The Relevance of BEPS Materials for Tax Treaty Interpretation

In this article, the author argues that the relevance of BEPS materials for tax treaty interpretation depends on which interpretive community is engaged. Some, but not all, frameworks for treaty interpretation by domestic courts, advisors and policymakers have shifted in the post-BEPS era. Selected questions of treaty interpretation are analysed with reference to the historical and current working methods of the OECD, as well as the plural nature of BEPS materials produced by the OECD, UN, IMF, etc.

1. Introduction

If the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project was about putting forward a set of consensus-based proposals for reform of, among other aspects of the international tax regime, the existing network of bilateral income tax treaties, it follows that BEPS materials are not relevant at all for the interpretation of pre-existing tax treaties. This is because the BEPS Final Reports are policy proposals, which national parliaments may or may not choose to accept as a basis to change the content of existing tax treaties. The relevance of BEPS materials for tax treaties that subsumed BEPS related proposals is more self-evident.

One should, however, question whether the OECD/G20 BEPS Project was merely about formulating a set of policy proposals. This is because the implementation phase of the project revealed a variety of motives, which can be seen in the range of peer pressure mechanisms, initially mandated by the G20 countries and now adopted by all members of the Inclusive Framework, to rapidly change the content of existing tax treaties. This feature of the Project distinguishes it from past work of the OECD to update understandings of tax treaties, with a view to stimulate uniform interpretation.

What may be the relevance of the BEPS materials for tax treaty interpretation now and in the future? This question will be analysed on the basis that it matters to who or to which group it is posed.

2. Questioning an Assumption: Is There a New Framework for Interpretation of Tax Treaties?

2.1. Introductory remarks

At the conference, where a draft of this article was presented, the relevance of BEPS materials was analysed in an outline asking whether there is a new framework for tax treaty interpretation in the post-BEPS era.

The BEPS Project was not business as usual for most persons with an interest or involvement in the international tax regime, as broadly understood. One can question who the target audience(s) was because of the deployment of both known and novel mechanisms for making decisions, prioritizing items for implementation and creating political and legal implementation mechanisms.

One, therefore, needs to step back when asking the question “what may be the relevance of BEPS materials for tax treaty interpretation”. Firstly, to whom is the question directed? If the audience is known, it becomes important to investigate the assumption whether, indeed, there is a new framework for tax treaty interpretation among those within the target audience. For example, if asking the question among lawyers, does one need to appraise the BEPS materials by using pre-existing legal norms, or do they need to be supplemented with new considerations? Will it be the same if the question is asked of judges, practitioners, policy makers, treaty negotiators or even to activists from civil society organizations (NGOs) with an interest in tax treaties?

More broadly, probing assumptions raise questions about how our knowledge about treaty interpretation is formed, by whom it may be influenced and what filters are or should be used to either allow or block the formation of new knowledge or frameworks. In developing this article, the constructs of hermeneutics were used, particularly a focus on practices among interpretive communities. This is because the BEPS Project has heralded an era in which persons and organizations from outside traditional tax technocratic groupings have rediscovered the societal importance of tax and especially cross-border tax regimes and their associated institutions. All sorts of organizations and institutions have views about the meaning and significance (or insignificance) of tax treaties today that stretches well beyond the traditional remit of groups of government and practitioner technocrats, academics or judicial officers.
2.2. Interpretive communities and their frameworks

From a functional perspective, a great variety of users interpret the meaning of legal texts for a range of stated and unstated purposes. One may group them, based on shared purpose or values, or common role or occupation, into interpretive communities. Part of hermeneutics involve studying the reasoning and debate among such a community of interpreters. The value of such study is that it may reveal the ways in which interpretation is grounded in text and contextual material, with reference to debate among a community of interpreters. In this way, objective explanation becomes possible for why differences in interpretation arise, but it is at once also subjective because, to be able to observe the actions of interpreters in a community, the observer must in some way become involved to identify those actions. It may be found, for example, that those making the ultimate decisions ‘privilege different forms of evidence and contextual considerations’, which can help explain how common knowledge among the group is formed. When these privileges set in patterns over time, they elevate as common values among a community and can harden into a rule or perhaps even into law.

Focussing on communities of interpreters can help to navigate unknown or new situations or discordance because dialogues that are based on shared values distil what really matters and what not. It is, therefore, important to be able to identify different communities within a particular field. A starting point is to look for shared function, which often is to discuss tensions and developments against an (unexpressed) set of common values or purpose. The way in which members of interpretive communities communicate, either with each other or as one when they reach a common position or formulate propositions, can be a good proxy for identification. Accordingly, the study of publications is a primary research method. But using publications only must be approach with caution because interpretive communities are often fluid, and membership is not static. The results of decisions among one community can be intended for other communities. Membership of this interpretive community is aimed. They form important interpretive communities in taxation.

2.3. Interpretive communities in the field of taxation

In the field of taxation, one may identify various communities of interpreters. Self-evidently, taxpayers, who are the audience at which most tax legislation is aimed, may form the main community. Yet, for the most part, taxpayers are not literate enough in legal tax language to meaningfully understand tax legislation, or multiples of different sets of tax laws when they operate in more than one jurisdiction. Consequently, the tax advisory community, with its diverse membership drawn from different disciplines with divergent approaches to legal language, acts as a surrogate for the taxpaying audience at which tax legislation is aimed. They form important interpretive communities in taxation.

Revenue authorities are the other main audience at which tax law is aimed since the primary task is to administer national legislation. Membership of this interpretive community is diverse too, drawn from various disciplines and different legal cultures, with the result that literacy and interpretation competencies to decipher legal tax language varies greatly within this group. Within the field of international taxation, ministerial officials who negotiate bilateral tax treaties form an interesting interpretive community, who, in their outlook, could be expected to naturally adopt a more international approach to the meaning of legal texts. Yet, not much is known about their practices, though important recent studies reveal surprising (and perhaps disappointing) evidence about a lack of engagement with the meaning of the tax treaty texts they negotiate.

1. The concept of interpretive communities is based on the work of Stanley Fish, the literary theorist and lawyer, who extended the scope of interpretation to include the interpreters themselves. See S. Fish, Interpreting the Variorum, 3 Critical Inquiry 1, pp. 191-196 (1976) and Is There a Text in This Class? (Harvard U. Press 1980).
2. Fish, Interpreting the Variorum, supra n. 1, at p. 194.
7. See Y. Braun, The True Nature of Tax Treaties, 74 Bull. Intl. Taxn. 1, sec. 4. (2020), Journal Articles & Papers IBFD. In contrast, D. Rosenbloom, Tax Treaty Interpretation, 34 Bull. Intl. Fiscal Docn. 12. pp. 543-544 (1980), Journals & Articles IBFD, who wrote on the basis of experience richer and expand. Knowledge of a field and practices occurring within it inevitably evolves through interaction among members of groupings. In a text-based field such as law, language as the primary medium for knowledge creation manifests in shared contact with the horizons of others such as in text-based debates and resolutions about differences of the meaning of law. As noted previously in this section, regard needs to be given to what ultimate decision-makers in such a community privilege or discard. But this is not all, as decision-making among interpretive communities may (and often do) involve blind spots. For example, community members can formulate reasons to exclude some vantages from their vision, either expressly or through consistent practice (suppression). If convincing to others, potentially a whole community can develop a norm to either include or exclude certain sources or even the results of other interpretive communities, causing a closing out of knowledge from a common horizon. Reasons for limiting a horizon may vary, but can occur when objectives or values of different interpretive communities do not align or even clash.
Legislators as interpretive communities suffer from similar competency limitations as taxpayers, such that the actual task of crafting and interpreting tax laws is by and large delegated to specialists’ communities of civil servants. Legislators perform a dual role as both the primary creator and interpreter of tax legislation, but very few politicians are literate enough in tax legislation, thus at the national level, civil servants are the main actors. In a supranational context, institutions with quasi-legislative capacity with a similar dual role either align with or antagonize specialist communities of civil servants in their work to craft and interpret tax laws. These supranational institutional communities are themselves all the time busy interpreting national tax laws and international treaties as their main task is to develop and maintain model laws, often with the goal of seeking harmonization or greater integration of national tax regimes.

Judicial officers from national courts, as arbiters over disputes about the meaning of tax law, whether in a domestic or international setting, form distinct sets of interpretive communities. Their discourse has important impact for other interpretive communities. Arbitration panels set up under bilateral tax treaties, which form a small but evolving community of interpreters performing a quasi-judicial function, play an adjunct role. However, the opacity surrounding their deliberations means that their practices cannot be studied, and their impact may be limited on other interpreters.

Interpretive communities in tax as described may be said to all contribute to orthodox knowledge within the wide field of taxation. But they certainly do not have exclusive say over the development of knowledge within the field. There is a whole range of interpretive communities that are not directly involved in the traditional roles of making, administering, complying with or deciding the formal meaning of tax laws. They may spectate, comment, criticize and/or advocate. Their behaviour may be informed by aims unrelated to traditional roles of formulating policy for the making of tax law, or the administration of or compliance with tax laws, or deciding disputes about its meaning. Distinct interpretive communities that may be observed here include educators or academics, who may teach the meaning of tax law to prospective members of other interpretive communities within the tax field. A related role may be to comment on the coherence of knowledge within the field, or within the practices of other interpretive communities, or to suggest routes for reform. Then, there are a host of civil society groupings or organizations, who may or may not share common goals of advocacy, who form sets of interpretive communities. Within the tax field, their prominence has risen considerably since the advent of the BEPS Project. Their framework for interpretation of tax law is not necessarily the same as those of others, such as judicial officers, civil servants engaged with tax policy or tax advisors, as it may include considerations of wider societal nature such as the impact of taxation on development, human rights, etc.

