THAILAND

Tax Treaty Renegotiations by Developing Countries: A Case Study Using Comparative Analysis to Assess the Feasibility of Achieving Policy Objectives

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1. INTRODUCTION

Tax treaties between industrialized countries (IC) and developing countries[1] (DC) presently take up the majority of the world's bilateral income tax treaties. Many of these tax treaties were concluded at a time when the DC found itself in a less than desirable negotiating position. Since the eighties, the more dynamic DCs have seen their economies develop rapidly, with some of them making the transition to an industrialized status, such as Korea and Mexico. However, many more DCs (including Thailand, the subject of the case study presented in this article) have exponentially grown during the last 20 years. Not only does that rapid (economic) development create incompatibilities with older treaties, but it also improves the DC's current overall position (technical knowledge, experience with taxpayer behavior, etc.) to conclude tax treaties that are more in their own interest.[2] The DC, perhaps, at the time of concluding the treaty could not benefit from the work of international organizations such as the UN,[3] etc. Another factor is that, in the early stages of its development, a DC may not yet have attained a sufficient level of sophistication in its domestic tax law, which, in turn, would reflect in its early tax treaties. Furthermore, the economic and political imbalance with an IC may have resulted in a sharing of tax revenue that would now be viewed by the DC as unsatisfactory. Finally, nothing excludes the possibility that successive governments may simply have a different view of what the tax treaty should look like.

Whatever the underlying reasons, *a DC may choose to renegotiate an existing tax treaty as soon as it, in an overall assessment by the current DC authorities, no longer sufficiently meets the current national interests*.[4]

However, a successful renegotiation of a tax treaty obviously requires agreement between both contracting states. How can a DC assess its chances of being able to improve its tax treaty with an IC? In other words, how feasible is it that the IC will agree to include tax treaty objectives of the DC in a renegotiated tax treaty? Furthermore, how can the DC assess the possibility whether, in the course of renego-

1. On the classification of states as developing or industrialized countries, see 4.2. and after.
2. Irish, C. R., "International double taxation agreements and income taxation at source", I.C.L.Q., 1974, pp. 292-316 (at 300).
3. On the one hand, the importance of the role of the UN MC when drafting treaties between DCs and ICs has been well documented (Wijnen, W.F.G. and Magenta, M., "The UN Model in practice", *Bulletin for International Fiscal Documentation*, 1997, pp.524-585; see also the topic of discussion "Usefulness of the UN MC" at the proceedings of the IFA Seminar, Vol. 15, *Double Tax Treaties between Industrialized and Developing Countries: OECD and UN Models, a Comparison*, Kluwer Law and Taxation, Deventer/Boston, 1990, p. 9.). However, it is fair to say that not all DCs are satisfied with what the UN MC has to offer. Sharp, but not entirely unjustified criticism has been noted from certain, mostly Latin American, DGCs along the lines of this quotation from Figueroa: "On the other hand, however, they [industrialized countries; EvdB] are victimizers when they harm the interests of developing countries by insisting on leveling the total tax burden by imposing this kind of model conventions that curb legitimate fiscal resources of poorer countries under the pretext of facilitating the establishment of an instrument to encourage flows to these countries" (IFA Seminar, Vol. 15, *Double Tax Treaties between Industrialized and Developing Countries: OECD and UN Models, a Comparison*, Kluwer Law and Taxation, Deventer/Boston, 1990, p. 9).
4. Obviously, the decision whether to renegotiate or not, and the objectives of that renegotiating are in more than one way related to the conditions of the original treaty. A preliminary question, and an interesting one at that, is why DCs have tax treaties with ICs in the first place but that question is not further examined here. It has been pointed out that the main reason for DCs to conclude tax treaties may be the "signal-function" to foreign investors: Vann, R.J., "International tax aspects of income tax", in Thuronyi, V. (ed.), *Tax Law Design and Drafting*, IMF, 1998, p. 986 et seq. ("Most important, tax treaties signal to foreign investors the country's intention to play by the generally accepted rules of international taxation and not to discriminate against foreign investors …"); see also (concurring) Van Overbeeke, M.P., and Prast-Ragetli, J.C., "Taxation and economic development", in De Waart, P., Peters, P. and Denters, E., (eds.), *International Law and Development*, Martinus Nijhof, 1988, pp. 268-269; Thomson, W.A., "Tax Treaties Policy in Asia: a comparative analysis", *TNI* (electr.), 03-13-95. ("... it is clear that the trading relationship can flourish without a tax treaty between the states concerned"); that an economic relationship can flourish without having a tax treaty in place is indeed undisputable. Thailand only had a tax treaty with the United States that actually entered into force in 1998. Since the mid-seventies, however, US investors have made a very important contribution to foreign direct investment in Thailand, and the United States has consistently been in the top 5 of the Thailand's trade partners. A similar argument can be made with respect to Singapore, that has not entered into a tax treaty with the United States at all; Figuerao also points out the difference between what he calls the apparent and the real need for tax treaties between DCs and ICs: IFA Seminar, Vol. 15, *Double Tax Treaties between Industrialized and Developing Countries: OECD and UN Models, a Comparison*, Kluwer Law and Taxation, Deventer/Boston, 1990, pp. 9-10 ("Nevertheless, considering the fact that the tax factor does not constitute an element entering into the decision to invest, the tax treaties do not take on the relevance that is usually attributed to them").

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tiating a tax treaty with an IC, a DC could lose some of the provisions that are already in its advantage in the existing tax treaty with the IC? It may be recalled that a tax treaty (re)negotiation is often a lengthy, costly process. If initiating a tax treaty renegotiation does not seem to be cost efficient, it may be considered to either to leave the existing treaty in place or to terminate the treaty altogether.

It is the contention of this article that a comparative analysis of the tax treaty policy of an IC with other DCs is a useful instrument when pondering the above questions, although its limitations[5] must be kept in mind at all times. In first instance, such a comparative analysis should be carried out on the DCs own body of tax treaties, with the view of determining which of the DC's tax treaties are in line with its current tax treaty policy. Furthermore, it is useful, before entering into a renegotiation process with a specific IC, to analyse the tax treaty policy of the targeted IC(s) by comparing its tax treaties with other DCs. That comparative analysis must be carried out in such a manner that it identifies useful information as to the likely position of the IC on the DC's tax treaty objectives. While there are certain important restrictions (which are further discussed below) to be kept in mind, reviewing and comparing the tax treaties the IC concluded with other DCs would allow for an assessment the relative weight the IC attaches to certain tax treaty provisions, in order to determine which of the DC's own tax treaty objectives are likely to be met with tough resistance, or otherwise by the treaty partner.

In order to carry out this analysis, the DC's current tax treaty objectives have to be defined beforehand and this usually is more difficult than it appears (Step I). Then, the current tax treaty objectives which have been identified should be compared with the DCs body of existing tax treaties, in order to identify the existing treaties that include the least amount of the current tax treaty objectives (Step II). In theory – but in theory alone – the treaties identified as being incompatible with the DCs current treaty objectives, are the most likely candidates for renegotiation. The next step is the comparative analysis itself. This involves verifying tax treaties the IC has concluded with other DCs (Step III). Finally, the current tax treaty objectives (as obtained by Step I) must be confronted with the results of the comparative analysis carried out in Step III. This allows the drawing of useful conclusions (Step IV).

In this article, a case study is carried out with respect to the tax treaties of Thailand. Thailand is a typical example of a dynamic DC that has an extended treaty network, with over 50 treaties signed or in force. Furthermore, Thailand has a large number of older tax treaties, which suggests that a larger number of treaties may no longer be in line with the current Thai tax treaty policy. Finally, Thailand has not yet renegotiated many of its older tax treaties.

It must be noted that comparative analysis has some important inherent limitations which are discussed in detail in 3. Using comparative analysis for tax treaty (re)negotiation efficiently, requires a good understanding of those limitations, so that the analysis does not lead to the wrong conclusions.

2. STEP I – OBJECTIVE SCOPE OF THE COMPARATIVE ANALYSIS: THE PROVISIONS TO BE COMPARED

2.1. General remarks

Before the comparative analysis can be carried out, it must first be determined which provisions will be the object of the comparison. In other words, which objectives will be verified in the IC's tax treaty practice with other DCs? This is the objective scope of the comparison. It is tempting to restrict this first step to a mere summing up of tax treaty objectives as defined by the DC's authorities, such as in a national model tax treaty, but there are several reasons why such practice would not be appropriate. A DC may perhaps not have a clearly defined policy in this matter, although many do.[6] DCs generally have limited resources and information available on the exact impact of certain tax treaty provisions on their fiscal revenue, let alone on trade and investment.[7] Consequently, it is difficult or impossible for the policymakers of a DC to design a clear tax treaty policy that goes further than what DCs generally see as in its interest, such as UN Model provisions. More importantly, it must be noted that most of the objectives that a DC (or any country for that matter) has in mind for tax treaties are not absolute. In other words, a DC may be swayed to relinquish ground on certain of its objectives in return for concessions elsewhere. Therefore, there must be room in the comparative analysis for a degree of flexibility. This is important with regard to the scope of the comparative analysis, as it must show useful information together with possible alternatives if a certain objective of the DC is not acceptable to the IC. If the treaty negotiators of the DC are informed in advance of the relative weight the IC associates with certain treaty provisions, they are obviously in a better position to conduct the negotiation process.

It is also conceivable that the person carrying out the comparative analysis is not aware of the DC's tax treaty policy, even if a clearly defined policy exists. The analysis may have been already carried out, for example, by another country, or by an academic for the purposes of research. It is also conceivable that a DC has a tax treaty policy, but wants to re-evaluate it, using a comparative analysis. In designing a new policy, it is after all important to know how other countries may react to the proposed new policy.

In summary, it is fair to say that the tax treaty policy of many DCs (on certain tax treaty provisions more than on others) will not be defined in absolute terms, but in relative terms. Instead of a predetermined result, the DC sets out to obtain the best possible negotiating result and pushing for the maximum the IC is prepared to accept. Of course, to a certain extent, all countries act accordingly, but this relative approach plays a more important role for DCs, for reasons explained above. Consequently, while defining the

5. See below.
6. Irish, C. R., "International double taxation agreements and income taxation at source", I.C.L.Q., 1974, pp. 292-316 (at 308).
7. As a matter of fact, even ICs do not always have all of the information that they would like in this respect.

