TAX TREATY NEGOTIATIONS: MYTH AND REALITY

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ABSTRACT

Tax treaties are the building blocks of the international tax regime. There are currently over 3000 tax treaties that regulate the lion’s share of cross-border investment. They are largely fashioned after a single model reflecting an increasing convergence of international tax norms. Despite this convergence, and despite the passing of nearly a century from when the first modern tax treaties were formalized into a model, there remains a great many unanswered fundamental questions about their application, interpretation, and effectiveness.

The importance of these questions was clearly exposed in the recent global displeasure with the norms of the international tax regime, displeasure which has eventually led to perhaps the single most extensive reform initiative for that regime, known as the BEPS project. Much effort and energy were spent on the study of tax treaties before, during, and in the aftermath of this project. Yet surprisingly, almost no effort has ever been made to study the actual making of tax treaties and their negotiation. This Article aims to begin filling this void with a pioneering survey of tax treaty negotiators that documents the process and launches a discourse over its implications for the interpretation and reform of international tax law around the world.

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INTRODUCTION

Tax treaties are the building blocks of the international tax regime.¹ There are currently over 3000 tax treaties that regulate the lion’s share of cross-border investment. They are largely fashioned after the Organization for Economic Cooperation and Development’s (OECD) Model tax convention,² reflecting an increasing convergence of the norms of the international tax regime.³ Tax treaties have been studied


². The most recent version is OECD, OECD MODEL TAX CONVENTION ON INCOME AND ON CAPITAL (2017) (“OECD Model” or “the Model”).

³. For the impact of the Model, see, e.g., THE IMPACT OF THE UN AND OECD MODEL
extensively, yet despite this convergence, and despite the passing of nearly a century from when the first modern tax treaties were formalized into a model, there remains a great many unanswered fundamental questions about their application, interpretation and effectiveness. The importance of these questions was clearly exposed in the recent global displeasure with the norms of the international tax regime, displeasure which has eventually led to perhaps the single most extensive reform initiative for that regime, known as the Base Erosion and Profit Shifting (BEPS) project. Much effort and energy was spent on the study of tax treaties before, during, and in the aftermath of this project. Yet surprisingly, almost no effort has ever been made to study the actual making of tax treaties (preliminary communications, decisions to negotiate, and the negotiations themselves). This Article aims to begin filling this void.

The most obvious reason for the lack of scholarship about tax treaty negotiation is the notorious confidentiality that surrounds the process. Tax treaty negotiators are universally opaque about their countries’ negotiation policies and procedures, and essentially never expose the details of actual negotiations in public. Very few are willing to discuss or write about their experiences even years after the fact. Negotiators take the position that such opacity is required to prevent the advantaging of

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8. The few exceptions include country studies tangentially touching upon some of the issues studied by this Article. See, e.g., Martin Hearson, When do Developing Countries Negotiate away their Corporate Tax Base?, 30 J. INT’L DEV. 233 (2018); JÜRGEN LUDICKE, OBERLEGUNGEN ZUR DEUTSCHEN DBA-POLITIK (NOMOS, 2008).

treaty partners in the process of negotiations, although a few have admitted, only in private conversations with the author, that this confidentiality is based more on tradition than real concerns. These admissions ring true since tax treaties, once concluded, are publicly available and most of them follow standard, commonly understood patterns. In some countries, such as the United States, there are ample public statements by officials and even publicly available “models” that to a large extent reflect the nation’s basic positions. Moreover, one finds it difficult to identify a disadvantage in a more transparent negotiation process, since beyond the aforementioned publicly available material, the range of possible positions on all important treaty measures is very limited. One cannot imagine many “surprise cards” that a country can draw during the treaty negotiation process, the value of which would be diminished by more transparency in the process.

Nonetheless, confidentiality is the universal norm, disadvantaging the study of tax treaties in at least two ways. First, treaties may only be effectively interpreted based on the scant available material that may not perfectly reflect the intent of the parties, at least not to the same extent that a more transparent process could (assuming that intent should be considered in the interpretation exercise). Second, there are many features of tax treaties that may be inferred from their reading, comparison, and from private discussions with officials and other scholarly studies. However, such an inference would be very difficult to formally substantiate based only on publicly available documents. The most straightforward example is the extent to which bilateral tax treaties draw on or even copy the language from the OECD Model. This practice is not a secret, yet to substantiate any claim along these lines, complex and costly studies had to be orchestrated.

Unlike these studies that used “reverse engineering,” by observing and

10. See, e.g., supra note 3.


12. Customary international law is that such intent must be reduced to the language of a treaty and may be used for interpretation in appropriate cases but only if articulated in accepted supplementary materials. See Vienna Convention on the Law of Treaties (1969) arts. 31–32 [hereinafter VCLT]. Nonetheless, Courts may conversely allow parties to use other evidence regarding intent. See, e.g., Yariv Brauner & Tsilly Dagan, The Maccabi Rishon Case Report, in TAX TREATY CASE LAW AROUND THE GLOBE—2013 (Daniel Smit et al., 2014) (an Israeli Court permitting testimony of a former treaty negotiator about the intent of the state in negotiating a particular treaty provision). A similar issue arose recently in the case of Molinos Rio de la Plata SA, c/ Direccion General Impositiva s/recurso directo de organismo externo, pending in the Argentinean Supreme Court, CAF 1351/2014 (I thank Eduardo Baistrocchi for this interesting reference).

13. See, e.g., Lang et al., supra note 3; Ash & Marian, supra note 3.
deducing the properties of tax treaties (usually) from the final texts, this Article approaches the barrier of treaty negotiation confidentiality head-on by directly asking negotiators about their experiences in an anonymous survey that promised not to violate respondents’ official obligations to their countries. The Article features the answers to this first-of-its-kind survey, with interpretation remarks and analysis. The purpose of this Article is trifold: first, it seeks to document the tax treaty negotiation process on a global scale, inter alia providing evidence for aspects of tax treaties that may be known to practitioners in the field but could not otherwise be supported with traditional authorities; second, this Article compares and contrasts (when appropriate) the results of the survey and the common perceptions of tax treaty negotiations as reflected in current laws and interpretation norms; and, third, this Article challenges the current standards of tax treaty interpretation that are difficult to reconcile with the results of the survey, evaluating the benefits of more nuanced interpretation and arguing that some of the difficulties exposed by the survey may be alleviated by policy changes, such as more multilateralism—a reform that might also be desirable on other grounds.

This Article proceeds as follows: Part I includes a brief review of tax treaty negotiation as it is described by tax literature to date. Part II follows with a description of the survey, its purposes, constraints, and its primary findings. Part III elaborates on the results of the survey. Part IV discusses possible extensions and follow up research, and Part V concludes.

I. WHAT IS KNOWN (OR THOUGHT TO BE KNOWN) ABOUT TAX TREATY NEGOTIATIONS

Tax treaties are ubiquitous and quite standard, yet they are multifaceted and complex instruments that cannot be understood through simply studying their immediate legal effect. Even their core function is debated. They are treaties, and as such, in one way or another, parts of the tax laws of all participating countries. Tax treaties are not necessary to achieve their primary doctrinal functions, most important among which is the desire to eliminate double taxation. These functions could be performed, and sometimes are performed by domestic law means. Nonetheless, the ubiquity of tax treaties obviate that countries believe that they cannot capture the benefits treaties purport to provide them solely via domestic law. Indeed, it is commonly believed that investors prefer to invest in countries with tax treaties in effect with the investors’ own

15. Id.
This may be the case, but, at the same time, the economic literature cannot even support the claim that tax treaties are beneficial (in terms of direct investment to the parties concluding them). So, perhaps tax treaties merely signal openness for investment? Perhaps, yet it is difficult to reconcile the breadth and complexity of tax treaty provisions with a mere signal. The exact content of tax treaties also may not testify to their true functions, which are rather standard and almost formulaic. Finally, a weaker signal might characterize tax treaties as a proxy membership card in the international tax regime (in some capacity). This intricacy is generally not reflected in the practice of tax treaties, or even in the (not so expansive) scholarship analyzing them. Tax treaties are typically viewed as real agreements among countries, carefully negotiated and drafted, and therefore directly affecting (affirming or altering) the relevant domestic laws of such countries.

The traditional story of modern tax treaties begins in the end of the 19th century in Europe, where tax systems of adjacent jurisdictions chose to reduce the burden on “cross-border” transactions by setting norms that would divide the taxation rights among them in an acceptable manner. The same period also saw the beginning of the wave of globalization that took the pre-World War I world by storm and significantly increased potential instances of “double taxation,” or over-taxation of cross-border transactions when compared with purely domestic transactions. The large capital exporters (also the more powerful economies in the world) promoted tax treaties as solutions for this double taxation problem, consolidating their proposal into a “Model” tax treaty under the umbrella

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16. Investors likely feel that the mere existence of tax treaties provides certain protection for their investment, beyond the specific tax benefits, perhaps based on the implied comity among the parties to a treaty.


18. See, e.g., supra note 3.


of the League of Nations.\textsuperscript{22} Despite a lack of consent to the proposal among developing countries, the Model was picked up by the OECD after a hiatus due to World War II, and has since become the caretaker of this Model which has come to dominate the international tax regime.\textsuperscript{23} The power of its backing and the lack of alternatives ensured the success of the Model as the standard followed by essentially all bilateral tax treaties for almost a century since its original drafting. It can also explain the lack of alternatives or fundamental reforms of the regime during this period.

This dogma has not been challenged, not even by the leading tax scholarship. Current treatises describe, if at all, only the barebones of the treaty making process (\textit{i.e.}, the state organs who are competent to negotiate treaties on behalf of the state and those who practically negotiate tax treaties (mostly finance ministry representatives, often in combination with officials from state or other departments)).\textsuperscript{24} The key issues they address include the effective dates of treaty provisions, the interaction between treaty and domestic law provisions, and the interpretation of treaty provisions under the norms of the 1969 Vienna Convention on the Law of Treaties (VCLT).\textsuperscript{25} They do not analyze the negotiation process itself or question it. In fact, they are even silent on the validity of the tax treaty once concluded.\textsuperscript{26}

It is not surprising therefore that the application and interpretation of tax treaties is \textit{de facto} limited to their text and the available context (mainly the OECD work product) in their interpretation. Rarely are the conditions pursuant to which the negotiation process took place and other potentially relevant circumstances (relevant to the context, object, and purpose of treaties) considered. This Article pioneeringly seeks to expose these conditions and circumstances through the conduct of the dedicated survey of tax treaty negotiations described next.

\section*{II. The Survey}

To expand understanding of tax treaty negotiation, the author conducted a survey of tax treaty negotiators. The purpose of the survey was to reveal and document information that has generally been kept confidential or released to the public only anecdotally. The survey was conducted by the author independently, without support or intervention.

\begin{table}[h]
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\begin{tabular}{|l|}
\hline
22. \textit{See supra} note 5. \\
23. \textit{See supra} notes 1–3. \\
25. \textit{Id.} \\
26. Primarily because tax treaties stringently follow the formal requirements for a valid treaty, concluded in writing, between states, and following the strictest ratification formalities. External circumstances are simply ignored. \\
\hline
\end{tabular}
\end{table}
by any other entity, and hence the access to potential respondents was limited to the professional ties of the author to this community. Over 300 individuals had been personally approached by the author to take the survey. Most in person and by email. None had outright declined, yet in fact 207 completed questionnaires were collected by the author. The individuals approached were all formal members of their countries’ tax treaty negotiation teams. All, except 4, had negotiated tax treaties within 5 years of the time they were approached to fill the survey.

The survey questionnaire was divided into five basic sections: training for the role of treaty negotiator; preparation for specific treaty negotiations; tax treaty policy, motivations to negotiate, renegotiate and revoke treaties; the substance of treaties; and the process of negotiations itself.

Respondents had negotiated 2,812 treaties (note that this number includes double counting, the extent of which could not be verified due to the anonymity protocol), with one negotiator being part of the negotiations of 40 treaties and two negotiators part of only two. The

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27. Primarily in international conferences, professional and academic meetings of international tax experts.

28. Mostly in person and by email. None had outright declined, yet in fact 207 completed questionnaires were collected by the author.

29. The individuals approached were all formal members of their countries’ tax treaty negotiation teams. All, except 4, had negotiated tax treaties within 5 years of the time they were approached to fill the survey.

30. The questionnaire is attached as appendix A.

31. Presumably the European Union, ASEAN, MERCOSUR or CARICOM.

32. This division is substantive and was not explicitly reflected in the questionnaire presented to the surveyed individuals.
A majority of respondents (over 70%) negotiated between 10 and 15 treaties.

A. Follow Up Interviews

21 follow up interviews were conducted by the author in the years 2019-2020. The interviewees were not asked whether they have responded to the request to fill the survey. They were all very experienced, high-ranking treaty negotiators who had represented both OECD and non-OECD countries. These individuals were selected by the author based on their reputation. The interviews’ sole purpose so far as this Article is concerned was to assess the reasonableness of the survey’s results, which they largely did. All references to (the very few) additional observations that came out of these follow up interviews are therefore explicitly identified as such in this Article.

