

Chapter 3

Model Tax Convention

by

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To avoid the important distortive effects that double taxation has on cross-border trade and investment, countries have developed a vast network of bilateral tax treaties. However, absent internationally-agreed standards and an easily accessible set of draft provisions, negotiations of these bilateral treaties between countries would be extremely difficult and these treaties would be applied and interpreted differently by countries. This case study deals with the role played by the OECD Model Tax Convention in the co-ordination of the internationally-agreed standards for the elimination of double taxation of income and the prevention of tax evasion. These standards are reflected in the network of more than 3 500 bilateral tax treaties that have been concluded, and are interpreted and applied, on the basis of these standards, which need to be continuously refined and adapted to new situations.

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Introduction

This case study deals with the co-ordination of the internationally-agreed standards for the elimination of double taxation of income (both at the corporate and individual levels) and the prevention of tax evasion. These standards are reflected in the network of more than 3 500 bilateral tax treaties that have been concluded, and are interpreted and applied, on the basis of these standards, which need to be continuously refined and adapted to new situations.

The need for bilateral tax treaties can be succinctly explained as follows. In order to remove tax-induced distortions between, on the one hand, domestic and foreign investments by resident investors and, on the other hand, domestic investments by resident and foreign investors, tax systems of most advanced countries follow the practice of taxing residents on their income regardless of its source (“residence taxation”), whilst, at the same time, taxing domestic income of foreigners (“source taxation”). This, however, creates a significant risk of double taxation since the income that a resident of State A derives from State B constitutes both the foreign income of a resident from the perspective of State A and the domestic income of a foreigner from the perspective of State B.

Since such double taxation, if it were to occur, would have an important distortive effect on cross-border trade and investment, countries have developed legal mechanisms to eliminate that double taxation. These mechanisms are incorporated in the vast network of bilateral tax treaties that currently exist (most countries also incorporate certain features of these mechanisms in their domestic laws).

These treaties also include rules on exchange of tax information and on assistance in the collection of taxes which allow countries to provide assistance to each other in the fight against cross-border tax evasion.¹

The conclusion of tax treaties involves negotiations between countries that have different tax systems and tax policies, which explains the need for specifically-tailored rules. Absent internationally-agreed standards and an easily accessible set of draft provisions that have been thoroughly discussed and tested in practice, these negotiations would be extremely difficult,

particularly for countries that have limited experience with tax treaties (as was the case for many Central and Eastern European countries in the 1990s). Also, once concluded, these treaties must be applied in a large number of different situations, which creates the need for guidance on the application and interpretation of their general provisions in particular circumstances.

Main characteristics of the co-ordination in the area of tax treaties

Persons and institutions involved

The OECD Committee on Fiscal Affairs plays a key role in the development of the internationally-agreed standards applicable to tax treaties. The meetings of the Committee on Fiscal Affairs and its subsidiary bodies² allow tax officials from the ministries of finance and/or from the tax administrations of both OECD and non-OECD countries who are involved in the negotiation, interpretation and application of tax treaties to develop, and agree on, these standards.

Whilst tax officials play the key role in the development of the standards, tax treaties, like other treaties, are concluded by States (the vast majority of existing countries are party to at least one tax treaty) and are therefore subject to an approval and ratification process that varies from country to country. In most countries, that process involves some form of parliamentary approval. Also, since tax treaties are typically incorporated into domestic law and therefore give direct rights to taxpayers, they frequently require interpretation by domestic courts. Thus, domestic parliaments, courts and even taxpayers also play a role in the co-ordination of tax treaty rules to the extent that they all use the internationally-agreed provisions and interpretations developed as a product of the co-ordination of tax treaties.

In federal States, the negotiation of treaties is typically a federal prerogative. With only one or two exceptions, tax treaties have therefore been concluded by federal governments. Income taxes, however, are sometimes levied and/or administered at the sub-national level, which may require a certain involvement of officials at the sub-national level. Despite that fact, officials of sub-national government are rarely involved in the discussion and development of tax treaty rules and interpretations.³

Objectives of the co-ordination

As explained in the next section (Short history of the development of international co-operation related to tax treaties), the main objectives pursued by the international co-ordination related to bilateral tax treaties have evolved over the years.