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Table 1

Objective/ Provision	Article	Sweden 19 October 1988 (new)	Australia 31 August 1989	Japan 7 April 1990 (new)	Czech Rep. 12 February 1994	Israel 22 January 1996	Switzerland 12 February 1996	Luxembourg 6 May 1996	Spain 14 October 1997	New Zealand 22 October 1998	United States 26 November 1996	Total per objective (%)
Art. 5.3(a) "assembly project, a construction project, supervisory activities"	5(3)(a) UN	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	100
Art. 5.3(b) "furnishing of services"	5(3)(b) UN	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	100
Art. 5.4(a) and (b) omit "delivery of goods"	5(4)(a)(b) UN	yes	yes	yes	yes	–	yes	yes	–	yes	yes	80
Art. 5.6 "insurance activities"	5(6) UN	–	–	–	–	yes	yes	yes	yes	–	yes	50
Art. 5.7 "agents with one principal"	5(6) OECD 5(7) UN	yes	yes	yes (protocol)	yes	yes	yes	yes	–	yes	yes	90
Art. 7.1 "limit force of attraction"	7(1) UN	yes	yes	–	no, but intellectual, royalties, commissions	–	–	yes	yes, but intellectual, royalties, commissions	yes	yes	70
Art. 12.3 "radio and television broadcasting"	12(3) UN	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	100
Art. 12.3 "industrial, commercial and scientific equipment"	12(3) UN	yes	yes	no	yes	yes	yes	yes	yes, include financial lease	yes	yes	100
Art. 12 "alienation of intellectual property"	12(–)–	–	yes	yes	yes	yes	yes	–	yes	–	yes	70
Art. 13.4 real property shares	13(4) UN	yes	–	–	yes	–	yes, but at least 20% and tax holding 50%	yes	–	no, but see down	yes (according to domestic laws)	70
Art. 13.5 "other shares"	13(5) UN	no, but see 13(4)	yes	–	no, but see 13(4)	yes	yes	no, but see 13(4)	yes	no, but see down	yes (according to domestic laws)	90
Art. 13 other gains may tax where they arise or both	13(–)	–	yes "nothing effects domestic law"	yes	–	–	–	–	–	yes "nothing effects domestic law"	yes (according to domestic laws)	40
Art. 14.1 "additional criteria"	14(1) UN	yes	yes	yes	"service in source state"	yes	–	yes	no, only fixed base	yes	yes	80
Art. 16.2 "top-level managerial officials"	16(2) UN	yes	–	–	–	–	–	yes	–	–	–	20

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scope of the comparative analysis in Step I, this must be taken into account.

2.2. The scope of the comparison in terms of tax treaty objectives

In case the DC has a clearly defined current tax treaty policy, and if it is available, this may be taken as *the starting point* for the determination of the scope of the comparison in terms of the DC's objectives. However, as was pointed out above, it is still recommended not to restrict the comparative analysis to that starting point alone but to supplement it with other objectives in the same manner as if, when no clearly defined tax treaty policy would be available. This will increase the insight into and the information on the IC's likely positions with respect to tax treaty negotiations with DCs. Whatever method is used, it must be able to demonstrate at least:

– which provisions the DC would like to see included in its treaties with ICs; and
– how important the inclusion of that provision is in the eyes of the DC.

In many cases, if no official clearly defined tax treaty policy is available, the provisions mentioned can be deduced from the DC's reservations made to the OECD Model in the "Non-Member Countries Positions on the OECD Model Tax Convention on Income and Capital", as published by the OECD (NMCP).[8] In the case study of Thailand, the NMCP is also the starting point.[9] However, using only the NMCP has some important drawbacks. It does not mean that if a country has formulated a reservation on a particular paragraph it may not be swayed to include it in the treaty. In other words, it sheds little light on how important the issue is for the country making the reservation. It may very well be that reservations have been made, but that in practice, resistance to the OECD provision is low, or, on the contrary, it may even be that actual recent treaty practices reveal that a certain provision is almost always included, probably on the initiative of the DC, but is nonetheless not mentioned among the reservations in the NMCP. Finally, reservations may be made for taxation that is not even possible (yet) under domestic law.[10]

A correction of the tax treaty policy objectives based on actual treaty practice is therefore necessary. Thailand, for example, has made a reservation on Art. 12(2) (definition of royalties) of the OECD Model in order to include technical fees in the definition of royalty.[11] Actual tax treaty practice, however, shows that only a couple of treaties

Objective/ Provision	Article	Sweden 19 October 1988 (new)	Australia 31 August 1989	Japan 7 April 1990 (new)	Czech Rep. 12 February 1994	Israel 22 January 1996	Switzerland 12 February 1996	Luxembourg 6 May 1996	Spain 14 October 1997	New Zealand 22 October 1998	United States 26 November 1996	Total per objective (%)
Art. 20 "students more income"	20(–)	yes	–	yes	yes	yes	see Czech Rep.	yes	yes	see Czech Rep.	yes	80
Art. 21.3 "source state taxation of other income"	–	yes	yes	–	yes	yes	–	yes	yes	–	yes	70
Art. – teachers and professors	21(3) UN	yes	yes	yes	yes	yes	no article, both may tax	yes	yes	yes	yes	100
total per country (%)		80	75	60	70	65	70	85	60	75	90	

8. OECD, "Non-Member Countries Positions", Paris, 2000; other, official, documents on government policy in this respect are not available to the public.
9. A Thai Model Tax Treaty was drafted (but not published) in the eighties, but has not been updated since, and is now no longer used. In 1996, the OECD held a workshop with Dynamic Non-Member Economies, including Thailand, and published *Tax Treaties. Linkages between OECD Members and Dynamic non-member economies*. This publication included a chapter written by Pichart Gesaruang, at that time the Director of Policy and Planning Division of the Thai Revenue Department. Although not an official governmental position, this chapter provides an authoritative insight in some general aspects of Thai tax treaty policy.
10. As China, Malaysia, Thailand and Vietnam did for taxation on capital; NMCP, on Art. 22 Para. 2.
11. NMCP, Art. 12(2), 6.

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actually include reference to technical fees, probably on the treaty partner's initiative, and not that of Thailand.[12] The opposite also occurs. Thailand's tax treaty practice shows that extending the definition of royalties with a special mention of payments for the use of tapes for radio and television broadcasting, but a reservation to that effect does not exist in the NMCP.[13]

Therefore, the tax treaty objectives found in the NMCP must be complemented with an overview of the actual treaty practice by the DC with ICs. The overview must be as *recent* as possible, and it must include a meaningful *number* of treaties with ICs. In my case study, I have chosen the ten-year period between 1988 and 1998. This period covers the last ten tax treaties that Thailand concluded with DCs. Since 1998 until now, no tax treaties were concluded with ICs. "Recent" in this context thus rather arbitrarily means since 1988, the year of signing of the new Thai tax treaty with Sweden. The tax treaty with a DC signed immediately prior to that treaty, was the 1985 tax treaty with Austria, which arguably takes us a bit too far back in time to allow for valid conclusions on current government policy.

2.3. Thai treaty practice with ICs: 1988-98

Table 1 gives an overview per country of the inclusion of several tax treaty provisions. The provisions themselves are briefly discussed below.

2.4. Thai treaty objectives in tax treaties with ICs: Overview

In this overview, most of the reservations made by Thailand in the NMCP have been discussed, but not all of them. Defining the source of royalties (as in Art. 12 (5) of the UN MC), for example, has not been included in the comparative analysis, and neither was allowing for a branch profits tax in Art. 24 of the treaty.[14] Tax sparing credit has not been included here either, because the dissimilarities in that provision from treaty to treaty are too important to be suitable for comparison in this brief article.

2.4.1. Supervisory activities: Art. 5 (3)(a) of the UN MC[15]

The UN MC added "supervisory activities" to the OECD definition (and reduced the time limit to six months) with respect to building sites, installation and assembly. The UN Commentary does not elaborate on the addition. Under the OECD MC, planning and supervisory services are only included in the term "building site or construction project" if they are carried out by the same enterprise as the one that actually does (or at least participates in) the physical construction.[16] As Blumenberg puts it: "In some cases the foreign enterprise's activity may be restricted to the mere planning and supervising of the work, i.e. the enterprise acts only as a consultant of the building contractor. These types of activities do not constitute a PE, neither according to German domestic law, nor according to German treaty law".[17] With the UN addition, however, supervisory activities lead to a PE if they are "in connection with" a building or construction site. In other words, even when the service performer is not itself participating in the physical construction, the ("intellectual") services may still constitute a PE under the UN Model treaty if those services concern the envisaged construction activity.[18]

The treaties with ICs between 1988 and 1998 show that Thailand's policy is to include reference to the UN provision about assembly and supervisory activities, and it seems that its DC treaty partners agree on this issue. The provision is included in every treaty with an IC between 1988 and 1998.

2.4.2. Furnishing of services: Art. 5 (3)(b) of the UN MC[19]

This provision was designed by the UN Group of Experts to mitigate the lack of source taxation possibilities for different kinds of business services which mostly, as was agreed, do not fall under the scope of the royalty article. Guideline 12 states:

> In order to solve the problem of the definition of royalties, the Group agreed to consider income from such activities as business profits and to include in Guideline 5 par. 3 [on permanent establishments, EvdB] a new subparagraph (b) which provides that the term permanent establishment should likewise encompass "the furnishing of services, including consultancy services, by an enterprise through employees or other personnel, where activities of that nature continue (for the same or a connected project) within the country for a period or periods aggregating more than six months within any twelve-month period".[20]

I have argued elsewhere that this provision is certainly not always accepted by ICs, because of its significant impact on tax sharing between the treaty states.[21] However, Thai-

12. Namely Australia and New Zealand (in both cases a standard feature in most of their tax treaties – Sec. 6 (1) ITA Act; Hamilton, R.L., and Deutsch, R.L., *Guidebook to Australian International Taxation*, Legal Books, 1996, pp. 2-27; Magney, J.W., *Australia's Double Taxation Agreements*, Legal Books, 1994, p. 66) Nepal (idem) and Pakistan (idem). Treaties with Korea and Malaysia also include a very limited reference to technical services; Van der Bruggen, E., "Source Taxation of Consideration for Technical Services and Know-How [in China, India and Thailand]", *APTB* 2001, pp. 42-60.
13. Thailand's treaties with Australia, Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Finland, Hungary, Israel, Japan, Luxembourg, New Zealand and Spain, for example, all include the mention of payments for the use of tapes for television or radio broadcasting in Art. 12, Para. 2. Only treaties with Singapore, Pakistan, Malaysia, France, Norway and Italy do not.
14. NMCP, 24/7 (refers to the OECD document Non-Member Countries Positions, on Art. 24 of the OECD MC, Para. 7 of the text of the NMCP. The same way of quotation is used for all objectives below).
15. NMCP, 5/11.
16. OECD Commentary, Art. 5 Para. 17; OECD Working Party Report, 6 January 1966 cited by Skaar, p. 407. Support may also be found in US Revenue Ruling 77-45, 1977-1 C.B. 415, where a consulting engineering firm that had planned and designed manufacturing plants, constantly evaluated on-site conditions, recommended changes to the construction plans, checked the contractor bills, etc. was deemed "supervision" and not construction. Huston, p. 60, notes that if "supervisory activities" are not mentioned separately in the treaty, these activities do not constitute a PE if the other conditions of the article are not met.
17. Blumenberger, J., in *Taxation of Permanent Establishments*, Germany, IBFD, p. 60.
18. Van der Bruggen, E., "PE When Furnishing Consulting Services under the OECD and UN Model Tax Treaties", *TNI*, May 2001, p. 2623.
19. NMCP, 5/14.
20. "Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries", UN, New York, 1979, p. 77.
21. Van der Bruggen, E., "Developing Countries and the Removal of Art. 14 of the OECD Model", *Bulletin for International Fiscal Documentation* (Tax Treaty Monitor), 2001, pp. 601-607.

