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Interpretation under the Multilateral Instrument (MLI) – Part One

This article, the first of a two-part series, explores the functioning of the MLI, its current design and the status of the synthesized texts. It deals with the interpretation rule of the MLI and its relationship with the interpretation rules of the Vienna Convention on the Law of Treaties.

1. Introduction

This article looks at some of the features that can be identified when interpreting the Multilateral Instrument (MLI).[1] The authors have selected possible issues that may be relevant when interpreting the MLI (*see* the note at the end of this section). Before elaborating on these different elements of interpretation, the authors will give a brief exposé on the functioning of the MLI and, in particular, on the design of the MLI.[2] This design implies that the MLI rules are to be applied alongside existing tax treaties (section 2.1.). Section 2.2. addresses the issue of amendments to covered tax agreements (CTAs) after ratification of the MLI and the relationship of these amendments to the BEPS minimum standards. In addition, section 2.3. discusses the meaning and scope of the MLI's compatibility clauses. Section 3. provides a general overview of the interpretation of the MLI and, in particular, its interpretation provision (article 2(2) of the MLI) and its relation to articles 31 et seq. of the Vienna Convention on the Law of Treaties (VCLT). After these more general and introductory sections (which are dealt with in Part One), Part Two discusses the following elements that may be relevant to the interpretation of the MLI:

– the importance and status of the Explanatory Statement (section 5.). The Explanatory Statement (ES) provides an explanation of the approach taken in the

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1. The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting of 7 June 2017 [hereinafter MLI]. *See* for a historical overview of multilateral tax conventions, R. Avi-Yonah & E. Lempert, *The Historical Origins and Current Prospects of the Multilateral Tax Convention*, World Tax J., pp. 380-401 (2023), Journal Articles & Opinion Pieces IBFD. *See also* on a certain "trend" from bilateralism to multilateralism in tax treaties, M. Stewart, *Unilateralism, Bilateralism, and Multilateralism in International Tax Law*, in *The Oxford Handbook of International Tax Law* (F. Haase & G. Kofler, eds., Oxford University Press, 2023); and P. Baker, *Using multilateral instruments to preserve a bilateral system*, 27 Journal of International Economic Law 4, pp. 611-614 (2024).

2. The approach of using a multilateral instrument to modify a network of existing bilateral treaties is not unique to tax treaty law. *See*, for example, *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* ("the Mauritius Convention", in force since 18 October 2017) and the comparison that scholars often make between the between the MLI and the Mauritius Convention. *See*, inter alia, C. Campbell McLachlan, *The Principle of Systemic Integration in International Law*, p. 167 (Oxford University Press 2024); M. Potesta & G. Kaufmann-Kohler, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in: Connection With the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? – Analysis and Roadmap*, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_research_paper_mauritius.pdf, in particular the comparison with the MLI, p. 77 et seq.; *see also* N. Bravo, *The Mauritius Convention on Transparency and the Multilateral Tax Instrument: Models for the Modification of Treaties?*, 25 Transnational Corporations Journal 3 (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3621978; and W. Alschner, *The OECD Multilateral Tax Instrument: A Model for Reforming the International Investment Regime?*, 45 Brooklyn Journal of International Law 1 (2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3311256. *See also* UNCTAD, Working Group III: Investor-State Dispute Settlement Reform, available at https://uncitral.un.org/en/working_groups/3/investor-state. The new para. 6 (alternative A) or 7 (alternative B), which were recently introduced in Article 25 of the UN Model Tax Convention, aim to override investment treaties. At first glance, they resemble the operation of the MLI, which is meant to be included in tax treaties alongside investment treaties. However, setting aside the fact that this rule would not be included in a multilateral instrument, it differs from the MLI in that it seeks to override treaties from other fields that are not institutionally linked to tax treaties, *see* thereupon Experts on International Cooperation in Tax Matters, 13th session, New York, 24-27 March 2025, Relationship of tax, trade and investment agreements, E/C.18/2025/CRP.2, notably the detailed minority view expressed at para. 69 et seq of the new Commentaries to Article 25 and for a critical analysis under the law of treaties and from a policy perspective, R. Danon & A. Martín Jiménez, *The U.N. Model Tax Convention's Attempt to Override Investment Treaties: A Critical and Normative Assessment*, 117 Tax Notes International, p. 825 et seq. (2025).

MLI and the impact that the substantive provisions may have on the CTA;[3]
- the Opinion of the Conference of the Parties to the MLI of 3 May 2021, which contains positions and statements on the interpretation of the MLI (section 6.);
- the relevance of the 2015 BEPS Action Reports (section 7.). The MLI intends to implement the tax-treaty-related measures of the final BEPS Action Reports, 2, 6, 7 and 14;
- the 2017 Commentary to the OECD Model and the situation in which a CTA is not based on the OECD Model or a pre-2017 version thereof (section 8.);
- future changes to the OECD Model that affect the substantive provisions of the MLI (section 9.);
- potential differences between the BEPS Action Reports and the 2017 OECD Commentaries (section 10.);
- article 32(1) of the MLI, including the mutual agreement procedure (MAP) and the Conference of the Parties provided for in article 32(2) of the MLI (section 11.);
- reservations and interpretation (section 12.); and
- language issues (section 13.).

The purpose of this article is to provide some preliminary insights into the relevance and impact of these elements in the interpretation process surrounding the MLI. To the authors' knowledge and limited to the jurisdictions represented by the authors, there is only one case to date that has addressed (i) the interpretation of the MLI or (ii) the relationship between the MLI and the CTA from an interpretative point of view, at least to some extent.[4] The authors have attempted to identify elements that might be expected to arise in practice when interpreting the MLI. The impact and relevance of some of these elements, such as the status of the ES, are already the subject of divergent views in the literature. The article does not pretend to be exhaustive in its treatment of all possible elements of interpretation. It is intended to address some of the issues and questions that may arise when interpreting the MLI and the underlying CTA in practice or in academia.

There seems to be a distinction between civil law and common law. Interpreters with a civil law background naturally tend to categorize the various sources of interpretation according to the relevant rules of interpretation, i.e. article 2(2) of the MLI, article 3(2) of the CTA and articles 31 et seq. of the VCLT. This categorization may determine which elements are taken into account and which are considered of no or less relevance. This may explain why much of the literature on the interpretation of the MLI has been written by civil law authors. Common law practitioners have a certain preference not to discuss the interpretation of the MLI in the abstract but to wait for a concrete case. With the help of that case and depending on its facts, the common law practitioner determines what is relevant to reach an appropriate interpretation result. The results reached in this case may influence future interpretations in other cases. This does not mean, however, that the common law interpreter would be unable to resolve an interpretation issue without an underlying case. The common law interpreter would consider all the relevant materials and balance them less categorically than a civil law interpreter would. It is therefore reasonable to conclude that a common law interpreter would be less categoric at this stage than a civil law interpreter would generally be.

This article is to some extent written from a civil law background, which may explain the categorization of the issues discussed and the appreciation and weighting of the identified elements in the interpretation of the MLI.

As mentioned, this article will be published in two parts. Part One consists of an introduction followed by section 2. (The functioning of the MLI) and section 3. (Article 2(2) of the MLI versus article 31 et seq. of the VCLT). This part will conclude with a summary of sections 2. and 3. (section 4.). Part Two will deal with sections 5. to 13. inclusive. Part Two will also contain a conclusion (section 14.) on the various issues addressed therein and recommendations concerning both Parts One and Two.

