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# Reflections on Multilateral Tax Solutions in a Post-BEPS Context

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*The international tax landscape has changed radically in the last decades. Evidence of this development can be shown in the change of strategy pursued by the OECD and the EU in order to tackle tax base erosion and profit shifting. The unilateral or bilateral solutions traditionally adopted by States have given way to multilateral solutions based on consensus and cohesion reached at global level among States. The multilateral phenomenon is strengthened as the most efficient solution to avoid double non-taxation in the short, medium and long term. For reaching its final consolidation, a leading role needs to be played by the States.*

## 1 THE MULTILATERAL PHENOMENON AT THE INTERNATIONAL LEVEL

In the international tax framework, it has become evident, especially since 2008, that the economic situation requires States to reach agreements on instruments at the international level to tackle the erosion of tax bases and profit shifting. Now, what do we understand by multilateralism? There are raised many difficulties in this question, so we will focus its delimitation on three distinct blocks.

Firstly, with regard to the tax treaties, in order to avoid double taxation, we can affirm that the number of signatory States of an agreement does not have to be the same as the number of States that ratify it.

In this case we distinguish two types of multilateralism: a relative one, in which, despite the fact that the subsequent ratification by the signatory States is not unanimous, it is considered that the majority support of the States gives legitimacy in order to understand this agreement as multilateral;[1] and another absolute, when an agreement must be unanimously ratified by all the signatory States of the agreement.[2]

In this sense, multilateralism acts as a remedy for the problems raised by the unilateral measures taken by the States to prevent the erosion of tax base. In lieu of this, solutions based on the transfer of sovereignty are raised in order to harmonize principles at the international level. In other words, multilateralism implies that fiscal solutions to double taxation and exemption must be carried out and supported by the majority of the States.

Thirdly, multilateralism is much more than a basis of consensus on which to reach agreements on tax matters. There are many initiatives promoted by international organizations and institutions (more specifically the OECD and the European Union) which emphasize fiscal solutions based on cooperation among Member States in order to achieve greater transparency in operations. Thus, multilateralism not only can serve as means of fighting against tax avoidance but also as means of cooperation among States in order to tackle tax base erosion and profit shifting (BEPS).

In relation to the latter, the cooperation instruments that support this position are, on one hand, transparency mechanisms in operations; as an example, compulsory automatic exchange of information between tax administrations, for which Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards of mandatory automatic exchange of information in the field of taxation which entered into force on 1 January 2016 (although in the Austrian case, its entry

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1 At European level, the best example is the OECD/Council of Europe Multilateral Convention on Mutual Assistance, which as of 31 Dec. 2015 was signed by eighty-four countries but only entered into force in sixty one of them. In addition, as J. M. Calderón Carrero, argues in *The Procedure of Exchange of Information Established in the Double Taxation Agreements Based on the Model of Convention of the OECD*, in *Fiscalidad Internacional* 1531–1532 (F. Serrano Antón Dir., CEF) number of countries have included reservations that restrict the scope of possibilities for mutual assistance regulated by the Convention.

2 This concept of absolute multilateralism was initially given to the multilateral instrument of the BEPS Action Plan, however, after the *Final Report Action 15* of Oct. 2015, the approach has shifted towards a relative multilateralism due to the casuistry that can occur if one of the signatory States subsequently do not ratify the agreement.

into force was delayed until 1 January 2017). It represents a significant progress in this field,[3] as well as the Council Directive 2015/2060 of 10 November 2015, repealing Directive 2003/48/EC on taxation of savings income in the form of interest payments.

On the other hand, mechanisms that articulate common parameters in the application of corporate income tax, such as the Common Consolidated Corporate Tax Base (CCCTB) system because, although the 2011[4] Directive Proposal did not prosper, its reactivation is expected through the Action Plan for Fair and Efficient Corporate Tax System in the European Union promoted by the European Commission and published in June 2015,[5] enhanced in turn by the Anti-Tax Avoidance Package published on 28 January 2016 which, among other measures, brings the proposal for a Council directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market (known as the Anti-Avoidance Tax Base),[6] as well as the multilateral instrument of the BEPS Action Plan that will be analysed later.

Once the concepts have been defined, the question is: why does the multilateral phenomenon arise as a solution to tax BEPS? This is not a trivial issue but the subject of discussion within the OECD.