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land has had little trouble in having its IC treaty partners agree to this provision between 1988 and 1998. The provision has been included in every treaty.

2.4.3. Omitting "delivery": Art. 5 (4)(a) and (b) of the UN MC[22]

By omitting reference to "delivery" in Art. 5 (4), the UN Group of Experts excludes "delivery facilities" from the so-called negative cases of the OECD-type PE. In other words, such facilities may very well be PEs, if they meet the other, general, requirements of the article as they probably do.[23] According to Vogel, a "delivery facility" will normally be considered a PE.[24]

"Delivery" is omitted in most of the Thai treaties with ICs between 1988 and 1998, which illustrates Thailand's policy in this respect. Israel and Spain, however, did not agree to do so.

2.4.4. Omitting "combination": Art. 5 (4)(f) of the UN MC[25]

The OECD Model provides in Art. 5 (4)(f) that the maintenance of a fixed place of business solely for any combination of Subparas. (a) to (e) ("the negative cases") does not constitute a PE provided that the overall activity resulting from this combination is of a preparatory or auxiliary character. By dropping the subparagraph concerning the combination of activities which are excluded from leading to a PE, the UN Group of Experts did not really try to introduce a clear distinction on the subject with the OECD MC,[26] but some members felt it was better left to bilateral negotiations.[27] Arguably, omitting or including the paragraph does not have much practical effect, but Thailand's treaty partners during the reference period did not see it that way. Only in about half of the treaties with ICs between 1988 and 1998 (Australia, the Czech Republic, Israel, and Spain did not agree to omit) was the subparagraph omitted.

2.4.5. Stock agents: Art. 5 (5)(b) of the UN MC and "order filling" NO MC[28]

An agent that maintains a stock of goods for delivery shall constitute a PE even if he has no authority to conclude contracts, according to the UN MC. This means that the mere keeping of goods for delivery may lead to a PE, even if the agent was not involved in concluding the sale.

It is the treaty policy of Thailand to provide in the PE article that agents (even without authority to conclude contracts) which maintain a stock to carry out delivery, or that habitually secure orders in the first-mentioned state wholly or almost wholly for the enterprise or an associated enterprise, are to be considered a PE. The text of this provision in the treaty with Australia, Austria, Bangladesh, Belgium, Canada, China, the Czech Republic, Denmark, Finland, France, Germany, Hungary, India, Indonesia, Israel, Italy, Japan, Korea, Luxembourg, Malaysia, Nepal, the Netherlands, Norway, Pakistan, the Philippines, Poland, Romania, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, the United Kingdom, the United States, Uzbekistan and the United Arab Emirates reads (or means) as follows:

Art. 5 par. 4

(c) has no such authority, but habitually secures orders in the first-mentioned State wholly for the enterprise or for the enterprise and other enterprises which are controlled by it or have a controlling interest in it.

The latter (securing orders) does not appear in the UN MC, but can be found in certain other treaties between ICs and DCs,[29] and in the ASEAN Model Tax Convention. Nevertheless, this obviously important feature of Thailand's tax treaty policy was included in all treaties with ICs between 1988 and 1998.

2.4.6. Insurance PE: Art. 5 (6) of the UN MC[30]

This provision only appears in the UN MC. Its purpose is to collect tax on insurance premiums where they are paid, regardless of the location or intervention of an agent. However, it is required to have a person collect the premiums in the source country.

With respect to Thailand as a source country, it is noteworthy that foreign insurance companies do not have access to the Thai life or casualty insurance market without being specifically licensed to do so by the Thai authorities.[31] A review of the tax treaties with ICs between 1988 and 1998 revealed that before 1996, no such provision was included. Since that date, however, (starting with Israel) all treaties make a special extension of the PE article for "insurance activities".

2.4.7. Independent agent with one principal: Art. 5 (7) of the UN MC[32]

An agent of an independent status cannot constitute a PE pursuant to transactions with a foreign enterprise if that agent is acting in his ordinary course of business. The UN MC specifies that when the activities of an agent are wholly or almost wholly on behalf of the foreign enterprise, he may not be considered of independent status. In practice, the Thai tax authorities will interpret "almost wholly" as being at least 80% of the income of the agent in question. This provision has been included in every Thai treaty with an IC between 1988 and 1998, except for the treaty with Spain.

2.4.8. Limited force of attraction: Art. 7 (1) of the UN MC[33]

By specifying that not only the profits which are attributable to a PE may be taxed in the source country, but

22. NMCP, 5/15.
23. UN Commentary on Art. 5 Para. 4, Para. 1.
24. Vogel, K., loc. cit., p. 324.
25. NMCP, 5/16.
26. According to Vogel (p. 324) omitting the paragraph just means that the general condition (only preparatory or auxiliary nature is excluded from being a PE) applies, leading to the same result as the OECD MC, which does include the paragraph.
27. UN Commentary on Art. 5 Para. 4, Para. 3.
28. NMCP, 5/17; Pichart Gesaruang, *Linkages*, OECD, Paris, 1996, p. 99.
29. See for example the German treaties with Bangladesh and India.
30. NMCP, 5/19.
31. Life Insurance Act, B.E. 2535; Casualty Insurance Act, B.E., 2535.
32. NMCP, 5/18.
33. NMCP, 7/3.

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also those directly between head office and the source country which relate to similar goods or business activities, the UN MC introduces a limited force of attraction. DCs are wary about the possibility of non-resident taxpayers maintaining a presence in their country without taxation, by simply claiming that payments from the DC correspond to profits unconnected to the PE.[34]

Under Thai domestic law, which does not have any reference to the concept of PE, source taxation on business profits is due if the foreign enterprise is "carrying on business in Thailand". Profit so derived is taxable in Thailand, regardless of a possible physical presence of the kind that is usually associated with a PE. Thailand has not put much emphasis on this point in its past treaty negotiations.[35] In about half of the treaties with ICs between 1988 and 1998, this principle was agreed to. Japan, the Czech Republic, Israel and Switzerland did not agree to the inclusion of the provision.

2.4.9. Radio and television broadcasting: Art. 12 (3) of the UN MC

Including payments for the use of or the right to use tapes for radio and television broadcasting was suggested by the UN MC, which was done in all the treaties with ICs between 1988 and 1998. Oddly, Thailand did not make any reservation to this effect in the NMCP, but actual tax treaty practice clearly shows a preference to include a special reference to cinematographic films and other tapes for television and radio broadcasting.[36]

2.4.10. Use of industrial, commercial or scientific equipment: Art. 12 (3) UN[37]

Payments for the right to use industrial, commercial or scientific equipment (rent, operational lease) was, until 1992, included in the royalty article of the OECD MC, and still features in that article of the UN MC which has not been changed since. In the words of Pichart Gesaruang: "Still, Thailand takes the view that payments for the use of equipment is rent of the royalty article".[38] Every treaty with an IC between 1988 and 1998 (also those after 1992, when the OECD moved this income to the business profit article) still mentions payments for the right to use equipment in the royalty article. Under Thai law, payments of this nature are subjected to a 15% withholding tax if the income is paid from or in Thailand. Note that the actual location of the property is not relevant for Thai domestic law.[39]

2.4.11. Alienation of intellectual property: Art. 12(–) NO MC[40]

It may be argued that the royalty article of the OECD and the UN Model tax treaties do not include payments that are consideration for the *transfer* of the ownership of an intellectual property right, an issue that has repeatedly found its way to the courts in developing countries such as India[41] and Malaysia.[42] On this subject, the OECD Commentary notes: "It is clear that where consideration is paid for the transfer of the full ownership, the payment cannot represent a royalty and the provisions of the Article [Art. 12; EvdB] are not applicable".[43] According to Vann, source taxation on royalties can therefore "simply be avoided as transactions for use can easily be converted into disposal transactions because of the flexibility of patent and copyright law in most countries".[44]

A significant majority[45] of Thailand's treaties contains this provision, which warrants its presence here among the tax treaty objectives, even if Thailand did not make a reservation in the NMCP to that effect. This provision is not found in any of the models.[46] Certain other DCs have done likewise.[47] It assimilates capital gains on intellectual property with income from intellectual property. Consequently, a (gross) withholding tax will apply, as opposed to no source taxation at all (lest the presence of a PE in the source country) or possible taxation under Art. 13. In the treaty with Japan it is phrased as follows (in Art. 12):

> The provisions of paragraphs 1, 2 and 4 of this Article shall likewise apply to proceeds arising from the alienation of any copyright of literary, artistic or scientific work including cinematograph films, and films or tapes for radio or television broadcasting, any patent, trade mark, design or model, plan, or secret formula or process, except when the provisions of paragraph 2 of Article 13 [capital gains on property of a PE; EvdB] are applicable to the gains to be derived from such proceeds.