From the 1920s to the early 1980s, the co-ordination efforts were primarily directed at developing the network of bilateral tax treaties.⁴ It was correctly assumed that the drafting of standard provisions which negotiators of bilateral tax treaties could use would greatly facilitate the negotiation and conclusion of bilateral tax treaties. Since the main purpose of these treaties is to remove an important obstacle to cross-border trade and investment, the international co-ordination that took place during that period is best viewed as aimed at improving market access.⁵ Secondary objectives of the co-ordination during that period could be described as follows:

- *Achieving regulatory efficiency gains through the adoption of common standards:* The OECD Council's Recommendation concerning the Avoidance of Double Taxation (adopted on 30th July 1963 together with the first OECD Model Tax Convention) refers to "the need for harmonising existing bilateral Conventions on uniform principles, with uniform definitions, rules and methods, and of agreeing on a common interpretation".
- *Improving the quality and effectiveness of domestic regulation, level the playing field and prevent regulatory arbitrage and facilitate the operation of own regulatory regime when dealing with trans-boundary activities:* for one State to be able to effectively tax the foreign income of its own residents, it is crucial that it be able to access foreign tax information. This is why the provisions of the Model Tax Convention dealing with the exchange of tax information have received so much attention (see below).
- *Facilitate inter-operability of systems:* most of the provisions of the Model Tax Convention deal with the allocation of taxing rights to the State of residence of the taxpayer and/or the State of source of the income. By doing so, these provisions address situations where the two States, through their domestic tax laws, claim taxing rights over the same item of income.
- *Conflict avoidance/resolution:* As indicated above, one of the goals pursued by the adoption, in 1963, of the first OECD Model Tax Convention was to achieve a uniform interpretation of the standard provisions included in this model, thereby reducing potential conflicts between taxpayers and tax authorities and between tax authorities of different countries concerning the meaning of these provisions. Also, that Model Tax Convention included provisions concerning the "mutual agreement procedure" through which a taxpayer can ask the competent authorities of the States that are party to a bilateral tax treaty to address cases of taxation not in accordance with the provisions of that treaty.

In the early 1980s, as the provisions of the OECD Model Tax Convention had already gained widespread acceptance and a large number of bilateral tax treaties were already in place (in particular between OECD countries), the co-ordination efforts of the OECD and its member countries started to focus a lot more on the interpretation and application of existing treaties. This change of focus is best illustrated by comparing the 1977 and the 2010 versions of the Model Tax Convention: whilst there have been relatively few changes to the provisions of the Model Tax Convention since 1977, the size of the detailed Commentary which explains how these provisions should be applied and interpreted has gone from 146 pages in 1977 to 418 pages in the 2010.

One could therefore consider that the main objectives of the co-ordination efforts have gradually moved towards conflict avoidance/resolution and facilitating the inter-operability of tax systems. This is not to say that the original objective of facilitating market access has been forgotten: since the 1990s, the OECD and its member countries have spent a lot of time and efforts helping non-OECD countries develop their tax treaty network.

Over the last 10 years, there has been another shift in the main objective of the co-ordination related to tax treaties. During that period, the OECD and its member countries have led a very successful campaign to improve transparency and exchange of information in tax matters. A main result of that campaign, which involved changes to the exchange of information provisions of the Model Tax Convention, has been the elimination of bank secrecy as an obstacle to the effective exchange of information upon request. The ongoing work of the Global Forum on Transparency and Exchange of Tax Information for Tax Purposes,⁶ in which more than 109 countries and jurisdictions are involved, is currently the most resource-intensive project pursued by the OECD in the area of tax treaty co-ordination. On that basis, one could certainly argue that the main objective of tax treaty co-ordination currently falls within the categories “improving the quality and effectiveness of domestic regulation”, “level the playing field and prevent regulatory arbitrage” and “facilitate the operation of own regulatory regime when dealing with trans-boundary activities”.

Forms that the co-operation is taking

Since the mid 1950s, the co-ordination of bilateral tax treaties has primarily taken place through the activities of the Fiscal Committee of the O.E.E.C. and its successor the OECD Committee on Fiscal Affairs. The main instruments through which tax treaty co-ordination is achieved are the OECD Model Tax Convention, which is used for the negotiation, application and interpretation of bilateral tax treaties and, since 1995, the

OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, which provide detailed guidance concerning the application of Article 9 of the OECD Model Tax Convention. Unlike bilateral tax treaties, the OECD Model Tax Convention and Transfer Pricing Guidelines are not legally binding instruments and would therefore fall into the category of soft law.

