to whether those regional instruments are still in force.
7. Which might be classified as an administrative agreement, expect of course that it also encapsulates the arm's length transfer pricing approaches of articles 7 and 9 of the OECD Model.
8. The Tax Notes database also lists one regional MTT dealing with estates and gifts – the 1989 *Nordic Countries Inheritance and Gift Tax Convention*, two pending conventions – the 1997 *Kenya-Tanzania-Uganda Agreement* and the 2010 *East African Community Income Tax Agreement* (five countries), as well as three agreements whose status (whether they are in force or not) remains uncertain: the 1944 *Succession Duties Agreement between Botswana, Lesotho, South African and Swaziland*; the 1957 *French Equatorial African Income Tax Convention*; and the 1961 *Income from Movable Capital Tax Agreement* (four countries).

In the field of administrative cooperation between revenue authorities, there is now an overlap in many countries between provisions for administrative cooperation in bilateral double taxation conventions, the MCAA, and a regional instrument on administrative cooperation (for example, in the European Union, the Directive on Administrative Cooperation ("DAC")).

3. The MLI

The MLI is perhaps best seen as a sui generis instrument. In effect, the MLI is an MTT in two halves. The first half (Parts I–V) implements some of the treaty-related conclusions of the BEPS Project by modifying those existing bilateral tax treaties that are designated as "covered tax agreements" (CTAs) for the purposes of the MLI. The second half, consisting of Part VI on arbitration, is a set of detailed rules dealing with mandatory binding arbitration of tax disputes that have arisen through the competent authority procedure of bilateral tax treaties and have not been resolved within the time limit specified in the procedure. This second half is much closer to a potentially global, but topic-specific MTT. While it deals with disputes that have arisen under the terms of an existing bilateral tax treaty, there is no obvious reason why it should be limited to the CTAs that are modified by the first half of the MLI. In principle, this second half of the MLI could have been a separate MTT in the form of a global convention on mandatory arbitration of tax disputes. In time, when the first half of the MLI has operated to modify the CTAs, that first half will in effect become redundant and Part VI will remain alone as the MTT on mandatory arbitration of tax disputes.[9]

So far as the first half of the MLI – the part that modifies existing CTAs – is concerned, in a sense one can say that the adoption of this half is, curious to say, the triumph of bilateralism over multilateralism. It might have been possible to achieve the same results by a multilateral instrument that actually replaced the relevant provisions of the existing bilateral treaties. However, at quite an early stage in the BEPS process, the decision was taken to modify existing treaties rather than replace their provisions.[10] The preservation of the bilateral nature of the network is reflected in the fact that contracting states could decide which of their existing bilateral treaties would be modified by the MLI, which of the modifications they would accept, what reservations they would make, and what choices they would make between different options offered by the MLI. Perhaps more significantly, the CTAs that were modified by the MLI could subsequently be amended or replaced by the competent authorities. Thus, with the sole proviso that the contracting states could not adopt a change that failed to respect the minimum standards agreed in the BEPS Project, any other changes to the bilateral treaties were permissible, including the complete abandonment of the wording adopted during the BEPS Project and reflected in the MLI.

This is very different from the position that might have obtained if the MLI had been a true MTT. On that basis, one would have expected a form of loyalty commitment in the MLI that the parties to the MLI would not depart from what had been agreed on a bilateral basis, and that only subsequent amendments to the MLI itself would make changes for all parties to the MLI (or at least those parties that accepted the amending protocol). Had that approach been adopted, then that form of MLI would have gone a long way towards beginning a process of replacing purely bilateral provisions by a common code of international tax rules binding on all parties to the multilateral treaty and modifiable in principle only by all parties. That is not the route that was adopted: clearly the government representatives involved in the BEPS process wished to retain full freedom of action to adopt or not adopt the MLI modifications, and to subsequently depart from those modifications (subject only to the minimum standards adopted through the BEPS process).

By providing a streamlined process for modifying a large number of bilateral tax treaties, the MLI also provided a remedy for the single most important failing of the bilateral network. This failing was the difficulty and slowness of the process of amending a large network of bilateral treaties by individual protocols, which was rapidly having the result that the bilateral treaty network was increasingly out of date and unresponsive either to commercial changes or to changes in the OECD and UN Models. By providing a mechanism for rapid and streamlined amendments, in some senses the MLI enabled the possible retention of a bilateral approach to international tax coordination.