The conversations between members of interpretive communities who are engaged with traditional roles (making, administering, complying with or deciding the formal meaning of tax laws) are guided by shared values within each community, but not necessarily across them. However, there may be some communality. For example, one may say that before the BEPS Project, these conversations have all to a greater or lesser degree been steered by accepted economic principles for good tax design, common law principles or general legal and tax codes, where they may respectively apply in different legal systems, and national-based judge-made guidelines about the meaning of tax law in relation to specific fact patterns. Each of these interpretive communities, depending on their shared values and purposes, privilege different sources and contexts within the periphery of acceptable discourse. For example, law makers, or quasi-law makers, may honour economic theory or administrative considerations in preference to judge-made guidelines, whereas tax advisory communities will pay close attention to judge-made guidelines, administrative practices and guides, and often ignore or pay little attention to economic theory. It is a feature of the taxation landscape that interpreters may be dual or multiple members of different communities, which may lay bare tensions and value differences between communities.

A distinct feature of the BEPS Project is that it has engaged most interpretive communities in the field of taxation and piqued the interest of others. The degree of engagement has, however, been uneven. Judicial officers are mostly absent from debates about the BEPS Project, except to the extent that they partake in discussion as members of other interpretive communities.

2.4. Which community needs to be studied?

As indicated, the answer to whether the BEPS materials are relevant for tax treaty interpretation depends on the interpretive community to which the question is posed. What is of interest as a secondary question is to ascertain whether any interpretive communities may have changed their position over time on the relevance or impact of BEPS materials on their positions, since this may signal a shift in knowledge. Different research methods are required to study how various interpretive communities may respond to the question about the relevance of BEPS materials for discussion and debate among them.

In legal systems inspired by the English common law court system, the study of case law and the way in which judges resolve questions of tax law interpretation meant that the practices and rules of this interpretive community were traditionally a most important focus of analysis by others (for example, tax administrators, advisors, educators and academics). Given the high level of formal publicity about the reasoning and conversation between actors (for instance, dissenting decisions by judges), research for the most part can be comprehensively performed on a desktop basis. The primary sources have been supple-
ment by a vast published scholarship. The justification for preferring analysis of communities of judicial interpreters over others, ranges again depending on which other community of interpreters are seized with the task. For example, the tax advisory community may need to impersonate judicial reasoning to be able to advise taxpayers, on an upfront basis, where the borderlines of acceptable and unacceptable tax avoidance may be found so as to avoid costly disputes down the line in which their clients (taxpayers) may ultimately fail. Conversation within the tax advisory community can often be concerned with optimizing this exercise by pushing taxpayers to engage in transactions as close as possible to apparent lines drawn by the judiciary. In this way, new cases before the courts are constantly precipitated, causing judges to review their earlier positions. For civil servants and international model law setting agencies, the study of practices among judicial interpreters is important to enable rational law reform where they consider policy miscarriage has become evident in the outcome of disputes about the meaning of tax laws. For example, if tax policy has not been transplanted as intended in the words of legislation (policy miscarriage), courts are generally not empowered to amend legislation but must give the legal meaning of the words found in the law, despite apparent conflict with policy considerations that may have informed the creation of the legal text. Within these spheres, the question is whether behaviours or even rules of interpretation have changed following the BEPS Project.

The author’s background means that the analysis in this article is limited. In civil law, studying judicial interpretive technique and the associated body of scholarship about it, may be less prominent as compared to common law (although it remains important). Concern for doctrinal purity and policy consistency; or systematic coherence of laws, may be more overtly a common goal of communities comprising tax advisory and legislative functionaries seized with understanding practices of judicial officers operating in a civil law system.

To study practices of interpretive communities other than judicial officers may require other research methods because desktop or doctrinal research may be limited or not possible due to low levels or even no public record of discussion or debate among members (for example, civil servants, tax treaty negotiators), or the heterogeneous nature of the community (for instance, tax advisors).

Accordingly, this article will focus on publications by the most prominent supranational institutions engaged with tax treaty interpretation as well as judicial officers as interpretive communities.

3. The Field in Which Interpreters of Tax Treaties May Operate

3.1. Institutional frameworks: Policy setting and quasi-legislative action by the OECD before and after BEPS

3.1.1. Opening comments

The question about the relevance of the BEPS materials needs, in part, to be appraised against the institutional background of how the OECD develops the OECD Model. Since inception, these processes have been in flux and have never really settled over a prolonged period. The review of practice below will show that the BEPS Project materials were created following a change in 2012 to the working method by which the OECD releases new versions of the OECD Model. The working method and format followed between 1992 and 2012 caused considerable legal uncertainty to arise about the impact of updates to the Commentaries on the OECD Model, based on preceding OECD reports, for the interpretation of existing model-based tax treaties because model clauses remained for the most unchanged between 1992 up to 2012. As will be shown in section 3.1.2., it appears that the OECD partly reinstated a practice in 2012 that reflects the working method and format used between 1977 up to 1992, although important additional features concerning implementation were added.

3.1.2. Updating a static bilateral tax treaty network through changes to the non-binding Commentaries on the OECD Model

As is well known, the OECD Draft Model (1963), the OECD Model (1977) and the OECD Model (1992) were all compiled after a decade or nearly two during which the OECD (or its predecessor, the OEEC) published a series of reports that later served as the basis to draw up a new model convention. This working method and format of publication meant that concluded tax treaties could be precisely traced to a specific model and a preceding series of OECD reports, if such a model served as the basis for negotiation. In this way, interpreters of treaty texts obtained some certainty about the legal basis on which bilateral tax treaties were negotiated. A disadvantage of the system was that new thinking appeared to be restricted to the future only, as it was not evident that pre-existing tax treaties could be interpreted in light of new positions. This all started to change in 1992 when the OECD adopted a new working method for the formulation and publication of its model tax convention. The 1992 change, which will be described subsequently, gave rise, with the benefit of hindsight, to legal debate and uncer-

10. OECD Draft Model Tax Convention on Income and on Capital (30 July 1963), Treaties & Models IBFD
12. OECD Model Tax Convention on Income and on Capital (1 Sept. 1992), Treaties & Models IBFD
tainty about whether it was legitimate for interpreters to rely on the latest version of a convention or its associated commentaries or preceding OECD reports when construing the meaning of tax treaty that was negotiated at a time when the updated OECD Model, the Commentaries on the OECD Model or OECD Reports were not in existence. The 1992 change to the working method for the OECD for its model tax convention had a background. During the 1980s, the temporal aspect of tax treaties was a topical issue of debate, initially among the communities of tax treaty practitioners and academics and later at the OECD following case law and legislative developments in North America. For example, in 1980 a leading commentator pointed out that interpretation of tax treaties based on the OECD Draft Model (1963) in light of the Commentaries on the OECD Model (1977) created legitimacy concerns. These developments provoked the OECD to consider a new direction for the OECD Model and the Commentaries on the OECD Model. Messere (1993), an economist and head of the OECD Fiscal Affairs Division from 1971 to 1991, explained the course of action decided upon:

In view of the problems already raised... Working Party No. 1 was wary about the possibility of complicating life by having three separate OECD Models – the 1963, the 1977, and now the 1992. The decision was accordingly taken that there would henceforth be only one OECD Model which would be the latest to be issued; and instead of waiting for many years to gather several amendments together, the Model should be amended on an annual basis... These decisions logically implied a loose-leaf format to allow for future updates. The most obvious advantage of this new approach is that the Model Tax Convention will always reflect the current views of OECD countries. This should make it a more useful instrument for readers... in practice... the main advantage of the change to an ambulatory loose-leaf presentation will be the greater flexibility which may permit improvements that should have been made many years ago. These sentiments were echoed in the Introduction to Commentaries on the OECD Model (1992), which explained the main reason for adopting the so-called ambulatory format:

Unlike the 1963 Draft Convention and the 1977 Model Convention, the revised Model was not the culmination of a comprehensive revision, but rather the first step of an on-going revision process intended to produce periodic updates thereby ensuring that the Model Convention continues to reflect accurately the views of member countries at any point in time. According to these arguments emanating from the OECD in 1992, changes in the OECD Commentaries became effective immediately after their adoption, whereas a change in the OECD Model would not become effective unless and until existing tax treaties were modified or new tax treaties concluded in consequence of the change, both courses of which require tedious procedures. Whether, indeed, changes to the Commentaries that post-date existing tax treaties may change the interpretation of such an existing tax treaty, became one of the most argued about legal questions in the two decades after 1992 among communities of tax practitioners and academics.


14. OECD Model Tax Convention on Income and Capital: Commentaries 1991, explained the course of action decided upon:

15. According to these arguments emanating from the OECD in 1992, changes in the OECD Commentaries became effective immediately after their adoption, whereas a change in the OECD Model would not become effective unless and until existing tax treaties were modified or new tax treaties concluded in consequence of the change, both courses of which require tedious procedures. Whether, indeed, changes to the Commentaries that post-date existing tax treaties may change the interpretation of such an existing tax treaty, became one of the most argued about legal questions in the two decades after 1992 among communities of tax practitioners and academics.