This general statement should, however, be qualified. As already mentioned, tax treaties are incorporated into domestic law and therefore give legal rights to taxpayers; where the provisions of tax treaties conflict with those of domestic tax law, the provisions of tax treaties generally prevail. Since the provisions of tax treaties can result in a significant reduction in the amount of tax payable to a country, the legal rights granted to taxpayers by tax treaties are often the object of litigation: each year, there are hundreds of court decisions involving the application and interpretation of provisions of bilateral tax treaties.

Based on the provisions of Articles 31-33 of the *Vienna Convention on the Law of Treaties* concerning the interpretation of tax treaties, the Commentary of the OECD Model Tax Convention and the OECD Transfer Pricing Guidelines play a crucial role in many of these cases.⁷ Some countries have gone further and have included specific provisions in their tax treaties requiring that the treaty be interpreted in accordance with the Commentary on the Model Tax Convention⁸ or have provided, in their domestic law, that their domestic transfer pricing rules should be interpreted in accordance with the OECD Transfer Pricing Guidelines. Also, where a treaty includes provisions on arbitration, it is usual to provide that the arbitrators will resolve issues of treaty interpretation having regard to the Commentary of the OECD Model Tax Convention as periodically amended and that transfer pricing issues will similarly be decided having regard to the OECD Transfer Pricing Guidelines. For these reasons, the OECD Model Tax Convention and the OECD Transfer Pricing Guidelines can be viewed as having an intermediary status between soft law and hard law.

In the context of its ongoing work on exchange of information, the OECD has also developed another approach aimed at ensuring that OECD and NOEs conform to its international treaty standard concerning exchange of tax information. Through a very elaborate system of peer review, the Global Forum on Transparency and Exchange of Tax Information for Tax Purposes is now examining how each member of the Global Forum and each country or jurisdiction found to be relevant complies with the internationally-agreed standard related to the effective exchange of tax information (see OECD, 2010).

Functions being co-ordinated/components covered in co-operation

As can be concluded from the above, the main co-ordination efforts in the area of bilateral tax treaties have focussed on the formulation of standards which are used for the negotiation, application and interpretation of tax treaties and of certain provisions of domestic tax laws (e.g. transfer pricing rules or rules for the collection of tax information) that are relevant for the purposes of tax treaties.

The OECD Committee on Fiscal Affairs has also been very active in setting the international tax agenda and goals: to take two recent examples, its work on transfer pricing (mid-1990s), its work on taxation of e-commerce (late 1990s) and its project on bank secrecy have all resulted in major developments in internationally-agreed standards.

Traditionally, there has been relatively little international supervision in the area of bilateral tax treaties. The recent OECD work on exchange of information, however, constitutes a significant exception. As explained above, the Global Forum on Transparency and Exchange of Tax Information for Tax Purposes, through its peer review system, monitors compliance with the internationally-agreed standard related to the effective exchange of tax information (see OECD, 2010).

Short history of the development of international co-operation related to tax treaties

In the early 1920s, at the instigation of the International Chamber of Commerce (which saw double taxation as an obstacle to European reconstruction), the Financial Committee of the League of Nations undertook work on the issue of international double taxation and tax evasion. At that time, a few countries had adopted unilateral measures to eliminate or at least reduce double taxation and a few bilateral treaties had already been concluded.⁹

Working as the Committee of Technical Experts on Double Taxation and Tax Evasion, senior tax officials of a few countries presented to the Financial Committee of the League of Nations, in 1927, a series of 4 draft treaties related to tax matters¹⁰ together with a Commentary on each draft. In doing so, the Committee of Technical Experts expressed the view that the approach of preparing draft for bilateral treaties was to be preferred to the drafting of a multilateral convention. As indicated in the Committee's report League of Nations (1927):

[...] the fiscal systems of the various countries are so fundamentally different that it seems at present practically impossible to draft a collective convention, unless it were worded in such general terms as to be of no practical value [...]. League of Nations (1927), p. 26