2. The Functioning of the MLI

2.1. General

Within the framework of BEPS Action 15[5] the OECD explored the feasibility of an MLI from a public international law perspective. For that purpose, the Committee on Fiscal Affairs of the OECD engaged an informal group of experts.[6] This group of experts indeed concluded that an MLI to modify and supplement tax treaties in order to give certain BEPS measures the intended effect was feasible and desirable.[7] The group of experts also addressed

3. According to article 2(1) of the MLI, a CTA is a tax treaty between two states, both of which are parties to the MLI, and both of which have elected to bring that treaty within the scope of the MLI thereby creating a match.
4. The only case which is identified within these parameters is the decision AU: FCA, 31 Oct. 2024, *Oracle Corporation Australia Pty Ltd v. Commissioner of Taxation (Stay Application)* [2024] FCA 1262 (the taxpayer has appealed this decision to the Federal Court of Australia Full Court). *See* for a discussion of this decision, A. Stamoulos, *Royalties in the Spotlight: The Significance of the Oracle Decision in Australian Tax Law*, 32 Intl. Transfer Pricing J. 2 (2025), Journal Articles & Opinion Pieces IBFD.
5. S. Austry et al, *The Proposed OECD Multilateral Instrument Amending Tax Treaties*, 70 Bull. Intl. Taxn. 12, p. 683 et seq. (2016), Journal Articles & Opinion Pieces IBFD.
6. OECD/G20 Base Erosion and Profit Shifting Project, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties*, Action 15, Final Report, Annex A (A toolbox for a multilateral instrument for the swift implementation of BEPS measures) (OECD 5 Oct. 2015) [hereinafter BEPS Action 15 Final Report]. Compare also https://web-archive.oecd.org/2017-06-07/441655-legal-note-on-the-functioning-of-the-MLI-under-public-international-law.pdf. The group of experts included: Philip Baker (United Kingdom), Théodore Christakis (Greece), Frank Engelen (Netherlands), Concepción Escobar Hernandez (Spain), Mathias Forteau (France), Itai Grinberg (United States), Jan Klabbers (Netherlands), Vaughan Lowe (United Kingdom), Philippe Martin (France), Yoshihiro Masui (Japan), Ekkehart Reimer (Germany), Giorgio Sacerdoti (Italy), Dire Tladi (South Africa).
7. *See*, for the effectiveness of the MLI, T.M. Vergouwen, D.M. Broekhuijsen & J.J.H. Reijnen, *The Effectiveness of the Multilateral Instrument in Amending the Bilateral Treaty Network: (On) the Measure of Multilateral Success*, 77 Bull. Intl. Taxn. 4, p. 177 et seq. (2023), Journal Articles & Opinion Pieces IBFD. *See also* C. Botha, R. Ramfol & O. Swart, *The Impact of Multilateral and Unilateral Measure on Profit Shifting from South Africa to Mauritius*, 2023 Intertax 3, p. 240 et seq. (2023); and R.

the technical issues surrounding the implementation of the BEPS measures into tax treaties. Especially the recommendations and solutions proposed by the group of experts regarding the relationship with existing and future tax treaties have been adopted to a great extent by the OECD.[8] As a result, these solutions and recommendations are included in the MLI. The MLI was developed by an ad hoc group consisting of – at that time – 98 jurisdictions.

The authors will give an overview of the most relevant aspects of the MLI and its relationship to CTAs. In this respect, the authors refer to an earlier publication of the group, although this publication was based on the underlying Action Report[9] and was written before the publication of the MLI and its ES. The MLI ultimately has been shaped along the lines of the preferred option set out in this publication. The OECD did not choose the option which would have allowed the MLI to function in the same way as an amending protocol to a single existing treaty. Under that option the MLI would have directly amended the text of CTAs.[10] If adopted, the MLI would have become largely irrelevant after such implementation.[11] In its current form, the MLI contains independent binding multilateral norms of public international law, which apply alongside and supplement existing tax treaties.[12] The application of the MLI to tax treaties qualifying as CTAs cannot so much be characterized as "implementation", but rather as a co-existing document both modifying and interpreting the CTAs.[13] Depending on the circumstances, i.e. the compatibility clauses and the notifications, it may be necessary to interpret both the MLI and the CTA. If a complete provision is added to the CTA or an existing provision is completely replaced in the CTA, the MLI provision and its terms will ultimately be interpreted. As such, the MLI provision should be interpreted with the help of article 2(2) of the MLI.

Depending on the respective BEPS measures, the MLI has supplemented, replaced or modified the provisions of the CTAs. In certain situations, a certain amount of autonomy may apply regarding the states involved. Finally, the legal consequences of the MLI will depend on certain bilateral agreements (matches) between the parties to the MLI.[14]

2.2. The design of the MLI

2.2.1. Some advantages and disadvantages of the MLI

The current design of the MLI has certain advantages and disadvantages as compared to the option of directly amending the text of the relevant tax treaty which may justify to some extent the current functioning of the MLI (*see* section 2.2.2.).[15] One of the disadvantages of the option to directly amend the text of the specific tax treaty is that it would be necessary to determine for each tax treaty whether and how the results of the BEPS Project should be incorporated.[16] From the incorporation of BEPS measures in a significant number of treaties, the MLI seems to be an appropriate means. The fact that not all tax treaties concerned are styled upon the OECD Model or that they may contain other deviations from the OECD Model plays a lesser role in the current form of the MLI compared to the option of directly amending the underlying tax treaty texts. A further disadvantage of an alternative design of the MLI, which would insert the substantive provisions of the MLI directly into an individual treaty, are the language issues.[17] French and English are both equally authentic for the current MLI.[18] Although the current design of the MLI may also raise language issues (*see* section 13. of Part Two), it likely would have become even more complicated if the alternative design of the MLI with similar authentic languages were chosen as a direct amendment of the tax treaty. This would potentially lead to a multitude of official language versions,[19] with the corresponding risks

Matabudul, *The Multilateral Instrument in Africa: A Strategic Analysis*, 2023 Intertax 5, p. 359 et seq. (2023).