The weight...
of opinion among communities of academics and practitioners was overwhelmingly that later OECD Commentaries were not directly relevant for legal interpretation of existing tax treaties. Some judicial officers also published their personal views on the matter, siding with the majority view.20

What is striking about the previously quoted explanations from 1992 by the OECD is that the impact on legal certainty of the move to the ambulatory formula was not mentioned as a consideration in the decision to embark along this route. The proposition was that there would, at any given moment after 1992, only be one OECD Model and Commentaries on the OECD Model. For the legally trained, such an efficiency argument did not hold water because any question about interpretation involved, as a starting point, identification of the version of the OECD Model and the Commentaries as they stood at the date of conclusion of a tax treaty.21 From this perspective, since 1992, there was in actual fact a great number of OECD Models. According to the release dates of the so-called condensed versions, these would be the OECD Model (1996),22 (2000),23 (2003),24 (2005),25 (2008)26 and (2010)27 and (2017) and the Commentaries on the OECD Model (1996),28 (2000),29 (2003),30 (2005),31 (2008)32 and (2010)33 and (2017). Strictly speaking, the date on which updates where inserted into the official loose-leaf publication is the exact date of the various OECD Models (1992 to 2010).

In 2012, the OECD announced that the loose-leaf publication of the OECD Model was to be discontinued.34 and the OECD Model would thenceforth be replaced with a new so-called "full version".35 The first full version of the OECD Model, as it read on 22 July 2010, was published in 2012.36 The full version of the OECD Model (2010) released in 2012 included the Introduction, Model Articles, the Commentaries, the non-OECD economies’ positions, the recommendation by the OECD Council of 1997 concerning the OECD Model, historical notes, a detailed list of conventions between OECD member countries and the full text of a number of background reports adopted after 1977. In its entirety, the OECD Model (2010) comprised 2,134 pages. Although nothing has been officially mentioned, in 2012, with the publication of the full version and the demise of the official loose-leaf publication, effectively updates after 2012 could only result in publication of a new full version of the OECD Model. Indeed, this is what has happened twice in the period after the change of format in 2012: full versions of the OECD Model (2014) and (2017) were published in 2015 and 2019, respectively.37

Table 1 shows that the changes made to the full version of the OECD Model (2014), compared to the OECD Model (2010), were not directly related to any work carried out under the BEPS Project that started in 2012.

The BEPS Project started in 2012 but by the time that the OECD Model (2014) was approved by the OECD Council, only the BEPS Action Plan and draft documents were available, which meant that this work was not reflected in the OECD Model (2014). The impact of the BEPS Project on the new working method to compile a Model Convention can be clearly seen in the OECD Model (2017), as illustrated by Table 2.

Table 2 shows that none of the 15 Final Reports that comprise the BEPS package, published in 2015, were appended to the full version of the OECD Model (2017). Rather, several new model clauses that were recommended in the Final Reports were added to the OECD Model (2017), together with a large quantity of new Commentaries on the OECD Model (2017), much of which was drawn from these reports. Table 2 further shows the lineage of the updates to the OECD Model (2017) clauses. They were mostly announced in detail in the BEPS Final Reports, but a few were developed later in the interval between 2015 and 2017. But there was one important exception. The change to article 3(2) of the OECD Model (2017) concerning treaty interpretation by competent authorities appears to have been developed after the Final BEPS package was


21. From a practical perspective, this had to be welcomed as it avoided the trap for unsuspecting court and other legal librarians that subscribed to the loose-leaf format, which, without the benefit of the condensed versions published between 1992 and 2012, made it very difficult to recognize the full text of a previous version of the OECD Model.

22. OECD Model Tax Convention on Income and on Capital (1 Sept. 1996), Treaties & Models IBFD.


25. OECD Model Tax Convention on Income and on Capital (15 July 2005), Treaties & Models IBFD.


27. OECD Model Tax Convention on Income and on Capital (22 July 2010), Treaties & Models IBFD.


32. OECD Model Tax Convention on Income and on Capital: Commentaries (17 July 2008), Treaties & Models IBFD.

33. OECD Model Tax Convention on Income and on Capital: Commentaries (22 July 2010), Treaties & Models IBFD.

34. Foreword OECD Model (2010).

35. Id.

Table 1 – Comparison of the full versions of the OECD Models (2010) and (2014)†

<table>
<thead>
<tr>
<th>Changes to the full version of the OECD Model (2014) from the OECD Model (2010)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Model articles</td>
</tr>
<tr>
<td>Article 10(2): change to clarify beneficial owner to be understood in relation to “paid to... a resident”</td>
</tr>
<tr>
<td>Article 11(2): change to clarify beneficial owner to be understood in relation to “paid to... a resident”</td>
</tr>
<tr>
<td>Article 17: change of terms from “artistes and sportspersons” to “entertainers and sportspersons”</td>
</tr>
<tr>
<td>Article 26(3): third sentence added</td>
</tr>
<tr>
<td>Model Commentaries</td>
</tr>
<tr>
<td>New paragraphs:</td>
</tr>
<tr>
<td>25.1, Introduction;</td>
</tr>
<tr>
<td>2.1, Article 6 – Immovable Property (related to Previous Reports R25-1 below);</td>
</tr>
<tr>
<td>75.1, Article 7 Business Profits (related to Previous Reports R25-1 below);</td>
</tr>
<tr>
<td>14.1, Article 8 Shipping, inland waterways transport and air transport (related to Previous Reports R25-1 below);</td>
</tr>
<tr>
<td>10.2-4, 20-20.1, Article 11 Interest;</td>
</tr>
<tr>
<td>4.3-5, Article 12 Royalties;</td>
</tr>
<tr>
<td>3.1, 31, Article 13 Capital Gains;</td>
</tr>
<tr>
<td>2.3-16, 3, 4.1, Article 15 Employment;</td>
</tr>
<tr>
<td>8.1, 9.1-5, 10.1-4, 11.1-5, 14.1, Article 17 Artistes and Sportspersons; and</td>
</tr>
<tr>
<td>4.1-4, 5.1-6, 8.1, 9.1, 10.4-6, 16-1, Article 26 Exchange of Information.</td>
</tr>
<tr>
<td>Changes to:</td>
</tr>
<tr>
<td>12.3, Article 10 Dividends;</td>
</tr>
<tr>
<td>9.1, Article 11 Interest;</td>
</tr>
<tr>
<td>1-3, 5, 7, 9, 10, 11, 14, Article 17 Artistes and Sportspersons;</td>
</tr>
<tr>
<td>4, Article 18 Pensions;</td>
</tr>
<tr>
<td>48, 63, Article 23 Relief;</td>
</tr>
<tr>
<td>31, Article 24 Non-discrimination;</td>
</tr>
<tr>
<td>3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 12.3-4, 13, 15, 19-7, 19-11, Article 26 Exchange of Information; and</td>
</tr>
<tr>
<td>12, Article 27 Assistance in Collection.</td>
</tr>
<tr>
<td>Previous OECD Reports included</td>
</tr>
<tr>
<td>The same 24 Reports from the period 1982 to 2010 in the 2010 full version, plus two additional Reports:</td>
</tr>
<tr>
<td>Tax Treaty Issues Related to Emissions Permits/Credits (OECD 2014) (R25-1)</td>
</tr>
<tr>
<td>Issues Related to Article 17 of the OECD Model Tax Convention (OECD 2014) (R26-1)</td>
</tr>
</tbody>
</table>

† Changes to or additions of reservations and positions by OECD member and non-member countries are excluded, as are typographical and grammatical changes.

Was it legitimate to change article 3(2) of the OECD Model (2017) in this way? This model clause is prominent for treaty interpretation. The apparent appropriation of interpretive power for competent authorities in the change, coupled with no opportunity for public comment or consultation about the change to article 3(2) of the OECD Model (2017), is not satisfactory.

The change to the format of the OECD Model after 2012 combined with the working method that followed during the period leading to the publication of the OECD Model (2017), raises the question whether the OECD effectively reinstated a system that mirrors what took place after 1963 up to 1992. Since 2012, there is again only a static official text of the OECD Model and the accompanying Commentaries on the OECD Model and preceding OECD reports that date to a specific release (and which may be contrasted to previous official releases). The OECD (2017) reminds one of the process that was followed in the 1980s that resulted in the OECD Model (1992): both periods are marked by concerns about cross-border tax avoidance that culminated in the publication of a series of OECD reports, the contents of which were consolidated partly or wholly in a new version of the model. Although the OECD reports from the 1980s were not thematically grouped under a title, they concerned base erosion and treaty shopping as a form of profit shifting and can therefore be said to have foreshadowed the 2012 BEPS Project. The key difference is in the outcome. In 1992, the recommendations to address profit shifting and treaty shopping were mostly inserted as interpretive positions in the OECD Commentaries, with the expectation that they would immediately affect the interpretation of existing tax treaties without the need for a hard-law change to their text. In contrast, the implementation of the BEPS tax treaty-related recommendations required hard-law changes to the texts of existing tax treaties, for which the well-known “Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and

The last occasion when the OECD Council approved the entirety of a model was in 1997 (see OECD, Model Tax Convention on Income and on Capital 2017 (Full Version) Annex (25 Apr. 2019), Treaties & Models IBFD).

OECD, Thin Capitalisation (adopted by the OECD Council on 26 Nov. 1986) (OECD 1986), Primary Sources IBFD.