It is well known that many factors have encouraged an abandonment of unilateral or bilateral measures and the adoption of alternative solutions to tax evasion and/or tax avoidance (e.g. economic globalization, open borders, aggressive tax planning strategies by corporations and multinational groups … ). However, it is necessary to analyse the impact that these and other elements have on the assumption by the States of multilateralism and the consequent transfer of fiscal sovereignty.

Firstly, the recession that has blighted the global economy is the starting point that marks the fiscal agenda of the States. Tax administrations have reduced their collection of public revenues which, consequently, makes impossible a fair redistribution of the public expenditure. Resulting an increase in the tax rates and tax burden. So much so that a sector of the doctrine has described this fact as a 'fiscal crisis of the State', due to the fact that they are unable to cover annually the tax revenue projections.[7]

In addition, this has been a subject of far-reaching debate within the States regarding their tax policies: if the tax burden is increased excessively, the most likely outcome will be an increase in aggressive tax planning strategies by companies which would imply a high volatility of tax bases. However, if the tax burden is not increased, the ability to obtain economic resources in the short-term and the maintenance of tax levels will decrease, without implying that the companies' aggressive tax planning strategies stop working.

Secondly, as Sanz Gadea argues, the inherited taxation patterns, which are still in force today, are not the best suited to tackle the reality of multinationals.[8] The source-residence duality as criteria for taxation on income has become obsolete due to, among others, the novelty of the digital phenomenon and the possibility of relocating the value chain from the source territory to a third country without a nexus.

The digital economy has been a turning point in the criteria for taxation on income in a specific territory. The need to establish subsidiaries in other Member States has given way to 'settlements' on the 'cloud'. This means that certain companies operate thousands of kilometres away from their customers and their sales are not taxed either at the source or at the residence generating revenue shortfalls in the treasuries of States that realize how those online business transactions escape taxation.[9]

For this reason, the response to the digital challenge cannot be addressed by the States incorporating only anti-avoidance measures in their domestic legislations, since there is no international consensus on the problems related to the digital economy. Therefore, there has been a rupture in the classical standard criteria for taxation on income and it is needed a reformulation[10] in order to adapt to the reality. Therefore, there has been a rupture in the classical standard criteria for taxation on income so a reformulation is needed in order to adapt these criteria to the reality.

Third, the phenomenon of globalization has revealed the disparity between taxpayers and tax administrations.

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[3] At the legislative level, it has been transposed into Spanish law by Royal Decree 1021/2015, of 13 Nov. 2015, which establishes the obligation to identify the tax residence of persons holding or controlling certain financial accounts and to report them within the context of mutual assistance.

[4] *See* the proposal for a Council Directive of 16 Mar. 2011 on a Common Consolidated Corporate Tax Base (CCCTB). Brussels, 23 June 2011. COM (2011). 121 final.

[5] *See* Communication from the Commission to the European Parliament and the Council, *A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action.* Brussels, 17 June 2015. COM (2015) 302 final.

[6] *See* the proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market. Brussels, (28 Jan. 2016). COM (2016) 26 final.

[7] Among others, *see* D. Carbajo Vasco, *Objetivos y medidas en la lucha contra el fraude fiscal desde una perspectiva internacional*, 88 Revista de economía vasca 149–150 (2015).

[8] *See* E. Sanz Gadea, *Hacia dónde van y hacia dónde deberían ir las normas de fiscalidad internacional*, 88 Revista de economía vasca 99–100 (2015).

[9] For more details, *see* J. Diaz-Faes, M. Irastoza & V. Durán, *La economía digital y el entorno BEPS*, in Antón, *supra* n. 1, at 1129–1153; R. Álamo Cerrillo & G. Lagos Rodríguez, *La economía digital y la posibilidad de fraude fiscal*, Revista de Técnica Tributaria 135–163 (Jan.–Mar. 2015); S. Cipollina, *Profili evolutivi della CFC legislation: Dalle origini All'Economia digitale*, 3 Rivista di diritto finanziario e scienza delle finance 356–393 (2015).