It is possibly too early to draw that many lessons from the process of drafting and adopting the MLI. That analysis is perhaps best attempted when the MLI has been in operation for a few more years. However, there are some initial comments that can be made.

First, in order to encourage as many countries as possible to sign up to the MLI, even if they identified only a small number of CTAs and elected for only a small number of the modifications (and rejected arbitration), it was necessary to make virtually everything in the MLI optional. Thus, countries could sign up to the MLI, and attend the signing ceremony, even if they only identified a small number of CTAs and even if they elected only for those modifications that represented minimum standards.

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9. There is a substantial and growing literature on the MLI. It is not the purpose of this article to add significantly to that literature or to analyse the MLI in detail. The only purpose sought to be achieved here is to put the MLI in the context of other MTTs, and perhaps draw some lessons for future MTTs from the drafting and adoption of the MLI.
10. *See* the 2014 interim report: OECD/G20 Base Erosion and Profit Shifting Project, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties – Action 15: 2014 Deliverable* (OECD, 2014), as well as the 2015 Final Report on Action 15.

Some countries clearly took that option. The result is that the MLI looks a little bit like a restaurant menu, attractive both to the gourmand and to the person on a strict diet. Subsequently, of course, some pressure has been placed on some countries to extend their list of CTAs, and governments are given the option to elect for modifications that they initially did not choose.[11]

Second, within some of the articles of the MLI that modify CTAs, a number of different options had to be offered to cater for the variations in the wording of existing bilateral treaties. During the drafting process, countries were asked to review their existing bilateral treaties and propose different forms of wording that might be necessary to achieve the intended modification.

Third, only a limited range of reservations were permitted to contracting states when they signed up to the MLI.[12] This is perhaps one of the positive aspects of the MLI, moving towards the adoption of common principles.

Finally, the MLI made provision for a "Conference of the Parties" to oversee the operation of the MLI and, potentially, to provide common interpretations of its provisions.[13] Time will tell how this mechanism operates.

Perhaps the single strongest lesson of the MLI is that it was achievable. That is, with the political will that the BEPS Project reflected, it was possible to get a broad consensus of countries to adopt a multilateral instrument, even if that instrument drew upon and provided support for a network of bilateral tax treaties.

4. The Advantages and Disadvantages of an MTT

4.1. Introductory remarks

Existing authors have, to a greater or lesser extent, identified various advantages and disadvantages of replacing the bilateral treaty network by one or more MTTs.[14] Many of the advantages are identified by reference to the disadvantages of a network of bilateral treaties. Less is said about the question of whether a multilateral approach is, entirely of itself, preferable to a bilateral approach.

4.2. Advantages

In terms of advantages, perhaps the single most important gain by comparison with a network of bilateral treaties is the removal of opportunities for tax competition through the terms of bilateral agreements. That is, because each bilateral treaty is a separate bargain between the contracting parties, it is possible to offer certain benefits to residents of some treaty partners that are not offered to residents of others. This offers the possibility of arbitrage by taxpayers and their advisers to obtain the best benefits offered by a country for each category of income. This spawns a practice of treaty shopping, which in turn requires the development of more and more complex anti-treaty-shopping provisions.[15] To the extent that an MTT contains common provisions, applicable to all countries, then the scope for arbitrage is removed.

However, that being said, the more options that are available to parties to an MTT, the more opportunities remain for arbitrage and treaty shopping (and the higher the requirement to counter them by anti-shopping provisions). One lesson learned from the MLI is that in order to encourage a large number of countries to sign up it is necessary to offer choices to countries, but the benefit of having common provisions through an MTT is smaller. To take a simple example: the reduction or elimination of withholding tax on dividends is perhaps one of the areas where arbitrage and treaty shopping is most common. However, it is pretty much inconceivable (given the number of different domestic law systems for the integration of corporate and shareholder taxation) that an MTT would offer a single solution to the taxation of cross-border dividends. Rather, it is likely that there would be a number of choices, with a range of withholding tax levels to suit particular systems. The same may be true of cross-border payments of royalties and interest (particularly if an option of taxation at source on royalties, for example, has to be retained for developing countries to sign up to the MTT). Thus, one can see the disadvantages of the bilateral treaty network, but it is not immediately apparent that an MTT would solve that problem.