Under Sec. 40 (3) of the RC, not only income from intellectual property is deemed taxable, but all "values received". Consequently, payments by a Thai resident to a

34. UN Commentary, Art. 7 Para. 1; Srinivasan, K., *Guide to Double Taxation Avoidance Agreements*, Vidhi Publishing, New Delhi, 1998, 1.55.
35. Pichart Gesaruang, *Linkages*, OECD, Paris, 1996, p. 99.
36. Thailand's treaties with Australia, Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Finland, Hungary, Israel, Japan, Luxembourg, New Zealand and Spain all include the mention of payments for the use of tapes for television or radio broadcasting in Art. 12 Para. 2. Only treaties with Singapore, Pakistan, Malaysia , France, Norway and Italy do not.
37. NMCP, 12/5.
38. Pichart Gesaruang, loc. cit., p. 101.
39. Unless the income is derived by a non-resident natural person (Sec. 41 RC).
40. Although this provision is not found in the OECD or the UN MC, it is, however, found in the US MC (Art. 12 Para. 2).
41. Precisely this question was addressed by the Calcutta High Court in its decision *CIT v. Davy Ashmore India Ltd* [1991] 190 ITR 626. In that decision, the Court took into consideration prior Indian decisions *CIT v. Ahmedabad Manufacturing & Calico Printing Co.* [1983] ITR 806 and *NV Philips v. CIT* (1) [1988] 172 ITR 521. The Court decided that the terms of the tax treaty (with the United Kingdom) did not permit including a payment for a sale of designs. Note that, under Sec. 9 (1) vi of the Income-tax act of India (1961) as interpreted by Explanation 2 to that section, "the transfer of all or any rights" is included in the definition of a "royalty" for domestic law purposes (although capital gains are excluded under the same Explanation 2). Similar decisions are reported by Rajaratnam, S., and Venkatramaiah, B.V., *Commentary on Double Taxation Avoidance Agreements*, SW, Mumbai, 1999, 1.203.
42. *Phaltan Sugar Works Ltd v. DGIR*, High Court, [1982] 1 MLJ 295; Pointon, L.D., *Revenue Law in Singapore and Malaysia*, Butterworths, 1986, p. 135.
43. OECD Commentary on Art. 12, Paras. 15 and 16; also Vogel, K., loc. cit, p. 788; Vann, R.J., "International aspects of income tax", in Thuronyi, V. (ed.), *Tax Law Design and Drafting* (Vol. 2), IMF, p. 742.
44. Vann, R.J., "International aspects of income tax", loc. cit., p. 742.; also Rajaratnam, S., and Venkatramaiah, B.V., *Commentary on Double Taxation Avoidance Agreements*, SW, Mumbai, 1999, 1.203.
45. Australia, Austria, Belgium, Canada, the Czech Republic, Finland, France, Germany, Hungary, India, Indonesia, Israel, Japan, Korea, Laos, Poland, Singapore, Sweden, Switzerland and the United Kingdom.
46. Although this provision is not found in the OECD or the UN MC, it is, however, found in the US MC (Art. 12 Para. 2).
47. For instance the German treaties with France, Ireland, the Netherlands and Turkey.

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company under foreign law which does not carry on business in Thailand, are assimilated with "royalties" (in the treaty sense of the word) and subject to 15% withholding tax, even if those payments constitute consideration for the transfer of the *ownership* of the intellectual property.[48] Needless to say, this rule has a significant impact on the taxing power balance. The proceeds of a sale by a Japanese enterprise to a Thai enterprise of a patent, for example, may be regarded as a royalty, and be taxed accordingly by Thailand.[49] Most DCs agreed to include such a rule in their tax treaties with Thailand between 1988 and 1998, but Sweden, Luxembourg and New Zealand did not.

2.4.12. Gains on shares: Art. 13 (4) of the UN MC[50]

The OECD MC allocates taxing power on capital gains (except on immovable property of a PE or on ships/aircraft) to the residence state of the alienator. The UN MC contains several changes in this respect, one of which addresses capital gains on shares. According to the UN MC, such capital gains may be taxed in the country where the company issuing the shares is a resident. Capital gains on shares constitute taxable income under Thai domestic law, also if realized by a non-resident company (but only if the income is paid in or from Thailand)[51] or a natural person (if the property is situated in Thailand).[52] Half of the Thai treaties with ICs between 1988 and 1998 include a provision similar to the UN Art. 13 (4). The tax treaties with Australia, Japan, Israel, Spain and the United States have this rule.

2.4.13. Additional criteria for independent services: Art. 14 (1) of the UN MC[53]

Contrary to the OECD MC (which only allows source taxation in case of a fixed base), the UN MC adds two more, alternative criteria for taxation in the source country: a presence in the source country that exceeds 183 days and the deduction of the income by a resident or PE in the source country if its exceeds a certain amount.[54]

The UN MC 2001 eliminated the possibility for source taxation if the income exceeds a certain amount.[55] The NMCP only mentions a reservation to include the possibility for source taxation on income from independent personal services if the performer is present in Thailand a certain number of days, and not if a certain amount is exceeded. This is remarkable because the latter condition has been included in the vast majority of Thailand's tax treaties to date,[56] and is therefore mentioned, together with a 183-day rule in Art. 14, among the Thai policy objectives. With respect to Thai treaties with DCs between 1988 and 1998, only the treaties with Switzerland and Spain do not include UN-type provisions.

2.4.14. Top-level managers: Art. 16 (2) of the UN MC[57]

Top-level managers are assimilated with members of the board of directors for the purpose of the UN MC, a rule clearly inspired by the fact that (foreign-owned) companies in DCs often have foreign managers. This allows the source country to tax these employees as well, and not only board members, regardless of the time they spend within the source country. Similar rules are found, with respect to Thai treaties with ICs between 1988 and 1998, only in the treaties with Sweden and Luxembourg.

2.4.15. Extended rule for students[58]

The taxation of income of students, still or formerly resident in the DC, but visiting the IC for study or training, is also a main concern for DCs. It is true that reducing the taxing power of the IC on income of the student is not only a matter of income sourced in the DC but also, for instance, maintenance remittances paid from the DC. Grants, awards and even personal service income may be earned by the student when abroad. It is increasingly common for students of DCs, especially Asian DCs, to pursue their studies (partly) in an IC. As mentioned above, the UN MC did recognize the importance of DC students in ICs, but failed to attach a real tax benefit for the DC to this situation, because it only requires the student concerned to be entitled to the same tax reductions as local students.[59] Many DCs have insisted on a more elaborate tax advantage for visiting students, suggesting that not only should grants, award, etc. be tax exempt in the IC, but also income from personal services the student performs in order to fulfil in his education and maintenance needs.[60]

Thailand has, with reference to the OECD MC Commentary, paid much attention to the taxation of its residents who visit other countries for the purposes of study. If possible, Thailand tries to include an exemption not only for remittances for maintenance and grants, but also for income from personal services. This was stipulated in all treaties with ICs between 1988 and 1998 (not always

48. As is the case in the United States (Para. 865 (d) (1) (b) IRC) and in Japan (Para. 138 (7) CTL).
49. See also "Tax Aspects of the selling of Intellectual Property ", *Thai Journal of International Taxation*, Vol 1, Issue 6, p. 10.
50. NMCP, 13/2.
51. Secs. 70 and 40 (4) RC (15% to be withheld on the gain to be withheld by the payer).
52. Secs. 41 and 50 (2) RC (15% to be withheld on the gain to be withheld by the payer).
53. NMCP, 14/12.
54. "In the course of the discussion on the contents of article 14, some members from developing countries expressed the view that it would not be justifiable to use the criteria of existence of a fixed base and length of stay to limit taxation by the source country, and that the source of income should be the only criterion. Some members from developed countries, on the other hand, felt that the exportation of skills, like the exportation of tangible goods, should not give rise to taxation in the country of destination unless the person concerned had a fixed base in that country comparable to a permanent establishment: they therefore supported the fixed base criterion. (…) As a compromise, the Group decided to include three alternative criteria, the satisfaction of any one of which would give the source country the right to tax the income derived from the performance of personal activities by an individual who is a resident of the other State. These criteria are found in subparagraphs A-C of par. 1."
55. During the seventh meeting of the Ad Hoc Group of Experts, 1996, it was indicated that the limited popularity of the provision in tax treaties was the main reason for removing it. Also, it was noted that threshold amounts in absolute amounts of currency are always hollowed out by inflation (E/1996/62).
56. With respect to treaties with developed countries only, the so-called "borne rule" (source tax if a certain amount is exceeded) was mentioned in every treaty except for those with the Czech Republic, New Zealand, Spain and the United Kingdom. With respect to treaties with developing countries, it is included in every treaty except Bangladesh, Laos, Mauritius and Vietnam.
57. NMCP, 16/2 (the reservation does not mention "top-level managers" but "senior employees". It is unclear why another terminology was chosen).
58. NMCP, 20/5.
59. UN MC, Art. 20 Para. 2.
60. See for example Japan–Philippines.

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including personal services income) except in the one with Australia, which incidentally is a major destination for Thai students.

2.4.16. Visiting professors and researchers[61]

Another rule recommended in the OECD Commentary without being actually included in the OECD MC or the UN MC,[62] is a provision exempting visiting professors, etc. from tax for a period of up to two years in the country where they are teaching. According to Van Raad, (commenting on an identical provision in the Dutch model treaty) many questions remain about the application and interpretation of this rule.[63] In a recent ruling delivered by the Thai Revenue department, it was stated, that in case the teacher continued to be present in Thailand after the two-year period, the exemption would not apply at all, not even for the first two years.[64]

From the Thai–Luxembourg treaty:

> An individual who is a resident of a Contracting State immediately before making a visit to the other Contracting State, and who, at the invitation of any university, college, school or other similar educational institution which is recognized by the competent authority in that other Contracting State, visits that other Contracting State for a period not exceeding two years solely for the purpose of teaching or research or both at such educational institution shall be exempt from tax in that other Contracting State on any remuneration for such teaching or research.

The treaties with Japan, New Zealand and Switzerland do not contain this provision but other treaties with DCs between 1988 and 1998 do.

2.4.17. Other income taxable where arises or in both states[65]

The UN MC provides that "other income" (income not dealt with in the foregoing articles of the treaty) may be taxed where it arises.[66] Another version of the article states that the income may be taxed in each of the contracting states, or that the treaty does not affect the domestic tax law of each of the states with respect to this income.[67] Under the OECD MC, only the state of residence has taxing power over this income. DCs are not the only ones to make use of the UN approach to other income. Canada, Australia, New Zealand, Portugal and Spain all reserved their position with respect to the OECD MC on this article, noting that they may wish to retain source taxing rights. In practice, for example, Canada and Australia almost always choose to include the UN article on other income instead of the OECD version. The willingness of a DC to accept a UN-style rule on other income depends, which appears to be the conclusion of the Dutch Minister of Finance's declarations on the subject, on how complete the treaty is with respect to the foregoing articles.[68] In other words, when there is more income already dealt with in the rest of the treaty, the more likely the IC will agree to provide for source taxation on other income. All of the Thai treaties with ICs between 1988 and 1998 allow taxation in both states in respect of other income.

2.4.18. Tax sparing credit[69]

The specifics of a tax sparing credit depend too much on the DC's domestic tax system to allow much leeway for the DC to develop any real policy objective, other than trying to include and if so, maximize the credit. This is illustrated by the different tax sparing credits described in Thailand's treaties with ICs between 1988 and 1998. Treaties with Israel and the Czech Republic provide a mutual tax sparing credit. In the treaty with Spain, it is simply mentioned that tax exempt or reduced (under the Investment Promotion Act) is deemed paid. Treaties with Japan, Australia and New Zealand all include a minimum shareholding percentage to qualify for a foreign tax credit on dividends from Thai companies. Certain treaties provide a "deemed paid rate" (Switzerland, Luxembourg) and for Sweden, it is higher than the current Thai withholding tax on interest, dividend or royalty.