[10] This issue deserves some reflection. Although there was no consensus between States on the parameters that define the digital economy through the BEPS Action Plan, either have pronounced or shown their will of carrying it out. A good example of this fact is the considerations included in the Final *Report Action 1* OECD on Oct. 2015 *Addressing the Tax Challenges of the Digital Economy* in which the significant digital presence in a territory as criterion for taxation was rejected against the opinion of the Expert Group on Taxation of the Digital Economy OCDE that were agreed with the adoption one year before.

The enterprises' aggressive fiscal policies have advanced much faster than the technological and personal administrative resources causing a clear imbalance in the pursuit of undeclared incomes. In other words, globalization of taxpayer or more specifically, the globalization of legal person, has arisen new possibilities of income relocation that has not been tackled by tax administrations due to its lack of personal and technological resources.

Lastly, the international community has realized that the fight against tax fraud cannot be tackled from a unilateral perspective. The international fiscal landscape has evolved from measures that combated the use of tax havens to other types of strategies based on consensus among States not only against tax havens but also against tax evasion and/or avoidance. As Hinojosa Torralvo says, tax fraud at an international level raises a variety of demands. He argues that it would be appropriate to set up an ongoing high level forum among the most important countries in order to achieve results.[11]

In this way, the fight against tax fraud has evolved and there is a clearer awareness of the problem of the lack of solutions that eradicate its boom. This has been understood by Calvo Ortega, arguing that the unilateral measures adopted against tax havens have not been effective to the extent that they were agreed. This is in spite of the efforts that have been undertaken mainly by the OECD and the States articulating unilateral measures at the internal level in their legislations.[12] Combating against tax fraud at the international level must be considered through consensus among States in the application of common fiscal standards.[13]

## 2 Action 15 of the BEPS action plan

### 2.1 *Multilateral Instrument BEPS After the Multilateral Convention of November, 2016: An Assessment*

Following the publication of the BEPS Action Plan in September 2013 and its action 15 that implemented a multilateral treaty ex novo, a new stage was opened in the international fiscal landscape. In a practically unprecedented way, it was intended to articulate a multilateral agreement that would unify the will of a large number of States and, to a certain extent, solved the problems included in the fourteen previous actions of the BEPS Plan.

In October 2015 BEPS final reports came to light, including action 15, although, given its complexity, it required more time for its implementation, even a group ad hoc was created in order to make it applicable.

A Multilateral Convention took place on 24–25 November 2016, involving more than 100 jurisdictions that definitively approved the multilateral instrument under the Action 15 of the BEPS Action Plan. The primary aim is to prevent base erosion in States by transposing results of the Convention into more than 2,000 bilateral tax treaties worldwide. Therefore, after the conclusions of the BEPS final report of the Action 15 of October 2015 and the creation of the ad hoc working group for its implementation, and in the absence of definitive results, its approval constitutes an unprecedented fiscal solution of the multilateral collaboration among States.[14]

The multilateral instrument under BEPS has emerged as the new international paradigm of fiscal solutions among states for two reasons: first, by facing great problems of the international tax system through the BEPS Plan and materializing (at least in the beginning) in an instrument the solutions to the problems described in the previous actions;[15] and second, by opening to signature of the agreement, which is a success in itself.[16]

As Zornoza Pérez says, 'the simple adoption of the text of the Convention and the opening for signature no later than 31 December 2016 (event which has taken place) is a success in itself, since it has triggered debate about the need for greater coordination that could allow the future adoption of a multilateral approach to certain problems of international taxation'.[17] However, since its inception, the multilateral instrument BEPS was

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[11] *See El fraude fiscal: una lucha de contrastes*, in *Medidas y procedimientos de lucha contra el fraude fiscal* 459–460 (J. J. Hinojosa Torralvo Dir., Atelier, Barcelona 2012) argues:that in the present situation of economic crisis it is necessary a joint fight against fiscal fraud at the international level, on one hand, due to the serious cash flow difficulties of the public coffers and, on the other hand, to citizenship that becomes more aware of the damage fraud causes economies around the world.

[12] *See* R. Calvo Ortega, *La hora de los paraísos fiscales*, 2 Nueva Fiscalidad 12–13 (2009). In the same sense M. A. Sánchez-Huete, *La nueva definición de paraísos fiscales: ¿el fin de los listados reglamentarios?*, 13 Quincena Fiscal 96–107 (2015) argues that one of the main problems of combating tax havens is the disparity in their conceptualization, or rather the inadequacy of their parameters, in which the OECD has played a leading role, establishing a flexible concept of tax haven.