A second advantage that has been identified by a number of authors is that an MTT can deal better with international tax problems that concern more than two countries, whereas bilateral tax treaties offer inadequate solutions to these problems. Examples here are triangular cases involving three countries (for example, where a company that is resident in State A has a

11. To continue the menu analogy, this is a little bit like a Chinese restaurant where one may be encouraged to order a certain number of dishes and then add to the dishes if it is found that they are rather small or not enough has been ordered.
12. *See* art. 28(1) MLI, which states that "no reservations may be made to this Convention except those expressly permitted…".
13. *See* arts. 31 and 32(2) MLI.
14. *See*, in particular, the contributions by Loukota, Thuronyi and Vann (*supra* n. 4). The author of this article does not intend any disrespect to those or any other authors if in the following discussion he does not refer to the specific views of any particular author. The advantages and disadvantages identified here are discussed by several of the authors, and there are some points that are made by none of the existing literature.
15. Of which two examples are the limitation on benefits provisions preferred by the United States, and the principal purpose test preferred by some other countries. The concern here is that the principal purpose test is so broad that it undermines reliance on tax treaties and, in doing so, undermines the whole concept of relieving double taxation through treaties.

permanent establishment in State B that derives income from State C, and, similarly, where a taxpayer – whether an individual or an entity – is resident in three or more states under the domestic law tests of those countries). Finally, the taxation of offshore indirect transfers usually involves three or more countries and cannot be adequately addressed in bilateral treaties.

It is no doubt true that bilateral treaties do not often provide a solution to these triangular cases, but it is far from clear how frequently these cases arise in practice.[16] There are also possibilities for resolving triangular cases either by special provisions contained in bilateral treaties, or by the operation of existing provisions in treaties such as the non-discrimination article, or possibly through arrangements for multilateral competent authority discussions. If triangular cases were that common and that problematic, and there were no existing solutions, one might have expected more pressure for an MTT to resolve these problems.

A third advantage of an MTT is that it is easier for some jurisdictions, particularly smaller jurisdictions that have come late to the conclusion of tax treaties, to enter into international fiscal relations with a large number of countries by signing an MTT, rather than concluding a series of bilateral negotiations. This is clearly true, and a good example is how the MCAA has very quickly created a network of arrangements for administrative cooperation between a large number of countries. However, no one is suggesting that the drafting of an MTT covering a whole range of substantive issues that are presently covered by a bilateral treaty based upon the OECD or UN Model would be particularly easy.

A related point that has not often been identified by existing authors is the imbalance in power that sometimes exists when a bilateral tax treaty is being negotiated. A developing country with only limited resources that can be devoted to treaty negotiation, limited experience in negotiating tax treaties, and generally little to offer to potential treaty partners may be at a real disadvantage in bilateral negotiations. This will particularly be the case when facing a much bigger economy that has more resources for treaty negotiation and much more experience and the possibility to use its power to deny the conclusion of a treaty to obtain its objectives in the negotiations. It may be that this imbalance of power and experience does actually affect the outcome of negotiations, or it may be that it is simply perceived to affect the outcome.

Whether an MTT would resolve this imbalance may depend upon the organization involved in the negotiation and drafting of the MTT. If that organization permits the wide participation of countries, and operates through the formation of coalitions of similar-minded countries, then the outcome is likely to be one that is acceptable to a broad range of different countries. Operating in this way, the formation of coalitions compensates for the lack of power of individual participant countries. On the other hand, if the process gives excessive power to a small group of countries, or even to one country, then the MTT process is not going to resolve this issue at all. Without going further into the point (which merits a much broader discussion) a consensus-based approach, under which, in principle, every country has to sign up to the agreement, gives a disproportionate amount of power to major players who may be willing to walk away from the negotiations if they do not get their way. The point can be made that it is not necessary for an MTT to be accepted by every country, or even every major country, at the outset. It is enough that the MTT is supported by a sufficient number of countries for it to enter into force; subsequently, other countries – even major players – may see the advantages of the MTT and join it instead of participating in a bilateral treaty network.[17]

A fourth advantage sometimes identified for MTTs is the ease with which they may be amended. Two aspects perhaps need to be separated here. Reaching agreement that the existing provisions of an MTT need revising may be more or less difficult. Once agreement has been reached to amend the MTT, however, there is little doubt that it is easier to amend a single MTT than it is to amend thousands of bilateral treaties.

On the first point, arguably, it may prove more difficult to reach agreement on the need for amendment of a binding, multilateral legal instrument than it is, for example, to agree to an amendment of a model tax convention such as the OECD or UN Model. An amendment to one of the Models binds no one. Even if a member country does not lodge a reservation, it is not in any way bound to use the new wording of the Model in its future negotiations. It has been argued in the past that the non-binding nature of the Models has made it easier to revise them. The danger of an MTT is that it becomes ossified (although even then protocols may introduce new optional wording which some countries wish to utilize).

