

# Is the Saving Clause A Wolf in Sheep's Clothes:

## An Interdisciplinary Study from Legal and Economics Aspects on Article 1(3) of the OECD MC 2017

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### Abstract

Art. 1(3) OECD MC 2017, the “**saving clause**”, was initially proposed to **safeguard tax treaties from being abused to prevent the application of domestic anti-avoidance rules**. However, the provision is drafted in such a general and neutral way, which raises doubts on its **efficiency** and **proportionality**. This research investigates the saving clause from **legal** and **economics** aspects to explore the **mechanism, legal consequences** and practical impact on states **policy inclination** and **taxpayers' welfare and behaviours**.

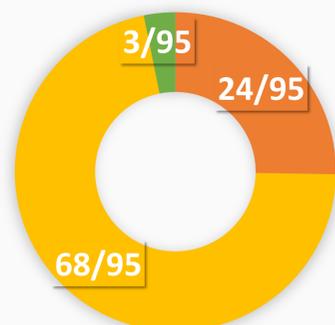
### Introduction

- The **compatibility of national anti-avoidance rules to tax treaty obligations** has been discussed by the OECD as early as 1998 → Lack of **Certainty**.
- To **prevent** treaties to be abused to **circumvent the application of domestic anti-abuse rules**, the OECD incorporated a new Art. 1(3) into its model convention (2017), which reads:

*“This Convention shall not affect the taxation, by a Contracting State, of its residents except with respect to the benefits granted under paragraph 3 of Article 7, paragraph 2 of Article 9 and Articles 19, 20, 23 [A] [B], 24, 25 and 28.”*

- The Art. 11 MLI purports to incorporate the saving clause into existing treaty network, but...

### Signatories' Position to Art. 11 MLI



- Signatories that accept the saving clause
- Signatories that reserve the saving clause (Art. 11(3)a)
- Signatories that apply the saving clause to some of its treaties (Art. 11(3)b)

### Structure, Scope and Methods

#### Interdisciplinary study

#### Standard Legal Analysis:

- Focus on **public international law**;
- Literature Research;
- Empirical study based on settled case law;
- Case study in the light of options by MLI signatories.

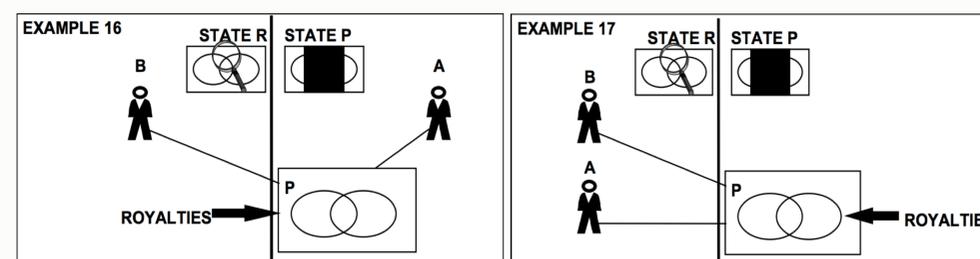
#### Economics study:

- Based on **game theory** and **public finance**;
- Normative study.

### Research Questions – Legal Study

The first part conducts a **standard legal analysis to the provision**:

- (1) **Interpretation** of the provision: the origin, the object and purpose, the scope, legal consequences of its application, and interaction with other treaty provisions.
- (2) Whether the rule is an **effective and efficient tool** to achieve its original purpose, namely, to reconcile the application of national anti-avoidance/abuse rules with tax treaty obligations;
- (3) Whether the saving clause **overshoots** its target and/or causes **disproportionate/ latent unintended consequences**:  
⇒ Regarding **income attribution conflicts**, the rule **converges the solutions to juridical double taxation and economic double taxation**, which is not fully set in the Partnership Report (1999) by OECD:



- ⇒ The rule **opens a backdoor** to rules departing from conventional norms to allocate taxing right, e.g., the GLoBE proposal under Pillar II?
- (4) Whether the provision is **coherent** with the collective intention of both parties or extra carve-outs to the provision's ambit is needed so that its application does not go beyond what was agreed by both parties?

### Research Questions – Economics Study

- (1) How do contracting states react to new policy options provided by the saving clause?  
⇒ **Necessarily reach the prisoner's dilemma or not?**  
Relax assumptions under the 2\*2 game, e.g., number of strategies, various distribution of bargaining power.
- (2) How do taxpayers react to different policy options of the contracting states in terms of, e.g., decision on location and/or legal forms of business?

### Conclusions To Date

- The US saving clause is of very limited value to interpret the OECD saving clause in the light of significant differences in their objects and context.
- In combination with revised Art. 23A/B(1), applying the saving clause to certain **extent eliminates legal uncertainties** in income attribution conflicts **at the price of unrelieved double taxation**.
- The saving clause is **far from an ideal master key** to reconcile rules such as that of the **GLoBE proposal** to current tax treaty network.

### Open for Discussion

- Economic double taxation stems from tax system disparities among jurisdictions, but application of the saving clause is the “**last step**” before reaching economic double taxation consequence. Whether/to what extent tax treaties should be responsible for this result?
- Solving economic double taxation requires not only **restricting** taxing right but also (to some extent) **harmonising** national tax law. Whether it is a proper time now to reconsider the function of tax treaties in such as highly digitalised and globalised era?

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