8. OECD, *Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, para. 5 (7 June 2017), Treaties & Models IBFD.
9. BEPS Action 15 Final Report.
10. This feature has been adopted in OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting, *Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule* (2 Oct. 2023); *see* OECD, *Explanatory Statement to the Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule*, para. 13 (15 Sept. 2023).
11. Para. 13 ES. *See also*, for this option, Austry et al., *supra* n. 5, at p. 663.
12. Compare para. 13 ES and the Opinion of the Conference of the Parties of the MLI, approved on 3 May 2021, para. 3, p. 4. An exception applies to part VI of the MLI (arbitration) that is intended to operate as a "single cohesive arbitration provision"; compare para. 19 and 20 ES. *See also* P.J. Hattingh, *The Multilateral Instrument from a Legal Perspective: What May be the Challenges?*, 71 Bull. Intl. Taxn. 3/4, sec. 4.2 (2017), Journal Articles & Opinion Pieces IBFD; A. Bosman, *General Aspects of the Multilateral Instrument*, 45 Intertax 10, p. 643 (2017); G. Manzi, *The Autonomous Interpretation of the Multilateral Instrument with Particular Relevance to Article 2(2)*, 74 Bull. Intl. Taxn. 12, sec. 2 (2020), Journal Articles & Opinion Pieces IBFD; N. Bravo, *A Multilateral Instrument for Updating the Tax Treaty Network*, sec. 2.2, (IBFD 2020), Books IBFD; M. Herrington & C. Lowell, *The Evolving World of Global Tax Planning: Part II*, 24 Intl. Transfer Pricing J. 2, p. 92 (2017), Journal Articles & Opinion Pieces IBFD; M. Corwin, J. Eggert & M. Zubler, *Practical Questions for Multinationals in an MLI World*, Tax Executive (20 Nov. 2017); and H. Jirousek, *Wohin entwickelt sich das internationale Steuerrecht?*, Steuer und Wirtschaft International 7, p. 533 (2017).
13. *See also* the Opinion of the Conference of the Parties of the MLI, approved on 3 May 2021, para. 3, p. 4; and N. Bravo, *The Multilateral Instrument and its Relationship with Tax Treaties*, 8 World Tax J. 3, pp. 282, 283 (2016), Journal Articles & Opinion Pieces IBFD. *See also* para. 13 ES to the Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule, which emphasises that, unlike the MLI, this Multilateral Convention no longer needs to be read in conjunction with the relevant covered tax convention, following the amendment of this covered tax convention.
14. Compare also Hattingh, *supra* n. 12, at sec. 4.2.
15. *See also* Austry et al., *supra* n. 5, at p. 683 and 684.
16. The Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule seems to be more straightforward as compared to the MLI.
17. Article 14(2) of the Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule provides that, for the purposes of incorporating Annexes I to V (containing the substantive subject to tax provisions) into their CTAs, contracting states may translate and authenticate the Annexes I to V into languages other than English and French (which are the authentic languages of this multilateral convention).
18. Compare the testimonium of the MLI: "Done at Paris, the 24th day of November 2016, *in English and French, both texts being equally authentic*, in a single copy which shall be deposited in the archives of the Organisation for Economic Co-operation and Development." [emphasis added by the authors]
19. An example would be the Austria-Italy Income and Capital Tax Treaty (1981) of which both German and Italian are authentic languages; *see also* J. Schuch & J-P. West, *Authentic Languages and Official Transla-*

of differences in meaning and of some amendments to a tax treaty being made in a language different from the rest of the treaty. This latter is less obvious under the current design of the MLI (*see* section 13.1. of Part Two).[20] Naturally, the current design of the MLI also raises language issues and does not preclude the need to accommodate a variety of languages.[21] As the MLI will have to be applied and interpreted in parallel with the CTA, these language issues may be more subtle. There is no direct impact on the CTA, but depending on the notifications and compatibility clauses, the impact of the MLI on each substantive provision will have to be determined.

A disadvantage of the MLI is a certain complexity due to compatibility clauses, reservations and notifications (*see* sections 2.5. and 2.6.). Of course, a further disadvantage of the current design of the MLI is that it does not entirely take into consideration the wide variance of constitutional frameworks and constitutional positions that may apply to different jurisdictions. For monist states, such as the Netherlands,[22] Japan[23] and France[24] the "implementation" does not lead to constitutional constraints. Generally, tax treaty provisions are applicable to both the government and taxpayers as per se binding rules. In view of their contents and nature, they can operate directly, and they do not need to be transformed into binding law through enabling legislation. These principles apply *mutatis mutandis* to the MLI entailing that the rules included therein apply alongside the CTA at issue prevailing over the domestic tax legislation. Although the United Kingdom,[25] Canada,[26] Italy,[27] India[28] and Australia[29] are dualist states there seem not to be additional issues in giving the MLI effect by legislation. This may be different in other jurisdictions which may impede the "implementation" of the MLI, such as in South Africa where the ratification was stalled for 5 years.[30] In the end, the MLI was seen as an administrative tax law focused on, inter alia, anti-avoidance. This approach allowed South Africa to avoid the question of whether the MLI would require the implications of each individual CTA to be illustrated.

In Germany, however, the implementation of the MLI is a two-step process. In the first step, the MLI was ratified exclusively by the German parliament.[31] However, the ratification of the MLI by the competent legal body does not automatically amend all German tax treaties. Therefore, in a second step, a separate application law for the CTAs is envisaged. The specific amendments to the tax treaties will be worked out in this application law and their application ordered.[32] In this respect, Germany has also made use of the reservation in article 35(7) of the MLI. This reservation allows jurisdictions to opt for a deferred "entry into force" by means of a reservation. Under article 35(7)(a)(i) of the MLI, the MLI will become applicable to a particular CTA 30 days after the jurisdiction concerned notifies the OECD that its domestic procedures for making the MLI applicable to that CTA have been completed. A jurisdiction making this reservation must simultaneously notify the relevant treaty partner. This provision allows countries to make the MLI applicable at a later stage and

tions of the Multilateral Instrument and Covered Tax Agreements, in *The OECD Multilateral Instrument for Tax Treaties* p. 67 (eds. M. Lang et al., Wolters Kluwer 2018). In a case of a direct modification, this would result in four languages being equally authentic for this treaty.