3. STEP II – DETERMINATION OF PRELIMINARY CANDIDATE FOR RENEGOTIATION

3.1. General remarks

In theory, which actually means taking into account only strict tax law arguments, it is not complicated to determine which tax treaties should be considered for possible renegotiation, namely those which contain the least amount of the DCs treaty objectives. The fewer objectives contained in an existing tax treaty, the higher the potential benefit of renegotiation. Obviously, the relative importance of different objectives in the eyes of the DC must also be taken into account.

To a certain extent, this exclusively technical approach oversimplifies the issue, as it does not take into account any other factors that may have an influence. Such factors do exist, as was already pointed out by Bartlett.[70] Often,

61. NMCP, 20/6.
62. During the seventh Meeting of the Ad Hoc Group of Experts on International Cooperation in Tax Matters, 1996, the Introduction was considered, but it does not appear in the Draft revised UN MC of 2001. UN, DGCs E/1996/62 ECOSOC. It does exist in the Dutch model tax treaty ("Nederlands Standaard Verdrag"), Art. 20.
63. Van Raad, C., "Internationaal Belastingrecht", Chap. III, p. 511 in Mobach, M.. a.o., *Cursus Belastingrecht*.
64. Ruling No. Gor Kor 0811/1556, 20 February 2001; and (concurring) Van der Bruggen, E., "Tax burden for foreign teachers or researchers in Thailand", *Thai Journal of International Taxation*, Vol. 1, Issue 2, pp. 8-9.
65. NMCP, 21/1.
66. How to determine when other income "arises" in a country is not dealt with in the treaty. Authoritative literature has suggested that this may be determined by the source rules found in domestic law, unless the context requires otherwise: Ward, A, Avery Jones, Depret, Ellis, Fontaneau, Lenz, etc., "The other income article of income tax treaties", *Bulletin for International Fiscal Documentation*, 1990, p. 409 (and *B.T.R.*, p. 358).
67. For example: Australia–Singapore, Italy–Argentina, Italy–Malaysia, Italy–India, Japan–Singapore, France–Sri Lanka, Belgium–Malaysia and Belgium–Singapore.
68. Tweede Kamer, vergaderjaar 1987-88, 20 365; commented on by Ward, A., Avery Jones, Depret, Ellis, Fontaneau, Lenz, etc., "The other income article of income tax treaties", *B.T.R.*, p. 352.
69. NMCP, 23/1; Pichart Gesaruang, *Linkages*, OECD, Paris, 1996, p. 101.
70. Bartlett, R.T., "The making of double taxation agreements", *B.T.R.*, 1991, p. 76 (78); see also Milton, D., "Tax treaty procedures", *Bulletin for International Fiscal Documentation*, 1980, p. 585 et seq.

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the decision to (re)negotiate a tax treaty is not taken by officials who fully focus on the technical specifics of the tax treaty, although considerations of that nature will certainly be entertained somewhere along the process. On the other hand, it must be assumed that once the decision is taken to renegotiate a certain tax treaty, a technical look at the old treaty and the desired objectives will be an integral part of the renegotiating team's preparation. In other words, even if the decision to renegotiate may not be an automatic consequence of an analysis of what is missing in the current treaty, such an analysis will be made anyway.

To carry out an examination in order to determine the amount of objectives (and their importance) found in existing treaties, it may be helpful to draft a comparative table. This table, drafted in the same manner as below with respect to Thailand, will indicate which objectives have already been met and in which existing treaties. By the same token, the table offers a comparative overview of which treaties lack the most current tax treaty objectives. Usually, it will obviously be more efficient to begin with the older tax treaties with ICs, as they tend to be the ones most out of touch with current tax treaty policy. In my case study of Thailand, I chose to include treaties that were concluded before being influenced by the publication of the UN Model in 1980.

3.2. Comparative table in the case of Thailand

In Table 2, vertically, the Thai treaty objectives are listed as defined and described above. The horizontal line is made up by the tax treaties concluded until 1981 with ICs. In the table it becomes clear which objective has been fulfilled ("yes"), and which remain unfulfilled.

3.2.1. Notes on the horizontal line: per objective

The picture that emerges from the verification of Thailand's tax treaties with ICs before 1982, is that some Thai treaty objectives have already been included in those treaties, but largely most of the objectives are absent. Generally, the picture is clearly in favour of the more recent treaties, i.e. the recent treaties include much more of Thailand's treaty objectives than the older ones.

More precisely, from the defined tax treaty objectives (excluding the tax sparing credit), only the following have a significant presence in the older treaties: omitting "combination" (Art. 5 (4)(f) UN MC), stock agents (Art. 5 (5)(b) UN MC) and "order filling", independent agents with one principal (Art. 5 (7) UN MC) and the extended provisions for students and visiting professors. With respect to these objectives, it is fair to say that a renegotiation is not warranted. As is demonstrated by the table, however, most of the other Thai objectives are largely absent (furnishing of services, limited force of attraction, leasing of equipment, top-level managers, etc.) or only sporadically included (omitting delivery, alienation of intellectual property).

Furthermore, some of the more important Thai treaty objectives, as indicated above, score among the lowest to be present in the reviewed treaties until 1981, for example, supervisory activities, furnishing of services, limited force of attraction, lease of equipment and source taxation on other income. Therefore, both in a quantitative and qualitative way, it is fair to say that the reviewed pre-1982 tax treaties do not meet many of the current Thai tax treaty objectives.

4. STEP III – SUBJECTIVE SCOPE: COMPARATIVE ANALYSIS FOR PRELIMINARY CANDIDATES

In Step III of the comparative analysis, the willingness of the treaty partner (one or more ICs found after Step II) to accept the treaty objectives (as defined in Step I) in the event of a (re)negotiation, has to be feasibly assessed. A helpful instrument in doing that would be to review the tax treaties of each of the ICs, so that can be established, how many times and with which other DCs, has the IC agreed to include such objectives. Determining the different scopes of the comparative analysis in terms of treaties that will be compared per IC, is obviously directly related to the validity of its conclusions. It is necessary to have a sufficient body of treaties for comparison, and also because it is important to have enough "comparable" DCs. On the other hand, practically, it may not be useful to include several dozen treaties in the comparative analysis. Two factors which are important in this respect are: time (temporal element) and type of country (economic element).

4.1. Determining the factors of the analysis: time period review

It must be determined over which period of time the comparative analysis is to be carried out, i.e. what is the maximum "age" of a tax treaty in order for it to taken into account as indicative of the IC's current tax treaty policy? Obviously, the more recent the treaty, the higher the chance that it is in line with the IC's current policy. But, generally, actual treaty practice shows that there has not been any dramatic shift in what a particular IC agrees with DCs since the 1980s, in terms of the DC's tax treaty objectives. If there were a dramatic shift in policy, it will be detected by the comparative analysis. Still, recent treaties should generally be given more weight than older treaties.

In the case study of Thailand, all tax treaties concluded by each of the selected ICs during the last 20 years were reviewed, but all this data cannot be represented here for reasons of length.[71] In this article, the statements are regarding the main trends and important notes from a Thai tax policy perspective.

4.2. Determining the factors of the analysis: which countries may be deemed "comparable"

Based on the case study of Thailand's treaty partners, it would appear that the identity of the country concerned is more relevant to the outcome of a treaty rather than the time the treaty was concluded. If this is true, countries that should be included in the scope of the comparison should

71. Those interested in the detailed overview should contact the author.

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Table 2

Objectives	Thailand–Belgium (16 October 1978)	Thailand–France (27 December 1974)	Thailand–Germany (10 July 1967)	Thailand–Italy (22 December 1977)	Thailand–Korea 26 August 1974)	Thailand–Netherlands (11 September 1975)	Thailand–Norway (9 January 1964)	Thailand–Poland (8 December 1978)	Thailand–Singapore (15 September 1975)	Thailand–United Kingdom (18 February 1981)	Total per objective (%)
Art. 5.3(a) "assembly project, a construction project, supervisory activities"	yes	–	–	–	yes	yes	yes	–	–	–	30
Art. 5.3(b) "furnishing of services"	–	–	–	–	–	–	–	–	–	–	0
Art. 5.4 (a) and (b) omit "delivery of goods"	–	–	–	–	–	–	yes	–	–	–	10
Art. 5.4 (f) OECD omit "combination of activities"	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	100
Art. 5.5 "stock agents"	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	100
Art. 5.6 "insurance activities"	yes	–	–	–	–	–	–	–	–	–	10
Art. 5.7 "agents with one principal"	yes	yes	yes	–	yes	yes	–	–	yes	yes	70
Art. 7.1 "limit force of attraction"	–	–	–	–	–	–	–	–	–	–	0
Art. 12.3 "radio and television broadcasting"	yes	–	yes	–	yes	yes	–	yes	–	yes	60
Art. 12.3 "industrial, commercial and scientific equipment"	–	–	–	–	–	–	–	–	–	–	0
Art. 12 "alienation of intellectual property"	yes	–	yes	–	yes	–	–	–	–	yes	40
Art. 13.4 "real property shares"	–	yes (in a real property cooperative)	–	–	–	–	–	–	–	no (former resident rule)	10
Art. 13.5 "other shares"	–	–	–	–	–	–	–	–	–	no (former resident rule)	0
Art. 13 other gains may tax where they arise or both	–	–	–	–	–	–	–	–	–	–	0

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Objectives	Thailand–Belgium (16 October 1978)	Thailand–France (27 December 1974)	Thailand–Germany (10 July 1967)	Thailand–Italy (22 December 1977)	Thailand–Korea 26 August 1974)	Thailand–Netherlands (11 September 1975)	Thailand–Norway (9 January 1964)	Thailand–Poland (8 December 1978)	Thailand–Singapore (15 September 1975)	Thailand–United Kingdom (18 February 1981)	Total per objective (%)
Art. 14.1 "additional criteria"	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	100
Art. 16.2 "top-level managerial officials"	–	–	–	–	–	–	–	–	–	–	0
Art. 20 "students more income"	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	100
Art. – teachers and professors	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	100
Art. 21.3 "source state taxation of other income"	yes	yes	–	not mentioned, both may tax	–	–	yes	–	yes	–	50
total per country (%)	55	40	40	30	45	40	40	30	35	40	

be those, that are for one reason or another, comparable with the DC concerned. Determining which countries are comparable and in what sense, is not an easy task especially because no evidence is available on which economic factors influence an IC's willingness to accept tax treaty provisions which are in the interest of DCs.[72] In view of the lack of evidence, one may wonder if it is at all possible to limit the scope of the analysis to comparable countries only. Even without detailed data on the subject, it seems however that excluding certain countries, or at least giving them less weight when drawing conclusions, may be appropriate, especially if there are very substantial differences between the two countries. In general terms, one could resort to the World Bank's classification of countries, which refers to the Gross National Income of each country. Adding more variables to the comparison, such as direction of trade, source of foreign direct investment, etc., may give the conclusions more validity but presently there is no real evidence to support such a conclusion.