Foreign Sovereigns: Conventions and the Use of Conduit Companies (adopted by the OECD Council on 27 Nov. 1986) (OECD 1986), Primary Sources IBFD and Double Taxation Conventions and the Use of Conduit Companies (adopted by the OECD Council on 27 Nov. 1986) (OECD 1986), Primary Sources IBFD.
Table 2 – Comparison of the full versions of the OECD Models (2014) and (2017), with annotations to the BEPS Project

<table>
<thead>
<tr>
<th>Model articles</th>
<th>BEPS Project origin and supplementary reports</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Preamble</td>
<td>BEPS Action 62</td>
</tr>
<tr>
<td>Article 1(2) and (3) hybrid entities, savings clause</td>
<td>BEPS Action 21</td>
</tr>
<tr>
<td>Article 3(1)(e) “international traffic”</td>
<td>Indirectly BEPS Action 2 and 2013 Discussion Draft</td>
</tr>
<tr>
<td>Article 3(1)(i) “recognised pension fund”</td>
<td>BEPS Action 6 and 2016 Discussion Draft</td>
</tr>
<tr>
<td>Article 3(2) interpretation by competent authorities</td>
<td>Allegedly BEPS Action 142</td>
</tr>
<tr>
<td>Article 4(1) pension fund inclusion in definition of a resident</td>
<td>BEPS Action 6 and 2016 Discussion Draft</td>
</tr>
<tr>
<td>Article 4(3) corporate tie-break rule</td>
<td>BEPS Actions 2 and 61</td>
</tr>
<tr>
<td>Article 5(1)(f), (5), (6) and (8) permanent establishment (PE) definition</td>
<td>BEPS Action 71</td>
</tr>
<tr>
<td>Article 8 change of title and deletion of place of effective management (POEM)</td>
<td>Indirectly BEPS Action 2 and 2013 Discussion Draft</td>
</tr>
<tr>
<td>Article 10(2)(a) dividend transfer</td>
<td>BEPS Action 61</td>
</tr>
<tr>
<td>Article 13(3) gains international transport shares</td>
<td>Indirectly BEPS Action 2 and 2013 Discussion Draft</td>
</tr>
<tr>
<td>Article 13(4) share transfer transactions</td>
<td>BEPS Action 61</td>
</tr>
<tr>
<td>Article 23A exemption method</td>
<td>BEPS Action 69</td>
</tr>
<tr>
<td>Article 23B(1) credit method</td>
<td>BEPS Action 69</td>
</tr>
<tr>
<td>Article 25(1) and (5) Mutual Agreement</td>
<td>BEPS Action 142</td>
</tr>
<tr>
<td>Article 29 Entitlement to Benefits</td>
<td>BEPS Action 62</td>
</tr>
</tbody>
</table>

Model Commentaries

Voluminous amendments attendant on the foregoing changes to the model clauses

Previous OECD Reports included

The same 26 Reports from the period 1982 to 2010 in the OECD Models (2014 and 2017 full versions)

1. Changes to or additions of reservations and positions by OECD member countries and non-members are excluded, as are typographical and grammatical changes.
4. The removal of the place of effective management (POEM) criterion as the tie-break test for dual corporate residents as recommended in OECD, Action 2 Final Report (2015), supra n. 3, logically meant that the criterion could not be retained to fix the treaty residence of enterprises operating international traffic business.
5. OECD, Public Discussion Draft – Proposed Changes to the OECD Model Tax Convention Dealing with the Operation of Ships and Aircraft in International Traffic (OECD 2013) [hereinafter OECD, Operation of Ships and Aircraft in International Traffic].
7. OECD, Public Discussion Draft – Treaty Residence of Pension Funds (OECD 2016), Primary Sources IBFD [hereinafter OECD, Treaty Residence of Pension Funds].
10. OECD, Treaty Residence of Pension Funds, supra n. 7.
12. OECD/G20, Preventing the Artificial Avoidance of Permanent Establishment Status – Action 7: 2015 Final Report (OECD 2015), Primary Sources IBFD.
13. The removal of the POEM criterion as the tie-break test for dual corporate residents as recommended in OECD, Action 2 Final Report (2015), supra n. 3, logically meant that the criterion could not be retained to fix the treaty residence of enterprises operating international traffic business.
14. OECD, Operation of Ships and Aircraft in International Traffic, supra n. 5.
16. The removal of the POEM criterion as the tie-break test for dual corporate residents as recommended in Action 2 Final Report (2015), supra n. 3, logically meant that the criterion could not be retained to fix the treaty residence of enterprises operating international traffic business.
17. OECD, Operation of Ships and Aircraft in International Traffic, supra n. 5.
19. Id., at p. 78.
20. Id.

Profit Shifting” (the MLI or Multilateral Convention) was eventually developed. This is a significant difference for legal interpretation of tax treaties. While changes to the OECD Commentaries require no domestic legislative action, domestic ratification of the MLI (or bilateral protocols based on it) is a prerequisite to implement any BEPS treaty-related changes. BEPS recommendations implemented in this way become constitutionally valid and, legally speaking, clearly stand on a different footing from a mere change to the OECD Commentaries. Whether the BEPS-inspired model clauses and associated commentaries in the OECD Model (2017) may be relevant for interpretation of existing and unaffected tax treaties will be discussed in section 4.3.
3.1.3. Synopsis of BEPS materials: OECD versus UN and others

As is evident from section 3.1.2., a significant part of the OECD BEPS materials was subsumed into the OECD Model (2017). Their status was, thus, transformed, as they have either become a model clause or associated commentary. Table 2 indicates that “BEPS materials” with such a transformed status refer to either a Final BEPS Report published in 2015 or an OECD discussion document published in the interval between 2015 and 2017. Apart from these OECD materials, what may be the remaining BEPS materials, and could they potentially have any relevance for tax treaty interpretation? For example, what is the status of the interim OECD BEPS Reports? But more pertinent is the question whether only the formal series of documents published by the OECD/G20 under the BEPS banner should be considered? Or should understandings of other interpretive communities inspired by the same motivation for the OECD/G20 BEPS Project be considered too? Pre-eminently in such a category will be the work of the UN, who established a dedicated organ to deal with BEPS concerns. The UN Committee of Experts on International Cooperation in Tax Matters formed a BEPS sub-committee in October 2013, with a mandate to propose updates to the UN Model relating to matters addressed as part of the OECD BEPS Action Plan and “other possible work relating to base erosion and profit shifting issues”.43 Since 2013, a plethora of documents have been published by the UN in which a range of tax treaty-related BEPS concerns were addressed.44 A feature of the UN’s publications is that the focus is placed on tax treaty-related base eroding or profit shifting concerns not prioritized by the G20 countries and OECD member countries.45 Some UN papers adopt interpretive positions that may not align with the position of the OECD.46 Much of this work has been subsumed or is referenced in the UN Model (2017).47

Apart from the OECD’s and UN’s BEPS related publications, there are further BEPS materials that are the product of collaboration between key institutions. For example, the so-called “toolkits”48 developed by the Platform for Collaboration on Tax, in which both the UN and OECD participate together with the International Monetary Fund (IMF) and the World Bank. These toolkits, in as far as they deal with tax treaty-related questions, may have relevance for interpretation of BEPS-inspired aspects of tax treaties. Other collaborative projects driven by BEPS tax treaty-related concerns involving key institutions are underway, for example how tax treaties impact the extractives industry in developing countries.49

The range of interpretive positions on BEPS aspects of tax treaties expands if it is accepted that the OECD does not have a monopoly on publication of BEPS materials. The proposition is that “BEPS materials” will be all those inspired out of shared concerns that underly the BEPS Project. In practice, this presents potential dilemmas for interpreters as they will find that an interpretive position or outcome inspired by BEPS concerns is not necessarily supported by the OECD, but may be by another institution such as the UN or the IMF. A good example may be found in the work related to indirect offshore share transfers. The draft Toolkit on the topic by the Platform on Collaboration in Tax, developed by the IMF, puts forward several proposals on how countries may design domestic tax law and the effect thereof on tax treaty clauses patterned on either article 13 of the OECD Model or the UN Model. Controversially,48 the toolkit suggests that countries may

45. For example, the relation between domestic general anti-avoidance rules and tax treaties, the tax treaty treatment of services, offshore indirect share sales, the UN approach to artificial avoidance of PE status, all explained in Trepelkov et al., eds., supra n. 44, at pp. 54 and 728, chs. II, III, and pp. 429–474, respectively. See also United Nations Handbook on Selected Issues for Taxation of the Extractive Industries by Developing Countries p 46 (UN 2017), available at www.un.org/esa/fid/wp-content/uploads/2018/05/Extractives-Handbook_2017.pdf.
46. See UN Committee, Update of the UN Model Double Taxation Convention between Developed and Developing Countries – Beneficial Ownership 6 (2 Apr. 2019), Document E/C.18/2019/CRP10, available at www.un.org/esa/fid/wp-content/uploads/2019/04/18STM_CRP10-Update-UN-Model-Doubl-Taxation_Beneficial-Ownership.pdf, where it is suggested that the “beneficial owner” concept in bilateral tax treaties is a narrow and targeted measure, in a way that is not “general in nature intending to address any potential instances of treaty-shopping.” Such an understanding may not accord with the view of the OECD, particularly the 2012 changes to the OECD Model: Commentaries on the meaning of the beneficial owner concept.
47. UN Model Double Taxation Convention between Developed and Developing Countries (1 Jan. 2017), Treaties & Models IBFD.
49. For example, the BEPS-related work of the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development in collaboration with the OECD covers the impact of tax treaties on the extractives industry, available at www.ifgmining.org/guidance-for-governments/base-erosion-and-profit-shifting (accessed 17 Mar. 2020).
50. The controversy can be seen in the public comments on version 1 of the draft Toolkit and the responses of the members of these, such as for instance “The draft does explore an expansion of the definition of ‘immovable property’ to anchor the concept of taxing rights in an economic basis, i.e. location specific rents derived from traditionally defined ‘immovable property’ or from the grant of other rights by governments that yield location specific rents. The draft proposes several alternative definitions that countries could use whether or not they wish to expand the concept to a greater or lesser extent. This is a fundamental part of the economic analysis provided, which it is hoped could yield greater certainty in the adoption of taxing rights” (see CB, The Relevance of BEPS Materials for Tax Treaty Interpretation).
unilaterally expand their domestic tax law definition of “immovable property” to include gains from property that, in general law, will not qualify as immovable, but which, in economic terms derive from “location specific rents linked to national assets”. This economics-based approach is not the position adopted in the Commentary on Article 6 of the OECD Model (2017) nor do any of the OECD BEPS materials support such an interpretation.