On the second point respecting the amendment of a single document, as opposed to amending multiple bilateral conventions, the MLI has now provided a possible solution to this problem with bilateral treaty networks. While it is hard to gauge how much appetite there is for a second or third MLI to modify the existing network of bilateral conventions, at least it has proven possible to streamline the amendment of a bilateral treaty network in this way.

A fifth advantage to an MTT is the possibility of common interpretation of the MTT's provisions. Because each bilateral convention is independently negotiated, albeit often using common terminology drawn from the OECD or the UN Model, the principle of common interpretation in international law has a somewhat modified application. Decisions of a national court,

16. As an entirely personal observation, in almost 40 years of international tax practice, the author of this article has yet to encounter a single triangular case where a tax treaty was involved.
17. Thus, for example, the United States has not joined the MLI, but this has not stopped other countries from drafting and concluding the Instrument.

even the supreme court of a country, on the interpretation of the treaty between State A and State B is not binding as to the interpretation of a treaty between State C and State D, even if the wording being interpreted (based on one of the Models) is identical. There are too many examples of courts being unwilling to follow the decisions of courts in other countries on identical wording. In the case of an MTT involving States A, B, C and D, the common interpretation approach should apply in principle. It is also more likely in the case of an MTT that there will be institutional arrangements, such as a conference of parties, or some other means of adopting common interpretations accepted by all contracting states.

Again, this is not an advantage that is totally unavailable for a bilateral treaty network. With some encouragement, courts could be induced more frequently to adopt an approach of common interpretation to bilateral treaties that are clearly based on identical Model wording. Equally, institutional arrangements could be advanced for the adoption of a process of producing common interpretations. To an extent, that is exactly what the OECD Commentaries and the UN Commentaries offer. The problem here, of course, is the legal status of the Commentaries, particularly amendments to the Commentaries adopted after the conclusion of a bilateral treaty. Presumably, an MTT would be accompanied by a commentary adopted by the signatory countries, intended (unlike the OECD Commentaries) to be appended to the MTT, and having a degree of persuasive force. This clearly has benefits, but a greater degree of common interpretation could no doubt be achieved within the scope of the bilateral treaty network.

One advantage of an MTT (which is not always highlighted by other authors) is the ease of access to a single document as opposed to a network of thousands of bilateral treaties. At present, anyone working in international taxation is likely to need access to one of the databases of the thousands of treaties. These databases are very good, including both existing, pending and terminated treaties, often including different language versions, and also identifying when the treaty went into force (or was terminated) and the impact on the treaty of the MLI. However, access to these databases is relatively expensive and not necessarily available to everyone. There is clearly something of an advantage (though not for the publishing houses that produce the databases) in having a single instrument. There is an added advantage if that instrument is adopted in only one language version or maybe two (though that may be rather idealistic on the one hand and potentially challengeable as cultural imperialism on another).

A related, but not identical point, is that a single, global MTT fits much better the needs of globalized business than a network of tax treaties. For a business operating in multiple countries, the tax consequences of particular transactions may involve considering several different bilateral treaty provisions, and there are potential advantages if the business had to consider only a single MTT.

That being said, the fact that bilateral treaties may all have identical wording based upon one of the Models is of course helpful, and the advantages of a single instrument may be reduced if the MTT offers contracting states a range of different options. The MLI is a single instrument, but the optionality that is built into it means that anyone using it has to understand the impact of the various different options available to different countries.

Finally,[18] the development of an MTT opens up a possibility of developing general principles of international taxation in a way that is not entirely possible with a bilateral treaty network. The best form of MTT is, arguably, one that goes back to basic principles and seeks for common consensus on those principles. Most authors who have written about MTTs have assumed that an MTT would be based on the existing wording of the OECD Model, with perhaps the UN wording as an optional variant.[19] It is also true that most of the regional MTTs so far are based upon the wordings of the relevant Model. It does not necessarily have to be so, however. The work on an MTT presents the opportunity to abandon some of the solutions that are wired into the existing Models and replace them by better solutions. Some authors, for example, indicate that an MTT could be used to introduce formulary apportionment in place of arm's length transfer pricing.[20]

It might be very difficult to adopt this approach of looking for new solutions other than on a topic-by-topic basis (with a view to developing "partial" MTTs, dealing with certain topics only). Arguably, Part VI of the MLI is an example of this, where a particular topic – in that case binding dispute resolution – was subject to a novel treatment. Another (less successful) example is the UNESCO/WIPO draft convention on copyright royalties.