20. Austry et al., *supra* n. 5, at p. 686; and R.X. Resch, *The OECD BEPS Multilateral Instrument and the Issue of Language*, 47 Intertax 6/7, p. 567 (2019).
21. Following the example of the Austria-Italy Income and Capital Tax Treaty (1981), the current design of the MLI would also allow four languages to remain equally authentic.
22. Article 94 of the Dutch Constitution (*Grondwet van het Koninkrijk der Nederlanden 2023, State Gazette 2023, No. 105*). There is an official translation, The Constitution of the Kingdom of the Netherlands 2023, included in https://www.denederlandsegrondwet.nl/id/vkwrf-6d92rnm/de_tekst_van_de_grondwet_met_toelichting.
23. Compare also M. Takahashi, *Implementing the Multilateral Instrument in Japan*, in *The Implementation and Lasting Effects of the Multilateral Instrument*, WU – Tax Law and Policy Series, sec. 22.7.1 (G. Kofler et al. eds., IBFD 2021), Books IBFD.
24. Once ratified and published in accordance with article 55 of the French Constitution, a treaty is in force. In a monist constitutional system such as France, this treaty then has a higher value than domestic law. If the provisions of a treaty are deemed to be directly applicable, they can be immediately invoked. These principles apply to the MLI. In fact, the administrative comments published by the French tax administration, 16 Dec. 2020, indicate that the MLI entered into force on 1 Jan. 2019 (§1 BOI-INT-DG-20-25) and modified the existing tax treaties (§10 BOI-INT-DG-20-25). *See also* C. Garcia, *Implementing the Multilateral Instrument in France*, in *The Implementation and Lasting Effects of the Multilateral Instrument*, WU – Tax Law and Policy Series, sec. 15.7.1. (G. Kofler et al. eds., IBFD 2021), Books IBFD.
25. *See also* S. Daly, *Implementing the Multilateral Instrument in the United Kingdom*, in *The Implementation and Lasting Effects of the Multilateral Instrument*, WU – Tax Law and Policy Series, sec. 35.7.1. (G. Kofler et al eds., IBFD 2021), Books IBFD.
26. C.A. Brown & J.J. Bogle, *Implementing the Multilateral Instrument in Canada*, in *The Implementation and Lasting Effects of the Multilateral Instrument* WU – Tax Law and Policy Series, sec. 8.7. (G. Kofler et al eds, IBFD 2021), Books IBFD.
27. The ratification law bill of the MLI has not been submitted to the Italian Parliament yet, and therefore Italy has not yet deposited its instrument of ratification to the OECD; *see* https://www.oecd.org/tax/beps/mli-matching-database.htm#mli-matching-database. According to authoritative Italian scholars, the distinction between monistic and dualistic states would not have significant ramifications in Italy (*see* B. Conforti, *Diritto Internazionale*, p. 340 (2018). Under art. 117(1) of Italy's Constitution, domestic laws have to comply with Italy's international obligations, which, according to the consistent case law of the Italian Supreme Court, also include tax treaties, whether bilateral or multilateral (*see* e.g. IT: Cass., July 2023, no. 21047 and case law cited therein). On the status of the MLI implementation in Italy, *See also* A. Zaimaj, Italian Branch Report, *Reconstructing the treaty network*, 105 Cahiers de droit fiscal international, p. 439 (2020); and P. Ludovici & M. Striato, *Implementing the Multilateral Instrument in Italy*, in *The Implementation and Lasting Effects of the Multilateral Instrument* WU – Tax Law and Policy Series, sec. 21.1.1. (G. Kofler et al. eds., IBFD 2021), Books IBFD.
28. India deposited the instrument of ratification to the OECD on 25 June 2019. The MLI entered into force for India on 1 Oct. 2019. *See also* A. Prassad Kotha & P. Preshori, *Implementing the Multilateral Instrument in India*, in *The Implementation and Lasting Effects of the Multilateral Instrument* WU – Tax Law and Policy Series, sec. 19.1.1, (G. Kofler et al. eds., IBFD 2021), Books IBFD.
29. In Australia implementing the MLI did not raise additional issues. Sec. 5 of the International Tax Agreement Act 1953 provides that a tax treaty "has the force of law according to its tenor". A new treaty is added to the list of treaties in sec. 5 by an amending act and this was the case for the MLI done by the Treasury Laws Amendment (OECD Multilateral Instrument) Act 2018.
30. C. West & J. Hattingh, *Implementing the Multilateral Instrument in South Africa*, in *The Implementation and Lasting Effects of the Multilateral Instrument* WU – Tax Law and Policy Series, sec. 31.7.1.6 (G. Kofler et al. eds., IBFD 2021), Books IBFD.
31. This was done by law dated 12 Oct. 2020, Federal Law Gazette II 2020, p. 1138.
32. D. Dominguez, *Implementing the Multilateral Instrument in Germany*, in *The Implementation and Lasting Effects of the Multilateral Instrument* WU – Tax Law and Policy Series, sec. 16.7. (G. Kofler et al. eds., IBFD 2021), Books IBFD.

on a CTA-by-CTA basis. This is particularly useful for jurisdictions with a dualist system, where individual tax treaties, as modified by the MLI, must be approved separately. In addition to Germany, Sweden has also opted for this deferred and separate applicability. From this perspective, Sweden faces constitutional constraints comparable to those in Germany.[33] In Sweden, each tax treaty has been incorporated into Swedish law through a separate statute. Consequently, for the provisions of the MLI to be applicable in Sweden, all treaties affected by the MLI need to be amended.[34] For this and related reasons, such as the fact that it was not clear at the time of signing the convention which treaties would be covered or what reservations other states would make, the government decided that each tax treaty would be amended separately in due course. For this reason, Sweden has made the same reservation as Germany under article 35(7).[35] Sweden is gradually implementing the MLI by signing amended tax treaties and having them adopted as law by the parliament.[36]

Switzerland has also made a reservation under article 35(7)(a) of the MLI.[37] Switzerland has signed and ratified the MLI[38] but has notified very few of its treaties as CTAs.[39] The main reason for this is the legal uncertainty as to whether the MLI "amends" the CTAs or whether it "coexists" with them.[40] For this reason, Switzerland has taken the position that it can only notify treaties as CTAs if the other contracting state confirms that it shares the "amending view" and is prepared to mutually agree on a document (pursuant to article 25(3) of the Swiss tax treaties modelled on the OECD Model and/or article 32(1) of the MLI[41]) detailing the changes made to the CTA by the MLI. The use of the MAP is certainly a somewhat novel approach to amending the text of a treaty, although it is in line with the amending view.[42]

Currently, such mutual agreements are in place with respect to only four of the tax treaties that Switzerland has notified as CTAs: Iceland, Czech Republic, Lithuania and Luxembourg.[43] In accordance with Swiss domestic law requirements, a consolidated version of the tax treaties with these four states has been published.[44] It cannot be excluded that the status accorded to MAPs in some states may have an impact on the reluctance of others to follow this path (*see* section 2.3.3.2.2. for more on the status of a MAP). Some of these MAPs also refer to article 35(7) of the MLI.[45] Regarding its other treaty partners, Switzerland will implement or has implemented the minimum standards through bilateral negotiations (amending protocols).[46]

2.2.2. The FTI versus the MLI

Although the background is different,[47] some of the constitutional constraints that may surround the MLI, e.g. for Sweden and Germany, may be reduced under the Fast-Track Instrument to Provide for the Streamlined Amendment of Bilateral Double Taxation Treaties (FTI) being developed by the UN Tax Committee's Sub-Committee on the Taxation of the Digitalized and Globalized Economy.[48] This FTI is intended to establish a procedure for the