3.2. Legal framework for tax treaty interpretation in national courts: Divergent approaches to key BEPS concerns

3.2.1. Opening comments

There is no universal “correct” way to interpret a tax treaty if it is acknowledged that practices of interpretive communities and their frameworks differ. At most, one can argue that within a certain community there can be ways in which tax treaties should clearly not be interpreted. For example, judicial officers should base the meaning of a tax treaty on the text of the instrument itself and not on unconsummated materials such as, say, a report by an NGO about the societal impact of a tax treaty.

Because tax treaties are always disputed before national and not international courts, there will only ever be multiple approaches, grounded by judges individually and as a collective in their domestic law and traditions. Of course, convergence in practice does (and should) occur, for which the framework of treaty interpretation in international law provides the clearest stimulus. Despite a long-established (and laudable) inclination towards international law providing the clearest stimulus, there is no universal “correct” way to interpret a tax treaty on the text of the instrument itself and not on unconsummated materials such as, say, a report by an NGO about the societal impact of a tax treaty.

For interpreters in this group, establishing who economically and factually ultimately benefits ownership benefits. One group of cases favours a legal meaning of beneficial ownership, which may be (partly) based on or influenced by the domestic law of the country concerned and in which an overt consideration of the presence or absence of tax avoidance motives was not relevant in establishing the outcome of applying the beneficial owner test.

In the opposing camp, cases can be found in which beneficial ownership was understood to refer to both legal aspects of ownership as well as economic enjoyment of ownership benefits. For interpreters in this group, establishing who economically and factually ultimately benefits from a payment self-evidently requires an approach that plays down or ignores legal formalism, with an emphasis on the substance of a commercial arrangement. This group of interpreters more overtly acknowledge that they attach an anti-tax avoidance function to the benefi-

...
cial owner concept, which means the presence or absence of tax avoidance motives may be more likely to be a consideration during the interpretation exercise.

It is worth recording the observation that the difference between the two schools of thought does not appear to fall along the common law and civil law divide. What then, may be reasons for courts taking opposing positions on the meaning of the beneficial owner concept? One reason, identified through the historical study of the concept’s history by Vann (2013), is the very work carried on by the OECD over four decades regarding the meaning and function of the beneficial owner concept.55 The OECD changed positions, by initially seizing the concept to address tax treaty abuse whilst the original elaboration of its meaning by the OECD in 1977 indicated that it had nothing to do with conduit companies or holding companies used for treaty shopping. Thereafter, stages followed in which, mainly through changes to the Commentaries on the OECD Model, interpretive positions were formulated that sought to dislodge the concept’s meaning from domestic law with a view to give beneficial ownership a distinct anti-treaty abuse function.56 These steps by the OECD over time (re)aligned the purpose of the concept with combatting tax treaty abuse.57 The anti-abuse function, which was suggested in the non-binding OECD Commentaries, opened up the range of possible interpretations and fields of application, which was taken up by only some communities of interpreters, i.e. the understanding that the beneficial ownership test was more than a mere legal concept and that it required consideration of economic elements (for example, factually passing on income and discretion over the use of income). The very working method employed by the OECD after 1992 up to 2012 to effectively seek amending the original meaning of beneficial ownership in tax treaties through reports and changes to the non-binding OECD Commentaries, inevitably meant that only some judges would take up the suggested interpretive positions, thereby causing inconsistency and uncertainty to arise in the overall landscape.

The period since 2012 signifies a fundamental change in the OECD’s working method to address tax treaty shopping. The idea of a quasi-legislative function through changing the Commentaries on the beneficial owner concept’s meaning appears to have been abandoned. The changes to the Commentaries on the OECD Model (2017) attempt no revision of the meaning of beneficial owner, but, instead, indicate that the new preamble language and new article 29 of the OECD Model (2017) address tax treaty abuse.58 The working method is now to recommend hard law changes to actual tax treaties to address tax treaty abuses such as forum shopping, as opposed to changing the Commentary and leaving treaty language static. The development of the MLAs as a novel instrument to change the text of bilateral tax treaties signifies this sea change in approach on the part of the OECD. Of course, new treaty clauses based on a new model clause will itself require interpretation. The structural difference, however, is that the OECD is now prepared to add or change the text of the OECD Model itself, as opposed to leaving it static and suggest stretched meanings of existing treaty language through changes posterior to the date of conclusion of model-based tax treaties.

3.2.3. Deferral of profit: National courts on compatibility of CFC rules and tax treaties

Another area where the OECD has persisted with the working method of addressing a key BEPS concern through amendments of the Commentaries on the OECD Model over time, is the question of the compatibility of CFC rules of model-based tax treaties. Here, too, two camps of cases decided in various domestic courts with directly opposing outcomes on the same question, namely whether tax treaties based on the OECD Model preclude the application of CFC rules, can be identified.59 It is

55. R.J. Vann, Beneficial Ownership: What Does History (and Maybe Policy) Tell Us, in Beneficial Ownership: Recent Trends sec. 19.4.1. (M. Lang et al. eds., IBFD 2013), Books IBFD. The historical analysis by Vann indicates that the extension of the beneficial ownership test to conduit scenarios developed in stages subsequent to the concept’s insertion into the OECD Model (1977), particularly pursuant to the publication of OECD, Double Taxation Conventions and the Use of Conduit Companies—Report (adopted by the OECD Council on 27 Nov. 1986) (OECD 1986), Primary Sources IBFD, which provided the intellectual stimulus for debates that hardened in the changes to the OECD Model: Commentaries (2003), which were again significantly altered in the OECD Model Tax Convention on Income and on Capital: Commentaries (26 July 2014), Treaties & Models IBFD.

56. Para. 12.1 OECD Model: Commentary on Article 10 (2014), argued that the beneficial owner concept clarified the words “paid to” used in tax treaties, thereby suggesting an understanding of the substance behind a payment and not a literal and/or legal reading. The OECD further argued that beneficial owner had to be understood “particularly” in light of the purpose of tax treaties to prevent fiscal avoidance.


58. Para. 12.5 OECD Model: Commentary on Article 10 (2017). This attitude has indeed provoked scholars to question the future role of the beneficial owner concept if its apparent function to address tax treaty shopping has now been transferred to the new preamble and limitation on benefits (LOB) model clause (see R.I. Danon, Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11 and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need it? in Current Tax Treaty Issues: 50th Anniversary of the International Tax Group (G. Maisto ed., IBFD 2020), Books IBFD).

59. Cases in which courts decided that a tax treaty based on the OECD Model precluded the application of a national CFC regime include: FR: CE, 28 June 2002, Re Societe Schneider Electric, Appeal No. 232 276, 4 ITLR 1077, p. 1108; Case Law IBFD; the decisions of the Brazilian Superior Tribunal de Justiça (Superior Court of Justice, STJ) in BR: STJ, 24 Apr. 2014, Companhia Vale do Rio Doce v. National Treasury, Special Appeal No. 1.325.709-RJ (2012/010520-7), 17 ITLR 643, p. 702, Case Law IBFD and Conselho de Contribuintes (Taxpayers’ Council, CC) in BR: CC, 19 Oct. 2006, Eagle Distribuidora de Bebidas S.A v. Second Group of the Revenue Department in Brasilia Appeal No. 148.709.9 ITLR 627, pp. 654-655, 657 and 650, Case Law IBFD. Courts in the following cases held that tax treaties based on the OECD Model did not preclude the application of a national CFC regime: UK: CAEW, 25 June 1997, Bricom Holdings plc v. Commissioners of Inland Revenue, 1 OFLR 365, p. 378; the decision of the Finnish Korkein oikeus (Supreme Administrative Court, KHO) in FI KHO, 20 Mar. 2002. Re A Oyj Abp, KHO 2002.26. 4 ITLR 1009, p. 1071, Case Law IBFD (the OECD Model: Commentaries relied on in this case to justify the outcome have since all been removed by the OECD); and the decision of the Saiko-Sai (Saiko-Saibansho) (Supreme
harder to group the judicial reasoning found in them into distinct schools of thought. What is clear from the two camps, is that some courts who found no clash expressly invoked versions of the OECD Commentaries that supported that view. In some cases, the OECD Commentaries were withdrawn that served as the basis for a court’s decision. Courts that decided tax treaties based on the OECD Model preclude the application of CFC rules did not refer to the OECD’s contrary position explained in a version of the OECD Commentaries. One could speculate whether they were weary of OECD Commentaries that were in flux on this difficult question. Canadian courts have acknowledged the range of interpretive positions, which also explains why express clauses in Canadian tax treaties are often included to preserve the application of Canadian CFC rules. The practice of Canada points to the solution. Hard law changes to tax treaties will put an end to the uncertainty whether tax treaties based on the OECD Model preclude the application of Canadian CFC rules. There is uncertainty as to whether the new article 1(2) of the OECD Model (2017) concerning hybrid entities may apply to CFC regimes and what the result of that may be for the question as to whether other pre-existing model clauses preclude their application.