The League of Nations organised a General Meeting of government experts to discuss the 1927 report. In 1928, that General Meeting recommended certain changes and presented three versions¹¹ of the first draft (renamed “Bilateral Conventions for the Prevention of Double Taxation in the Special Matter of Direct Taxes”).¹²

A new Fiscal Committee, which first met in 1929, was set up by the League of Nations to continue the work in this area. In 1933, that Committee approved the text of a multilateral convention intended to eliminate the double taxation of profits of enterprises (“Draft Convention Adopted for the Allocation of Business Income between States for the Purposes of Taxation”) (League of Nations, 1933). In 1935, however, the Committee, recognising that few countries had expressed an interest for signing that convention, concluded that the idea of a multilateral convention should be abandoned in favour of a model for bilateral treaties (League of Nations, 1935, p. 4).

Work of the Fiscal Committee of the League of Nations continued until 1946, when the Committee published its last series of models for bilateral tax treaties, the 1943 Mexico Models and the 1946 London Models (League of Nations, 1946).

In 1956, international efforts to co-ordinate tax treaties intensified when the O.E.E.C. mandated its newly created Fiscal Committee “to determine, and make concrete proposals to the Council on, principles to be applied ... in order to avoid double taxation. The study shall cover the following questions: [...] In general, the standardisation of the most important concepts to be found in Double Taxation Agreements, e.g. domicile, permanent establishment, classification and localisation of income.” (OEEC, 1956)

The Fiscal Committee set up a number of Working Parties to which it allocated the task of drafting the various articles of a model convention together with a detailed Commentary. These Working Parties and the Committee itself met regularly and, between 1956 and 1961, published four reports that included different draft articles for a tax treaty. In the first of these reports, the Committee recommended the elaboration of a new model bilateral convention acceptable to all OEEC member states and envisaged replacing the existing bilateral conventions with one multilateral convention.

In 1963, a consolidated revised version of the previously published draft articles and their commentaries was published under the title “Draft Double Taxation Convention: Report of the O.E.C.D. Fiscal Committee”. At that time, the Committee still considered the possibility of transforming its work into a multilateral convention, as indicated in the introduction of the report (OECD, 1963, Paras 60, 61).

Over the following years, the Fiscal Committee (which became the Committee on Fiscal Affairs in 1971) continued its work on the Draft Convention and in 1977, published a revised version (OECD, 1977) that included a number of changes to the draft articles and an expanded Commentary. By the time this work was completed, the Committee had definitively abandoned the idea of a multilateral Convention.¹³

The tax treaty work of the Committee on Fiscal Affairs has continued without interruption since 1977. This work is primarily carried on by the Committee’s Working Party 1 on Tax Conventions and Related Questions (in addition, Working Party 6 on the Taxation of Multinational Enterprises deals with treaty issues related to transfer pricing whilst issues related to treaty provisions on exchange of information and assistance in collection of taxes are dealt with by Working Party 10 on Exchange of Information and Tax Compliance, the Global Forum on Transparency and Exchange of Information being concerned with monitoring the application of the internationally-agreed standards on transparency and exchange of information).

As previously explained, the focus of the OECD work on tax treaties shifted after 1977. Throughout the 1980s, the Committee prepared and published a number of reports dealing with specific aspects of the application and interpretation of the 1977 Model Tax Convention. In 1991, recognising that the revision of the Model Tax Convention had become an ongoing process, the Committee on Fiscal Affairs adopted the concept of an ambulatory Model Tax Convention which would be periodically updated to take account of new developments. This led to the publication in loose-leaf format, in 1992, of a new version of the Model Tax Convention that incorporated the conclusions of the various reports adopted between 1977 and 1991.

Since then, the Model Tax Convention has been updated 8 times (in 1994, 1995, 1997, 2000, 2003, 2005, 2008 and 2010). The next update is currently scheduled for 2014. Each of these updates dealt with a number of new or previously unresolved questions. For instance, the 2010 update included the following changes and additions:

- the replacement of the treaty provisions, and their Commentary, dealing with the attribution of profits to permanent establishments (the new provisions and Commentary reflect work on this issue that Working Party 6 carried on between 1998 and 2008);
- new Commentary providing guidance on how treaty provisions should be applied with respect to the income of collective investment vehicles;
- new Commentary providing concerning the application of tax treaties to State-owned entities, including Sovereign Wealth Funds;
- new Commentary providing guidance on how treaty provisions should be applied to payments made in common telecommunication transactions (such as the payment of roaming charges between cell phone operators);
- new Commentary providing guidance on how treaty provisions concerning income from employment should be applied in the case of individuals who work in a foreign country for a short duration.