[13] At the Spanish legislative level, a study on the evolution of the concept of tax haven can be found in M. Siota Álvarez, *La lista española de paraísos fiscales y sus nuevos criterios de actualización*, 157 Crónica Tributaria 163–180 (2015).

[14] For more details, view the final text of the Multilateral Convention: http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf.

[15] While we know that this is indeed not the case, we have just mentioned above the problems caused by the negative effects of the digital economy and the failure to incorporate fiscal solutions in the text of the new BEPS multilateral instrument.

[16] It is true that there are other precedents of multilateral tax conventions although we think that, due to their size, characteristics and the large number of countries involved, this is the convention per excellence in the international tax context (although, of course, this requires countries' ratification).

[17] J. Zornoza Pérez, *Acción 15. El instrumento multilateral y el plan de acción BEPS*, in *Erosión de la base imponible y traslado de beneficios: estudios sobre el plan BEPS de la OCDE* 463–464 (J. Ramos Prieto Dir., Aranzadi, Navarra 2016)

regarded by some voices as 'diffuse'[18] due to that they considered this kind of multilateralism did not constitute *stricto sensu* a multilateral agreement.

While it is true that the absolute multilateralism pursued by the OECD in its initial configuration has not been carried out, it has been modulated towards an instrument with relative or, if it is preferred, flexible[19] multilateralism, which is perhaps the characteristic that best defines the 'star instrument' of the BEPS Plan. Moreover, it has been said, with good judgment, that it is a multilateral instrument with characteristics of bilateralism, since it does not intend to eliminate the entire network of bilateral tax agreements, but rather to interact on an equal footing with them. This will not be a simple task.

The fact is that this 'bilateral multilateralism' that characterizes the multilateral instrument BEPS has allowed its opening to the signature. A too rigid configuration would have been an obstacle, on one hand, for the countries involved in its elaboration, and on the other, for countries that definitely ratified it.[20]

In short, a multilateral instrument project has been sought, not only by the OECD countries but also by a large sector of international taxation. The aim was to join as many States as possible and in order to do this, it was necessary to give some of the goals proposed and the excessive rigidity of its parameters up.

In other words, States are allowed to retain an effective fiscal sovereignty or a minimum interference, so that under these conditions the pretext for their union would be favourable, as it seems to have been.[21]

In this matter, the principal policy-making body of the multilateral instrument BEPS, the OECD, in question in recent years, seems to have demonstrated legitimacy after opening the Convention to its signature. In this way, the process from the creation of the Plan in 2013 until its opening for signature in 2016, has allowed to consolidate the OECD as the leading organization in the fight against tax fraud. As a result, it has achieved something unusual: that almost a hundred countries agreed an *ex novo* instrument whose objective is to change the parameters of international taxation.

In this sense, the OECD has carried out its work, and it is laudable that it has been completed at the expense of the countries that ratify it, because the remote possibility of reaching a consensus among such a large number of countries, and in addition, the opening for signature, is commendable.

Moreover, in our view, this success of the BEPS multilateral instrument is definitive, even if it is not ratified by a significant number of States. The basis of consensus and unprecedented dialogue in the international community and the collaboration between countries is the most important. And in the event that the multilateral instrument is not completed, its results can be used in the future or continued by another organization on the basis of what has already been worked out. In this way, the multilateral BEPS instrument is not the end, but a new procedure that will allow countries to reach multilateral agreements in the future.

In any case, the multilateral instrument, whether States widely ratified it or not, has laid the foundation stone for a real international fiscal coordination, building a solid foundation of consensus and cohesion, giving the States the certainty that tax agreements are possible and highly desirable for the future development of international taxation.

## 2.2 *The Multilateral Instrument of the BEPS Action Plan as a Historic Milestone*

Once we have contextualized the multilateral instrument of the BEPS Action Plan in the international scene, we wonder if the multilateral instrument of the BEPS Action Plan is really a fact that marks a before and after in the international tax system. There are many difficulties in this question, and the responses that emerge from different sectors are significant in this respect.