B. Constraints

The survey was not designed to produce meaningful statistical inferences, yet it is (to the best of the author’s knowledge) the first to independently document the process of tax treaty negotiation, and clearly the first to capture a sizeable portion of the treaty negotiation world. The strict anonymity protocol prohibited country and personal identification beyond OECD membership and self-identification as representing an emerging economy or a less-developed country. The survey consequently could not identify correlations between certain answers and world regions or specific countries. Trends identified are, therefore, general and are often unable to reflect important nuances (such as a specific outlier country’s policies). Nonetheless, the identification of respondents as representatives of OECD and non-OECD countries exposed important differences, rough as they may be, among these groups of respondents.

The survey included some internal checks for consistency, combined with general checks based on follow-up interviews. Yet, the author is certain that self-selection highly impacted the results of the survey. Half of the individuals asked to complete the survey were directly approached by the author. The author requested that they forward the link to the survey to other trusted members of their negotiation teams. Follow-up interviews and the mentioned internal checks indicate that respondents were quite candid in their answers to the survey, although it is difficult to distinguish between answers based on independent

33. In person and by video conferencing.
34. See, e.g., questions 8, 15 & 25.
35. Since the author only had access to individuals with whom he had been acquainted and those who were more open and willing to contribute to an academic study in the first place.
assessment and those that just toe the line. The author could not identify a difference in this regard between OECD and non-OECD respondents.

Finally, the timing of the survey was not intentional, but it is possible that the post-BEPS events have influenced some answers. There is, however, at least one indication that such impact might not have been very significant: the minimal reference to so-called double non-taxation that was at the core of the BEPS Project.36

C. Findings

The findings of the survey for the most part should not surprise international tax experts. They soundly echo the common understanding in the field about the centrality of the OECD, the OECD Model, and related OECD materials in treaty negotiations. The survey similarly supports the doubt often cast over the myth of tax treaties as rigorous, fully-negotiated agreements among states based on an informed study of all relevant aspects and potential outcomes of the negotiations.37

The most common myth surrounding tax treaties is perhaps that the reason for their conclusion is primarily economic, and generally serve to promote cross-border trade and investment. The survey reveals that in fact a wide variety of reasons drive countries to conclude tax treaties; it especially reveals the highly political context of treaty negotiations and the diversity of interests involved. Tax treaties are not particularly efficient devices for the regulation of international investment in markets that constantly change and advance: they take a long time to negotiate, are difficult to amend, and are rarely revoked. They are also negotiated in very conservative ways, all in line with practices steered by existing international institutions (the OECD, the United Nations, the International Monetary Fund (IMF), and others), the MLI being the glaring exception, although not necessarily a significant one.38 The survey confirms the slow processes that prevent dynamic and frequent negotiations of tax treaties, a property that is not inherent in all treaties. 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, as well as its future.

This section highlights the key findings of the survey with a view of

36. See infra Part IV.F (in the answers to question 9 of the survey).
37. See, e.g., Brauner, Vogel Lecture, supra note 6.
38. Since the main goal of the MLI was to protect the conservative processes and properties of the international tax regime and in effect it was heavily controlled by the OECD. See Yariv Brauner, MCBEPS: The MLI—The First Multilateral Tax Treaty That Has Never Been, 46 INTERTAX 6 (2018) [hereinafter, Brauner, MCBEPS].
drawing insights for the current practice of international tax law and perhaps also for its potential reform.

1. Summary of Notable Results

   a. Training

   The training section of the survey made it clear that the population of negotiators may be roughly divided in three: those who received extensive, relevant training; those who received some training; and almost a third who essentially received no specific training prior to joining the negotiation team. The overall confidence of the respondents in their training seems to be wanting, especially among non-OECD representatives. Better training correlated to OECD membership, but presumably even more strongly correlated to specific jurisdictions, mostly, but not solely OECD members. Alas, the survey could not verify and document this conclusion due to the inability to ask about the identity of the specific jurisdictions represented.

   The training questions also highlighted the importance of the OECD Model, with the large majority of respondents receiving at least some training on it, compared to half of the population not receiving any training on the U.N. Model. The answers are clear that one cannot view the U.N. Model as “the” model for non-OECD jurisdictions, but rather as a supplement to the OECD Model, at least in terms of priority during training. The importance of the OECD Model goes hand-in-hand with the dominance of the OECD as an organization. The large number of negotiators participating in OECD work, the superior intensiveness of such work, and the lack of a counterbalance or alternative legal sources fortify such dominance.

   Finally, the answers reflect a significant weakness in the training protocols so far as the laws and policies of actual and potential treaty partners are concerned, which further iterates the focus on the OECD Model convention as a benchmark for negotiations and specific domestic policies that deviate from it, a focus that is further confirmed in the other sections of the survey.

   b. Preparation for Negotiations

   The questions concerning the preparations for specific negotiations revealed a grim reality of poor readiness so far as the laws, policies, and economic position of treaty partners are concerned. Negotiators felt

39. For a detailed discussion of the answers, see infra Part III.A.
40. For a detailed discussion of the answers, see infra Part III.B.
relative confidence in their general training on the OECD and own country’s models, less confidence in their knowledge of their counterparties’ laws (and treaties), and low confidence in their understanding of such countries policies and economic positions. Moreover, most if not all of, the preparation was based on internal resources and traditional, comparative materials, a far cry from what private investors considering investment in such countries would consult. These protocols of negotiations support some general observations. First, jurisdictions (mostly, but not only, and not all OECD countries) with superior training also prepare better for negotiations, permitting them to dominate negotiation partners with different protocols. Second, the confidentiality protocol clearly stifles progress in the preparation of most countries for tax treaty negotiations. Third, the preparation (similarly to the training) protocols lead to a narrow focus on a few issues for negotiation, all of which are framed as adherence or deviation from the OECD model, a framework that prevents a more comprehensive analysis of the actual purposes of tax treaties and their potential impact on the parties. How could negotiators maximize the economic gains from tax treaties when they are barely familiar with the economic positions of either country or the law and policies of their negotiating parties? Non-OECD negotiators essentially all claimed to negotiate treaties to promote cross-border trade and investment, for example, yet the scant economic (and scant law) scholarship on tax treaties cast doubt on the contribution of tax treaties to cross—border investment.41

c. Policy and Drivers of Negotiations42

This survey section attempted to reveal how countries approach tax treaty negotiation when they are unable to constantly negotiate all the treaties they desired. It exposed a significant difference between OECD and non-OECD countries, where the former usually followed a general, written policy, publicly available or confidential, while the latter has had to adhere to ad hoc policies or none at all. In terms of the main drivers of the decision to negotiate a treaty, trade needs and foreign policies featured most prominently, followed by the needs of specific private interests.

When asked the same questions about the decisions to renegotiate existing tax treaties (rather than initially negotiate them), the respondents revealed a clear difference between these circumstances, answering that the needs of private interests had been much more important, and foreign policies much less important (trade needs only somewhat less important)

41. See, e.g., supra note 17. This Article does not enter this debate, yet it points to the fundamental disconnect between stated and real action by governments in the context of tax treaty negotiations.

42. For a detailed discussion of the answers, see infra Part III.C.
for the decision to renegotiate a treaty. Other important factors for the decision to renegotiate had been changes in domestic laws and tax planning schemes that required responses in the form of treaty modifications. One may generally observe that the initial decision to negotiate is more political and diplomatic than the decision to renegotiate that stems from treaty and situation specific features.

Finally, treaty revocations, which are not numerous, were driven primarily by legal changes, and in fewer cases by foreign policy requirements and revelation of violations of treaty obligations. An obvious conclusion from the answers to this section of the survey is that treaties are not a simple product of an economic compromise among states designed to facilitate the trade and investment between them. Tax treaties are also not single-dimensioned, often driven by diplomacy and politics, or by private rather than public interests.

d. The Substance of Tax Treaties

Many factors impact the substance of tax treaties and different countries emphasize different factors during the negotiations of tax treaties. When the negotiators were asked about the (single) primary factor impacting the substance of treaties from their perspective, no single factor emerged as dominant and little difference could be detected between OECD and non-OECD countries. But, a more specific inquiry revealed that negotiators viewed traditional tax treaty norms as most important (double tax elimination, withholding tax reduction and exchange of information), attributing less importance to limits on source taxation of business income and dual residence issues, an interesting result in light of the relative volume of disputes arising from these issues. Correspondingly, dispute resolution was considered only mildly important to the respondents.

In terms of drafting, the survey echoed prior studies, demonstrating the dominance of the OECD Model (and Commentaries) and the lesser but not negligible importance of the U.N. Model (and Commentary) in the drafting of tax treaties. It importantly revealed that only a small part of tax treaties is originally drafted during negotiations.

43. Ash & Marian, supra note 3.
44. Note that this observation is not designed as a critique of tax treaties in this Article, but merely as a positive observation based on the survey.
45. For a detailed discussion of the answers, see infra Part III.D.
46. See, e.g., Lang et al., supra note 3; Ash & Marian, supra note 3.
Personal relationships are important for effective, productive tax treaty negotiations, more so for OECD negotiators who also appeared to have accumulated more of these personal relationship with other negotiators, especially other OECD negotiators.

2. The OECD/Non-OECD Divide

Despite the limitation of not having the exact jurisdictions represented by the respondents, the survey revealed a significant divide between OECD and non-OECD jurisdictions in terms of the tax treaty negotiations strengths. OECD countries’ negotiators are better trained, better prepared for negotiations, are more involved in the international community of policymakers and negotiators (with the particular advantage of participation is OECD work), are advantaged due to the dominance of the OECD Model, its commentary, and other important OECD work (such as the TPG), and are advantaged by the dogmatic practice of treaty negotiations that rely on the OECD Model as the benchmark for such negotiations.

The true divide is however not precisely between OECD and non-OECD jurisdictions but rather between much better-prepared and less-prepared teams. Most of the former represent OECD countries, and most OECD countries are better-prepared than non-OECD countries, but a few jurisdictions seem to be as well trained and prepared for negotiations as their OECD counterparts. All the answers that indicated such better preparedness came from negotiators identified as coming from emerging economies rather than less developed economies.

3. The Disconnect Between Drivers of Tax Treaty Negotiations and Their Contents

Evaluation of the answers regarding the drivers of treaty negotiations reveal that many negotiators often confuse the drivers of negotiations with the factors impacting the eventual contents of tax treaties. Politics and foreign policy are clearly important in the decisions to negotiate many tax treaties. Similarly, grand goals, such as the promotion of cross-border investment, serve as the overall goals of tax treaty negotiators. Yet, one can hardly find a practical impact of these drivers and goals in specific, negotiated treaty provisions that are largely negotiated based on model and general positions of countries, regardless of the circumstances.

47. For a detailed discussion of the answers, see infra Part III.E.
of specific treaties. The survey did find that sometimes negotiators view their treaty network as a whole, assessing the goals of the network rather than treaty-by-treaty, which explains some of the mentioned disconnect, yet too few negotiators testified to taking this holistic position to explain the entire disconnect.

Tax treaties are therefore complex instruments. They are primarily political instruments, designed and practiced in a manner that preserves the current norms and architecture of the international tax regime (and its balance of powers). They also serve as the glue of the regime, legitimacy cards, or fig leaves in the view of some, with impact that goes beyond their normative content.

4. The Non-Negotiation of Tax Treaties

An important finding of the survey is that in practice only a small part of tax treaties is negotiated on average. An even smaller part is originally drafted. The reason for the difference between the above measures is that often negotiation is between two model languages or a model language and the language taken from country models or existing provisions taken from other tax treaties. The Author is convinced that the reported numbers are even smaller in practice, which reduces the “negotiated” part of tax treaties.

5. The Dominance of the OECD Model

The survey confirms the findings of earlier studies that the OECD Model language dominates the language of tax treaties. It also confirms that the U.N. Model is a significant source of language for a large number of treaties. This dominance is complemented by the importance of the OECD commentaries in the negotiation process, yet again most non-OECD negotiators recalled discussing the commentaries only occasionally or rarely. The dominance of the Model led to estimates that 75% of the language of tax treaties is taken from the Model. Such

48. Truly idiosyncratic treaty provisions typically relate to domestic law quirks, such as the United States “saving clauses,” necessary to back its unique citizenship-based taxation. See, e.g., U.S. Model, supra note 11, art. 1(4). Or, see the unique provisions in Chilean treaties that reconcile the model provisions with the unique imputation regime in Chile. See, e.g., 2008 Tax Treaty Between Chile and France, art. 10(2).

49. The most obvious demonstration of this approach is the inclusion of so-called “most-favored-nation” (MFN) provisions in tax treaties, typically providing for low withholding tax rates, the idea being that the country willing to include such a provision was willing to reduce its relevant withholding tax rate yet insisted on postponing the effective date for such reduction to a later date connected with negotiation of similar provisions with other countries. For more on MFN provisions in tax treaties, see, e.g., Ines Hofbauer, Most-Favoured-Nation Clauses in Double Taxation Agreements—A Worldwide Overview, 33 INTERTAX 445 (2005).
estimate is consistent with the findings of the survey about the portion of treaty language that is negotiated in reality, and the percentage of original drafting in tax treaties. The dominance of the Model is not merely an observed fact; it is perpetuated by the practice of negotiations. It is the single most studied educational source and hence familiar to negotiators via their training, preparations, and updates, further augmented in importance in light of the relatively poor training otherwise. It is further supported by the power of the OECD as the caretaker of the international tax regime and OECD countries’ negotiators’ prominence in the field.