33. *See also* D. Edvinsson, *Swedish Branch Report, Reconstructing the treaty network*, 105 Cahiers de droit fiscal international, IFA, pp. 792 and 793 (2020). The Swedish Parliament approved the MLI Proposal on 16 May 2018. The MLI has entered into force in Sweden. However, under the Swedish dualist system, domestic legislation is required to transpose the rights and obligations of the MLI into domestic law. Subsequently, the Swedish government must submit proposals to Parliament to amend the laws by which the tax treaties have been transposed into Swedish domestic law in order for the provisions of the MLI to come into effect in Sweden. Such an amendment, for instance, has been proposed with the United Kingdom.
34. *See* on the Swedish government position in Government Bill to Parliament Proposition 2017/18:61 Multilateral konvention för att genomföra skatteavtalsrelaterade åtgärder, pp 8-9.
35. *See* id. at pp. 31-32. For a description on the Swedish tax legislative process, *see* e.g. B. Wiman, *Constitutional Issues in Developing International Tax Norms: A Swedish perspective*, in *Current Tax Treaty Issues*, pp. 157-178 (G. Maisto ed., IBFD 2020), Books IBFD.
36. *See* e.g. the treaties with Russia (2018), Switzerland (2019), the United Kingdom (2021), Germany (2023) and France (2023).
37. A. Brunner & M. Seiler, *Implementing the Multilateral Instrument in Switzerland*, in *The Implementation and Lasting Effects of the Multilateral Instrument* WU – Tax Law and Policy Series, sec. 33.1.1. (G. Kofler et al eds., IBFD 2021), Books IBFD.
38. The MLI is approved by the Federal Assembly on 22 Mar. 2019 (RO 2020 2625) and ratified on 29 Aug. 2019.
39. 12 tax treaties have been nominated as CTAs, namely Argentina, Austria, Chile, Iceland, Italy, Lithuania, Luxembourg, Mexico, Portugal, South Africa, the Czech Republic and Türkiye (*see* https://www.fedlex.admin.ch/eli/cc/2020/486/fr, art. 2)
40. *See* Swiss Federal Council, *Botschaft zur Genehmigung des multilateralen Übereinkommens zur Umsetzung steuerabkommensbezogener Massnahmen zur Verhinderung der Gewinnverkürzung und Gewinnverlagerung*, Swiss Federal Gazette, p. 5389 et seq. (Bundesblatt; BBl 2018), available at https://www.admin.ch/opc/de/federal-gazette/2018/5389.pdf.
41. Some of the MAPs at issue also refer to art. 32(1) MLI.
42. Brunner & Seiler, *supra* n. 37, at sec. 33.7.1.
43. *See* Mutual Agreement between the Competent Authority of the Swiss Confederation and the Competent Authority of Iceland RO 2023 110 (16 Dec. 2022), available at https://www.fedlex.admin.ch/eli/oc/2023/110/fr; Mutual Agreement between the Competent Authority of the Swiss Confederation and the Competent Authority of the Czech Republic RO 2021 29 (24 Nov. 2020), available at https://www.fedlex.admin.ch/eli/oc/2021/29/fr; Mutual Agreement between the Competent Authority of the Swiss Confederation and the Competent Authority of the Republic of Lithuania RO 2021 28 (16 Nov. 2020), available at https://www.fedlex.admin.ch/eli/oc/2021/28/fr; and Mutual Agreement between the Competent Authority of the Swiss Confederation and the Competent Authority of the Grand Duchy of Luxembourg RO 2020 2715 (27 May 2020), available at https://www.fedlex.admin.ch/eli/oc/2020/487/fr. *See also* https://www.fedlex.admin.ch/eli/oc/2023/132/fr.
44. *See* the tax treaties with Iceland (consolidated version), available at https://www.fedlex.admin.ch/eli/cc/2015/793/de; Lithuania (consolidated version), available at https://www.fedlex.admin.ch/eli/cc/2003/176/de; Luxembourg (consolidated version), available at https://www.fedlex.admin.ch/eli/cc/1994/333_333_333/de; and the Czech Republic (consolidated version), available at https://www.fedlex.admin.ch/eli/cc/1997/961_961_961/de.
45. The MAP between on the one hand Switzerland and the Czech Republic, and Lithuania and Luxembourg on the other also refers to art. 35(7) of the MLI (compare also the Swedish and German position within this respect).
46. S. Bernasconi & B. Peyer, *Reconstructing the treaty network*, 105A Cahiers de droit fiscal international, IFA, p. 789 (2020). *See* Swiss Federal Council, *supra* n. 40, at p. 5389 et seq.
47. The background is to support developing countries that do not have the resources to negotiate amending protocols and to provide them with a tool to incorporate amendments to the UN Model into their respective tax treaties. Compare also P. Baker, *A Fast-Track Instrument to Update Developing Countries' Tax Treaties*, 52 Intertax 10, p. 584 (2024) and Baker, *supra* n. 1, at p. 616.
48. *See* Annex 2 of 22 Sept. 2023, prepared by Philip Baker for the 27th Session of the Committee of Experts on International Cooperation in Tax Matters, Geneva 17-20 Oct. 2023. This was given its second reading at the 28th Plenary Session of the UN Tax Committee in New York on 19 Mar. 2024. The current text of the draft FTI is set out at Annex A of UN document E/C.18/2024/CRP.8, Draft 28th Session Report on the Digitalized Economy, 4 Mar. 2024. The work was referred to in

streamlined amendment of existing bilateral tax treaties. These amendments will reflect changes to the UN Model that can be implemented quickly and smoothly in the relevant treaties.

The (draft) FTI consists of two parts: a "Framework Convention"; and a set of "schedules".[49] The Framework Convention provides a structure and a process through which amendments made to the UN Model can be fast-tracked into specific bilateral tax treaties. The schedules each contain the text of a recent amendment to the UN Model.[50] The basic idea is that the specific amendments contained in the schedules can be fast-tracked into existing bilateral tax treaties using (i) the framework of the Conference of the Parties established under the Framework Convention;[51] (ii) the process for identifying CTAs;[52] and (iii) matching the positions of different countries.[53] In fact, the Framework Convention is a multilateral agreement that sets out the structure and the process.[54] Participation in the Framework Convention only commits a state to participate in the process. It does not commit a state to make any change to any bilateral tax treaty that that state has concluded.[55] This intends to guarantee the sovereignty and discretion of the participating states over the content of their treaties. It also highlights a relevant difference with the MLI, whose main purpose is to implement the BEPS measures and certainly the minimum standards. Signing up to the MLI is supposed to offer less discretion and leeway.

A participating state should identify those CTAs in respect of which it would be willing to consider one or more of the amendments set out in the schedules to the FTI, provided that the other contracting state is also willing to do so. After listing its existing CTAs, each participating state should indicate which of the schedules it might be willing to apply to each treaty, and on what terms (where there is a choice, for example, with respect to the tax rate). States may also indicate the conditions they would require for agreeing to a particular amendment.[56] States are not explicitly limited to the exact wording of the amendments contained in the schedules, although the FTI intends to limit the amendments to those made to the UN Model.

The format of each schedule includes a draft amending protocol. The output of the FTI is a series of amending protocols, each of which incorporates the UN Model amendments into a particular treaty. There is also an enhanced procedure for states that want a higher degree of automation in amending their tax treaty. States may opt for this enhanced procedure.

A comparison of the FTI with the MLI reveals some similarities in that both are aimed at streamlining the amendments or modifications to existing tax treaties. The MLI aims, among other things, to implement the BEPS outcomes in tax treaties in a coherent and coordinated manner. The MLI imposes a binding legal obligation on the parties to the MLI in respect of their CTAs to make the specific amendments or modifications, unless they make reservations not to apply certain articles, which is mainly the case for the non-minimum standards. The minimum standards are mandatory. In contrast, the FTI does not impose a legal obligation to make a specific amendment to a particular treaty. There is only the willingness of a state to participate in the FTI process. As noted in section 2.2.1., the MLI is a legally binding instrument that amends or modifies treaties (except where reservations apply) so that the constitutional issues noted for Switzerland, Germany and Sweden continue to exist. This should not be the case for the FTI, assuming that the normal procedures and constitutional rules for amending protocols would also apply to the FTI, since its output takes the form of amending protocols.[57]

Of course, some of the previously mentioned disadvantages of amending protocols apply mutatis mutandis to the FTI, since its output is the same; the MLI overcomes to a greater extent the fact that treaties can be based on different models. The MLI is most suitable for implementing mandatory elements, such as the minimum standards, in different CTAs. No or at least less flexibility in principle is needed for the minimum standards. This flexibility is included in the MLI for the non-minimum standards through reservations. As a result, the MLI seems in principle (if not necessarily in practice) to be a suitable instrument to fulfil these purposes.[58] The FTI appears

the sub-committee as "Workstream A". The FTI has been submitted to the Economic and Social Council by the Committee of Experts on International Cooperation in Tax Matters, Report on the twenty-ninth session, Geneva, 15-18 Oct. 2024. It is on the agenda of the Economic and Social Council for its session from 24 to 27 Mar. 2025. It is subject to approval by the UN General Assembly. It appears that some states are still subject to constitutional constraints under the FTI; para. 69 of UN document E/C.18/2024/CRP.8. *See* for a short history of the FTI, M.A. Ahmed, *The UN-Sponsored Multilateral Fast Track Instrument – Barking up the Wrong Tree?*, Talking Points 26 (2023), Journal Articles & Opinion Pieces IBFD.