A doctrinal sector considers this question affirmative based on a division of stages in the fight against profit shifting by multinationals, among which we emphasize Sanz Gadea that contextualizes these stages in three different approaches:[22]

(1) First approach: where the objective is the proper distribution of tax revenues on the benefits of multinational groups, characterized by the implementation of the OECD Model Convention;

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[18] Among others, R. García Antón, *The 21st Century Multilateralism in International Taxation*: *The Emperor New Clothes?*, 8(2) World Tax J. 161 (2016).

[19] As Pérez, *supra* n. 17,at 470. 'All the possibilities for incorporating flexibility in order to broaden the consensus suggested by the 2014 Report have therefore been used, which raises doubts about the consistency of the final result achieved'.

[20] An unusual example could be seen in the international context when more than 100 jurisdictions worked together on the elaboration of the final text.

[21] More doubts are generated by the possible introduction of excessive reservations and comments to the Convention that detract from its purpose and deprive it of effectiveness. In addition, a number of countries implementing measures that do not follow the BEPS parameters. This is particularly worrying and can produce the same result than an excessive introduction of derogations from the BEPS Convention. As F. Serrano Antón, says, *La era post beps o la ejecución de su plan de acción: convenio multilateral vs. Implementación unilateral*, 12 Quincena Fiscal 56–80 (2016) 'Although multilateralism can have a good example if the Convention comes to be approved, today it can be seen that States continue to adopt rules that paradoxically are not in the same line of action as the Multilateral Agreement.' These decisions may undermine the outcome of the BEPS Action Plan. In this sense, it should be mentioned as Pérez, *supra* n. 17. the position of United States that has approved *The United States Model Income Tax*, which, as the author says, 'BEPS-related concerns do not rank high on the agenda of the Department of the Treasure.' In any case, the development of events will get us out of doubt, and will allow us to carry out a deeper analysis.

[22] Gadea, *supra* n. 8, at 102–103.

(2) Second approach: based on the taxation on the consolidated tax base distributed among the multinational groups´companies through a distribution formula and, therefore, characterized by the Common Consolidate Corporate Tax Base (CCCTB) system;
(3) Third approach: in which the political design of eliminating double non-taxation is configured, and in which the BEPS Project is its flagship.

However, he answers this question in an affirmative way because the BEPS Project is taken into account as a whole, not in isolation. However, if we consider a practical approach, we can assimilate the Multilateral Instrument to the BEPS Action Plan in its entirety. That means that the Multilateral Agreement of BEPS is configured as a mechanism for solving the problems that encompass the remaining actions BEPS and should be equated with the multilateral instrument for its recognition as a fact with historical relevance in the international fiscal landscape.

In this line, Martín Jiménez and Calderón Carrero differ from this description to the BEPS Project based essentially on two reasons: the first one, the lack of definition of many of its sections that are crucial for its possible interpretation (*v. gr.*, the concepts of 'base erosion' or 'aggressive fiscal planning' are not defined); And the second, based on the disparity of tax bases with the economic reality of each jurisdiction. The BEPS Plan can serve to provoke an important movement but not to provide a definitive solution in this regard.[23]

The second of these reasons requires reflection. As is well known and emphasized with good judgments by the mentioned authors, the configuration of tax bases in each territory are characterized by a disparity in relation to the rest of jurisdictions, and not only in the applicable tax rate. In this respect, the BEPS Action Plan is not a pioneer in attempting to achieve through its multilateral instrument a homogeneity in the fight against base erosion, as other projects at European level have tried it previously.

The proposal for a directive on a CCCTB of 2011 should be remembered. Although with little success, it can serve as an important precedent to raise that the disparity between the tax bases at community and global level will make impossible to reach practical and effective agreements. Therefore, the multilateral instrument is more a theoretical idea, even idyllic, but given previous practical experiences may be inert in its final results.