4.2.1. Belgium

The Thai–Belgian tax treaty was concluded on 16 October 1978 and contains relatively more of the Thai treaty objectives when compared to other Thai tax treaties which were concluded with other ICs during the same period. For example, the provisions on independent agents with one principal, and on the alienation of intellectual property which are included in the Thai–Belgian treaty, are usually absent in tax treaties concluded with other ICs during the same period. Important objectives that are not included in the current treaty are the furnishing of services, the limited force of attraction, the lease of equipment, the source taxation on other gains, and top-level managers.[73]

It is fair to say that there is a reasonable chance to have Belgium concede to the furnishing of services PE. Although this rule was not included in more than half of the Belgian treaties with other DCs, more recent treaties show a trend to agree to the provision, especially with the Asian countries Vietnam, Indonesia, the Philippines and Sri Lanka. The limited force of attraction provision shows the same picture: often accepted in recent treaties with Asian countries (India, Indonesia, Pakistan, the Philippines, and Vietnam) although there are exceptions (Bangladesh). Lease of equipment has been included by Belgium in the royalty article in most treaties with DCs, with the notable exception of Mauritius, even after 1992 (Argentina, Indonesia, Vietnam, etc.).

Source taxation on other gains is much less likely to be accepted by Belgium. Only in the treaties (since 1981) with Argentina and Egypt, did Belgium agree to allow the source country the right to also tax the capital gain. With respect to top-level managers, they are often treated as directors in Belgium's tax treaties with DCs and therefore, Thailand would have a good chance to introduce this rule in a renegotiated treaty with Belgium.

72. This issue was also touched upon in the OECD Report: "Tax Sparing; A Reconsideration", p. 33.

73. The treaty even provides that directors with day-to-day functions may be taxed under Art. 14 instead of under Art. 16.

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4.2.2. France

The tax treaty with France was signed on 27 December 1974, and only meets a few of the current Thai treaty objectives. Stock agents and independent agents with one principal are included in the treaty, and the "combination of negative activities" is omitted. Besides, in the rules concerning teachers, students and independent personal services only the source taxation for other income is allowed.

Certain current Thai treaty objectives may be expected to meet with little French resistance, in the event of renegotiation. If the recent French treaties with DCs may be taken as an indication, supervisory activities (accepted i.e. with China, India, Latvia and Lithuania, but not with Bangladesh and Vietnam) and radio and television broadcasting (which has not been mentioned except in the treaties with Israel and South Africa) will more likely be accepted by France. The leasing of equipment has been accepted by France in most of its tax treaties with DCs such as Bangladesh, China, India, Jamaica and Vietnam, which were concluded after the treaty with Thailand.

Most Thai treaty objectives, however, have not been readily included by France in its tax treaties with other DCs. Such is the case for the furnishing of services (only with China), insurance PE (Bangladesh only), limited force of attraction (China only) and the alienation of intellectual property (not with DCs).[74] The same goes for source taxation on other gains (China only) and top-level managers (Pakistan and South Africa). An only slightly better chance exists for omitting delivery (with Bangladesh, India and Pakistan). The fact that most of the important Thai tax treaty objectives have only been sporadically accepted by France, in its other treaties, is an unfavourable sign for an eventual treaty renegotiation between Thailand and France.

It should be pointed out that the exemption in the current treaty of personal income of students is exceptional for France. Only the treaty with Pakistan includes a similar provision, and therefore, it should be anticipated that in the course of a possible renegotiation, the French may attempt to renegotiate the provision.

4.2.3. Germany

The Thai tax treaty with Germany was signed on 10 July 1967, and is remarkably similar to the treaty with France. Only the alienation of intellectual property, which was not included in the French treaty, is mentioned in the German treaty, but with respect to source taxation on other income, it is reversed. It seems almost as if the one objective needs to be sacrificed to obtain the other. In this situation, it is hard to say which of the treaties are more disadvantageous to Thailand, the French or the German, but it is clear that neither meets much of Thailand's recent objectives.

When verifying the room for improvement, it becomes apparent that most of the Thai objectives have only sparsely been included by Germany, in its recent treaties with other DCs. Furnishing of services was only included once (China)[75] and while the limited force of attraction, alienation of intellectual property and top-level managers were *never* accepted. Source taxation on other gains was only accepted in the treaties with China and Egypt. Germany has sporadically accepted some provisions, which are not present in the current treaty with Thailand, such as those on delivery (Bangladesh, Indonesia and Pakistan) and insurance PE (Egypt, Indonesia and Philippines). Germany appears to have found capital gains on shares more acceptable (included in treaties with Bangladesh, Pakistan, Uruguay, etc.) as well as source tax on other income (China, Egypt, Philippines, etc.). The lease of equipment, which features in most of the reviewed treaties, even after 1992 (such as with Argentina, Estonia, India, Venezuela and Vietnam), is apparently quite acceptable to Germany. Supervisory activities have also often been agreed upon by Germany.

It must be pointed out that including alienation in the royalty article, as in the current Thai–German tax treaty, is unique in recent German tax treaty policy with DCs. In the event of a renegotiation, this issue may be raised.

4.2.4. Italy

The treaty with Italy was signed on 22 October 1972, and contains only few of the Thai treaty objectives, such as stock agents, omitting combination of activities and additional criteria for independent personal services, besides students and teachers. The other income article was omitted.

In the mean time, Italy has agreed to include a furnishing of services PE in its treaties with China, Indonesia, Pakistan, Sri Lanka and Vietnam, and therefore it may be swayed to accept a similar provision for Thailand as well. The same can be said for omitting "delivery" (accepted with Algeria, Bangladesh, India, Indonesia, Pakistan, Venezuela and Vietnam), lease of equipment (Bulgaria, India and Indonesia) and capital gains on shares.

More persuasion will be necessary with respect to insurance PE, limited force of attraction (Italy accepted with India and Indonesia, but declined for example with China and Vietnam), and source taxation of other gains (only with China). In order for Italy to agree upon alienation of intellectual property, it may take a change in its treaty policy because it has, to date, not done so with a DC.

4.2.5. South Korea

The Thai treaty with South Korea was signed on 24 August 1974. In the meantime, South Korea has concluded multiple treaties with DCs, and has become a member of the OECD.

When reviewing South Korea's treaty policy, it becomes clear that certain current Thai treaty objectives have never (or almost never) been accepted by South Korea in its tax treaties with other DCs. Such is the case, i.e. with the alienation of intellectual property, gains on shares and source taxation on other gains. All those rules, however, have already been included in the current Thai treaty with South Korea.

Among the remaining Thai treaty objectives, the furnishing of services was accepted by South Korea in its treaties

74. France has included this provision in its treaty with Israel.
75. A source tax on technical fees has, however, been included in the treaty with India.

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with China, Indonesia, Kuwait, the Philippines and Sri Lanka, but not adopted in treaties with Vietnam and Bangladesh. Omitting delivery was carried out in a few treaties, namely those with Bangladesh, Indonesia, Pakistan and Vietnam, but not with other countries such as China, Fiji, Malaysia, the Philippines and Sri Lanka. Including an insurance PE was done in roughly a third of South Korea's treaties: Indonesia, Morocco, Pakistan, etc. Including lease of equipment in the royalty article is fairly common for South Korea's treaties, and figure in the current Thai–South Korean treaty.

Limited force of attraction and top-level managers are provisions which are only rarely included in South Korea's tax treaties (the former only with Indonesia, the latter with the Philippines), which cannot be a favourable sign for Thailand in the event of a possible renegotiation.

4.2.6. The Netherlands

The Thai–Dutch treaty was concluded on 11 September 1975. Certain important Thai treaty objectives are not met in that treaty, such as the furnishing of services, omitting delivery, insurance PE, a limited force of attraction, lease of equipment, alienation of intellectual property, etc.

In view of recent Dutch treaty practice with DCs, a limited force of attraction (only accepted with Argentina and Indonesia), will be hard to achieve in a renegotiation. This has been confirmed by an official statement by the Dutch government to that effect.[76] Likewise, alienation of intellectual property was not contained in any of the reviewed Dutch treaties. Source taxation for gains on other property has only been agreed upon by the Netherlands in a few treaties such as with Brazil and China,[77] while allowing the source country to tax a capital gain on shares, features in a slightly higher number of cases.

A relatively higher chance exists with respect to the introduction of the furnishing of services, which has been included in quite a number of Dutch treaties with DCs (China, Indonesia, the Philippines, Vietnam, etc.). The treaty with India does not provide for a furnishing of services PE, but has covered fees for technical services in Art. 12.

Omitting delivery, and an insurance PE are among the Thai treaty objectives that are perhaps less important, but have frequently been accepted by the Netherlands. More importantly, Dutch treaty practice indicates that the lease of equipment (which figures in most of the Dutch treaties with DCs) and top-level managers (accepted with Indonesia, Pakistan, the Philippines, South Africa, Sri Lanka, but not included with countries such as China, India and Vietnam) may very well be accepted in the event of a renegotiation.

Most of the Thai treaty objectives currently featuring in the Dutch–Thai treaty are not at all unusual for the Netherlands, with the possible exception of agents with one principal, which was only included in a small minority of its treaties with DCs (Argentina and Indonesia). There is no article for other income in the present treaty (see also the Dutch treaties with India, Indonesia, etc.).

4.2.7. Norway[78]

The treaty with Norway was signed on 9 January 1964 and is the oldest tax treaty with Thailand that is still in force. In its current form, it contains the least amount of Thai treaty objectives. Only items such as supervisory activities, source tax on other income and omitting delivery, are already part of the treaty, besides the usual Thai provisions on independent personal services, students and teachers. It is noteworthy that the current treaty with Norway does not grant a tax sparing credit.

Consequently, there is plenty of room for improvement, at least in theory. Norway has, for example, accepted a furnishing of services rule in a *majority* of its treaties with DCs including China, India, Indonesia, Nepal, the Philippines and Vietnam. The same can be said for the combination of activities (Indonesia, Sri Lanka, Venezuela, Vietnam, etc.), agents with one principal, limited force of attraction (including Indonesia, Pakistan, Sri Lanka, Vietnam), radio and television broadcasting and the lease of equipment (including China, Indonesia, Pakistan, the Philippines, Sri Lanka, Vietnam).