III. RESULTS

A. Training

The typical confidentiality surrounding tax treaty negotiations extends to the training protocols for members of the negotiation teams. A few beliefs about tax treaty negotiations, some of which are based on personal knowledge of the author and others on personal conversations conducted by the author, are common among the members of the international tax community. First, the composition of the tax treaty negotiation teams varies among different countries, comprising inter alia of government tax experts, other treasury ministry officials, foreign office officials, and language experts. Second, there are generally no standard training protocols for these positions. Third, training, for the most part, takes place within the respective governments, with the exception of general tax treaty training sessions provided by the OECD, the UN, and the IBFD. Fourth, tax treaty negotiation teams are often dominated by an individual team member, typically this person is the head of the team. Fifth, these dominant members are typically active country representatives in international organizations (namely the OECD, UN, etc.).

The purpose of the questions asked regarding training was not only to document or directly challenge these beliefs. The personal aspects of such challenges may make them ineffective. Rather, the survey sought to understand the actual training activities taking place in the different jurisdictions and test a hypothesis suggesting they are materially different in different countries. Most importantly, the survey intended to compare the training of treaty negotiators representing OECD and non-OECD members, and explore the potential imbalance between treaty partners; an imbalance that extends beyond the training itself and visited throughout the article.

50. Other private and ad-hoc training programs are known to exist as well, yet these are few and far in between and are not believed to have significant impact.
Table 1 depicts the answers to the first substantive question asked: “I received specific training to prepare me for the task of tax treaty negotiator…” One could immediately observe that none of the respondents thought that they received “extensive” training, while approximately a quarter had not received any specific training prior to joining a tax treaty negotiation team. Moreover, close to half of respondents thought that they had been trained only “to a certain extent,” leaving only about a quarter who answered with an affirmative: “yes.” Interestingly, the survey did not find a difference among OECD and non-OECD jurisdictions in this regard. One should note, however, that the non-OECD group of countries is very diverse, and follow-up interviews indicated that the least developed countries’ representatives are generally believed to have been less well-trained as a whole. This impression was common to interviewees from both developed and developing countries.

![Graph showing training levels among OECD and non-OECD jurisdictions.]

**Table 1**

Question 2 followed, asking more specifically: “I was trained in tax treaties law when I joined the negotiation team…” The answers, depicted in Table 2, are interestingly quite different than the answers to question 1 depicted in Table 1. A clear majority of respondents, and more so (over 70%) of non-OECD respondents, answered that they had received no tax treaty law training, while less than a quarter received adequate training. Again, however, one cannot conclude from these

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51. Note that all the Tables in this Article depict on the Y-Axis the number of answers, not percentages, unless explicitly mentioned otherwise.
results that OECD countries provide decisively superior training to their negotiators.

The following two questions focused on the training of negotiators on the two dominant Model tax treaties. These questions were relevant for both the training inquiry and for the inquiry, elaborated on below, about the drafting of treaties. Questions 3 read: “I was trained on the OECD model upon joining the negotiation team:…”. The answers, depicted in table 3, demonstrate that 99% of the negotiators representing OECD countries had indeed been trained on the OECD Model, although only a few reported that their training had been extensive. Negotiators from non-OECD countries had also been trained on the OECD Model, although to a lesser extent than in OECD countries. Less than 20% answered that they received no such training. Note that respondents reported more confidence about their training on the Models than about their general training depicted in tables 1 and 2. This incongruity could be explained by the tendency of training to focus solely or almost solely on the Models. This explanation was widely confirmed by all the follow-up interviews.

Table 2

The following two questions focused on the training of negotiators on the two dominant Model tax treaties. These questions were relevant for both the training inquiry and for the inquiry, elaborated on below, about the drafting of treaties. Questions 3 read: “I was trained on the OECD model upon joining the negotiation team:…”. The answers, depicted in table 3, demonstrate that 99% of the negotiators representing OECD countries had indeed been trained on the OECD Model, although only a few reported that their training had been extensive. Negotiators from non-OECD countries had also been trained on the OECD Model, although to a lesser extent than in OECD countries. Less than 20% answered that they received no such training. Note that respondents reported more confidence about their training on the Models than about their general training depicted in tables 1 and 2. This incongruity could be explained by the tendency of training to focus solely or almost solely on the Models. This explanation was widely confirmed by all the follow-up interviews.

52. See infra Part III.D.
A corresponding question, number 4, read: “I was trained on the U.N. model upon joining the negotiation team: . . .” The answers, depicted in Table 4, reflect significantly less training on the U.N. Model, and approximately half of the participants responded that they had not been trained on that Model at all. Interestingly, OECD countries’ representatives had been trained on the U.N. Model more extensively overall than their non-OECD counterparts.
Next, the participants were asked: “I received training regarding my country’s general tax treaty policy: . . .” The answers to question 5 include the highest positive response among the training-related questions. Non-OECD respondents demonstrated less confidence in such training when compared to their OECD counterparts, yet only slightly so. Approximately 20% of them answered in the negative to this question, however, compared with less than 10% of OECD representatives.

Conversely, the most negative response in the training section of the survey was to question 6: “I received training regarding the negotiating parties’ tax treaty policies: . . .” Well over half (61%) of the respondents said that they had received no such training, and only about 20% had responded in the positive. The divergence among non-OECD negotiators was more significant than that among OECD negotiators. Follow up interviewees unanimously thought that the reason for this difference had been the stark differences among negotiating teams from traditionally better and less prepared teams. Testing for differences in the answers to this question between negotiators representing “emerging economies” and “less-developed-countries” confirm that most of the positive answers (70%), yet not all of them, had come from the former group. Moreover, even among the respondents from “emerging economies,” the majority still responded in the negative to this question. Therefore, one must conclude that some developing countries or “emerging economies” (but not all of them) invest in quality training for treaty negotiation. This
conclusion was confirmed in follow up interviews.”

Table 6

Question 7 is a related question: “I reviewed the negotiating party’s recently negotiated tax treaties (please note all that apply): . . .” It is, of course more related to the next section of the survey that focuses on preparations for specific negotiations, yet it also reflects on the level of training of treaty negotiation team members. The answers to this question showed no significant differences between OECD and non-OECD negotiators and therefore are presented in the aggregate. The answers are also largely consistent with the answers to question 6, demonstrating rather weak training and preparation protocols so far as specific treaty partners are concerned, with the reading of such partners’ most recent treaties being by far the most common method. All of those who answered that they had read all of their partners’ treaties prior to the negotiations also answered positively to question 6.

53. Those countries are well-known in the professional community, still the mention of specific names is beyond the scope of this Article and in many ways immaterial for its purposes.
The final question in this section: “What is the primary goal of tax treaties according to your training?” intended to explore the connection between the training protocols and the substance of negotiated tax treaties. The answers to this question reflect a stark difference between the expectations of OECD and non-OECD countries, with the large majority of the former’s representatives highlighting the elimination of double taxation, while the even larger majority of the latter opted for the promotion of cross-border trade and investment. Small minorities of both populations preferred the answer that tax treaties complement general policies of their countries, with a few other OECD negotiators choosing the answer “promotion of cross-border trade and investment,” and a few other non-OECD negotiators choosing the elimination of double non-taxation. These answers are very traditional and expected. It is almost surprising how few respondents chose the other less obvious, but not less accurate answers.

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54. See infra Part IV.D.
Question 41 belongs to both the preliminary, identity questions of the survey, and to the substantive part itself, asking: “Did you participate in your country’s work with the OECD? Other organizations?” The first goal of this question had been to document the cross-over between negotiation and (country) representation activities of many tax treaties, and to confirm their stature in their countries and respective international organizations. Of respondents, 60% provided a detailed answer to this question with the other 40% answering “no.” Essentially all the positive respondents that identified as OECD country representatives stated that they had indeed participated in OECD work. Among non-OECD negotiators, 30% stated participation in OECD work (presumably as observers). Almost 40% of respondents stated that they participated in U.N. tax work, with no significant differences between OECD and non-OECD countries. A few (<10%) stated that they participated in E.U. tax work (presumably negotiators for E.U. Member States). A total of 7 respondents stated that they participated also in business and similar groups’ work, mentioning CIAT in particular (CIAT is a group of Latin American Tax Administrators).

A second goal of this question had been to add another layer to the documentation of the dominance of the OECD in the global treaty making process, which is evident from the above answers.

B. Preparation for Negotiations

The next set of questions shifted the focus from the general training
of the tax treaty negotiation teams to their preparation for specific negotiations. There is naturally an intellectual overlap between general and specific training, yet the questions in this section attempted to expose the protocols used when specific treaty partners or potential treaty partners where concerned. In addition, the answers to the question in this section add to the picture portrayed by the answers to the questions in the first section concerning the level of training and preparation of the teams for negotiations.

The first question in this section that focuses on specific preparations for negotiation was question 10: “I studied the tax laws of the negotiation partner prior to the negotiation session: . . .” The answers are depicted in Table 10. Approximately 20% of the participants answered in the negative, and only 50% of them felt confident about such preparation (answering “extensively” or “yes”). It is impossible of course to seriously negotiate a treaty without knowledge of the domestic law infrastructure to which it applies, so these results are problematic. They are even more disturbing for non-OECD countries where the percentage of “no” answers was close to 30%. Note that the answers are individual, so it is possible that negotiators who answered “no” had been coupled with better trained negotiation team members, yet this explanation cannot explain the extent of the negative answers and regardless points to the weakness in preparation for negotiations, especially among non-OECD countries. At the same time, note that the percentage of confident positive answers (“extensively” or “yes”) among OECD participants from OECD countries was lower than among non-OECD countries, which casts doubt over the efficacy of preparation in OECD countries as well. Finally, the answers to this question parallel those of question 7 demonstrating similar levels of preparation in terms of the study of a negotiation party, domestic tax law, and treaties. Yet they are more positive than the answers to question 6 inquiring about such party’s tax policies, a less important matter for negotiators according to this survey.
Table 10

Question 10 had a follow-up question 11 that had been presented only to those who had not answered “no” to question 10, inquiring “What form of study (please note all that apply)?” The response, depicted in Table 11, demonstrates an overwhelming preference for self-study of the tax laws of the negotiating party. Less than a quarter of the respondents to this question testified to conducting hearings with business operating within the jurisdiction of the trade partner (presumably having first-hand experience with the material), while only very few testified to using other methods of study. Most interestingly, only two participants had hired local experts (in the form of a local law firm or a similar firm) for advice. Question 11 permitted elaboration, which 33 participants took advantage of, yet their answers reflected similar conservatism with the majority saying that they primarily relied on IBFD (comparative law) materials, while a smaller significant number (10% of respondents) answered that they relied on materials provided by other parts of their governments, mainly by the ministries of foreign affairs. These answers were generally confirmed by the follow up interviews.
An even less impressive picture was presented when the participants were asked about their country’s economic position. Question 12 read: “I received specific training updating me on my country’s economic position: . . .” The answers, depicted in Table 12, demonstrate that over 50% of respondents had not been trained on their own country’s economic position, a result especially pronounced among non-OECD countries’ negotiators. Only a rough quarter of respondents felt confident (answering “yes”) in such training.
Similar to question 10, question 12 was followed-up with question 13 which asked those who did not answer “no” to question 12 about the form of training employed. In this case the answers were diverse and yet again demonstrated preference for reliance on intra-government sources.

![Graph]

**Table 13**

Question 14 followed up with a similar question about training on the treaty partner’s economic situation. The answers, depicted in Table 14, demonstrate an even grimmer picture than that presented by question 12, where about 2/3 of the participants felt that they had not been trained on their counterparties’ economic situation. Again, the results demonstrate somewhat better training among negotiators from OECD countries, but still over 50% of them had not received such training. This result must be interpreted as a belief that such training is unnecessary for effective tax treaty negotiation. This belief must signify that the bilateral economic position is less important in the course of tax treaty negotiations despite the fact that that position is most often lauded as the first basis for the conclusion of tax treaties.
Table 14

Finally, toward the end of the questionnaire, question 40 returned to the matter of preparation for negotiation, asking: “While negotiating, to what extent were you updated on: . . .” The answers, depicted in Table 40, provide another perspective on the above answers. It is obvious from this Table that OECD work (presumably OECD Model related work like reports, Transfer Pricing Guidelines (TPG), and other data) drives the negotiation of tax treaties together with domestic law constraints. Meanwhile, more general policy-related and less standardized sources are of much less interest for negotiating team training.
The third section of the survey shifted the focus from preparation to policy. The decision to negotiate or re-negotiate a tax treaty is crucial among the policy decisions faced by all countries since none of them is practically able to negotiate beyond a few treaties each year. The development of tax treaty policy and priorities is therefore key to an efficient practice. A relevant question to this survey section, question 5, was asked in the first section. The answers to question 5 for the most part demonstrated that negotiators felt confident about their training on such policy. This survey section takes this confidence to task.