49. For possible future developments within the UN and whether the United Nations Framework Convention on International Tax Cooperation will lead to a multilateral Framework Convention; *see* Baker, *supra* n. 47, at p. 617; P. Baker, *Reform of the International Tax Architecture: the UN Fails to Reach Consensus*, Tax Journal, p. 12 (Sept. 2024); F. Heitmüller, *Scenarios for Negotiating a UN Framework Convention on International Tax*, ICTD Working Paper 218, Institute for Development Studies, pp. 7-9 (2025); Y. Brauner, *What Can the UN Do That the OECD Can't or Won't?*, 53 Intertax 1, pp. 45 and 45 (2025); and D.M. Broekhuijsen & L.C.J. van Apeldoorn, *International Tax Cooperation in a Multipolar World*, 53 Intertax 1, p. 57 (2025).
50. Including a specific reference to pension funds (Schedule 1), a provision on gains in relation to natural resources and offshore indirect capital gains (Schedule 2), a provision on fees of technical services (Schedule 3, reflecting article 12A of the UN Model), a provision on income from automated digital services (Schedule 4, article 12B UN Model), arbitration (Schedule 5), subject to tax rule (Schedule 6), a provision on capital gains deriving from the value of immovable property (Schedule 7) and a provision on a definition of a services permanent establishment (Schedule 8).
51. The Framework Convention establishes a Conference of the Parties, which will meet at least once a year and will provide an opportunity for countries to "speed date" and agree amendments to their bilateral treaties based on the UN Model amendments. *See* art. 12 of the Framework Convention.
52. Art. 1(c) gives a definition of a covered tax agreement.
53. Baker, *supra* n. 47, at p. 584. *See also* arts. 3 and 4.
54. Compare also Ahmed, *supra* n. 48.
55. Baker, *supra* n. 47, at pp. 584 and 585.
56. Id., at p. 585.
57. Id., at p. 586.
58. However, *see* A. Hohmann, *The limited impact of the BEPS Multilateral Instrument*, The International Centre for Tax & Development, Blogs (1 June 2023), available at https://www.ictd.ac/blog/the-limited-im-

to be more suitable for incorporating amendments to tax treaties based on the UN Model (and, in some case, the OECD Model) where it is appropriate to leave a high degree of flexibility to participating States. As discussed in section 2.3., the MLI has led to a proliferation of synthesized texts, whereas the FTI and its format of amending protocols should not lead to the need for synthesized texts.[59]

2.3. Synthesized and consolidated texts

2.3.1. General

From a practical perspective, it could be suitable to draft synthesized or rather consolidated versions of the CTAs and the effects of the MLI on these treaties. However, this is not a prerequisite for the application of the MLI. It is useful to note that, in principle, these versions are not to be considered as applicable legal instruments at an international level.[60] Practical application is most encouraged with consolidated versions.[61] In a consolidated version, the provisions of the MLI and a CTA are integrated into one text (similar to an amending protocol).[62] The authors would like to stress the desirability of having consolidated texts on which the participating jurisdictions have agreed. This would not only be helpful for practitioners (tax authorities, judiciary, tax lawyers, taxpayers and academia) but would also contribute to legal certainty and uniformity of texts and positions.[63] Consolidated texts would also avoid the need for these practitioners to draft such texts themselves, which could potentially lead to discrepancies as knots still need to be untangled regarding final positions and, for example, the exact effects of compatibility clauses, reservations and notifications.[64]

According to the authors, the OECD's arguments against consolidated texts are not convincing. The OECD considers that the result of a consolidated text could be confusing and would not respect the nature of the MLI, i.e. that the MLI does not amend the text of the CTAs but rather applies alongside and modifies the application of the provisions of the CTAs. Technically this is correct, but in practice it is necessary to determine the impact of the MLI on a particular provision of the CTA, which would ultimately lead to the drafting of some kind of consolidated text. Given the preference of the OECD and a significant number of participating states for synthesized texts, practitioners will individually draft some sort of consolidated text, with the risk of different interpretations and applications. In the opinion of the authors, this will even lead to more confusion. It is therefore appropriate for states to endeavour to draw up such texts. This will ensure uniformity and greater legal certainty.

Of the countries involved in this article, Switzerland produces consolidated texts. This is mainly due to its domestic legal system. Under Swiss domestic law, consolidated texts of all tax treaties must be published in the classified compilation of federal legislation and treaties.[65] Since Switzerland applies the MLI only to treaties with states that share the "amending view" (*see* section 2.2.1.) and are willing to agree by mutual agreement on a text detailing the amendments made to the treaty by the MLI, the risk of a divergence between the published consolidated text of a CTA and the text of the MLI should be minimized.[66] The position of Switzerland is that the consolidated texts only have the status of a mutual agreement in which it is also drafted.[67]

2.3.2. Synthesized texts: General features

According to the OECD guidance, a synthesized text is a single document (or website) containing for each CTA: (i)

pact-of-the-beps-multilateral-instrument/ (accessed 5 May 2025); and A. Hohmann, V. Merlo & N. Riedel, *Multilateral Tax Treaty Revision to Combat Tax Avoidance: On the Merits and Limits of BEPS's Multilateral Instrument*, Research School for International Taxation, Working Paper 10/2022 (9 Mar. 2023), which show that there is considerable reluctance on the part of qualifying states to opt for the non-minimum standards, and even for those states that do opt for the non-minimum standards, the effect is limited due to a lack of matching, *See also* section 1.6.