Less acceptable to Norway, so it seems, is the alienation of intellectual property which has not been accepted in any of the reviewed treaties. The important rule on top-level managers has been included in a significant minority of treaties (only with China, Pakistan and Sri Lanka).

It is noteworthy that rules deviating from the OECD MC with respect to students and teachers, is rarely accepted by Norway (the former only with Brazil, the latter only with Brazil and China), but it had done so in the current treaty with Thailand. In case of a renegotiation, maintaining these provisions should not be taken for granted.

4.2.8. Poland

The tax treaty with Poland was signed on 8 December 1978. At the time, Poland was a part of the "Soviet block" and did not play an important role in international economic trade with capitalist countries. Since then, Poland has become a member of the OECD and is on the verge of entering the EU. It goes without saying that this important change of circumstances is not reflected in the existing tax treaty.

The current treaty with Poland mentions some of the Thai treaty objectives, but most remain unfulfilled. Since that time, Poland's recent tax treaty policy shows that including furnishing of services may be acceptable as it has done so in roughly half of its treaties with DCs (including with Indonesia, the Philippines, and Vietnam). Introducing a limited force of attraction will be more difficult, but Poland did accept it in the treaties with Indonesia, Uzbekistan and Vietnam, but not, for instance, with India and the Philippines. Including supervisory activities and omitting delivery with respect to the PE has often been accepted by Poland, which sheds light on a possible Thai

76. "Notitie Algemeen Fiscaal Verdragsbeleid", 1987, onderdeel v2, *Kamerstukken*, II, 1987-1988, 20 365 nr. 2.
77. The treaty provides: "where the property is situated".
78. See also above, with respect to the renegotiated Thai treaty with Norway, infra note 87.

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proposal to that effect. Alienation of intellectual property has not been included in any of the reviewed treaties.

Source taxation on other gains has only sporadically been accepted by Poland,[79] such as with China and Egypt, while the inclusion of top-level managers in Art. 16 was agreed with Egypt and India, but not with countries such as China, Indonesia and Vietnam. Source taxation on other income seems to stand a slightly better chance, and was included in treaties with Armenia, China, Indonesia, Philippines, Vietnam, etc.

4.2.9. Singapore

Thailand concluded its tax treaty with Singapore on 15 September 1975. The treaty contains only two Thai treaty objectives concerning permanent establishments, namely stock agents and independent agents with one principal. Furthermore, besides the reference to students and teachers, the only additional criteria for Art. 14, and source tax on other income have been included in the treaty. It may therefore be said that the treaty with Singapore scores rather low with respect to current Thai treaty objectives. This may be the result of the difference in economic development between Thailand and Singapore, at the time of the conclusion of the treaty, which was less important than at present.

In the meantime, Singapore has concluded tax treaties with some DCs, but comparably less than other ICs.[80] Therefore, the comparative analysis is based on a thinner body of evidence, and the conclusions must be handled more selectively.

Nevertheless, it is clear that Singapore has little trouble accepting several Thai treaty objectives, such as supervisory activities, combination of activities and radio and television broadcasting.[81] Lease of equipment was included in more or less half of the reviewed treaties, including with India, Indonesia and Vietnam.

The furnishing of services was included in the Singaporean treaties with China, India, Indonesia and the United Arab Emirates, but not with Vietnam and Pakistan. Omitting delivery from Art. 5 was only agreed upon in the treaties with Indonesia and Pakistan. An insurance PE was not included in any of the reviewed treaties, and neither was limited force of attraction. Evidently, Singapore is also not likely to deviate from the OECD MC concerning the source tax on capital gains in its treaties with DCs (although it did so with China and it agreed to omit the article altogether with Indonesia).

With respect to the taxation of students, the current Thai–Singapore treaty includes an exemption for remuneration for personal services in Singapore for the purpose of the taxpayer's maintenance, not exceeding SGD 12,000 or THB 96,000, which is in line with recent Singapore tax treaty policy.[82] The same goes for the UN-style treatment of other income in the current treaty.[83]

4.2.10. United Kingdom

The treaty with the United Kingdom was signed on 18 February 1981. Independent agents with one principal, stock agents, combination of activities and the alienation of intellectual property are some of the Thai treaty objectives that have been included in the current treaty, but most of the others (besides those on students and teachers) have not been included.

Many of those have, in the meantime, been accepted in UK treaties with other DCs, such as supervisory activities, the lease of equipment and real property shares. Other objectives are less in line with UK treaty policy. Furnishing of services (accepted for instance with Argentina, India, Indonesia and Malaysia, but not with Vietnam, Bolivia, etc.) figures in a *significant minority* of the United Kingdom's treaties with DCs, and the same can be said for omitting delivery (Argentina, India, Indonesia, etc.) and source taxation on other capital gains.[84] Source taxation on other income[85] was included by the United Kingdom in several treaties, including China, India, Indonesia, Malaysia and Nigeria. Introducing lease of equipment in the royalty article seems quite acceptable to the United Kingdom, which has done so in a majority of the reviewed treaties (Argentina, China, India, Indonesia, Malaysia, etc. but not Vietnam).

It will, however, be difficult to have the United Kingdom to agree to an insurance PE (only included in the treaty with Indonesia), limited force of attraction (which is not mentioned in any of the reviewed treaties), alienation of intellectual property and top-level managers, as most of those objectives have not or only very rarely been included in the United Kingdom's recent tax treaties with DCs.

It is noteworthy that Thailand has managed to introduce the alienation of intellectual property into Art. 12, which is unique in the United Kingdom's tax treaties with DCs during the reviewed period (including treaties with Indonesia, Malaysia and Vietnam). In case of a renegotiation, it cannot be ruled out that this provision will come under pressure.

5. STEP IV – CONCLUSION PER COUNTRY

With respect to *Belgium*, it is fair to say that most of the Thai treaty objectives have been accepted in Belgian tax treaties with other DCs subsequent to the treaty with Thailand. If this may be taken as an indication of Belgium's response to Thai proposals in the case of a possible renegotiation of the Thai–Belgian treaty, it seems likely that most of the current unfulfilled Thai tax treaty objectives would be accepted by Belgium, with the possible exception of source taxation on other capital gains. However, the current Thai–Belgian treaty is less unfavourable than

79. By providing that they may be taxed "where they arise".
80. Bulgaria, China, India, Indonesia, Latvia, Mauritius, Pakistan, South Africa, the United Arab Emirates and Vietnam.
81. How Teck Tan, "Singapore's tax treaty policy", *Intertax*, 2001, 185 ("Most treaties also include provisions on supervisory activities similar to UN 5 (3) a."). The same can be said with respect to excluding the maintenance of a fixed place of business solely for any combination of the activities in OECD Art. 5 (4)(a)-(e) from the definition of a PE, as noted by the same author.
82. How Teck Tan, "Singapore's tax treaty policy", *Intertax*, 2001, 188.
83. Thomson, W.A., loc. cit., 95; How Teck Tan, "Singapore's tax treaty policy", *Intertax*, 2001, 188.
84. Usually by providing that both states may tax the capital gain.
85. Sometimes by omitting the article altogether.

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those with other ICs, and that must obviously be taken into consideration.

With respect to *France*, it seems that most of the Thai treaty objectives have not or only rarely been included in the treaties that have been concluded since by France with other DCs. If that may be taken as an indication of the French response to Thai proposals in case of a possible renegotiation, it seems that only the provision for the lease of equipment is likely to be accepted. Though it is *not likely* that *none* of the important Thai treaty objectives will be acceptable to France, this may be interpreted as a less than favourable sign during possible renegotiations.

With respect to *Germany*, it is fair to say that the situation is even less encouraging than the one with France. Taking its recent treaties as an indication of a possible German response to Thai proposals in case of a renegotiation, it seems that the lease of equipment and other income are the only important objectives that have a good chance of being accepted. Relating to the other objectives, much as is the case with France, it may be noted that it is *not likely* that *none* of the important Thai treaty objectives will be acceptable to Germany, but the lack of enthusiasm to include them in treaties with other DCs is not a favourable sign.

With respect to *Italy*, chances for a successful renegotiation are much better. If its recent treaty practice with DCs may be taken as an indication of the Italian response to Thai proposals, it would appear that there is a good chance of introducing several important Thai treaty objectives, such as the furnishing of services, the lease of equipment and perhaps the limited force of attraction. Given the low number of Thai treaty objectives that are present in the current treaty, Italy is consequently (in theory) an obvious candidate for renegotiation.

With respect to *South Korea*, the current, though not entirely unfavourable, treaty has still room for improvement. If South Korea's recent tax treaty policy with other DCs may be taken as an indication of possible responses to Thai proposals, there seems to be a good chance to obtain furnishing of services, omitting delivery and lease of equipment. However, one must bear in mind that the current treaty contains two Thai objectives that are quite unusual for Korea to accept (alienation of intellectual property and source tax on other gains), which may come under pressure in a renegotiation.

With respect to *the Netherlands*, one may be optimistic. Some important Thai objectives stand a good chance of being accepted, such as the lease of equipment, furnishing of services and top-level managers, while success on other capital gains or perhaps even a limited force of attraction cannot be ruled out either.

With respect to *Norway*, there is, in theory, plenty of room for improvement, and taking Norway's recent tax treaty policy with other DCs as an indication of possible responses, there is a good chance to introduce furnishing of services, limited force of attraction, independent agents with one principal and the lease of equipment. Success on top-level managers cannot be excluded either. On a more pessimistic note, it must be pointed out that Norway may be inclined to review the current favourable rules on students and teachers, or trade them off. Nevertheless, the combination of the current relatively unfavourable treaty and the encouraging results of the comparative analysis, make Norway a theoretically obvious candidate for renegotiations.[86]

With respect to *Poland*, which has evolved considerably since the conclusion of the 1978 treaty, the outlook is rather positive. Using recent Polish tax treaty policy with other DCs as an indication, it is likely that supervisory activities, furnishing of services and omitting delivery are acceptable to Poland, as well as source tax on other income and lease of equipment. Together with the low amount of Thai treaty objectives that are included in the current treaty, Poland is an obvious candidate for renegotiation, at least in theory.

With respect to *Singapore*, the outlook is also rather positive when one views Singapore's recent tax treaty policies with other DCs. Important Thai treaty objectives such as lease of equipment and top-level managers seem quite acceptable to Singapore, as well as supervisory activities and omitting combination of activities. There is also a reasonable chance to include furnishing of services and source tax on other gains, although it is unlikely that all of those objectives can be achieved.