3.2.4. Exceptionality in tax avoidance cases before national courts

There is evidence that judges in various jurisdictions have an (intuitive?) tendency to look for exceptional interpretative positions when they are confronted with the typical tax avoidance case in which application of the law or treaty on a literal reading appears to be technically correct. In other words, the standard framework for tax treaty interpretation may be adjusted to overcome the apparent sound reading of the law or treaty, according to an exception that the court may ground in its general legal framework.

Typical exceptionality-type arguments, all taken from cases in which domestic tax legislation applicable to tax avoidance post-dated the tax treaty in question, are as follows. Germany’s Bundesfinanzhof (Federal Tax Court, BFH) held that bilateral tax treaties are subject to an “avoidance reservation”, which was a principle of law with a “special status.” In a dualist country such as Australia, courts have argued that legislation enacted by parliament to incorporate a tax treaty in domestic law could not have been intended to allow the use of tax treaties to sustain tax avoidance arrangements. Even though English common law does not recognize a general abuse of law doctrine, the Court of Appeal of England and Wales (CAEW) upheld retrospective legislation to prevent “misuse” of a tax treaty because the treaty was not intended to “serve as an instrument used by taxpayers who choose to participate in artificial arrangements to avoid or reduce their level of taxation.” In 1961, the UK House of Lords (HL) held that anti-avoidance legislation aimed to put a stop to “gross misuse” and abuse of a concession contained in a tax treaty did not breach the comity of nations or established rules of international law. The UK Supreme Court (UKSC) in 2016 explained the purposive approach to interpretation in the field of taxation as follows. All of tax legislation is designed by Parliament to “draw their life-blood from real world transactions with real world economic effects”, which means that any transaction, or an element of a composite transaction, that has no purpose other than tax avoidance, cannot benefit from tax legislation and by extension from a tax treaty. Decisions by civil law courts in which an abuse of law doctrine has been applied to tax treaties are numerous.

In the cases considered under this heading, courts did not invoke OECD materials as justification for formulating this variety of exceptionality approaches to tax law or tax treaty interpretation in the presence of tax avoidance. In most instances, reliance was placed on principles present in the general legal framework under which the court operated, and past jurisprudence was important. It, therefore, seems unlikely that BEPS materials may stimulate further invention or a rise of exceptionality among judi-
cial officers in tax treaty cases involving tax avoidance. Accordingly, for this interpretive community, the BEPS materials appear to have a limited reach because there is no historical evidence that such materials will affect the general legal principles used by judicial officers to deal with tax avoidance cases involving tax treaties.

3.3. Managerialism in the tax advisory and corporate communities

As mentioned earlier in section 2.3, a traditional core role for a tax advisor dealing with tax treaties included an aspect of learning how to impersonate judicial reasoning. It is a core competency to be able to advise taxpayers, on an upfront basis and looking forward, where the borderlines of legally acceptable and unacceptable tax avoidance may be found so as to avoid costly disputes with tax regulators down the line in which a client (taxpayer) may ultimately fail. Therefore, one can say that tax advisors (including in-house advisors at corporate entities) as an interpretive community relied heavily on studying the practices of judicial officers, in the variety of interpretive communities that they operate. That may still be so in the aftermath of the BEPS initiative.

Yet, the role of advisors as interpreters has undeniably become more complex, particularly since the advent of the BEPS Project and the series of so-called leaks of private tax information about multinational or high-profile individuals.\(^7\) Tax advice on the meaning of tax treaties no longer appears to be a straightforward exercise in legally grounded reasoning. A variety of managerial frameworks, whether required or inspired by regulation,\(^7\) or industry standards, corporate governance or simply good practices, are aspects that feature prominently on the horizon of the advisory community. The importance of risk management in tax, exemplified by the so-called tax control framework,\(^7\) exemplifies the rise of managerial approaches among the community of tax advisors to interpretation of tax law, including tax treaties. This is not to say that legal reasoning as the primary driver of positions taken by tax advisors is now eclipsed. Rather, the process when interpreting tax treaties has become more complex as it is expected of advisors to be sensitive to considerations such as reputational impact for clients that are not strictly related to legal reasoning. Moreover, for accounting purposes, standards require that uncertain tax positions ought to be identified, the likelihood (probability) of them being sustained need to be established and the amount of tax that management might expect to pay need to be measured with a view to recognize and account for a potential financial liability.\(^7\)

The Financial Accounting Standards Board’s (FASB’s) guidance for this exercise indicates that “an allocation or a shift of income between jurisdictions” gives rise to a tax position,\(^7\) which evidently means that any advice given about the meaning of a tax treaty will inherently trigger application of this accounting standard. Tax treaty interpretation positions adopted by advisors may force a client to recognize a financial liability based on the probability of the position being sustained if challenged. Establishing probability for this purpose is a complex and imprecise exercise, which has been explained as follows:

> Companies need to consider a wide range of possible factors when asserting that the more-likely-than-not recognition threshold has been met. The entity’s processes should ensure that all relevant tax law, case law and regulations, as well as other publicly available experience with the taxing authorities, have been considered. A tax position that is supported by little authoritative guidance or case law may still have a more-likely-than-not chance of being sustained (and, thus, of being recognized) based on facts, circumstances and information available at the reporting date. The absence of specific authoritative guidance or case law does not automatically preclude a more-likely-than-not determination. Rather, other sources of authoritative tax law, although they do not specifically address the tax position, could be relevant in concluding whether a position meets the more-likely-than-not recognition threshold.\(^7\)

What is striking from the above is that the position of interpretive communities such as tax authorities and commentators (including academics) are relevant for the accounting exercise, in addition to those of judicial officers. A tax advisor that, therefore, wishes to avoid a situation in which his or her advice on the meaning of tax treaty will cause a client to recognize a financial liability for accounting purposes will need to take account of a wide variety of sources that may, strictly in terms of the relevant legal interpretation framework, be less relevant or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court. To illustrate: A tax advisor relies on a decision of a court of intermediate standing to support a tax position, or even inadmissible as evidence if the matter were to be heard by a court.
demic in that jurisdiction published a case note arguing that the court’s decision was incorrect and shows grounds upon which the highest court might in future decide such a matter differently than the decision of the court of intermediate standing. The tax authority of the jurisdiction concerned published guidance material on the tax treaty issue in question, in which the view of the academic and OECD or UN BEPS materials on treaty abuse are cited. What may the effect of all of this be on the tax advisor’s framework to interpret the tax treaty? It is only human to expect that awareness of all these sources, overshadowed by an imprecise accounting tool that may cause financial ramifications for a client, will colour the reading of the tax treaty by the advisor.

Reputational damage for a client as an outcome of tax advice perhaps exemplifies, at the extreme end, the need for managerial approaches to tax treaty interpretation. Further, it is now, more than ever before, expected of tax advisors to be able to read the relevant political landscape and adopt a forward-looking approach that is not only based on the law as one may find it today, but also as it is likely to be reformed in multiple jurisdictions. The occurrence of voluntary payments of tax, which self-evidently cannot be rooted in law-based tax advice and which is not only an ad hoc occurrence in some jurisdictions, provides evidence that reputational impact of tax advice and anticipation of future tax reform adds layers that affect the interpretation process among the community of advisors.

The developments described in the preceding paragraphs impact the answer as to whether BEPS materials are relevant for tax advisors dealing with tax treaty interpretation. Certainly, part of the answer may be informed by whether, legally, BEPS materials are relevant or not. But law and its interpretative frameworks as exemplified by communities of judicial officers is no longer the only or overriding aspect to consider for advisors.

4. BEPS Materials and Tax Treaty Interpretation after the MLI: Selected and Emerging Normative Questions

4.1. Introductory remarks

The most immediate area in which interpretive communities will face the question of the relevance of BEPS materials concerns tax treaties that have been amended by the MLI to implement BEPS-related tax treaty proposals, especially general treaty anti-avoidance rules. There is of course also a category of existing tax treaties that are not subject to the MLI, but which has been amended to include BEPS-related proposals through bilateral renegotiation. This is an ongoing process, which continues after publication of the OECD Model (2017) and the UN Model (2017) and the publications resulting from the ongoing work by these organizations and others about BEPS-related treaty questions. Sections 4.2. to 4.3. will address selected interpretation questions discussed at the conference where a draft of this paper was delivered.