59. Baker, *supra* n. 47, p. 586.
60. Compare para. 13 ES. However, they might qualify as agreements between competent authorities under the MAP foreseen in bilateral tax treaties according to the Note by the OECD Directorate for Legal Affairs, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Functioning under Public International Law*, para. 33 and fn. 27 (2017); para. 13 of the ES to Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule states that since this multilateral convention directly amends the relevant CTAs, contracting jurisdictions may wish to develop consolidated versions of their CTAs as amended by this multilateral convention.
61. Australia has various consolidated synthesized texts, the version with New Zealand having been amended three times to achieve uniformity in presentation rather than substance.
62. OECD, *Guidance for the development of synthesised texts - Multilateral Convention to Implement Tax Treaty Measures to Prevent BEPS*, pp. 9 and 10 (2018).
63. *See* for an example of an attempt to draft consolidated texts by IBFD, A. Perdelwitz, D. Calderón Manrique, R. Hamzaoui & V. Arruda Ferreira, *MLI – Its Entry into Force and the Consolidated Texts of Impacted Articles of the First Affected Treaties* (3 July 2018), Talking Points, Journal Articles & Opinion Pieces IBFD, re the Austria-Poland tax treaty, the Austria-Slovenia tax treaty and the Poland-Slovenia tax treaty.
64. According to OECD, *Guidance for the development of synthesised texts - Multilateral Convention to Implement Tax Treaty Measures to Prevent BEPS*, pp. 9 and 10 (2018).
65. https://www.admin.ch/gov/de/start/bundesrecht/systematische-sammlung.html. *See also* Brunner & Seiler, *supra* n. 37, at sec. 33.7.4.
66. Bernasconi & Peyer, *supra* n. 46, at p. 798.
67. *See* Swiss Federal Council, *supra* n. 40, at p. 5359 et seq.:
In Switzerland's view, the BEPS Agreement therefore requires that the exact wording of the amendments to the relevant DTAs be recorded separately in writing with the partner countries concerned. Such agreements on the exact wording of the amendments constitute a bilaterally agreed determination of the textual effects that the BEPS Agreement has on the relevant DTA. However, these agreements are not revision protocols. They are based on the BEPS Agreement and result from the reservations and notifications made by Switzerland and the respective DTA partner countries. These mutual understanding agreements serve only to formally incorporate the amendments made by the BEPS Agreement into the consolidated texts of the DTA concerned and do not create any new obligations for Switzerland or result in the waiver of existing rights. The DTAs contain a provision that allows for the conclusion of mutual agreement procedures to resolve difficulties and doubts arising from the interpretation or application of the agreements. On this basis, the FDFA can consolidate the texts and conclude the corresponding agreements.
See also Bernasconi & Peyer, *supra* n. 46, at p. 789 noting that in case of any divergence between the published consolidated text of a CTA, the ratified texts of the MLI as approved by the parliament should prevail over the consolidation of a CTA which only has the legal value of a mutual agreement concluded by the administration. For a different view, *see* Brunner & Seiler, *supra* n. 37, at sec. 33.7.4, which states that in the future it will be this consolidated version that Swiss courts and tax authorities will refer to when applying the CTA.

the text of the CTA, including the text of relevant amending instruments; (ii) the MLI provisions affecting a CTA based on the MLI positions of the contracting jurisdictions (the matches); and (iii) information on the dates on which the MLI provisions in each jurisdiction become applicable to a CTA.[68] These synthesized versions are expressly intended for use as a tool only and, in principle, they have no legal status at least according to the OECD and the states drafting these texts.[69] From that perspective, taxpayers cannot rely on them (*see*, however, section 2.3.3.2.2.). To determine the effect of the MLI, the MLI should be read in conjunction with the provisions of the CTA.

2.3.3. Various approaches as regards the preparation and design of the synthesized texts

2.3.3.1. General overview and Table

The Netherlands,[70] the United Kingdom,[71] Japan,[72] France,[73] Australia,[74] India, South Africa and Germany[75] draft synthesized texts. The way in which the synthesized texts are prepared may differ from one jurisdiction to another. A survey of the various jurisdictions represented by the members of this group has been carried out. This gives an overview of these differences, even between states involved in a similar synthesized text. The authors have included in Table 1. the various reactions of the countries involved (the table reflects the situation in the various countries concerned up to and including 30 April 2025). The table should be treated with caution and cannot be considered in isolation. The necessary nuances and inconsistencies are explained in the following paragraph (in summary and then in more detail). The table is intended to be used for categorization and to show how different countries deal with synthesized texts in different ways.

As will be explained, Table 1. shows that, in terms of synthesized texts, there are three apparent (*see* below for the reason for "apparent") types of countries represented by the authors (Italy is excluded because it has not ratified the MLI, Canada has not published synthesized texts although other countries, e.g. the Netherlands and the United Kingdom, have published synthesized texts of the tax treaty with Canada, and the United States, which is not a party to the MLI):

(1) those (Australia, India, United Kingdom) that distinguish between (i) unilateral texts where the other country was not consulted; (ii) those where the other country was consulted but did not explicitly agree (and there is at least one example of this category (India-United Kingdom) where the texts differ); and (iii) those where the other country agrees that the text represents a shared understanding (at least initially for Australia);

(2) those (France, Japan, the Netherlands and South Africa) that, at least in some cases (though never for France and Japan), state that they have consulted the other country (for the Netherlands this is in a statement to Parliament rather than in the text); sometimes one country (South Africa) states that it has consulted the other (the Netherlands), while the Netherlands is silent on this point in its version. These countries never state whether the text represents a shared understanding or not. In a few cases (e.g. Australia and India in relation to the Netherlands) the other country states that there was a shared understanding, which can therefore be inferred for the country in this category; and

(3) those (Germany, Sweden, Switzerland) that adopt the MLI by separate protocols, thus creating a legally binding instrument containing the MLI amendments rather than a synthesized text. Moreover, Switzerland publishes a consolidated text where a mutual agreement is in place to modify the relevant tax treaty pursuant to the MLI.

The reason for saying "apparent" above is that items (1) and (2) may be the same, but without being explained by

68. OECD, *Guidance for the development of synthesised texts - Multilateral Convention to Implement Tax Treaty Measures to Prevent BEPS*, p. 9 (2018).
69. *See* e.g. the introduction drafted by HMRC to the synthesized texts as regards Canada and India.
70. Compare https://www.rijksoverheid.nl/documenten/publicaties/2021/06/01/synthesised-texts-belastingverdragen-waarvoor-het-mli-geldt and https://www.rijksoverheid.nl/documenten/brochures/2022/07/12/multilateraal-instrument-mli-e n-nederlandse-belastingverdragen. This concerns synthesized texts for the tax treaties with: Australia, Bosnia and Herzegovina, Canada, Czech Republic, France, Finland, Georgia, Iceland, India, Indonesia, Israel, Japan, Kazakhstan, Korea (Rep.), Latvia, Lithuania, Luxembourg, Malta, New Zealand, Norway, Qatar, Serbia, Singapore, Slovakia, Slovenia, South Africa, United Arab Emirates and the United Kingdom.
71. The United Kingdom produces synthesized texts of the MLI. This involves producing a text, ideally by agreement with the other contracting state, that shows the modifications made by the MLI alongside the original text. So far there is no guidance in the United Kingdom on how these synthesized texts are to be applied in practice.
72. The Ministry of Finance of Japan takes a position to prepare a consolidated version shortly after the MLI becomes applicable to a certain covered agreement. As of April 2025, 39 consolidated versions in both English and Japanese have been published, while two others are in preparation, available a thttps://www.mof.go.jp/english/policy/tax_policy/tax_conventions/mli.htm. The production of what is called a consolidated text is in fact a reflection of Japan's implied unilateral approach.
73. In France consolidated versions of the tax treaties as amended by the MLI are available online as they come into effect with the concerned states (*see* for instance with Austria https://www.impots.gouv.fr/sites/default/files/media/10_conventions/autriche/convention_avec_lautriche_modifiee_par_la_cml.pdf). General remarks at the beginning of each consolidated version indicate that "This document is not a substitute for the authentic texts of the Treaty and the MLI, which remain the only applicable legal instruments".
74. Compare https://www.ato.gov.au/general/international-tax-agreements/in-detail/multilateral-instrument/.
75. The synthesized texts of Germany's double taxation agreements (DTAs) as modified by the MLI are published by the Federal Ministry of Finance. These documents provide consolidated versions of the DTAs, integrating the changes introduced by the MLI, and are essential for the interpretation of the modified agreements. These synthesized texts are available on the official website of the Federal Ministry of Finance in the section on international tax law and double taxation agreements. Not all synthesized texts may be available immediately, as their publication depends on the ratification and implementation status of the MLI with each treaty partner. For a comprehensive list of Germany's DTAs and their current status regarding the MLI, including available synthesized texts, *see* https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Allgemeine_Informationen/synthetisierte-texte-DBA-BEPS-MLI-AnwG-newsletter.html. The respective synthesized texts of the tax treaties can be found in the country-specific information on Croatia, France, Greece, Hungary, Malta, Slovakia and Spain.