The process through which changes are made to the OECD Model Tax Convention is relatively uniform.

First, a treaty-related issue is brought to the attention of the Committee on Fiscal Affairs, or more frequently of its Working Party 1, by a delegate, a member of the Secretariat, a business representative or an academic. In many cases, the issue results from a court decision dealing with a particular aspect of tax treaties. The issue is first examined by the Steering Group on the Revision of the Model Tax Convention, a subsidiary body of Working Party 1 that was set up in 1991 and whose role is to examine all tax treaty issues brought to the attention of the OECD and to make a recommendation as to how the issue should be dealt with. That recommendation may take different forms, such as:

- where the issue will likely require substantial work, a proposal that a special Working Group be set up to deal with the issue;
- where the issue can be dealt with relatively easily, draft changes to the OECD Model Tax Convention;
- a proposal not to pursue the issue.

Proposals for changes to the OECD Model Tax Convention that result from the work of the Steering Group or of Working Groups set up to deal with complex issues are submitted to the approval of Working Party 1. In most cases, the Working Party will seek comments from business and other interested parties by releasing the proposals as a discussion draft (OECD,

2011, 2012). The Working Party finalises the proposed changes in light of the comments received (a second discussion draft may be released if substantial revisions are required) and adopts the proposed changes. The changes are then included in a report on the next update of the Model, together with the relevant “reservations” and “observations” of member countries and “positions” of non-member countries. Once approved by the Working Party, that report is submitted to the approval of the Committee on Fiscal Affairs and, a few weeks later, to that of the OECD Council.

The practice of including “reservations”, “observations” and “positions”, which goes back to the 1963 Draft Convention, provides a flexible way of making changes to the OECD Model Tax where there is substantial but not unanimous support for these changes. As explained in the Introduction to the Model Tax Convention, a “reservation” indicates a disagreement with the drafting of a specific Article of the OECD Model whereas an “observation” indicates a disagreement with an interpretation included in the Commentary of the OECD Model Tax Convention (as explained below, the term “position” refers to a disagreement recorded by a non-OECD country).

Involvement of non-OECD countries

The 1997 update to the OECD Model Tax Convention included the official views (referred to as “positions”) of a number of non-OECD countries. These “positions” identify where these countries disagree with the text of an article of the OECD Model or with an interpretation given in the Commentary. These positions are kept up-to-date and the Model currently includes the positions of 28 non-OECD countries.¹⁴ The inclusion of the positions of these countries reflects the growing need to take account of the views of non-member countries in the development of the internationally-agreed standards included in the OECD Model Tax Convention.

Other mechanisms are also used to involve non-OECD countries in the work related to tax treaties. For instance, for the last 16 years, an annual Tax Treaty Meeting has been held at the OECD for tax treaty officials of OECD and non OECD-countries. That meeting, which is attended by around 250 participants representing around 100 countries and international organisations, allows a technical discussion of tax treaty issues and facilitate the development of bilateral contacts among tax treaty negotiators. In addition, since the early 1990s, the OECD Secretariat organises each year an average of 10 week-long regional seminars and meetings which are held throughout the world and which allow non-OECD countries to better understand and apply the internationally-agreed standards in the area of tax treaties and to build their capacity to negotiate and apply tax treaties.

Work of the United Nations in the area of tax treaties

Since the late 1960s, the United Nations has also been involved in international co-ordination efforts related to tax treaties, first through the *Ad hoc* Group of Experts on International Cooperation in Tax Matters and more recently through the work of the Committee of Experts on International Cooperation in Tax Matters. That Committee is composed of 25 members acting in their personal capacity and meets once a year for 5 days.