On the other hand, as the Anglo-Saxon doctrine has shown, the starting point of efforts to coordinate tax regimes among a large number of countries, using as pretext the multilateral agreement, dates back to the work of the League of Nations[24] and First World War. At that time, a group of economists was appointed to write a report about alternative solutions to international double taxation.[25] However, these efforts were not effective in practice since the content of the report stated that the League of Nations should focus on bilateral double taxation conventions rather than multilateral conventions.[26]

Serrano Antón, highlights that the multilateral phenomenon is not a purely novel initiative since, although the majority of double taxation agreements are bilateral, there are a small number of multilateral conventions in force or that have been in force, among others: the Agreement for African, Malagasy and Mauritian Common Organizations (OCAMM) signed in 1971; The Agreement to avoid double taxation and prevent tax evasion between the States of the Arab Economic Union signed in 1973; The Multilateral Treaty for the avoidance international double taxation signed by the members of the Council for Mutual Economic Assistance (COMECON) in May 1977; The Economic Community of West African States Convention (ECOWAS) signed in 1975; And the Nordic Convention for the avoidance of double taxation with respect to Income and Wealth signed in 1996.[27] In addition, we should not forget as a precedent for the success of multilateral fiscal solutions the Multilateral Agreement on Mutual Assistance prepared by a committee of experts of the Council of Europe on the basis of an OECD draft, opened for signature in 1988 and entered into force in 1995.[28]

Thus, during the second half of the twentieth century, several initiatives have promoted multilateralism among

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[23] A. Martín Jiménez & J. M. Calderón Carrero, *El Plan de Acción de la OCDE para eliminar la erosión de las bases imponibles y el traslado de beneficios a otras jurisdicciones: ¿final, el principio del final o el final del principio?*, 1–2 Quincena Fiscal 110–111 (2014). In this sense J. M. Calderón Carrero & A. Quintas Seara, *Cumplimiento tributario cooperativo y buena gobernanza fiscal en la era BEPS* 18–19 (Navarra: Aranzadi 2015) affirm that the aim of the BEPS Action Plan is not what is described in its lines of action but rather it is a message addressed to the main mass of taxpayers (natural persons) who support the tax system in the sense that 'large taxpayers' (legal persons) are also subject to a 'fair tax contribution' in order to maintain a stable level of 'voluntary compliance' by natural persons and in emerging and developing countries.

[24] *See* M. Lang & J. Schuch, *Europe on Its Way to a Multilateral Tax Treaty*, 9 EC Tax Rev. 39–44 (2000).

[25] For more details, *see* W. Bruins, L. Einaudi, E. Seligman & S. Stamp, *Report on Double Taxation Submitted to the Financial Committee*, League of Nations, Doc. No. 73/F.19 (1923).

[26] Not only that, but within the institution there was a confrontation in the postures advocated; From those voices that promoted a replacement of the bilateral system of Conventions towards a multilateral system, to the coexistence of bilateral and multilateral agreements. The multilateral instrument encompasses the particular cases that bilateral network of Conventions did not cover. *See* for more details J. Dunlop, *Taxing the International Athlete; Working Toward Free Trade in Americas Through a Multilateral Tax Treaty*, 27 Nw. J. Int'l L. & Bus. 227–233 (2006); D. Oliver, *Tax Treaties and the Market State*, 4 Tax L. Rev. 587–608 (2003).

[27] *See* F. Serrano Antón, *Los principios básicos de la fiscalidad internacional y los convenios para evitar la doble imposición internacional: historia, tipos, fines, estructura y aplicación* 314–315 (*Fiscalidad Internacional* Dir., Madrid: CEF 2015). In the same sense, A. Martín Jiménez, *Otros tratados internacionales*, in *Convenios Fiscales Internacionales y Fiscalidad de la Unión Europea* 831–860 (N. Carmona Fernández Dir., Madrid: CISS 2015) conduct an analysis of the General Agreement on Tariffs and Trade (GATT), and of the General Agreement on Trade in Services (GATS) conducted by the World Trade Organization are examples of agreements or multilateral conventions with international relevance.

[28] For more details, *see* the comments of R. Falcón Y Tella & E. Pulido Guerra, *Derecho Fiscal Internacional* 207–210 (Madrid: Marcial Pons 2013).

States as a solution to double taxation in terms of income and wealth, although they are not currently effective against double non-taxation of income. Therefore, the multilateral instrument cannot be considered as a pioneer idea due to the immediate precedents that have been going on for more than forty years.

However, in our view, the novelty of the multilateral instrument lies in another important aspect: the consensus of the international community for the avoidance of profit shifting of multinational corporations and groups so that benefits are taxed wherever they are generated. While the BEPS Treaty is not an original notion of multilateralism among States, we can consider it as innovative in relation to the consensus of a large number of countries whose common objective is to avoid base erosion because of the social dissatisfaction with aggressive tax strategies of corporations. This has become a global problem[29] and the OECD has revealed it as the channel of consensus in the negotiations.