Question 16 followed up with a question: “Would you say that your country has a clear policy regarding priorities in tax treaty negotiations?” The answers clearly diverged between OECD and non-OECD representatives. The former (almost all) reported having relevant policies, with over 60% reporting having stable policies and a bit over a quarter reporting ad-hoc policies established for negotiations. These answers are
generally consistent with the general satisfaction from the relevant training expressed in the answers to question 5. The answers of non-OECD negotiators however were starkly less positive, with a third reporting no treaty negotiating policies and close to a half reporting that policies had been established ad-hoc. Less than a quarter reported that their countries had had stable treaty negotiation policies. There is at least some inconsistency between these answers and the corresponding answers to question 5, as it would be difficult to have training on non-existing policies. One explanation for this inconsistency may be that some of the respondents confused general policy training, such as OECD Model related training, with their country specific tax treaty policy training.

<table>
<thead>
<tr>
<th>Yes, and it is publicly available</th>
<th>Yes, there is a written policy that is available to treaty negotiators, yet is not publicly available</th>
<th>Policies are established ad-hoc</th>
<th>No, there isn’t</th>
</tr>
</thead>
<tbody>
<tr>
<td>OECD</td>
<td>Non-OECD</td>
<td>OECD</td>
<td>Non-OECD</td>
</tr>
</tbody>
</table>

Table 16

Question 16 was preceded by question 15 that asked directly: “What were the primary goals of treaties negotiated by you? (Total should be 100%): . . .” The purpose of this question was to explore the broad stroke treaty policies of countries, and to serve as a baseline question to contrast with other, similar questions elsewhere in the survey. The answers to question 15 demonstrate that the two major goals of tax treaties were to accommodate trade needs and to complement (general) foreign policies. Specific needs of MNE were also important policy factors. Among the “other” answers respondents and follow up interviews mentioned the
specific needs of certain individuals (distinguished from MNE about which the survey specifically asked), and the needs of other economic enterprises, such as funds and other financial institutions, which could be added to the needs of MNE to demonstrate the sizable impact of lobbying and specific economic interest groups in the development of tax treaty negotiation policies. Finally, a few answers mentioned a general desire to expand a country’s tax treaty network as a primary negotiation goal.

It is interesting to compare these answers with the answers to question 8.55 One can immediately observe a difference between treaty goals as defined by the training and treaty policy in practice, and particularly treaty goals as considered in the decisions to negotiate or prioritize the negotiation of tax treaties.

Table 15

The next set of questions further explores the drivers in the decisions of countries to commence negotiations. First is question 17: “What was the impact of the bilateral trade position among the negotiating parties on the decision to commence negotiations?” The answers reveal a clear belief that the bilateral trade position of the parties had been very important (the most important when compared with competing drivers) for the decision to commence negotiations. The answers show a difference between OECD and non-OECD negotiators, where the latter were more careful in the attribution of importance to this driver for negotiations, but at the same time fewer non-OECD negotiators answered that the bilateral trade position had had no impact or had been unimportant in the decision to commence negotiations. Follow up interviews revealed that political and foreign policy considerations are

55. Supra Part IV.A.1.
likely the primary reasons for commencing negotiations with treaty partners when the bilateral trade position could not justify them.

Question 18 followed with: “What was the impact of needs of domestic investors/businesses on the decision to commence negotiations? Note that this question is more general than question 15’s reference to the impact of MNE needs. Domestic interest features almost a quarter of the principle purpose of treaty negotiations in question 15. The answers to question 18 support this outcome where over a third of responses were that these needs were either significant or important in the decision to commence negotiations. Another third thought them to be somewhat important and another third not important or having no impact. The interesting result was the divergence between OECD and non-OECD respondents to question 18. OECD negotiators were more extreme in their answers, where close to a half reported that private interests had had no impact on the decisions to commence negotiations, and over a quarter reported a significant impact, while the majority of non-OECD negotiators opted for the less extreme options, stating that such interests had an important or somewhat important impact.
Question 19: “What was the impact of foreign policies on the decision to commence negotiations?” also reflected differences between OECD and non-OECD negotiators, albeit smaller than those in question 18. The former attributed less importance overall than the latter to foreign policies in the decisions to commence negotiations. These results were challenged by some follow up interviews that reflected a stronger tendency among the most powerful countries to commence treaty negotiations based on foreign policies.56

56. Some well-known examples include the United States signing of tax treaties with countries in the Eastern Bloc beginning with the years of the détente and former USSR republics immediately after the collapse of the Soviet Union, the revocation of the treaty with South Africa in protest of Apartheid, and the short-lived United States–Honduras Tax Treaty. See, e.g., Rocco V. Femia & Layla J. Aksakal, The Use of Tax Treaty Status in Legislation and the Impact on U.S. Tax Treaty Policy, TAX NOTES INT’L (Apr. 26, 2010).
The results are in conformity with the central role of foreign policies as a primary purpose of tax treaties, as reflected in question 15.57

Table 19

Finally, this section included an open question 20: “Did anything else impact such decisions? Please elaborate:…” The response to this question was scant, only 21 individuals responded to this text question, yet 6 of them simply responded: “no.” The others mentioned regional considerations, membership in international organizations (regional or others), “politics” without elaboration, and a desire to expand the tax treaty network.

The next four questions repeated the former questions but focused on decisions to renegotiate treaties rather than to initially negotiate them to examine the difference in considerations in these two cases. The first question therefore, question 21, asked “what was the impact of the bilateral trade position among the negotiating parties on decisions to

57. Supra Part IV.C.1. Note that as already mentioned with respect to question 15 the answers are not in line with the treaty goals as defined in training. See answers to question 8, supra Part IV.A.1.
renegotiate treaties?” Overall, the answers to this question reflected a lesser importance to the bilateral trade position in renegotiation decisions when compared to initial negotiation of tax treaties, however the difference was not large. Almost the entire difference is attributed to OECD negotiators.

Table 21

Question 22 asked “what was the impact of the Needs of Domestic Investors/Businesses on decisions to renegotiate treaties?” This question parallels question 18, yet the answers reflected a large difference between the situations, attributing much more importance to domestic private interests in the case of renegotiation of treaties. Although differently distributed, the answers of both OECD and non-OECD negotiators strongly reflected this difference. Moreover, less than 10% of the answers indicated no impact or no importance, while a third of the answers indicated so for question 18.
Question 23 asked “what was the impact of foreign policy on decisions to renegotiate treaties?” This question parallels question 19. Again, the different circumstances led to significantly different answers indicating a much lesser role for foreign policy considerations in treaty renegotiations. The difference for non-OECD negotiators was larger than that for OECD negotiators yet it was significant for both populations.
Table 23

Question 24 paralleled question 20 asking “did anything else impact such decisions?” This question attracted more interest than question 20, with 53 responses. Most mentioned changes to domestic laws and regulations and changes in treaty or foreign policies. Approx. 40% mentioned response to tax avoidance/evasion structures revealed by one or more tax authorities. A few respondents mentioned (response to) positions taken by the treaty partner (in newer treaties). A few respondents mentioned again the interests of particular individuals and companies with political powers.

Question 26 asked: “what the main reason(s) for revoking tax treaties by your country has been (if any)?” Treaty revocations have not been extensively studied to date, and the instances of revocations, although not insignificant are sparse when considering the numbers of tax treaties overall. Consistently, just about half of respondents (92) answered that the question was not relevant to their experiences, while 11 respondents refrained from answering this question. Nonetheless, among those who had viewed the question relevant the large majority (69%) referred to legal changes that required such drastic action, only 16% blamed violations of treaties, while 15% referred to foreign policy reasons.
Follow up interviews raised a suspicion that the latter percentage is too low, since the interviewees viewed foreign policy as very important in revocation cases, yet, perhaps some of the respondents viewed the category of legal changes more appropriate in cases that could have fallen under both categories, such as in cases of sanctions of different kinds imposed by one (or both) party/ies on the other/s that had made tax treaties between them inoperable.  

![Pie chart showing percentages]

Table 26

D. The Substance of Tax Treaties

Perhaps the core subject of the survey, this section attempts to extract the perspectives of treaty negotiators of the substantive provisions of the treaties they had negotiated.

Question 25 is a preliminary general question, asking: “what factor has impacted the substance of the treaty negotiations you have participated in the most?” One can immediately observe that a variety of factors are weighed by negotiators, with different negotiators focusing on different drivers: bilateral trade, the needs of domestic private interests,

changes in domestic and international norms, and foreign policy are weighed almost equally (with foreign policy having a slightly lesser weight). There was no significant difference between OECD and non-OECD negotiators’ answers to this question. A small percentage of the respondents opted for an “other” answering. Of these 8 respondents (all OECD negotiators), 7 mentioned tax avoidance schemes and cases related to them as primarily affecting the substance. A few also mentioned the need to expand the treaty network of their country.

Two important comments are warranted. First, some of these answers are puzzling, because foreign policy considerations for instance hardly interpret to particular tax treaty norms; perhaps respondents referred to the indirect impact of foreign policies on the mandate to conclude a treaty or accommodate the needs of treaty partners, whatever the content may be or based on acceptable norms (i.e., OECD Model norms), and perhaps they expressed the importance of the political mandate to conclude a treaty. Similarly, it is difficult to see how the wish to expand a country’s treaty network impacts the substance of its treaties beyond perhaps more readily accepting the standard Model rules. The answer that tax avoidance schemes primarily drove the substance of tax treaties is more on point. Yet, again, treaty anti-avoidance measures occupy at best a very small part of tax treaty norms, which raises questions about this answer. Nonetheless, it is possible that these answers, all by OECD negotiators, focused on recent changes to tax treaties influenced by the BEPS project, the 2017 OECD Model and the MLI, which indeed primarily featured anti-avoidance norm changes and additions.

Second, a comparison of the answers to this question and the answers to the similar questions 15 and 8 demonstrate inconsistency, raising the suspicion that the substance of tax treaties does not bear a direct relationship with the general policy goals or the drivers to negotiate these treaties.

60. The foreign policy option was inserted to this question to test the precision of the answers, drawing a parallel between question 25 and similar questions about the purpose of tax treaties. Evidently, at least a sizable number of answers were imprecise.

61. See supra Parts III.C & III.A.
Table 25

Question 28 followed up on question 25 with a more detailed inquiry and an opportunity to evaluate the weight of different factors (not only the primary factor) impacting the substance of tax treaties. It asked: “assess the importance of the following in the negotiations of the tax treaties in which you participated (percentages): . . .” As probably expected, the reduction of double taxation and the facilitation of cross-border investment featured most strongly in essentially all of the answers. A related factor, the signal that the economic environment in the treaty partners is stable and hence safe for foreign investment had similar strength. The commitment to exchange of information was also viewed as strongly as the above, which on the one hand is expected as it has been a fundamental part of tax treaty norms from their beginnings. Yet, on the
other hand, is directly beneficial and hence important mostly to countries with significant outbound investment, a distinction that the survey did not reveal (the answers of OECD and non-OECD negotiators were very similar on this matter).

The two fundamental impacts of tax treaties came next. Withholding tax reduction was viewed as at least “important” to 90% of respondents, and the limitation on source taxation of business income, which involves a much larger pool of taxes was considered much less important. Only 60% of respondents viewed it as at least “important.” One other key impact of tax treaties—the resolution of dual residence was viewed as even less important. The only category deemed less important was the assistance in the collection of taxes, a controversial norm that a majority of countries exclude from their tax treaties. The provision of treaty dispute resolution fared better but not as much with only about 2/3 of the answers viewing it as at least “important.”

The elimination of double non-taxation category was particularly interesting since it had been at the heart of the recent BEPS and post-BEPS developments. Indeed, a third of the respondents (mostly OECD negotiators) viewed it as critical to the negotiations, yet another third (mostly but not overwhelmingly non-OECD negotiators) viewed it as less than important. Foreign policy goals again featured as at least important for 2/3 of the participants, consistent with related questions in this survey. The desire to conform domestic laws with international standards was similarly viewed as at least important by 2/3 of respondents, and at the same time about 1/3 viewed it as marginal or not important (with similar representation to OECD and non-OECD negotiators).

Table 28

Question 29 documents the impact of the OECD Model on tax treaties, an impact demonstrated and estimated by other recent scholarship. It asked: “to what extent has the language of the OECD Model served as a default in negotiations?” Unsurprisingly, essentially all OECD negotiators answered, “to a large extent.” Almost 2/3 of non-OECD negotiators had the same answer, with only less than 10% of them answering that it had had no influence.