In this respect, an MTT offers two significant advantages. First, there is an opportunity to get away from the strictures of the existing bilateral treaty network, based on the existing Models, and to develop a new instrument based upon novel concepts that are more appropriate to the current time. Second, there is a very real advantage of being able to update and amend that MTT with immediate impact for all states' parties.

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18. Of course, there may well be other advantages to an MTT that are not identified here. Those discussed here are simply the principal advantages as they occur to the author of this article and to those other authors whose writings he has considered.
19. This is true, for example, of the draft European Union MTT included in the book by Michael Lang et al., *supra* n. 4.
20. *See*, for example, Thuronyi, *supra* n. 4. To an extent, the Pillar One proposals discussed at the end of this article are an example of that.

4.3. Disadvantages

In the discussion of the advantages of an MTT, some of the disadvantages have already been identified. There are, however, a few more that should be highlighted.

Several authors who write about MTTs point out that they are difficult, if not impossible, to conclude (except possibly on a regional basis). They point out that the OECD very early on abandoned attempts to produce a multilateral convention, and that the League of Nations draft on the determination of the profits of businesses operating in several countries proved unsuccessful. However, this is now disproved by the success both of the MCAA and more recently by the MLI. The lesson of the MLI, in particular, is that if there is a political will behind the MTT, then it is possible to achieve it. In principle, it is easier to achieve an outcome if one is not looking for consensus but simply for an instrument that reflects the wishes of a significant number of countries. In many respects, building up international support for an MTT is no different from building up international support for any other multilateral instrument to deal with a problem common to all countries.

A second disadvantage of an MTT is that it is likely to contain multiple options, adding to the complexity of the document. This is certainly evident in the first half of the MLI, but that partly arises from the fact that this half was directed at modifying a large network of bilateral conventions that had adopted different wording and different approaches. Even then, the MLI sought to reduce the number of divergent versions of the wording by limiting the possible reservations. If a new MTT approaches an issue de novo, and looks for solutions, it is possible that a single solution might be adopted, or possibly a solution with only one or two alternative approaches (perhaps one approach for developing countries and one for high-income jurisdictions). Neither the MCAA nor Part VI of the MLI have the same complexity of the first half of the MLI (even though Part VI does contain some options).

A third disadvantage highlighted by some authors arises from the fact that an MTT is exactly the converse of a network of bilateral treaties. That is, a network of bilateral treaties allows the individual circumstances of the two countries concerned – their individual tax systems, and the flows of persons, trade and investment between the countries – to be taken into account in negotiating the treaty. It is exactly this bespoke negotiation that leads to the variation between bilateral treaties and opens up the opportunities for tax competition, arbitrage, treaty shopping and all the other disadvantages.

This is really a matter of approach. Those who consider that it is advantageous for each bilateral treaty to be tailor-made for the pair of countries concerned will prefer the bilateral approach (and will need to develop anti-treaty-shopping measures to counter the arbitrage that may result). Those who believe that tax competition through variation in treaty provisions is a major problem will prefer a multilateral solution, with perhaps relatively few alternative options available to the contracting state.

A final disadvantage of an MTT may arise from the institutional structure within which it is negotiated. It is possible that the structure could give undue influence to a small number of countries, or even only one country, in the formulation of the MTT. The possibility that an MTT has a distinct advantage by allowing groups of countries to exert influence through coalitions has been discussed in section 4.2. It could be argued that both the MCAA and the MLI suffered from this defect in representing the views of a smaller group of countries that was then foisted upon others. The MCAA, to be recalled, started off as an instrument drafted by the Council of Europe and the OECD, and was only later widened to countries that were not members of those two organizations. Similarly, the MLI reflected a BEPS process which, at its start, was dominated by the OECD and G20 countries. This may partly explain why a number of countries, while signing up to the MLI, have elected for the minimum possible participation by adopting only the minimum standards.