It should be highlighted that this consensus has been manifested in various actions of the European Union whose aims were to implement the actions described in BEPS, and not only in relation to the multilateral instrument (the EU has not pronounced on the matter). The Anti-Tax Avoidance Package published on 28 January 2016, and in particular the Anti-Avoidance Tax Base or Anti-BEPS Directive[30] are two examples of this.

This situation is extremely important; although it is true that the BEPS Action Plan was articulated by OECD in order to promote the fight against base erosion with a multilateral character, as we know, its reports and recommendations are soft law instruments. It does not happen with the guidelines emanating from the European Union, which generally have the range of Directives.

That is to say, although the OECD is the leading international organization in the multilateral fight against the profit shifting, the European Union is binding means to develop such actions, for which it can be extremely useful, as can be seen in the Anti-BEPS Directive. The European Union is developing instruments to implement the parameters described in the BEPS Action Plan with a practical effectiveness.

## 3 Are we heading towards a new principle of the international tax system based on multilateralism?

### 3.1 *The International Experience*

In the last decades we have experienced a significant phenomenon: an evolution in the strategies of the States to fight against profit shifting by companies and multinational groups. From a first stage in which the efforts of the OECD and the European Union focused on identifying the territories suspected of forming tax havens towards another stage in which these measures have been overtaken by solutions between States in a fight against tax fraud at the international level.

In relation to the first of these stages the OECD became aware of the fight against tax havens and, more specifically, of the identification of its characterizing elements through the Report Harmful Tax Competition: An Emerging Global Issue published in 1998. It included a series of elements that allowed to consider a territory as a tax haven. Later, in the first decade of 2000, and as a result of the previous Report, the first list of countries suspected of being a tax haven, and, in the light of this, the Model Agreement on Exchange Information and The Global Forum were created in 2002 and 2003 respectively. Thus, in the final stretch of this stage, during the years 2006 to 2009 the fundamental task of the OECD was to draw up a 'black list' of tax havens and sign collaboration agreements, which led to the elimination of the mentioned list and its conversion into the so-called 'grey list', something in which the G-20 intervention in 2008 was fundamental.

At European Union level, the guidelines go hand in hand with those laid down by the OECD: the Code of Conduct was set up in 1998 and, in the new century, the Directives have been the mechanism used to transfer Member States the concern about tax havens and the fight against them. Examples include, inter alia, Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments; Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States; Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares.

In the second stage, the confirmation of the change in trend towards solutions based on multilateralism within the OECD was constituted by the BEPS Action Plan, as a result of numerous meetings at the G-20 and G-8 summit. They alerted to the need to act jointly by setting common standards and guidelines in the fight against fiscal fraud with a global approach. After this, the reports published in 2014 and the Final Report Action by Action of October 2015 have implemented the measures specified in the Plan, although due to the time period since its publication the results are not yet tangible.

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[29] *See* H. Van Den Hurk, *Starbucks Versus the People*, 68(1) Bull. Int'l Tax'n 67–90 (2014). This is an in-depth analysis of the strategies developed by multinationals such as Amazon, Apple, Google or Starbucks that makes a risible taxation despite their large annual profits, and which was the social discontent of the international community.

[30] *See* the proposal for a Council Directive …, *supra* n. 4, at 7–12.

At European Union level, many initiatives have confirmed this change in trend, including: Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures; Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation; And more recently, Directive 2014/107/EU of 9 December as regards mandatory automatic exchange of information in the field of taxation which implements the 'Anti-tax Avoidance Package' published on 28 January 2016, which we have already mentioned previously in this article.

This analysis of the measures adopted by the OECD and the European Union in order to eradicate, first, the use of tax havens and, more recently, tax fraud at the international level, proves that this institutions, as leaders in the fight against tax avoidance, have risen above directives, recommendations and opinions based on unilateral or bilateral solutions among States and have encouraged them to agree on common parameters in the fight against tax fraud at the international level.

For this reason, the classic principles that govern international tax relations of territoriality and personality find a new element in their fields of action: the multilateralism.