63. See supra note 3.
Table 29

Question 30 asked the same question about the U.N. Model: “to what extent has the language of the U.N. Model served as a default in negotiations?” The large majority of non-OECD negotiators as well as about 20% of OECD negotiators answered that this Model had often served as the default language in negotiations. A little more than 20% of non-OECD negotiators attributed more importance to that Model, answering “to a large extent,” while only 2 OECD negotiators testified to have never used the U.N. Model as a default text.
Table 30

Question 31 asked “how often have provisions in other treaties concluded by one or both parties been used in the drafting?” This is a well-known practice among experts and indeed about 2/3 of the respondents answered that such use had been frequent (chose the “often” answer) and another 10% answered “to a large extent.”
Question 32, one of the key questions in the survey, asked: “In an average negotiation, how many treaty articles/specific paragraphs were seriously negotiated in your estimate?” The answers to this question confirmed that only parts of treaties are actually negotiated between the parties. On average, respondents claimed to have negotiated about 13 articles (out of the typical 30+ treaty articles) and more specifically about 18 paragraphs (out of around 100 typical treaty paragraphs). There was a difference among OECD negotiators who on average claimed to have negotiated one article and one paragraph more than non-OECD negotiators. For the purposes of this Article the difference was deemed immaterial. One must question the accuracy of the answers to this question. Careful follow up interviews led to the conclusion that the numbers are likely inflated. A few features of the answers support this conclusion: first, a few answers were clearly exaggerated (e.g., one respondent answered that they negotiated 38 treaty articles on average); second, quite a few respondents used the same numbers for articles and
paragraphs, which is possible yet realistically suspicious,\textsuperscript{64} and third, respondents used mostly numbers rounded to the tens, especially in their answers to the number of paragraphs negotiated (many 25, 30, and 40), numbers that seemed too high to the follow up interviewees. In any event, the author is confident that the results are not deflated, which means that at most 10–15 tax treaty articles and 15–20 paragraphs are actually negotiated on average.

Question 33 followed up on question 32, asking: “Can you estimate what percentage of the language of your treaties included original drafting?” Note that this is a different question than question 32 since it is possible to negotiate a paragraph and settle on model language rather than engage in original drafting. The answers to this question, with no significant difference between OECD and non-OECD negotiators averaged 14%. Like question 32, the answers to this question are likely inflated, not truly reflecting the true percentage. Most follow up interviewees estimated the answer between 10–15%, similarly to most respondents. Upon reflection, guided by the interviewer all admitted that a 5% (around 5 treaty paragraphs) is a much more realistic estimation. Beyond the tendency to attribute importance to one’s role, it is natural to focus on one’s active role in the negotiations, and nothing is more active than original drafting, rather than the less active negotiation over model language. Moreover, a very large number of respondents used the same numbers for questions 32 and 33 even though the former asks about articles and paragraphs and the latter about a percentage. The proximity of these questions may have compromised their utility.

Question 34 asked about a very common practice in the interpretation of tax treaties: “to what extent has the OECD commentary been discussed during negotiations?” This is important for both the justification of the vast use of the commentary in practice and to examine the thoroughness of the negotiations (the commentaries clarify for most purposes many treaty provisions as well as provide some alternative treaty language in some cases). Unsurprisingly, OECD negotiators answered that the commentary was extensively discussed, with only 10 opting for “occasionally” discussed. Non-OECD negotiators portrayed a very different picture, with less than a quarter answering “extensively” but almost the same number answering “rarely” or “never.” Taking into account that the large majority of treaties are not concluded among OECD members these answers show a discrepancy between the answers of OECD and non-OECD negotiators.

\textsuperscript{64} Since the most important and hence likely most heavily negotiated articles include multiple paragraphs that are likely to be negotiated if their subject matter is controversial.
A similar question was asked about the U.N. commentary (despite its perceived lesser impact),\textsuperscript{65} “to what extent has the U.N. commentary been discussed during negotiations?” The answers, as expected, attributed much less importance to this commentary. A third of OECD negotiators answered that they had never discussed it during negotiations, while non-OECD negotiators were split between the more positive answers with less than 50% of them answering that they had discussed the U.N. commentary “occasionally” during negotiations. Like the answers to question 34, the discrepancy between the OECD and non-OECD negotiators; answers to this question cannot be easily reconciled.

\footnote{\textsuperscript{65} As well as the argument in this commentary itself that it has no intention of being binding. 2017 United Nations Model Double Taxation Convention, Introduction, \textsection 12.}
Table 35

The next questions were about secondary sources of law beyond the commentary, with question 36 asking: “to what extent have court cases been discussed during negotiations?” The large majority of non-OECD negotiators answered that cases had either “rarely” or never been discussed, while over a half of OECD negotiators answered that cases had been discussed occasionally or even often. One could explain this discrepancy by arguing that intra-OECD negotiations discuss cases while other treaty negotiations rarely do so, yet this Article views this explanation as hardly convincing.
Table 36

Other secondary legal sources had received even less attention than cases. Question 37 asked: “to what extent have secondary sources (such as books, articles, etc.) been discussed during negotiations?” About 30% of OECD negotiators answered “often” or “occasionally,” while less than 5% of non-OECD negotiators gave similar answers (2/3 of them answering that they had never discussed these sources during negotiations).
Finally, question 39 wrapped up this section of the survey with a slightly different question: “can you estimate what percentage of your country’s treaties primarily follows the:” (different models). The OECD Model featured in 80% of OECD negotiators, with the U.N. Model only in 10% of them. OECD negotiators also answered that over 50% of their treaties followed their country’s own Model. A simple explanation for these numbers is that it includes both distinct country models, such as the U.S. Model, and other country models fashioned after the OECD Model. It is likely that U.S. respondents, for example, distinguished between treaties primarily fashioned after the U.S. Model and treaties that significantly divert from such model, while other countries’ representatives’ answers simply reflected the overlap between the OECD Model and their own country models, an explanation that was confirmed in the follow-up interviews.

Non-OECD negotiators answered that about half of their treaties followed the U.N. Model, while over a third followed the OECD Model (mostly treaties with OECD treaty partners or non-OECD partners that follow the OECD Model regardless of their status as non-members).

In the interim one could conclude, first, that the OECD is more influential than the U.N. Model, yet not decisively so, refuting an
argument that the U.N. Model is merely a marginal afterthought. The OECD Model is not, however, dominant beyond the OECD world. Second, OECD negotiators (or negotiators viewing the OECD Model as superior) more significantly influence the drafting of tax treaties. Third, individual country models are significant in the negotiation of tax treaties, although this survey could not precisely map the divergence of such models from the dominant models, especially the OECD Model.66

Table 39

E. The Negotiation Process

The last section of the survey focused on the negotiation process itself. Question 38 asked directly: “how important are personal relationships and a friendly environment for a successful and quick negotiation?” The respondents were frank in admitting that personal relationships and affinity among negotiators were very important for quick and successful treaty negotiations, with 47% stating that it was “extremely important”

66. This would require a more detailed questioning. In the follow up interviews, however, it became clear that U.S. negotiators at least attribute much importance and influence to its unique U.S. Model.
and 34% “very important.” Only a single respondent thought that it was not important at all, none chose the “slightly important” option, while the rest (18%) thought that it was “moderately important.” Follow-up interviews strongly supported these results, implying that flexibility and willingness to compromise were often impacted by the behavior of, and history between the persons negotiating the treaty.

The general results of this question are both quite clear and universal, yet one notes that OECD negotiators were much more positive than non-OECD about the importance of personal relationship on treaty negotiations, with non-OECD negotiators preferring the less enthusiastic terms of “very important” and “moderately important” to “extremely important,” as well as still keeping positive about the impact of such personal relationships. The difference could be explained by cultural differences (both in terms of the level of reservation in expressing the importance of personal relationships and in terms of the homogeneity among OECD negotiators that is undoubtedly more pronounced than that of the general population of tax treaty negotiators), but also by the fact that OECD negotiators tend to meet more regularly than the general population of tax treaty negotiators and hence have more opportunities to forge closer personal relationship.
Question 27, located earlier in the order of questions answered (just after the questions about treaty renegotiations and revocation) asked: “what are the main reasons for delays in concluding tax treaties?” The answers to this question are of course relevant also to the inquiry about the substance of tax treaties,67 but in terms of the negotiation process itself the answers somewhat conflict with the answers to question 38 above, when less than 5% of respondents mentioned “personal differences and style” or other communication issues as part of the main reasons for delays in negotiations.

The respondents therefore opted to emphasize substantive disagreements among countries as the main reasons for such delays, yet these reasons diverged. 25% blamed differences in domestic laws, almost all negotiated for non-OECD countries, with slightly fewer (essentially all OECD) noting disagreements over special tax regimes (a special case of domestic law differences), tax rates, disagreements regarding the extent of double tax relief (again all OECD, mostly referring to tax

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67. See supra Part IV.D.
sparing and insufficient limitations on exemption based relief), and general politics (both OECD and non-OECD). Less than 5% of the responses, all coming from non-OECD negotiators, mentioned constitutional constraints, likely in reference to the exchange of information and dispute resolution mechanisms in tax treaties.68

![Table 27](image)

**F. General Issues**

Though not belonging in its own section of the survey, question 9 asked: “in your opinion: does the impact of actual tax treaties correspond to their primary purpose you mentioned above?” Note that this question followed the first question asking about the primary purpose of tax treaties. About half of the respondents were a bit hesitant about it, answering “somewhat,” with only a third of respondents answering an unequivocal “yes,” and only a few “no” answers. There were 15%, who chose instead to elaborate in text. About 5% commented that they viewed the primary purpose of tax treaties was to eliminate both double and double-non taxation, which is not an answer to the question but rather

68. The constitution of some countries safeguards bank secrecy and of others who prohibit the delegation of authority implied in mandatory arbitration provisions. See, e.g., 2017 U.N. Model, Commentary on art. 25, ¶ 65, and Commentary on art. 26, ¶ 2.
perhaps a complaint about the request in question 8 to pick a single primary goal for tax treaties. The other 10% expressed a much more interesting view: that treaties are primarily ceremonial or declaratory, emphasizing that most benefits are already granted or possible under domestic law anyway. Of the respondents, 10% who chose this text option also mentioned that treaties are concluded based on general policies of the countries, with a few mentioning that treaty conclusions take the entire network of agreements into account rather than each tax treaty separately. This implies that the network as a whole perhaps meets the goals even if single treaties do not seem to do so. This question was extensively discussed in the follow-up interviews. These interviews confirmed most of the sentiments expressed by the responses to question 9, but they also challenged the “yes” answers as dogmatic, “toeing the party lines,” although there appeared to be no significant difference between OECD and non-OECD negotiators in the answers to this question. The “yes” answers were tested against the other “treaty purpose” questions in the survey and were found to have very strong correlation to standard, dogmatic answers to these latter questions.  

Table 9

Finally, question 42 concluded the survey with an open question.

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70. For example, answers to questions 8 & 15.
asking for comments on the survey itself. Only 21 respondents answered this question. More than half of them mentioned that some of the questions had been difficult to answer since their countries had had different policies for treaties with developed and developing countries, insisting on the OECD or own model in the former case and willing to accept the U.N. model in the latter. These answers, coming almost exclusively from OECD negotiators, were expected, yet the survey avoided the complexity of depicted special protocols for different countries due to the concern that it would make the already somewhat long and complex survey prohibitively so, that it would nudge the respondents (especially OECD respondents) to toe the line and provide dogmatic answers, such as that each negotiation is carefully strategized and planned for based on the specific circumstances, and that it would be useless since the country identity of the respondents themselves could not be revealed. When the answers to the survey revealed divergence of this kind it was explicitly discussed.

Another common comment was related to tax treaties more generally, essentially stating their futility, arguing that domestic law solutions are more effective. In a similar vein, the same respondents tended to argue that some countries regularly violate tax treaties, a practice tolerated solely for political reasons. Almost all the respondents mentioned their distaste for treaty override, some specifically mentioning the U.S. practice.

IV. THINKING DIFFERENTLY ABOUT TAX TREATY INTERPRETATION

The main contribution of this article is empirical, yet it is useful to demonstrate its potential law and policy implications. This section elaborates on two immediate implications of the survey and its analysis (leaving further analysis to future work): (1) how better understanding treaty negotiations might aid in their interpretation and (2) how these negotiation measures affect a future multilateral tax treaty.

A. Tax Treaty Interpretation

1. Conventional Tax Treaty Interpretation

There is no standard cannon of tax treaty interpretation. The theory and practice of tax treaty interpretation is for the most part quite universal. Tax treaties are commonly interpreted as such, as treaties (i.e., international agreements between countries (mostly bilateral in the case of tax treaties)). The text of the treaty is publicly available and therefore
is not usually in debate. Interpreters therefore have typically applied the norms of the VCLT, which are also widely recognized as customary international law. As is well-known, the VCLT calls first for a literal interpretation of the treaty language according to its “ordinary meaning,” but also in their “context” and in light of the treaty’s “object and purpose.” Interpretation of any kind naturally follows this rule, yet in the treaty context the rule does not provide the relative weight that should be given to its components (words/context/object/purpose). Moreover, many factors and methodologies (such as a historical analysis) could (and should) inform this process of interpretation, again with little guidance about the appropriate balancing act required from judges, who must rule on specific outcomes of the interpretation. There is a long-standing debate among scholars over the ability of judges (and other interpreters) to master this balancing act. In practice, the more literal interpretations tend to dominate tax treaty law.