Finally, with respect to the *United Kingdom*, the possibilities are certainly more limited, although there is some room for improvement. Using the United Kingdom's recent tax treaty policy with other DCs, few Thai tax treaty objectives may be expected to be met with a favourable reaction. With the exception of lease of equipment, and to a much lesser extent furnishing of services and perhaps source tax on other gains, most Thai treaty objectives are unlikely to be accepted by the United Kingdom.

From this analysis and with the reservations formulated above, Italy, Norway and Poland offer the best chances for a successful renegotiation, as does Belgium but the latter treaty is less in need of renegotiation. With respect to the Netherlands and Singapore optimism is also warranted, but to a lesser extent. It is noteworthy but not surprising

86. During the preparation of this article, the Thai–Norwegian double taxation agreement was renegotiated, which led to an initialization earlier this year. Working groups of two countries have agreed on the changes to the text of the new DTA. The revision of the new DTA has already been approved during a meeting of the Thai cabinet held on 10 July 2001 and it is expected that the new treaty will be signed soon. Most of the changes with the 1964 treaty were carried out to bring the treaty in line with the recent OECD Model. With respect to provisions that benefit a DC, it can be noted that the furnishing of services has been included in the definition of a PE in the new treaty. Also, "films or tapes used for radio or television broadcasting" has been included in the definition of "royalties", following the UN Model in this respect. More importantly, "the use of or the right to use industrial, commercial, or scientific equipment" now falls under the scope of the royalty article. The UN provision on agents with one principal has also been included. Furthermore, there is no longer a separate article for visiting professors. Finally, under the 1964 treaty Norway was not obliged to grant a tax sparing credit for tax paid in Thailand, but a tax sparing clause has been added in the new treaty. When the result of this initialized treaty is compared with the conclusions of the comparative analysis, it is fair to say that almost all of the "predictions" based on the analysis have materialized in the new treaty. Indeed, just as the comparative analysis indicated, a furnishing of services rule and leasing of equipment was accepted by Norway. The same goes for radio and television broadcasting, and agents with one principal. Furthermore, in line with the conclusions of the comparative analysis of Norway's treaty practice with DCs, alienation of intellectual property was removed from Art. 12, and the special article for visiting professors deleted.

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that with the large European countries, France, Germany and the United Kingdom, there are fewer guarantees for a successful renegotiation, although almost all treaties may be improved in one way or another.

6. CONCLUDING REMARKS: THE LIMITATIONS INHERENT IN USING COMPARATIVE ANALYSIS FOR TAX TREATY (RE)NEGOTIATIONS

6.1. Does a tax treaty renegotiation start from a clean slate

In the event of a treaty renegotiation with an IC, are the DC's objectives already included in the old treaty deemed "acquired"? In other words, can a DC lose provisions in a renegotiated treaty which were already included in the existing treaty?

The answer to this question is important. If yes, it means that it may be better *not* to renegotiate *rather* "favourable" tax treaties in an attempt to make them *more* favourable should there be a good chance that the IC will try to make them *less* favourable. In other words, it must be verified first which favourable provisions in the current treaty may come under pressure during renegotiations. If there are too many of the first kind compared to those of the second kind, it may be better to leave the initiative for renegotiation to the other party.

It seems that losing ground in the renegotiation is certainly a real possibility.[87] The most sensitive areas for Thailand in this respect appear to be withholding tax rates and the tax sparing credit. Treaties concluded in the 1970s contain very high minimums in respect of withholding tax, reflecting Thailand's domestic rates. In the meantime, those domestic rates have been reduced to 10% (dividend) and 15% (all others). In the renegotiated treaties with Denmark, Sweden and the United States withholding tax rates were reduced. In the case of Denmark and the United States, withholding tax on certain royalties was even reduced under the domestic rate. An eventuality that needs to be entertained, is that in the renegotiation process other ICs will also propose a lower minimum, perhaps even lower than the domestic rate.

Relating to tax sparing credits, Thai treaty partners have in the renegotiation mostly added conditions that had been introduced in their domestic legislation. More worrying, from the perspective of a DC, is the reluctance of the ICs to extend tax sparing provisions for an unlimited duration.[88] By detaching the tax sparing provision from the duration of the rest of the treaty, an uncertainty is incorporated into the treaty, to the disadvantage of the DC. Sasseville already pointed out, in 1996, the change in treaty policy that OECD countries have with respect to tax sparing credits: "OECD countries now appear to be less liberal than before with respect to tax sparing credits in tax treaties. Typically, they will allow tax sparing with respect only to certain identified incentives or activities and will limit in time the application of the provision".[89]

Although a DC may indeed lose some ground in renegotiations, Thailand's experience shows that, to date, it has *obtained much more of its objectives than it has been required to give up*. The latter may, however, only be a one-time catch-up effect of the pre-UN MC treaties, to include some of the provisions mentioned in that model.[90] In any event, it is fair to say that a renegotiation between an IC and a DC is not a "fail-safe" game for the DC. In return for more favourable source provisions, the IC may expect something in return, even if it seems comfortable with the idea that the DC will obtain more out of the renegotiation than the IC.

6.2. Limitations inherent to the method of comparative analysis

As was repeatedly pointed out above, there are several important limitations inherent to the use of comparative analysis for tax treaty (re)negotiations. Primarily, this method negates the fact that the outcome of a tax treaty negotiation is the result of "bargaining". The contents of double taxation conventions can only, to a certain extent, be predicted by confronting the tax treaty policies of the contracting states, which is essentially what is accomplished by comparative analysis. For example, comparative analysis does not take into account the *relationship between the different objectives*.[91] In other words, it may be that a DC has mostly accepted a certain provision in the treaty because another provision was left out, or a certain objective was included in return for a clarification in the protocol, which would not have showed up at all. When countries have turned a relationship between objectives (or between an objective and a provision in their benefit) into policy, this would not always show up in the comparative analysis. And there is evidence to suggest that such policies do indeed exist. From the structure of the OECD MC itself, it is unavoidable that certain types of income, and therefore certain provisions, are related to each other. Income from technical services, for example, has points of contact with business profits, royalties and income from personal services. The statement of the Dutch Minister of Finance referred to above, for example, shows that there is a relationship between granting source taxation on other income (which is one of the Thai tax treaty objectives) and the other (non-objective) provisions of the tax treaty.[92] Other examples are the trade-off

87. With respect to Thailand, the time threshold for building sites was increased from three to six months in the new Thai–Danish treaty. Tax sparing provisions also contain more conditions in the renegotiated treaty with Denmark.

88. The new treaty with Denmark, but see also treaties with Spain, New Zealand and Australia.

89. Sasseville, J., "Current Issues in International Tax Policy", in *Linkages*, OECD, Paris, 1996, p. 9. See also OECD, "Tax Sparing; A Reconsideration", Paris, 1998, pp. 31-33.

90. It would be interesting to see if such is indeed true by observing the renegotiations of treaties between ICs and DCs that were concluded some time after 1980. That would also shed some light on another suggestion, namely that certain of the UN changes on the OECD MC (more particularly the ones that are less costly in terms of waived tax revenue for the IC) benefit from a "presumption of acceptability". In other words, because they are included in the UN MC, some provisions are difficult for the IC to refuse to include in a treaty with a DC, because of the "authority" attached to them.

91. Such relationships have not been included in this study, although it would theoretically be possible to do so.

92. Tweede Kamer, vergaderjaar 1987-88, 20 365; commented on by Ward, A., Avery Jones, Depret, Ellis, Fontaneau, Lenz, etc., "The other income article of income tax treaties", *B.T.R.*, p. 352.

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between withholding tax and information about the beneficiary of the income, and the relationship between the amount of withholding tax and the definition of the income subjected to it.[93]

To reduce the effect of this limitation, it is recommended to include more objectives in the scope of the comparative analysis. By not only conducting a comparative analysis on the exact objectives the DC would like to have included but also on all tax treaty provisions that are to benefit of the DC, it may be possible to discern relationships that exist between such provisions from the viewpoint of the IC.

Another limitation is that no variables are included in the comparative analysis which allow the establishment of a possible relationship between an IC's tax treaty policy and economic indicators. The decision to enter into a tax treaty with another country is at least in part economically inspired.[94] It may very well be that the willingness of an IC to accept objectives of DCs in tax treaties depends to a certain extent on the importance of their economic relationship, or expectations of a future economic relationship. The case study of this article certainly seems to suggest so, if we compare the negotiating success of large DCs (such as India and China) to those of smaller ones (such as Bangladesh and Latvia). In any event, this issue deserves further study, but the exact impact of economical considerations may remain in the shadows forever. In the meantime it is prudent to keep the possible impact in mind while conducting comparative analysis.

6.3. Relevance of comparative analysis

Although the limitations of the method must be kept in mind, it would be a mistake to deny the relevance of comparative analysis for tax treaty (re)negotiation. Certain trends in the tax treaties of an IC are so unmistakable, that they cannot be taken as anything else than a clear indication of the actual tax treaty policy of an IC. Furthermore, an elaborate comparative analysis may indicate negotiation solutions and alternatives between the contracting states. As such, a comparative analysis demonstrates the *actual* relative weight of tax treaty preferences of treaty partners, as opposed to public statements of policy that may or may not be available. Of course, most of the information derived by comparative analysis will not be of an absolute nature. Rather, it shows the policy spectrum of the IC: are certain provisions generally strongly opposed, negotiable or treated with indifference by the IC?[95] This allows an assessment of the chances of concluding a successful treaty with the examined country, namely a treaty that includes enough of its own tax treaty objectives. It is also to be noted that comparative analysis may of course also be used as a tool for preparing (re)negotiations between ICs.

Besides as an assessment of introducing tax treaty objectives in the course of a renegotiation, a comparative analysis can also be used for other purposes, such as for re-examining tax treaty policies of a DC or for finding alternative solutions to tax treaty provisions. Also, if during negotiations, a deadlock occurs, a comparative analysis may indicate alternative solutions. In addition, the conclusions of a comparative analysis may be used as negotiating arguments. It may be more difficult for an IC to continue to refuse adopting a certain tax treaty provision during the negotiation process if it becomes apparent that the same provision was in fact accepted by that same country in other treaties with DCs.[96]

93. See, for example, the comments by the Dutch government (in "Notitie Algemeen Fiscaal Verdragsbeleid", loc. cit., onderdeel v3) which states that if the withholding taxes on royalties are not sufficiently reduced under the treaty, it is the policy of the Dutch government to define "royalty" as narrow as possible.

94. Bartlett, R.T., loc.cit., 358; Thomson, W.A., "Tax treaties policy in Asia: a comparative analysis", *TNI* (electr.), 03-13-95.

95. Thomson, W.A. , loc. cit., 95.

96. Vogel, p. 49, points out that it often occurs that concessions made to one contracting party are demanded subsequently by similarly situated partners, and that it is difficult to deny them.

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