4.2. Tax treaties that embed BEPS proposals

4.2.1. MLI amended tax treaties: Trapped in the 2015 OECD BEPS package for guidance?

The Explanatory Statement to the MLI indicates that “[t]he commentary that was developed during the course of the BEPS project and reflected in the Final BEPS Package has particular relevance” to interpret the substance of BEPS treaty-related measures.79

The Commentaries on the OECD Model (2017) are not directly referenced. Non-OECD member countries participated in the work on the MLI but not necessarily in the work on the update to the OECD Model. This raises the issue of whether interpretation of tax treaties amended by the MLI will be trapped in time in the sense that the commentaries developed in the 2015 BEPS Package do not appear to be capable of being changed, amended or updated. In other words, is the pre-eminent supplementary source of meaning for this category of BEPS-amended tax treaties static? The Explanatory Statement to the MLI does not address the possibility of an update to commentaries contained in the 2015 BEPS Package nor the relation to future versions of the OECD Commentaries. This can probably be explained by the fact that non-OECD member countries participated in the work on the MLI. The clearest avenue to update the commentaries in the 2015 BEPS Package may be a conference of the parties, as envisaged by article 31 of the MLI. Signatories of the MLI include many non-OECD member countries. Therefore, an update of the 2015 treaty-related OECD BEPS materials should not be assumed to result in a carbon copy of the OECD Commentaries. As was illustrated in section 3.1.2. BEPS materials include treaty-related work of other organizations, such as the UN or the IMF, that do not always support or align with priorities or interpretive positions of the OECD BEPS materials. For example, if important changes are made to, say, the Commentary on Article 29(9) of the OECD Model (2017) concerning the principal purpose test (PPT) (as inevitably will become necessary in future), these changes will, on the face of the statements in the MLI Explanatory Statement, have no direct relevance or may be contested if other organizations in their work on BEPS do not align with an OECD position.

4.2.2. Excursus: What is the role of the examples in the 2015 BEPS Action 6 Final Report that illustrate the operation of the PPT?

A pertinent treaty interpretation question that has been anticipated concerns the role of examples about the meaning of the PPT first articulated in the 2015 BEPS Action 6 Final Report. The report itself states that the ten

The relevance of BEPS materials for tax treaty interpretation

This can be seen in their argument that reveals an assumption about the "general objective" of tax treaties, namely to "encourage cross-border investment". Whether in fact tax treaties have any impact on cross-border investment has become highly contested during the BEPS era, with empirical economic studies showing conflicting results. The IMF has found that tax treaties with investment hubs have not been "associated with additional investments" for 41 African economies in the period 1985 to 2015. A finding of this nature suggests that the presence or absence of a tax treaty does not determine the choice of investment jurisdiction. Is Example C otherworldly? In the face of concrete economic data, it is, therefore, questionable to base tax treaty interpretation on the ground that granting treaty benefits ought to be linked to benefitting investments. Tax treaty benefits should not be viewed like investment subsidies, which appears to be the effect of Examples C and D. Furthermore, the new BEPS-inspired preamble language for tax treaties does not state investment promotion as an objective. Is the implication of Examples C and D that investment promotion must be read into the preamble of tax treaties so that in the absence thereof, the bar will be higher for granting treaty benefits?

The foregoing discussion is not exhaustive of all the questions that arise when the examples illustrating the operation of the PPT are studied. However, they speak to a central concern that arises from the use of examples instead of more elaborate model clauses. These problems compound when the Model Commentaries on the OECD Model (2017) are compared to the 2015 BEPS Action 6 Final Report – they are not carbon copies of each other. The OECD Commentaries (2017) contain three further examples not found in the 2015 BEPS Action 6 Final Report as well as statements about the status of the examples for tax treaty interpretation. Examples K to M were added in the OECD Commentaries (2017) on the PPT. In the OECD's solution for all three examples, the mantra is repeated that "[t]he intent of tax treaties is to provide benefits to encourage cross-border investment" and the reasoning concludes that treaty benefits ought to be granted when the "context of the investment" shows "commercial purpose".


Examples K to M were added in the OECD Commentaries (2017) on the PPT. In the OECD's solution for all three examples, the mantra is repeated that "[t]he intent of tax treaties is to provide benefits to encourage cross-border investment" and the reasoning concludes that treaty benefits ought to be granted when the "context of the investment" shows "commercial purpose".

The argumentation in the BEPS Action 6 Final Report seems to be influenced by what the drafters of Example C considered to be the type of purposive interpretation of tax treaties that is required to decide treaty benefits cases.

Example C deals with RCo, a company resident in State R that wishes to expand an electronic device production business. The transactions in the aim of the PPT concern the establishment by RCo of a manufacturing plant in one of three developing countries identified based on their low manufacturing costs. All three countries identified are said to provide similar economic and political environments. However, only one of them (State S) has a tax treaty with State R. RCo decided to build the plant in State S.

Now, the reader might be forgiven after considering Example C for concluding that one of RCo's principle purposes in choosing State S was the availability of tax treaty relief because all other factors are stated to be equal between the three potential developing countries. Not so, according to the 2015 BEPS Action 6 Final Report:

In this example, whilst the decision to invest in State S is taken in the light of the benefits provided by the State R-State S tax convention, it is clear that the principal purposes for making that investment and building the plant are related to the expansion of RCo's business and the lower manufacturing costs of that country. In this example, it cannot reasonably be considered that one of the principal purposes for building the plant is to obtain treaty benefits. In addition, given that a general objective of tax conventions is to encourage cross-border investment, obtaining the benefits of the State R-State S convention for the investment in the plant built in State S is in accordance with the object and purpose of the provisions of that convention. (Emphasis added)

The difficulty with the foregoing quoted explanation is that the footing appears to be confused. The wording of the PPT does not refer to "the principal purposes" of a transaction, as is argued at the emphasized part, but requires identification of any and all principal purposes without privileging any particular type. The drafters of Example C argue that it is unreasonable ("cannot reasonably be considered") that one of the principal purposes was to obtain treaty benefits. This is illogical. If the cost of manufacturing is equally low in the three jurisdictions being considered and RCo's choice for one is based solely on the presence of a tax treaty while there are no treaties with the two others, how can RCo's choice not have as its purpose the obtaining of treaty benefits? Evidently, investment in State S was also a principal purpose of RCo. If this is not the meaning of the text of the PPT, then it is very poorly drafted and in serious need of revision.

The argumentation in the BEPS Action 6 Final Report seems to be influenced by what the drafters of Example C considered to be the type of purposive interpretation of tax treaties that is required to decide treaty benefits cases.


Examples K to M were added in the OECD Commentaries (2017) on the PPT. In the OECD’s solution for all three examples, the mantra is repeated that “[t]he intent of tax treaties is to provide benefits to encourage cross-border investment” and the reasoning concludes that treaty benefits ought to be granted when the “context of the investment” shows “commercial purpose”.


84. Beer & Loeprick, supra n. 83, at p. 28.


86. Id., where it is stated that “[w]hen reading these examples, it is important to remember that the application of [the PPT] must be determined on the basis of the facts and circumstances of each case. The examples below are therefore purely illustrative and should not be interpreted as providing conditions or requirements that similar transactions must meet in order to avoid the application of the [PPT].”

87. Id.

88. Id.


81. Id., at p. 60.

82. Id.
The central issue arising from the PPT examples developed in the 2015 BEPS Action 6 Final Report and the Commentaries on the OECD Model (2017) is, therefore, whether the PPT contains an unexpressed commercial purpose test, which by implication will favour granting tax treaty benefits in the presence of underlying economic investment. On its wording, the PPT does not refer to the presence or absence of a commercial purpose or indeed does not require an actual economic investment as a prerequisite for claiming tax treaty benefits. The PPT wording requires that all relevant facts and circumstances be considered, naturally, in light of the object and purpose of the treaty. Whether parties had commercial purpose, if, indeed, there was an investment, will of course be a relevant fact. The question, however, is whether the presence or absence of commercial purpose and underlying investment are the decisive facts that will determine whether tax treaty benefits are to be granted in borderline cases. The PPT examples imply that commercial purpose in the presence of an underlying actual investment will indeed be decisive. As indicated earlier, these arguments based on assumed purpose of tax treaties to encourage investment raises controversy and more questions than answers. Tax treaties apply not only in a business context but also to government activity and the employment or private affairs of individuals. The PPT examples reveal a bias suggesting its application is intended for a business context. The fact that the PPT’s scope and decisive criteria for its application are not expressed in the text of the PPT model clause but rather in supplementary materials such as reports and commentaries, falls into the pattern of using examples to legislate. History shows that the OECD’s working method of using commentaries hampered and did not aid uniform tax treaty interpretation in domestic courts to address key BEPS concerns such as treaty shopping and profit shifting (see section 3.2.). The PPT text itself requires serious redrafting and elaboration if history is not to repeat.

4.2.3. Bilaterally amended tax treaties incorporating BEPS proposals

Bilateral tax treaties that are not subject to the MLI, but rather amended through protocol to incorporate BEPS treaty-related measures will not suffer the same time trap explained in section 4.2.1. for MLI-affected tax treaties. What may be important here is to establish whether the OECD Model (2017) or the UN Model (2017) served as a basis for negotiation of changes to them. As illustrated in section 3.1.2. although the two models align on many BEPS-related new model clauses, there are also important differences in priorities and interpretive positions, indeed, can differ between the two models. Moreover, there is much ongoing work being performed by both organizations and others on BEPS tax treaty concerns that were not finalized or addressed in the 2015 OECD BEPS Package.

4.3. Tax treaties without BEPS measures: A new purposive interpretation?

Are BEPS tax treaty-related measures proposals only for pre-existing tax treaties that will not be amended, either bilaterally or via the MLI? Based on the historical impact of OECD materials such as the partnership report and the beneficial owner reports and Commentaries on the OECD Model, the author’s position has been that:

Over time, the BEPS MLI measures, especially those regarding appropriate circumstances in which to deny treaty benefits through discretionary measures, will impact the intellectual framework.90

How may BEPS materials impact the framework (and for which interpretive community) in regard to pre-existing tax treaties that will not be changed to include BEPS measures?