The VCLT also provides a secondary interpretation norm to regulate the use of supplementary interpretation materials in appropriate circumstances (ambiguous or obscure language, absurd outcomes, and confirmation of Article 31 outcomes). There is a debate among experts whether supplementary material are always available to support interpretation under Article 31 or perhaps they kick-in only when needed. This debate is very important for tax treaty law since it bears for example on the question whether the OECD Model Commentaries are part of the context of the treaty or merely supplemental material. Naturally, if the latter is correct and one takes the position that Article 31 is sufficient to interpret a tested treaty provision then one should not rely on the Commentaries in the process. In practice the use of the Commentaries is essentially universal, yet such Commentaries had not even been discussed in the process of negotiations of many treaties, and many treaties adopted

71. The two most common exceptions for this conclusion are the use of multiple, usually two, authentic languages in bilateral treaties, and, more recently the treaties amended by the MLI.
72. Supra text accompanying note 23.
73. Id.
74. VCLT, supra note 12, art. 31.
75. See, e.g., Edwin van der Bruggen, Unless the Vienna Convention Otherwise Requires: Notes on the Relationship Between Article 3(2) of the OECD Model Tax Convention and Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 43 EUROPEAN TAX’N 142, 142 (2003).
76. VCLT, supra note 12, art. 32.
77. For an excellent review and analysis of this matter, see Michael Lang, Can Law Regulate its own Interpretation? Relevance and Meaning of Articles 31-33 Vienna Convention on the Law of Treaties (VCLT) and Article 3 para. 2 of the Model Convention of the Organisation for Economic Cooperation and Development (OECD MC) for the Interpretation of Double Taxation Conventions, in RESEARCH HANDBOOK ON INTERNATIONAL TAXATION (Yariv Brauner, ed., forthcoming 2020).
the Model language without a consideration of the Commentaries.\footnote{78} Regardless of the debate or the reality reflected in the survey, courts heavily rely on the OECD Model and Commentaries, almost universally. They do so simply because these materials are available to them. They almost never support such reliance with legal analysis and reasoned justification.\footnote{79}

A particular provision that is common to almost all tax treaties further throws gasoline on the fire of the debate over the proper interpretation of tax treaties. Model Article 3(2) effectively provides that terms not defined in tax treaties would have their meaning under the domestic law of the country imposing the tax. Most scholars and in practice essentially all countries and interpreters take this provision literally and the resort to domestic law is rampant.\footnote{80} This practice is difficult to reconcile with the duty of the interpreter under the VCLT, most importantly an interpretation of a term based on ordinary meaning, the context, and the object and purpose of the treaty. Tax treaties often include definitions. Such definitions are gradually decreasing in modern treaties, and there are many treaty terms that could (easily) be interpreted as such without the need to resort to domestic law.\footnote{81}

The survey informs this debate in at least two ways: first, the incomplete negotiation of treaty provisions, and even more so the minimal original drafting of treaties cast doubt over the level of obligation taken by the parties in tax treaties. The stark differences in training among countries amplifies such doubt, and the poor preparation for negotiation in some countries makes a mockery of the notion of (an informed) “agreement” that is at the basis of all treaties. Of course, all countries are bound by the treaties they sign and arguing that such treaties are invalid due to insufficient agreement or a lack of sufficient preparation by one of the parties would be futile, yet some of the deficiencies exposed by the survey may be remedied by a fresh view of treaty interpretation rules that takes the reality of treaty negotiation into account. For example, it seems that a contextual interpretation of a treaty term must be superior to a resort to domestic law in such a world. Of course, when such interpretation is difficult or its outcomes are too controversial, resorting to OECD Model 3(2) is acceptable. Also, an automatic resort to Article 3(2) whenever a term is not explicitly defined

\footnote{78} See Appendix A, Survey Question 34, infra.\footnote{79} See, e.g., DAVID A. WARD ET AL., THE INTERPRETATION OF INCOME TAX TREATIES WITH PARTICULAR REFERENCE TO THE COMMENTARIES ON THE OECD MODEL (2006); SIOERD DOUMA & FRANK ENGELEN, THE LEGAL STATUS OF THE OECD COMMENTARIES (2008).\footnote{80} See, e.g., van der Bruggen, supra note 62.\footnote{81} See, for example, the conflict over the proper interpretation of the term “employment” in tax treaties. See, e.g., Kasper Dziurdź, Article 15 of the OECD Model: the 183-day Rule and the Meaning of “Employer,” 58 BRIT. TAX REV. 95 (2013).
in a treaty would be difficult to support.

2. The Contract Analogy

The imbalance between the better and less funded and prepared negotiators revealed by the survey begs a rethinking of tax treaty interpretation, especially in light of the dominance of the OECD, its Model, its negotiators’ network, and the availability advantage of its work. This imbalance is completely unaccounted for by the current tax treaty interpretation canon. Countries are of course _prima facie_ free to negotiate, or not, and to conclude, or not, any treaty. Yet _de facto_ these decisions are much more complicated and many countries are bound by political, diplomatic, internal, and economic pressures or by mere ignorance. This picture raises a dilemma not unlike that which exists under contract law when it comes to interpretation of unbalanced contracts. This Part explores the lessons that tax treaty law may learn from this principle under contract law regarding similar circumstances.

One must be careful not to hastily draw parallels between contracts and treaties. A contract analogy is hardly acceptable for most purposes of treaty interpretation, but perhaps an analogy to the standard form contract theory could be useful in this context. Standard form contracts challenge traditional contract theory based on free will, consent, bargaining and all available information. The modern dominance of standardized contracts has challenged these basic premises of freedom of contracts underlying such theory. Despite the academic debate over the proper regulatory response or the extent of appropriate state intervention in such contracts, some intervention is commonly viewed as desirable.

This debate is not solely over the proper state response to standardized contract but also over their identification. Identification criteria include: drafting made in advance of the negotiations; drafting by a single party; a take-it-or-leave-it form, or, alternatively as a form that could only be minimally changed; obvious power, knowledge or expertise imbalance among the parties; the use of a single form in many transactions, and as a matter of routine practice; and an imbalance between the numbers of transactions (based on the form) that the powerful party (many) and the weak party (few) enters into. It is not difficult to observe that many of these attributes fit the practice of tax treaty negotiations as exposed in the

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82 For evaluation and critique of the contractual analogy in general, see, e.g., Akbar Rasulov, _Theorizing Treaties: The Consequences of the Contractual Analogy_, in _Research Handbook on the Law of Treaties_ 74 (Christian J. Tams et al. eds., 2014). For a specific application of such critique in the context of tax treaties see, e.g., Brauner, _Vogel Lecture, supra_ note 6, at 28.

survey. This begs the question whether it is appropriate to treat tax treaties differently from other treaties because of their standardized nature.

State regulation of standard form contracts ranges from minimal intervention in cases of extreme unfairness governed by the theory of unconsciousness[^84] to strict intervention when the dogma of the freedom of contracts cannot be sustained.[^85] The lack of a world government or a formal international tax organization precludes strict regulatory response of the same kind with respect to tax treaties. Only two avenues of response are pragmatically available in this context: changing the practice of tax treaties and their negotiations, and a revision of tax treaty interpretation standards. The former avenue has been explored by this author elsewhere, with the conclusion that a more multilateral regime may show some promise toward a fairer, more legitimate, and hence more stable regime. This Article contributes thoughts with respect to the latter avenue, suggesting a revision of treaty interpretation as we know it to take account of the standard properties of tax treaties.

Initially, the validity of tax treaties must be discussed, considering their standardization. The notion of consent is of course central for the mere existence of a treaty. Indeed, it is difficult to view the consent of some countries to form-like treaties in the same way that one views a more extensively negotiated treaty between roughly equal parties. The question however is whether the difference between these consents warrants action. One possible action would be to void parts or all of the most imbalanced treaties, yet it is difficult to see much support for such an extreme measure, especially when many non-OECD countries are enthusiastic to engage in treaties with OECD members. Moreover, it is hard to conceive of a predictable method by which the imbalanced treaties would be chosen to be void, or what portions would be voided. It is not realistic to draw parallels between tax treaties, no matter how unbalanced, and unconscionable contracts. A more reasonable response may be the use of a different interpretation norm for unbalanced agreements.

One norm that could come to mind is interpretation against the drafter of the form.[^86] Such norm would hardly do for at least four reasons. First,


[^85]: See, e.g., id. (comparing the responses of German and United States laws); Robert Dugan, Standardized Form Contracts—An Introduction, 24 WAYNE L. REV. 1307 (1978).

[^86]: Coming from the contra proferentem cannon. See RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981). One may recall another tax law interpretation norm: the interpretation of tax law in favor of a taxpayer when in doubt. Yet, this norm is rather anachronistic, its roots
oftentimes the weak party is very enthusiastic to conclude a tax treaty with the more powerful party and knowingly pays less attention to the details of the treaty; it wants “a” treaty, and the standard form does not excessively offend it. This makes sense if one recalls the view that tax treaties are not necessarily required to deliver their typical normative content. Second, the countries that simply want “a” treaty may be less concerned about the contents of treaties because they are willing to violate them in circumstances that would not be acceptable to them. Special interpretation in their favor would then be futile and would merely complicate the already fragile international tax regime. This argument is not strong since it is likely that powerful parties would be inclined to benefit from such behavior, further tilting the balance of treaties in their favor. Third, it may often be difficult to decide when to trigger the unbalanced interpretation norm. For example, when a country such as China negotiates a treaty largely based on the OECD Model with one of the smaller, poorer OECD members, would it be reasonable to interpret the treaty as a rule in favor of China? Fourth, even if one could establish the circumstances for justifiable application of the unbalanced interpretation norm it is unclear how such norm be applied, and to what extent. In any event, the unbalanced interpretation norm would be difficult to reconcile with customary international law as it is reflected in the VCLT, and therefore a better avenue for progress would be to consult the VCLT for assistance with the imbalance to the extent it is concerning.

Do the basic norms of the VCLT make sense for tax treaty interpretation in these unbalanced circumstances? This Article argues that they do. The more literal interpretation of tax treaties that is so common today is understandable from the perspective of human (or judge) behavior, and so is the reliance on OECD materials of all kinds when no serious alternatives exist. Yet, the realities of tax treaties exposed by the survey, especially the imbalance among many treaty partners and the partial de facto negotiation of treaties, cannot be ignored. The overly literal interpretation simply exacerbates the problem, practically ignoring the rest of the VCLT command to take context, object and purpose into account. Standardization of norms and universal interpretation of terms must therefore take precedence, to the extent reasonable, as well as account for the facilitation of cross-border

being in administrative law, and viewed as unnecessary when one properly and comprehensively interprets modern tax laws, especially when it is difficult to view the government as the all-mighty party and the taxpayer as the weak one as a rule.

87. This reality came up quite strongly in the follow-up interviews and is quite well-known in the practice.

88. See Dagan, supra note 14.

89. Who is the “drafter” in this case? Who is the weaker party?
investment involving the treaty partners.\textsuperscript{90}

A more controversial conclusion, yet an unavoidable one, would be to decrease the importance of OECD materials, including the OECD Commentaries in tax treaty interpretation. Parties wishing to explicitly adopt interpretation based on the Commentaries may of course do so. One may worry that such reference may become a standard practice to the detriment of the weaker parties. Without such reference, at least judges would not be able to consider the Commentaries and other OECD materials before they engage in meaningful interpretation under VCLT Article 31 if they were to properly do their jobs. One area that will be strongly affected by a clearer view of the VCLT is transfer pricing, where an OECD report known as the TPG dominates judgments on an almost universal basis.

Treaty interpretation requires hard work at times, perhaps contrary to human nature. This Article argues that the survey’s results mandate that judges avoid the shortcuts that have been so common to date. Alas, there is an additional complication that is perhaps less relevant for judges but clearly relevant for policymakers: the need to balance the potential value of special tax treaty interpretation against the harm. The typical complaint against special interpretation rules is that they increase uncertainty, and of course the international tax regime’s primary achievement is the uniformity, standardization, and certainty that it provides the world. Should one be concerned that special interpretation rules would do more harm than good? This Article takes this concern very seriously, yet it argues in response that, first, the changes proposed should improve standardization since it would limit resorting to diverging domestic laws and reduce the incentive to enact domestic beggar-thy-neighbor rules;\textsuperscript{91} second, the changes proposed should make the international tax regime fairer and hence improve its legitimacy, which is the source of much of its recent problems; and third, the changes are compatible with a future multilateral tax treaty that would be at the center of the international tax regime.

The use of the contract analogy to examine the treaty interpretation rules require one to examine alternative analogies to the standard form contract analogy explored above. Instead of a standard form contract it may be possible to view tax treaties as incomplete contracts that may benefit from default rules.\textsuperscript{92} Note that this analogy may take two somewhat different routes: view the OECD Model—the orthodoxy—as the default or explore the development of default treaty interpretation.


\textsuperscript{91} Note that the MLI, when applicable, does not fully fill this function.

\textsuperscript{92} Like the functions of, for example, the U.S. Uniform Commercial Code (U.C.C.).
rules.

Viewing the OECD Model as a default system is not as simple as one may think when she acknowledges the dominance of the Model in the international tax world. There is little doubt that the language of the Model serves as a de facto default language in negotiations as the survey reveals. More importantly, the OECD’s interpretation of the Model language and ancillary positions that go beyond interpretation, all embedded in the Commentary, the TPG, and other OECD reports are used, almost universally, by courts and experts to “complete” treaties when required. The first problem with this system is that it lacks legality and hence lacks legitimacy. The second, and perhaps more acute, problem is that it does not produce desirable consequences as the survey reveals.

An alternative use of contract law theory concerning defaults may be to think about development of defaults for treaty interpretation when it is required. Such default rules would not be required when a treaty permits the imposition of a withholding tax at a specific rate, yet may be useful to define “employment,” an often controversial and undefined term in tax treaties, or to determine whether a treaty partner meets its treaty obligations when it mandates the use of a transfer pricing method that is not explicitly permitted by the TPG. Defaults may be useful (if we accept this analogy), therefore whenever treaty interpretation is required.