As is well known, Rubio Guerrero argues that the fiscal practice of countries is based on a combined application of both principles (territoriality and personality): taxation of residents by their global income and non-residents by household income.[31] However, following the approach chosen by the European Union and the OECD to the issue of double non-taxation, it is worth mentioning a new de facto principle of International Tax Law: the multilateralism in international tax solutions.

In relation to this, Rosembuj shows the existence of an international principle based on the anti-erosion of the tax base as a global orientation, which implies the existence of factual circumstances produced by certain economic agents whose space is the extraterritoriality. There is, therefore, a need for global solutions.[32] Again, and following this line, the solution to the erosion of the tax base results from an agreement between States and, thus, the use of multilateralism.

Multilateralism as international tax principle presupposes the recognition, in our view, of a series of parameters:

(1) Unilateral and bilateral fiscal solutions are not sufficient to tackle double non-taxation;
(2) Subsequently, a solution is urgently needed in order to curb the increase in fiscal engineering strategies by multinational corporations and groups; and
(3) States agree to give up part of their fiscal sovereignty in order to harmonize uniform world standards against such practices.

This last issue requires a further consideration. The sovereign capacity of States has been limited since the consolidation of the European Economic Area. In this sense, Martín Queralt and Martínez Lafuente emphasize that limitations of States in their financial power due to their integration into the European Communities must be understood in the light of the self-limitations that imply the transfer of powers or, if preferred, the transfer of sovereignty.[33] Thus, the limitations suffered by the States resulting from the transfer of sovereignty, in this case, tax, have in turn the need to set common principles and parameters in the application of taxes in the European Union.

The idea of multilateralism is strengthened in this context: the transfer of sovereignty in tax matters to supranational organizations along with recommendations, reports, opinions and directives show evidence that multilateralism, as a principle of international tax solutions, is a reality. Or at least, it is a fact drawn from the recommendations emanating from the OECD and the EU.

Furthermore, if we consider the importance of multilateral solutions at present and, given that the guidelines revolve around their consolidation, there is no doubt that this new principle becomes the international taxation principle *par excellence.* We are indeed facing a new reality, in which, although the personalistic, territoriality principles, or non-discrimination principle contained in Article 24 of the OECD Model Tax Convention have proven extremely useful, they cannot be used in all their dimensions because they are not adapted to new States' guidelines, which, as seen in previous paragraphs, are based on the use of multilateralism.

## 4 Final conclusions

### 4.1 *First*

Considering the multilateral instrument of the BEPS Action Plan as a novel phenomenon, it has not become a milestone due to similar initiatives have existed over the last 40 years. However, it is a landmark when we take into

*Notes*

[31] *See* J. J. Rubio Guerrero, *Los principios básicos de la fiscalidad internacional y la doble imposición internacional*, in *Manual de fiscalidad internacional* 78–79 (T. Cordón Ezquerro Dir., Madrid: IEF 2004).

[32] For more details, *see* T. Rosembuj, *Principios globales de fiscalidad internacional* 89–92 (Barcelona: El Fisco 2012) who develops this peculiar international tax principle based on the theory described by E. Kleinbard in *The Lessons of Stateless Income*, Research paper, University of Southern California Law School, No. 11–16, (2011).

[33] *See* J. Martín Queralt & A. Martínez Lafuente, *La política fiscal europea*, in Tratado de Derecho comunitario Europeo 270–274 (García de Enterría, E., Dir., Madrid: Civitas 1986). In the same way, C. M. López Espadafor, *Principios básicos de fiscalidad internacional* 25–30 (Madrid: Marcial Pons 2010) provides a deep compilation on the conceptual delimitations of the classic principles that govern the international tax system.

account the set of wills it encompasses and the ability to generate a meeting point in which Member States negotiate common measures in the fight against the base erosion at the international level.

### 4.2 *Second*

There is a new principle of International Tax Law based on the multilateralism of tax solutions and on the OECD and European Union guidelines. Both have been contributing and promoting consensual solutions among States for many years in order to avoid the classical unilateral or bilateral solutions.

### 4.3 *Third*

Multilateralism is a present and future reality. International society has become aware that the erosion of tax bases, and hence, tax fraud, cannot be tackled unilaterally by States. They have become realized that the only way is to negotiate and take measures with the rest of the States at the international level.