The United Nations work in the tax treaty area has focussed on tax treaty relations between developed and developing countries. In 1980, it published the *Nations Model Double Taxation Convention between Developed and Developing Countries*, which was largely based on the 1977 OECD Model Tax Convention but was adapted to the particular circumstances of negotiations between developed and developing countries. The UN Model was updated twice, in 2001 and in 2012. In both cases, the update process focused primarily on previous changes that had been made to the OECD Model.

Whilst various proposals have been made in recent years concerning a possible upgrade of the status of the UN Committee (e.g. to make it a governmental body and increase the number of its members) and a possible increase in the resources allocated to its work, these proposals have not been adopted by the ECOSOC, which is the UN body to which that Committee reports.

Assessment

There are few areas in which countries are more jealous of their sovereignty than in tax matters. Tax systems, and in particular direct tax systems, continue to show considerable differences which can create distortions (in particular through double taxation and non-taxation situations) and result in significant administrative costs for tax administrations and compliance costs for taxpayers. Despite the potential for economic efficiency gains, there is no indication that countries are willing to consider any form of harmonisation of their direct tax systems.

Countries have, however, developed extensive co-ordination through a network of bilateral tax treaties which are based on common provisions and interpretations. A key feature of this co-ordination has been the development of the internationally-agreed provisions included in the OECD Model Tax Convention which countries typically incorporate in their bilateral tax treaties and, maybe more importantly, of common interpretations of these provisions (included in the Commentary of the OECD Model Tax

Convention and, as regards transfer pricing, in the OECD Transfer Pricing Guidelines) which are generally followed by tax administrations and which are often relied on by courts when deciding tax treaty issues.

This type of flexible co-ordination has clear advantages. It greatly facilitates the relations between tax administrations involved in the negotiation, application and interpretation of bilateral tax treaties whilst preserving the tax sovereignty of countries involved.

It also has, however, important limitations. As a general rule, countries are, in effect, free to adopt parts of the internationally-agreed standards and ignore others. Whilst the work of the Global Forum on Transparency and Exchange of Information constitutes a very effective form of peer pressure in the area of exchange of information, such peer pressure is not as developed in other tax treaty areas. Also, the OECD limited membership means that not all countries, especially major emerging economies, are directly involved in the development of the internationally-agreed standards.

Also, whilst the international co-ordination efforts related to tax treaties address a large number of topics, they cannot be considered as comprehensive. For instance, the way that treaties are incorporated into domestic law raises constitutional and legal issues that are specific to each country and are therefore difficult to co-ordinate even though these issues can affect a country's compliance with the provisions of its tax treaties. Another example is the way that domestic courts interpret the provisions of tax treaties: given the independence of the judicial branch and the fact that judges are usually not represented in international fora dealing with tax treaties, it is difficult to achieve a high degree of co-ordination in that area.

The inclusion of arbitration provisions in tax treaties may contribute to ensure a greater respect of the internationally-agreed standards. In 2005, the OECD Committee on Fiscal Affairs developed an arbitration provision to be included in bilateral tax treaties; according to that provision, where the competent authorities of two States that have concluded a tax treaty are unable to resolve a case brought to their attention under the mutual agreement procedure of their tax treaty, the issue(s) that have prevented them from reaching an agreement must be decided by independent arbitrators. This new provision is slowly beginning to appear in tax treaties but many countries, including OECD countries, are still very reluctant to accept it.

The challenges that result from the OECD limited membership are partly addressed by the innovative ways in which the Committee on Fiscal Affairs has involved non-OECD countries in its work on tax treaties. In addition to the mechanisms described above, the OECD has, since the 1980s, been actively involved in the work of the UN Ad Hoc Group of

Experts on International Cooperation in Tax Matters and, subsequently, the UN Committee of Experts on International Cooperation in Tax Matters. More recently, the UN Secretariat has become an observer to the Committee on Fiscal Affairs. Finally, major emerging economies such as Argentina, China, India, Russia and South Africa participate as observers in all the meetings of the Committee's subsidiary bodies dealing with tax treaties.