At a first glance the use of a default against the context of the survey’s findings is not different from the use of an interpretation against the drafter rule already explored above in the standard form contract context. Yet, in contract law, defaults serve to remedy contracts’ incompleteness rather than to interpret their content. Tax treaties are never entirely complete in the sense that they do not reflect the exact or entire understanding between the treaty partners regarding the taxation matters between them. They traditionally include rules that plug most of the typical holes one may find in them.

Implementation of treaties is explicitly left to the states imposing the relevant tax. Undefined terms are similarly completed by domestic law pursuant to Article 3(2). The personal and substantive scopes of treaties are for the most part clearly defined with an understanding that they are not comprehensive and that treaty provisions would not be applicable

93. See also, e.g., Sissie Fung, The Questionable Legitimacy of the OECD/G20 BEPS Project, 10 ERASMUS L. REV. 76 (2017).
94. Indeed, the idea is rooted in a similar common law maxim. See, e.g., Alan Schwartz, The Default Rule Paradigm and the Limits of Contract Law, 3 S. CAL. INTERDISC. L.J. 389, 391 n.3 (1993).
95. VOGEL (4th ed.), supra note 4, supra note 4, Introduction, ¶ 68.
96. The exact rule is a subject to a debate already mentioned, yet regardless of that debate there is no need for an external default rule in such cases. See supra note 62.
outside such scopes.\(^97\) Most treaties include an “other income” provision that regulates the treatment of income not explicitly mentioned in the specific (income) allocation rules of such treaties. When they do not include such a provision then the formerly mentioned scope rule would provide that such income’s treatment extends beyond the scope of the relevant treaty.\(^98\)

One area that could obviously benefit from a default would be transfer pricing, with Model Article 9 outlining the general standard for addressing non-market (related party) transactions but is silent as to implementation of this standard.\(^99\) The solution to this problem is covered already by the custom that leaves the implementation of treaties to the countries themselves, yet, since transfer pricing is typically a zero-sum game for the treaty partners, simply leaving it to each other’s domestic laws may be problematic. Indeed, the TPG has evolved as a default norm for exactly such purposes. Its legitimacy is based on its mere availability for the courts and for tax administration rather than on any sound legal basis. Other issues that could benefit from default rules (or interpretation as a matter of fact) are often covered by other OECD reports which suffer from the same problem of the TPG, or the Commentaries, which legitimacy is debatable,\(^100\) and even further challenged by the survey.

The lack of a legal basis for existing defaults stems from the softness of the international tax regime,\(^101\) and the absence of a central forum for international taxation. This state of affairs begs the question whether default rules, even if desirable in theory, could even be relevant, \textit{a fortiori} effective for tax treaties?

One may take the analysis of tax treaties as exposed in the survey and argue that the contract analogy, either using standard form contract or default contract theories, is unsatisfactory since it does not reflect the power of the OECD’s charter, its Model and other materials. A better analogy may be to legislation. Indeed, standard form contract theory often analogizes it to legislation and uses standards of statutory interpretation to think about the proper regulation of such contracts.

This analogy is not entirely without merit, because the OECD operates at times as if it were a legislator, and increasingly so.\(^102\) Yet, it is difficult to see what the benefit of such analogy may be. The sensitivities of statutory interpretation relate to the interaction between the sovereign and the subjects of the legislation in the complex structure of the three

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98. \textit{Id.} art. 21.


100. \textit{See supra} note 66.


102. \textit{Id.}
branches of government and the people subject to the legislation that may regulate the people’s behavior, protect them, and in short organize the society under the familiar system of checks and balances. Tax treaties do not fit well in this picture. The OECD is very powerful, but it clearly cannot claim and does not wish to claim sovereign-like status. The international tax regime lacks a central forum and any kind of legitimacy to sustain the analogy. Even if one wished to protect weaker countries from coercive behavior (of either the OECD or a more powerful negotiation partner) in the context of tax treaty negotiation. The legal tools for such protection simply would not be available; the analogy cannot therefore stand scrutiny.

Moreover, it is difficult to see the difference between the wish to protect a weaker party in treaty negotiation using the legislation analogy compared to the standard form contract analogy analyzed above. The lack of a central international tax forum, the illegitimacy of the OECD as an international standard setter, and, above all, the expected reluctance of any country to cede power to an outside forum or norm make this avenue inferior to the use of contract theory. Statutory interpretation is therefore unlikely to add anything to the already customary norms of treaty interpretation if they were to apply properly, in the manner suggested above based on the standard contract analogy.

In conclusion, this Article argues that it is not necessary to change the rules of treaty interpretation embedded in the VCLT to address the imbalance in tax treaty negotiations exposed by the survey. A better solution would be to apply such rules as they should have been applied, just taking into account the said imbalance, namely to make a serious effort to interpret treaties as dictated by VCLT Article 31: (a) in their context and in light of their object and purpose; (b) with due weight to the good faith requirement; (c) without automatic resort to domestic law pursuant to Model Article 3(2); and (d) with careful and reasoned attention to the Commentaries, and only when necessary and justified.

### B. Implication for a Future Multilateral Tax Treaty

The survey, and hence this Article, focuses primarily on the practice

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103. Doing so would provide the forum legitimacy that it does not already have.
104. In appropriate cases tax treaties already have the mentioned Article 3(2) as a reference to domestic law, and the parties are free to further clarify their position and mandate such reference. Such specific clarifications and references should be and are in practice made, in treaty protocols.
105. Good faith in both application and interpretation. VCLT, supra note 12, arts. 26 & 31.
106. Countries should, as a “best practice,” pay attention to the Commentaries and other relevant OECD reports during tax treaty negotiations, and, unless capable and willing to seriously engage in an educated study of their implications to the negotiated treaty, should explicitly reject them as a source of interpretation for each treaty negotiated.
of tax treaties, almost all of which are bilateral tax treaties, yet recent developments increased the interest, both academic and political, in a future multilateral tax treaty. The many good reasons to conclude a multilateral tax treaty, and its potential risks, have been explored elsewhere. This Article adds to this discourse the argument that concluding a multilateral tax treaty, or any addition of multilateral elements into the international tax regime should reduce some of the challenges that the imbalance between the haves and have-nots exposed by the survey.

Assuming that the ideal solution would be a single multilateral tax treaty it is easy to observe the attraction of the multilateral model. The poorer countries of the world would have access to all the benefits of the treaty while at the present the natural (and less natural) limits on the amount of tax treaties a country can negotiate every year push most of the less powerful (mostly the smaller, less “attractive” economies) down the priority ladder for treaty negotiations and renegotiations with the stronger economies.

Moreover, the fewer resources available for poorer countries should be less pronounced in the context of a multilateral tax treaty when compared to bilateral negotiations further contracting the imbalance in treaty negotiations. One may argue that the poorer countries will also have less influence on the content of a multilateral tax treaty compared to bilateral negotiations, a disadvantage that may wipe out the savings abovementioned. This argument is not convincing, since, first, as well demonstrated by the survey, the power of the less powerful countries in bilateral negotiations is very limited anyway, and, second, a multilateral tax treaty could have mechanisms for specific, differing policy stances, as well demonstrated by the MLI, allowing all countries to secure their most important interests. Perhaps counterintuitively, this Article argues that countries may be in a better position to secure specific positions in the multilateral setting than in the bilateral setting. Bilateral tax treaties do not permit specific “reservations,” since whatever is agreed should find itself in the language of the negotiated treaty, so when a weak party (or any party) seeks a provision that does not fit the other party’s law or policies the best it could hope for is a non-reciprocal treaty provision.

107. Most notably the BEPS project, the events leading to it, and its aftermath.
108. The obvious manifestation of this interest is the conclusion of the MLI, itself a multilateral tax treaty, even if limited in scope and effect.
110. For example, a party may wish to impose a withholding tax on gains. Generally, developed countries do not impose withholding taxes on gains, so even if a treaty accommodates that tax they would not collect it, and therefore their sole interest in the negotiations would be to limit the rate on the tax (imposed only by their treaty partner), a limitation that would be meaningless for its own revenue.
Bilateral tax treaties tolerate some non-reciprocal provisions, but only few and mostly provisions that are non-reciprocal due to unique differences in the domestic laws of the negotiating parties.\footnote{For example, some treaties permit one party to relieve double taxation using the credit method and another using exemption when the same parties’ laws use the same (diverging) methods for relief of double taxation under their domestic laws. See, e.g., Convention Between the Republic of Austria and the Kingdom of the Netherlands for the Avoidance of Double Taxation with respect to Taxes on Income and Capital, art. 24 (1 Sept. 1970) (as amended through 2009), 779 U.N.T.S. 207, Reg. No. 11098.} Non-reciprocal treaty provisions make sense,\footnote{See Brauner, Vogel Lecture, supra note 6.} yet they are relatively rare, a reality that could only be explained by the power of the OECD, its members, and the dominance of the OECD work-product, including mainly its Model and Commentaries, as exposed by the survey.

The nature of a multilateral tax treaty should also be beneficial for the poorer countries. The single, unitary norms provided by such treaty should protect these less experienced and lesser trained countries during the negotiations. One may argue that in this regard a multilateral tax treaty is unlikely to improve on the current state of affairs since in any event most treaties are fashioned after the OECD Model, as the survey reveals. But, one may recall that the norms embedded in the OECD Model are essentially a deal struck among the richest members of the OECD, itself the club of the wealthiest countries. A multilateral tax treaty will necessarily improve upon that deal so far as the poorer countries are concerned. At the very least they would have “a” voice in the striking of the deal. In addition, the original deal was struck among large capital exporters that proceeded to further promote the interests of the so-called residence jurisdictions, primarily through the consistent and continuous decimation of withholding taxes (at source). This policy has not changed in recent years despite the realization by most of these powerful countries (most notably the United States) that they are also large source jurisdictions and in many cases became net capital importers during the second part of the last century.\footnote{See, e.g., Michael J. Graetz, The David R. Tillinghast Lecture, Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies, 54 TAX L. REV. 261 (2001).}

The general policy of such countries has not changed, yet in the context of the debate over the proper taxation of the digital economy many of them took positions consistent with their real situation as significant source jurisdiction (albeit with the singular focus on the digital economy), unilaterally adopting source style taxes.\footnote{Most notably France with the introduction of its Digital Services Tax. See, e.g., U.S. Trade Representative, Report on France’s Digital Services Tax (2019), available at https://ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf.} Furthermore, the geopolitical changes that saw the ascent of formerly less-developed
countries, such as China and India, their demand of voice and their influence on the international tax discourse put serious pressure on the OECD to consider and in some cases to compromise and accept norms more consistent with source taxation, support the prediction that a multilateral tax treaty would improve (from the perspective of the less well-off countries) on the current norms of the international tax regime based on the OECD Model, and therefore remedy some of the imbalance in treaty negotiation between powerful and less powerful countries.

This different nature of a multilateral tax treaty should also improve its own legitimacy, which should assist poorer countries in at least two ways: (a) it should assist them to develop improved domestic laws and policies that absent a multilateral tax treaty they would have found difficult to adopt; and (b) it should make defection from the deal, or violation of the treaty obligations more difficult and costly, which should be beneficial to the less powerful countries since the more powerful countries are likely to be better positioned to benefit from such violations and definitely better positioned to bear their costs. Along the same lines, a multilateral tax treaty should improve the transparency of the international tax regime and its norms. Therefore, violations of treaty obligations and other deviations from the universal agreement should become more obvious and more easily exposed. Transparency and stability naturally also benefit investors and their home countries, keeping source jurisdictions true to their obligations and reducing the pressure to defect on politicians from such countries.

A multilateral tax treaty should improve tax treaty dispute resolution, an improvement that is likely to benefit the less powerful countries. The current mutual agreement procedure (MAP) common to essentially all bilateral tax treaties is a soft regime that lacks finality and certainty, and has been long criticized for that, yet it had originally served the international tax regime well since it made such a regime less threatening in terms of sovereignty concession. The maturation of the regime brought about the said criticism and proposals for reform, led by a proposal made by the OECD itself to supplement the MAP with mandatory arbitration procedures to improve the certainty and finality given to taxpayers subject to treaty rules. The lack of cohesiveness and trust among countries halted the reform and to date only a few countries have embraced it. If a multilateral tax treaty were to be concluded, it would be very difficult to keep the (inherently bilateral) MAP alone as its sole dispute resolution mechanism. This would improve chances of reform and likely lead to a more balanced interpretation of tax treaty obligations as described in the former Part. These likely consequences of a multilateral tax treaty should diminish the imbalance in treaty negotiations between countries exposed by the survey.