By way of conclusion on the discussion of advantages and disadvantages, perhaps the best one can say is that the jury is out on this issue. There are some identifiable advantages to an MTT, but it is not the case that most of them could not be achieved within the context of a bilateral treaty network. Equally there are some disadvantages. Ultimately, it comes down to two issues. First, there is the question of approach. Is it better to have a network of treaties that reflect the bargaining process between pairs of countries, or to try to move away from it? Second, the institutional structure in which an MTT is developed can have a huge impact on the perception that it is an instrument drafted to reflect the interests of one group of countries, and is then foisted on other countries for whom it is not necessarily the ideal solution.

5. A Future MTT: Some Concluding Comments

With the adoption of the MCAA, and the MLI in particular, it has been shown that a multilateral approach to international taxation is possible. Lessons can be learned from these instruments, particularly relating to the importance of the institutional structure within which the instrument is developed and operates. Whether the OECD's Inclusive Framework presents a suitable institutional structure remains to be seen. Many multilateral instruments in other fields are developed either under the aegis of the UN or through a special conference called for this purpose, and it may be that an MTT on tax matters is better developed through that process.

There are various forms that a future MTT could take. There is no doubt that there is room for more regional, substantive MTTs on the pattern of those that have already been concluded. Discussion of a possible EU MTT was fashionable 20 years ago and might be revived.[21] It has also proved somewhat easier to get widespread agreement between states for MTTs dealing with administrative cooperation, so further MTTs in that area might be expected. Part VI of the MLI has established the groundwork for mandatory binding arbitration, and that might evolve into a separate Tax Arbitration Convention in future years.

In terms of substantive international tax rules, it is reasonable to predict that it would be difficult to obtain agreement on an MTT covering, comprehensively, all aspects of double taxation, unless this was based on a globalized version of the OECD and UN Models. It may be preferable and easier, however, to build up a new network of MTTs on a topic-by-topic basis. To a degree, this was already the case with the MTTs dealing with administrative cooperation and with arbitration. However, it might be perfectly feasible to adopt this "partial" approach by looking at one particular category of income currently covered by the OECD and UN Models at a time. It might not be wise to start with one of the more difficult topics, such as the attribution of profits to permanent establishments, where there is a strong divergence of views. On the other hand, there is relative uniformity in approaches to certain aspects of the taxation of individuals, e.g. salaries, wages and other similar remuneration. A "partial" MTT dealing just with cross-border employment, including frontier workers and secondees, might be a good starting point.[22] Another possible topic would be pension taxation, including provisions dealing with the deduction of pension contributions paid cross-border, though that would almost certainly need to have two options for taxing rights to reflect the different approaches taken, for example, in the UN Model.

At the time of writing this article, the possibility of an MTT to give effect to an agreement on the taxation of the digitalized economy seems quite probable. It remains to be seen whether there will be an agreement on Pillar One or Pillar Two or both. If there is, then it is likely that each of them will require an MTT (or, if one likes, a new MLI) taking different forms. So far as Pillar One is concerned, this introduces a new taxing right and will have to override the provisions of existing bilateral treaties. That will need, almost certainly, to have a specific provision setting out in detail how the new taxing right is to be applied, and how it will interrelate with existing taxing rights recognized by bilateral tax treaties and with methods for relief of double taxation. So far as Pillar Two is concerned, much of those proposals require implementation by domestic law of the countries concerned. To that extent, therefore, the MTT/MLI that gives effect to it will impose duties on states to achieve a particular result, but the means under which those results are achieved may be left to each country's national legislation. There may be some elements of Pillar Two that require adjustment to existing bilateral treaties, and might follow the modification approach of the MLI.

When the *Bulletin* began publication 75 years ago, it might have seemed quite uncertain whether the future lay in a bilateral or a multilateral approach to regulation of international tax issues. Through much of the ensuing 75 years, the focus has been on bilateral approaches. However, the MCAA and the MLI show that multilateral solutions are possible. Throughout, there have been some examples of MTTs. Going forward, it remains genuinely open whether the bilateral route or the multilateral route will be preferred. More realistically, it is likely that, for some time to come, there will be a mixture of a bilateral treaty network on the one hand with, perhaps, a growing number of multilateral conventions each dealing with particular topics on the other. It will be interesting to reassess the position on the 100th jubilee anniversary of the *Bulletin*. The author of this contribution has already indicated his willingness to write on the topic at the 100th anniversary.

21. This is discussed, in particular, in the book edited by Michael Lang et al., *supra* n. 4. At the time, it was thought that existing bilateral tax treaties may have been incompatible with EU law: subsequent case law from the Court of Justice has tended to show that that is not the case.
22. The idea of "partial" MTTs is discussed, for example, by Loukota, *supra* n. 4.