Notes

1. In some cases (*e.g.* where a country does not levy income taxes and does not, therefore, present a risk of double taxation), tax information exchange agreements have been concluded in order to allow such countries to exchange information with other countries. Except where indicated otherwise, these agreements are not covered by this note.
2. The Global Forum on Transparency and Exchange of Tax Information for Tax Purposes also plays a key co-ordinating role with respect to the application of the exchange of information provisions of tax treaties and of tax information exchange agreements. The Global Forum, whose secretariat is provided by the OECD, has been established as a part II programme of the OECD; as of June 2012, 109 countries and jurisdictions were members of the Global Forum (see www.oecd.org/tax/transparency).
3. The application of tax treaties to sub-national taxes raises a number of issues which are outside the scope of this note.
4. As explained below, this included a few failed attempts at developing multilateral treaties designed to eliminate the need for bilateral treaties.
5. This objective is clearly stated in the first recommendation on taxation adopted by the O.E.E.C. Council (C(55)37, dated 17 February 1955), according to which:

[...] Considering it desirable that obstacles to international trade and investment which arise from the double taxation of income and property should be removed and considering, in addition to unilateral legislative action, the conclusion of bilateral agreements the best means to that end;

I. RECOMMENDS to the Governments of the Member and Associated countries that they should persevere in their efforts to avoid the double imposition of direct taxes by the conclusion of bilateral agreements with one another and that they should, where appropriate, review existing agreements which may no longer be adequate to deal with this problem.

6. *Supra*, Note 2.
7. For example, in a December 2011 decision of the Supreme Administrative Court of Finland dealing with the application of various tax treaties to software payments received by a Finnish company, the Court held that “When interpreting in a Finnish context tax treaty terms in accordance with the OECD model, it is reasonable to regard as significant what a commentary on the model says, irrespective of whether the other party is a member of OECD”. The use of the Commentary on the OECD Model Tax Convention by courts is not restricted to OECD countries: for example, in a landmark decision rendered in 2003, *Union of India v. Azadi Bachao Andolan*, the Supreme Court of India expressly referred to the OECD Commentary in support of its conclusions concerning the interpretation of the tax treaty between India and Mauritius:

There is a further reason in support of our view. The expression ‘liable to taxation’ has been adopted from the Organisation for Economic Co-operation and Development Council (OECD) Model Convention 1977. The OECD commentary on Article 4, defining ‘resident’, says: “Conventions for the avoidance of double taxation do not normally concern themselves with the domestic laws of the Contracting States laying down the conditions under which a person is to be treated fiscally as “resident” and, consequently, is fully liable to tax in that State”. The expression used is ‘liable to tax therein’, by reasons of various factors.

8. For example, the use of such treaty provisions is part of Austria’s treaty practice.
9. Whilst Austria, Hungary, Italy, Poland, Romania, and the Kingdom of the Serbs, Croats, and Slovenes attempted to deal with tax issues in a multilateral manner when they all signed a multilateral tax convention in Rome in 1921, that multilateral convention was only ratified by Italy and Austria.
10. Draft of a Bilateral Convention for the Prevention of Double Taxation, Draft Bilateral Convention for the Prevention of Double Taxation in the Special Matter of Succession Duties, Draft of a Bilateral Convention on Administrative Assistance in Matters of Taxation and Draft Bilateral Convention on Judicial Assistance in the Collection of Taxes.
11. Draft Convention No. Ia, Draft Convention No. Ib and Draft Convention No. Ic.
12. League of Nations (1928), p.7. The report added the following explanation as regards the two additional versions of the draft “...which draw no distinction between impersonal and personal taxes, the first applying particularly to relations between countries in which taxation by reference to domicile predominates, and the second to relations between countries possessing different fiscal systems.”

13. As indicated in Paragraph 37 of the Introduction of the 1977 Model Tax Convention.
14. Albania, Argentina, Armenia, Belarus, Brazil, Bulgaria, Croatia, Democratic Republic of the Congo, Gabon, Hong Kong (China), India, Indonesia, Ivory Coast, Kazakhstan, Latvia, Lithuania, Malaysia, Morocco, People's Republic of China, Philippines, Romania, Russia, Serbia, South Africa, Thailand, Tunisia, Ukraine, United Arab Emirates and Vietnam.

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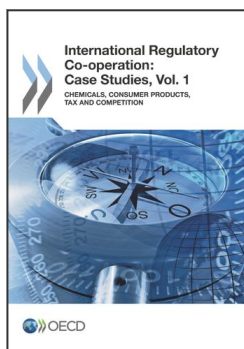
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