Lastly, what if countries fail to conclude a multilateral tax treaty? This
Article argues that multilateral developments short of a multilateral tax treaty should also be positive in terms of the said imbalance. This argument is supported by the MLI, a multilateral tax treaty that merely supplements the current regime based on bilateral tax treaties and is designed to maintain its viability.\textsuperscript{115}

Regardless of one’s view of the MLI, it achieved at least a couple of things. First, it indirectly disposed of the notion that tax treaties are fully and carefully negotiated, since countries were obliged to take overarching positions without contact with their treaty partners and therefore without the implied give-and-take. The MLI permitted limited, non-reciprocal provisions, yet only in a few cases and with no apparent explanation why.\textsuperscript{116}

Second, the MLI included unnegotiable provisions, known as the minimum standards of BEPS. Such inclusion demonstrated the possibility of core provisions agreed by all which must be the backbone of a multilateral tax treaty, resulting in transparency and legitimacy benefits of the sort described above. Third, the MLI formally included mandatory arbitration provisions even if only a few MLI signatories adopted it (\textit{i.e.}, opted into such regime).

These are a few examples that support optimism that multilateral developments short of a full-fledged multilateral tax treaty should be advantageous in terms of reducing imbalances. A word of caution is due however in this context. One could imagine partial solutions worse than the current regime and even worse: one could imagine an inauspicious takeover of a multilateral effort by the same powerful countries that dominate the current regime.

This Article acknowledges this risk and proposes that it is unlikely because of the geopolitical changes that left these countries with less power than they had before, and because of the information rebalancing fed by globalization, the ascent of formerly less-developed countries and the growing academic research of the international tax regime and tax treaties, to which this Article hopes to contribute.

\textsuperscript{115} See, \textit{e.g.}, Brauner, \textit{McBEPS, supra} note 51.

\textsuperscript{116} \textit{Id.}
**Appendix A: Tax Treaty Negotiation Questionnaire**

**Q1 Informed Consent . . .**

**Q2 Country (please note all that applies):**

- [ ] OECD Country (1)
- [ ] Non-OECD Developed Country (2)
- [ ] Emerging Economy (3)
- [ ] Developing Country (4)
- [ ] Member of a Regional Tax Agreement (5)
- [ ] Common Law (6)
- [ ] Civil Law (7)

**Q3 Role in negotiation**

- [ ] Head of Delegation (1)
- [ ] Team Member (2)
- [ ] Support (3)

---

117. The appendix precisely replicates the paper survey (except for the informed consent language). An exact copy of this survey populated the online version. The answers to both forms were manually consolidated by the author.
Q4 No. of treaties negotiated:

<table>
<thead>
<tr>
<th>Number ()</th>
<th></th>
</tr>
</thead>
</table>

Q5 I received specific training to prepare me for the task of tax treaty negotiator:

- [ ] Extensively (1)
- [ ] Yes (2)
- [ ] No (3)
- [ ] To a Certain Extent (4)

Q6 I was trained in tax treaties law when I joined the negotiation team:

- [ ] Extensively (1)
- [ ] Yes (2)
- [ ] No (3)
- [ ] To a Certain Extent (4)
Q7 I was trained on the OECD model upon joining the negotiation team:

- Extensively (1)
- Yes (2)
- No (3)
- To a Certain Extent (4)

Q8 I was trained on the U.N. model upon joining the negotiation team:

- Extensively (1)
- Yes (2)
- No (3)
- To a Certain Extent (4)

Q9 I received training regarding my country’s general tax treaty policy:

- Extensively (1)
- Yes (2)
- No (3)
- To a Certain Extent (4)
Q10 I received training regarding the negotiating parties’ tax treaty policies:

☐ Extensively (1)

☐ Yes (2)

☐ No (3)

☐ To a Certain Extent (4)
Q11 I reviewed the negotiating party’s recently negotiated tax treaties (please note all that apply):

☐ All of them (1)
☐ The most recent treaties (2)
☐ A sample (3)
☐ None in particular (4)
☐ Only treaties with similar countries to mine (5)
☐ The country’s model tax treaty (6)
☐ The treaty negotiation team members split the treaties among them (7)

Q12 What is the primary goal of tax treaties according to your training?

☐ Relieve of double taxation (1)
☐ Assistance in tax enforcement and collection (2)
☐ Eliminating double non-taxation (3)
☐ Promoting cross-border trade and investment (4)
☐ Complementing general (economic and other) policies of My country (5)
Q13 In your opinion: does the impact of actual tax treaties correspond to their primary purpose you mentioned above?

☐ Yes (1)

☐ Somewhat (2)

☐ No (3)

☐ Elaborate if possible: (4)

Q14 what form of study (please note all that apply)?

☐ Self-Study (1)

☐ Materials provided by the negotiation party (2)

☐ Consultant residing in my country (3)

☐ Hearings with businesses operating within trade partner (4)

☐ Law firm practicing within the negotiating party’s jurisdiction (5)

☐ Other (6)
Q15 I studied the tax laws of the negotiation partner prior to the negotiation session:

☐ Extensively (1)

☐ Yes (2)

☐ No (3)

☐ To a Certain Extent (4)

*Skip To: Q16 If I studied the tax laws of the negotiation partner prior to the negotiation session: = No*
Q16 I received specific training updating me on my country’s economic position:

☐ Extensively (1)

☐ Yes (2)

☐ No (3)

☐ To a Certain Extent (4)

Q17 I received training by (please note all that apply):

☐ Government official/s (1)

☐ Other treaty negotiators (2)

☐ Head of the Team (3)

☐ Academics (4)

☐ Practitioners (5)

☐ Foreign experts (6)

☐ Others: (7)
Q18 I received specific training updating me on my Treaty Partner's economic situation:

☐ Extensively (1)
☐ Yes (2)
☐ No (3)
☐ To a Certain Extent (4)

Q19 What were the **primary** goals of treaties negotiated by you? (Total should be 100%)

_____ Trade needs (1)
_____ Needs of specific MNEs (2)
_____ Foreign policy (3)
_____ Other (4)

Q20 Would you say that your country has a clear policy regarding priorities in tax treaty negotiations?

☐ Yes, and it is publicly available (1)
☐ No, there isn’t (2)
☐ Policies are established ad-hoc (3)
☐ Yes, there is a written policy that is available to treaty negotiators, but it is not publicly available (4).
Q21 What was the impact of the bilateral trade position among the negotiating parties on the decision to commence negotiations?

☐ Significant (1)
☐ Important (2)
☐ Somewhat important (3)
☐ Not important (4)
☐ No impact (5)

Q22 What was the impact of needs of domestic investors / businesses on the decision to commence negotiations?

☐ Significant (1)
☐ Important (2)
☐ Somewhat important (3)
☐ Not important (4)
☐ No impact (5)
Q23 What was the impact of foreign policies on the decision to commence negotiations?

☐ Significant (1)

☐ Important (2)

☐ Somewhat important (3)

☐ Not important (4)

☐ No impact (5)

Q24 Did anything else impact such decisions? Please elaborate:

__________________________________________________________

Q25 What was the impact of the following on decisions to renegotiate treaties?

Q26 What factor has impacted the **substance** of the treaty negotiations you have participated in the most?

☐ Bilateral trade (1)

☐ Needs of domestic investors / businesses (2)

☐ Foreign policy (3)

☐ changing norms in domestic and treaty norms (such as changes to Model tax treaties or their Commentary) (4)

☐ Other (5)

__________________________________________________________
Q27 Bilateral trade position among the negotiating parties?

- Significant (1)
- Important (2)
- Somewhat important (3)
- Not important (4)
- No impact (5)

Q28 Needs of Domestic Investors / Businesses

- Significant (1)
- Important (2)
- Somewhat important (3)
- Not important (4)
- No impact (5)
Q29 Foreign Policy

☐ Significant (1)

☐ Important (2)

☐ Somewhat important (3)

☐ Not important (4)

☐ No impact (5)

Q30 Did anything else impact such decisions? Please elaborate:

______________________________________________

Q31 What has been the main reason(s) for revoking tax treaties by your country (if any)?

☐ Changing economic or trade positions (1)

☐ Foreign policy (2)

☐ Legal changes (3)

☐ Violations of the treaties (4)

☐ Not relevant (5)
<table>
<thead>
<tr>
<th>Q32 Click to write the question text</th>
<th>Critical (1)</th>
<th>Very Important (2)</th>
<th>Important (3)</th>
<th>Somewhat Important (4)</th>
<th>Marginal (5)</th>
<th>Not Important (6)</th>
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</thead>
<tbody>
<tr>
<td>Facilitation of Cross-border Trade and Investment (1)</td>
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<td>o</td>
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<tr>
<td>Elimination of Double Non-Taxation (2)</td>
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<tr>
<td>Limit source taxation on business income (3)</td>
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<td>o</td>
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<td>o</td>
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<tr>
<td>Withholding tax reduction (4)</td>
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<td>o</td>
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<td>Double Tax Relief (5)</td>
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<tr>
<td>Solving dual residence – unincorporated taxpayer issues (6)</td>
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<td>o</td>
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<td>Solving dual residence-corporations (7)</td>
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<td>o</td>
<td>o</td>
<td>o</td>
<td>o</td>
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<td>Exchange of information (8)</td>
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<td>o</td>
<td>o</td>
<td>o</td>
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<td>o</td>
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<tr>
<td>Assistance in collection of taxes (9)</td>
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<td>o</td>
<td>o</td>
<td>o</td>
<td>o</td>
<td>o</td>
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<td>Q32 Click to write the question text</td>
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<td>Very Important (2)</td>
<td>Important (3)</td>
<td>Somewhat Important (4)</td>
<td>Marginal (5)</td>
<td>Not Important (6)</td>
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<tr>
<td>Provide a platform for dispute resolution (10)</td>
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<tr>
<td>Foreign policy goals - signal of political friendliness (11)</td>
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<tr>
<td>Signal a stable environment for foreign investment (12)</td>
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<tr>
<td>Conform domestic laws with International standards (13)</td>
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</tbody>
</table>
Q33 What are the main reasons for delays in concluding tax treaties:

☐ Disagreement regarding extent of relief of double taxation (1)
☐ Differences of domestic laws (2)
☐ Constitutional constraints (3)
☐ Tax rates (4)
☐ Disagreement over "special" tax regimes (5)
☐ Issues related to personal differences and styles (6)
☐ politics (7)
☐ Communication issues / lack of cooperation in information gathering (8)

Q34 In an average negotiation, how many treaty articles / specific paragraphs were seriously negotiated in your estimate?

0 2 4 6 8 10121416182022242628303234363840

<table>
<thead>
<tr>
<th>Articles ()</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Paragraphs ()</td>
<td></td>
</tr>
</tbody>
</table>
Q35 Can you estimate what percentage of the language of your treaties included original drafting?

<table>
<thead>
<tr>
<th>Percentage (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 5 10 15 20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100</td>
</tr>
</tbody>
</table>

Q36 To what extent has the language of the OECD Model served as a default in negotiations?

- To a large extent (1)
- Often (2)
- Somewhat (3)
- Never (4)

Q37 To what extent has the language of the U.N. Model served as a default in negotiations?

- To a large extent (1)
- Often (2)
- Somewhat (3)
- Never (4)
Q38 To what extent has the OECD commentary been discussed during negotiations?

☐ Extensively (1)
☐ Occasionally (2)
☐ Rarely (3)
☐ Never (4)

Q39 How often have provisions in other treaties concluded by one or both parties been used in the drafting?

☐ Always (1)
☐ Often (2)
☐ Occasionally (3)
☐ Rarely (4)
☐ Never (5)
Q40 How important are personal relationships and a friendly environment for a successful and quick negotiation?

- [ ] Extremely important (1)
- [ ] Very important (2)
- [ ] Moderately important (3)
- [ ] Slightly important (4)
- [ ] Not at all important (5)

Q41 To what extent has the U.N. commentary been discussed during negotiations?

- [ ] Extensively (1)
- [ ] Occasionally (2)
- [ ] Rarely (3)
- [ ] Never (4)
Q42 To what extent have court cases been discussed during negotiations?

- Often (1)
- Occasionally (2)
- Rarely (3)
- Never (4)

Q43 To what extent have secondary sources (such as books, articles, etc.) been discussed during negotiations?

- Often (1)
- Occasionally (2)
- Rarely (3)
- Never (4)

Q44 Can you estimate what percentage of your country's treaties primarily follows the:

<table>
<thead>
<tr>
<th>Percentage</th>
<th>OECD Model</th>
<th>UN Model</th>
<th>Own Country's Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 to 10</td>
<td>[ ]</td>
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<td>10 to 20</td>
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<td>30 to 40</td>
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<td>40 to 50</td>
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<td>70 to 80</td>
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<td>80 to 90</td>
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<td>90 to 100</td>
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</tbody>
</table>
Q45 While negotiating, to what extent were you updated on:

<table>
<thead>
<tr>
<th></th>
<th>Extensively (1)</th>
<th>Regularly (2)</th>
<th>Sometimes (3)</th>
<th>Rarely (4)</th>
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<tr>
<td>OECD work (1)</td>
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<tr>
<td>Tax treaties of other countries (2)</td>
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<td>○</td>
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<tr>
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<td>Academic articles (5)</td>
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<tr>
<td>Other countries laws (6)</td>
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<td>Regional developments (7)</td>
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<td>○</td>
<td>○</td>
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</tbody>
</table>

Q46 Did you participate in your country’s work with the OECD? Other organizations?

Q47 We wholeheartedly appreciate the effort and willing to contribute to this study. We would appreciate any other comments or suggestions that you believe may assist the study. Thanks in advance for participating.