The analysis in section 3.3. illustrates that the advisory community could be expected to consider BEPS materials regardless of whether in legal argument such materials are relevant or not. This is because they may need to take account of the positions of interpreters such as regulators or others (for example, commentators) who refer to BEPS materials as justification (rightly or not) for interpretive positions they adopt on any tax treaty’s meaning.

Judges may, indeed, be more hesitant to overtly refer to BEPS materials when interpreting unchanged tax treaties. However, over time they may not be immune to influence.91 The impact of the new preamble to the OECD Model (2017) and UN Model (2017) may, indeed, over time signify a move to mandatory purposive interpretation of tax treaties. On the wording of the new preamble language, application outcomes of tax treaties need to be considered in order to avoid creating opportunities for “non-taxation or reduced taxation through tax evasion or avoidance” as an expressly stated purpose. If this purpose is fully embraced, it means that judges would need to consider not only what may be the ordinary meaning of treaty terms in their context, but also what is the overall outcome, for the fiscus of both countries concerned, of applying that meaning in a given case. For example, if interpretation of a tax treaty according to the ordinary meaning of terms results in a situation of non-taxation, a most difficult interpretive conundrum will arise because the new stated purpose of tax treaties is to avoid such situations. It may be that judicial officers in these circumstances might rely on exceptionality arguments based on the presence of tax avoidance (see section 3.2.3.). Non-taxation however does not necessarily equal tax avoidance.92

---

90. Hattingh, supra n. 78, at sec. 3.2.
91. See the example of Re Swiss Swaps Case I(A)(2015). supra n. 54, discussed in Hattingh, supra n. 78, at p 3, who upheld the view of scholars, who themselves relied on the OECD conduit companies report, to argue that beneficial ownership is an anti-avoidance measure that should be viewed as implicit in tax treaties regardless of whether in their wording they used the concept.
92. The facts of the cases of Fowler (2016-2018), infra, which at the time of writing this article, was making its way through the courts in the United Kingdom, provide a good illustration of a case that results in non-taxation because the residence country (South Africa) unilaterally chose not to exercise taxing rights whilst the factual behaviour of the taxpayer was not influenced by the tax position in either country. (See the decision of the UK First-Tier Tribunal (FTT) in UK: FTT, 12 Apr. 2016, Fowler v. Revenue and Customs Commissioners., (2016) BTLIR 644 and J. Avery Jones & J. Hattingh, Fowler v. HMRC: divers and the dangers of deeming. 4 Brit. Tax Rev., pp. 431-433 (2016); the decision of the UK Upper Tribunal (UT) in UK: UT, 30 May 2017, Martin Fowler v. Commissioners for Her Majesty’s Revenue and Customs, [2017] UKUT 219 (TCC), (2017) 19 ITLR 1042, Case Law IBFD; and UK: CAEW, 15 Nov.
Furthermore, jurisprudence tends to become generalized over time after courts take a new direction. It will become harder as time goes by to dislodge old tax treaties from new ways of interpreting the species as a whole, particularly because the new preamble’s greatest impact may be to force a new type of purposive tax treaty interpretation on courts for tax treaties with BEPS measures in them. Whether this direction for tax treaty interpretation will be consistent, remains to be seen – the OECD BEPS materials articulate various different purposes of tax treaties. Evidently, the overall statement of purpose in the new preamble language is driven by tax avoidance concerns, but there appears to be more. Under the new PPT, an escape clause requires that the purpose of distributive rules ought to be established. As discussed in section 4.2.2, the Commentary on Article 29 of the OECD Model (2017) regarding the PPT describes or insinuates purposes for tax treaty distributive rules that are absent from the new preamble language. For example, the OECD Commentary on Article 29 (2017) on the state that the “general objective of tax conventions is to encourage cross-border investment” and “[t]he intent of tax treaties is to provide benefits to encourage cross-border investment”. These statements are tantamount to saying tax treaty benefits are a form of subsidy to attract and compete for foreign investment. If that is the true rationale for tax treaties, then why were these assertions only taken up in the OECD Commentary on Article 29 (2017) and not in the preamble? If they are accurate, does it mean evidence is required whether a specific tax treaty, in fact, promotes investment? Economic literature is inconclusive on the general question whether tax treaties, in fact, stimulate or increase investment levels.

Should purposive interpretation of tax treaties be grounded in generalized or contested objectives for tax treaties formulated in OECD BEPS materials only? It is axiomatic that a tax treaty is concluded in a specific bilateral context comprising the economic and political relations between two countries. The examples in the Commentary on Article 29 of the OECD Model (2017) dealing with the application of the PPT indeed indicate that the context of a treaty needs to be studied to decide whether granting benefits accords with an alleged objective to stimulate investment. Therefore, purposive treaty interpretation may indeed require consideration of, for example, bilateral conditions under which a tax treaty was negotiated to discover whether governments in fact had such a goal when they decided to conclude a tax treaty. A recent empirical study conducted among tax treaty negotiators suggested that considerations about investments stimulation are often ethereal in tax treaty negotiations.

The variety of BEPS materials and contrasting positions in them can be expected to muddle purposive interpretation of tax treaties because different interpretive communities can be expected to privilege certain materials over others.

5. Conclusions: Discriminate Approaches to Tax Treaty Interpretation in an Increasingly Complex Landscape

Whether BEPS materials are relevant for tax treaty interpretation depends on the interpretive community that may address the question, as well as their framework for treaty interpretation. The relevance of BEPS materials may be less or more intense, and either affect all levels or only some levels of tax treaty interpretation, depending on which interpretive community engages with the material. On a spectrum, one may say that the tax advisory community of treaty interpreters may view the BEPS materials as mostly relevant and they may be indiscriminate about the legal and/or normative relevance of these materials for treaty interpretation according to the type of treaty concerned. They may be most affected by the broad range of materials that comprise BEPS materials (including BEPS materials beyond the publications of the OECD). This is because the interpretive framework for tax advisors dealing with tax treaties has shifted and now comprises considerations of law and non-law such as risk-based managerial approaches and regulations. Communities of judicial officers may occupy the opposite end of the spectrum, as their interpretive framework is generally exclusively law-based and does not show evidence of fundamental change or transformation in the aftermath of the BEPS Project. They may be expected to adopt the most strict or discriminate approach to the normative relevance of BEPS materials for tax treaty interpretation. Yet, over time they will not be unaffected.

The impact of changes in working methods to update the OECD Model and/or the Commentaries on the OECD Model is significant when the legal relevance of BEPS materials is analysed. The system prevailing from 1992 to 2012 of updating static tax treaty language through significant changes of the BEPS Project. They may be expected to adopt the most strict or discriminate approach to the normative relevance of BEPS materials for tax treaty interpretation. Yet, over time they will not be unaffected.

The true nature of tax treaties has been and continues to be questioned. A recent analysis, partly based on a survey among tax treaty negotiators, adopts the position that tax treaties may often be no more than political documents. See Y. Brauner, supra n. 7, at sec. 4.5: “The most common myth surrounding tax treaties is perhaps that the reason for their conclusion is primarily economic, generally to promote cross-border trade and investment. The survey demonstrates the wide variety of reasons states conclude tax treaties, the highly political context of treaty negotiations and the diversity of interests involved. These results expressly reveal the nature of tax treaties – little discussed in scholarship, yet well understood in practice – as political documents that may be necessary for specific tax law purposes and are primarily important for the stability and legitimacy of the international tax regime and its future.”
decided by domestic courts that dealt with the meaning of similarly worded concepts in functionally the same type of dispute (for example, beneficial owner cases, compatibility of CFC rules with model-based tax treaties). The change of working method in the aftermath of the BEPS Project, namely to develop new model clauses and legal infrastructure for more efficient implementation via the MLI, means that the legal relevance of BEPS materials on the substantive meaning of such new clauses may be much less prone to questioning. However, one important exception was identified. It should be expected that the interpretation of the PPT by domestic courts will result in conflicting outcomes. A contributing factor will be the confusing examples about the PPT’s application developed in the 2015 BEPS Action 6 Final Report and subsumed and expanded in the Commentaries on the OECD Model (2017). This is because these examples suggest that a purposive interpretation of the PPT means it is subject to a commercial purpose test that will favour the granting of treaty benefits in the presence of an underlying economic investment. But none of this is clarified in the text of the PPT, which will inevitably lead to arguments about the legal admissibility and meaning of the PPT examples. Some courts will take up the suggestion to imply a commercial purpose test in the PPT, while others will not.

New complexities for treaty interpreters have arisen due to the politically related dimension of the BEPS Project, such as its legitimacy or exclusionary nature in the initial phase. The participation of non-OECD members in the implementation phase underlined the reality that the OECD does not have a monopoly on the production of BEPS materials. BEPS concerns are shared by others, for example the UN, the IMF, World Bank and various institutions focused on developing countries. BEPS materials about tax treaty aspects have been and continue to be produced by these organizations in which priorities are not the same as for OECD member countries and certain BEPS-related tax treaty interpretive positions not shared by the OECD have already been formulated (for example, in regard to indirect offshore share sales).

Consequently, the ever-increasing number of voices about the meaning of tax treaties heard in the post-BEPS era means that all communities of tax treaty interpreters will eventually need to navigate and adapt to a plural landscape.