Table 1. Responses to synthesized texts in the involved jurisdictions

Country[1]	Nominated treaties	CTAs in force	Synthesized texts	Shared understanding	Unilateral	Unilateral after consultation
Australia	42	31[2]	31	16	14	1
Canada	94		0	0	0	0
France	88	77	61	0	61	0
Germany[3]	14	0	0	0	0	0
India	93	54	35	25	5	5
Italy	82[4]	0	0	0	0	0
Japan	43	39	39	0	39	0
Netherlands	81[5]	52	28	0-28?[6]	0?	0-28?
South Africa	76	52	41	0-41?	0?	0-41?
Sweden	64[7]	0	0	0	0	0
Switzerland	12[8]	4[9]	0	0	0	0
UK	121	72	34	21	11	2

1 United States omitted as not a party to MLI.
2 Australia sought early on to have shared understandings for its synthesized texts with only 4 out of 19 synthesized texts not shared understanding as at early 2021. 4 years later, 15 out of 31 synthesized texts are not shared understanding. At some point the ATO seems to have decided to complete synthesized texts for treaties as MLI changes came into force without having a shared understanding.
3 The German Ministry of Finance has published a draft bill to implement the MLI for 9 countries. Once the bill is passed, Germany will only have to notify the 9 countries of the change in the respective tax treaties. Once these countries have sent their notifications, the MLI will enter into force.
4 Italy listed 82 covered treaties when it signed the MLI in 2017, but both the old (1977) and the new (2015) treaty with Romania were counted. The old treaties with Yugoslavia (1982) and Czechoslovakia (1981) were listed as they still govern the relationships with Bosnia and Herzegovina, Serbia and Montenegro, on the one hand, and Czech Republic and Slovak Republic, on the other hand. Two of the listed treaties (i.e. those with Gabon and Kenya) are not in force yet.
5 The official list shows 82 treaties. However, the tax treaty with Zambia seems to have been counted twice. Both the previous 1977 treaty and the current 2005 treaty are included in the list.
6 The Dutch version does not explicitly mention this point.
7 Sweden has terminated its treaty with Greece.
8 As mentioned above, because of its "amending view" approach, Switzerland has only notified 12 tax treaties as CTAs. ***See supra*** n. 39.
9 Currently, mutual agreements are only in place with respect to 4 of the 12 tax treaties that have been notified as CTAs: Iceland, Czech Republic, Lithuania and Luxembourg. Thus, Switzerland is bound by the MLI's provisions with these 4 states, pursuant to art. 35(7)(b), in conjunction with art. 35(7)(a)(i) of the MLI. A consolidated version has been published for the tax treaties with these four states. ***See supra*** n. 43.

the countries in (2). Accordingly, the differences in the columns of the table should not be given too much weight.

2.3.3.2. Analysis and further explanation

2.3.3.2.1. Imbalances

The focus will be mainly on the countries in (1) and (2). For the synthesized texts drafted by some of these countries in relation to their treaties, such as the Netherlands, France and Japan, the disclaimer,[76] in the view of the Netherlands, actually only contains the ratification clause[77] while the Japanese[78] and French[79] versions imply (for Japan) and stipulate (for France) that the synthesized text is drafted unilaterally. The Dutch State Secretary for Finance indicated in a letter to the Dutch parliament that the relevant treaty partners would be consulted in advance on the preparation of the synthesized texts.[80] However, it

76. The OECD, *Guidance for the development of synthesised texts - Multilateral Convention to implement Tax Treaty Measures to Prevent BEPS*, sec. 2.1.4 (OECD 2018) indicates what a general disclaimer contains. This disclaimer must be included before the specific synthesized texts of the relevant CTA. It can be based on the wording suggested by the OECD, i.e. the General sample disclaimer text (*see* para. 16 of the OECD Guidance). According to the OECD Guidance (paras. 17 et seq.), this general disclaimer should refer to (i) the legal instruments of the synthesized text (the MLI and the CTA); and (ii) the latest MLI positions of the relevant states used to produce the synthesized texts. In addition, the disclaimer could include (iii) a statement that further modifications could be made to the MLI positions and that these modifications could change the effect of the MLI on the CTA; (iv) a statement that the synthesized text has no legal value and that the text of the MLI, applied alongside the text of the CTA, would remain the only applicable legal documents; (v) a description of the approach taken in developing the synthesized text; (vi) a statement that changes have been made to the text of the provisions of the MLI in order to align the terminology used in the MLI with that used in the CTA and that these changes do not alter the substance of the provisions of the MLI; and (vii) a statement that all references to the provisions of the CTA are references to the CTA as modified by the provisions of the MLI. In addition to the general disclaimer, the OECD Guidance (sec. 2.4.2) also contains a disclaimer on the entry into effect of the MLI provisions.

77. *See* the Dutch version of the synthesized text of the Australia-Netherlands tax treaty:

> The document was prepared on the basis of the MLI position of the Netherlands submitted to the Depositary upon acceptance on 29 March 2019 and of the MLI position of Australia submitted to the Depositary upon ratification on 26 September 2018. These MLI positions are subject to modifications as provided in the MLI. Modifications made to MLI positions could modify the effects of the MLI on the Agreement.

Compare https://open.overheid.nl/documenten/ronl-2907dcc2-5c64-4b43-99ee-da07ec8795b8/pdf.

78. According to the preambles of the synthesized texts of the treaties published by the Japanese Ministry of Finance (MOF), they were all prepared by the MOF alone.

79. *See* the French version of the synthesized text of the France-Netherlands Tax Treaty: "*La France a publié de manière unilatérale une version consolidée disponible à l'adresse suivante*: https://www.impots.gouv.fr/sites/default/files/media/10_conventions/pays-bas/pays-bas_modifiee_cml_20190805.pdf."

80. The letter of the State Secretary for Finance of 21 Sept. 2020, no. 2020-0000166279. The Netherlands applies principles of good governance including the principle of protection of legitimate expectations (*vertrouwensbeginsel*). However, a letter to parliament (and framing questions about Dutch treaty policy) is made by the State Secretary of Finance in his capacity as co-legislator. According to the Supreme Court this is not covered by the principle of the protection of legitimate expectations. That principle only applies to statements made by the State Sec-

is not clear from the published texts whether and to what extent the Netherlands consulted relevant treaty partners in advance. The published synthesized texts have been drafted in accordance with the OECD guidelines, but the disclaimer suggested by the OECD on whether and to what extent prior consultation with the relevant treaty partner has taken place in the drafting of the synthesized text is missing. Nevertheless, the South African version of the synthesized text of the tax treaty with the Netherlands implies that it was drafted in consultation with the Netherlands. In fact, South Africa also publishes the other synthesized texts only after consultation with the other relevant state, [81] which in addition to the Netherlands, includes Australia,[82] Canada,[83] France,[84] India,[85] the United Kingdom[86] and Japan.[87] Although the Netherlands is silent on prior consultation in the relevant synthesized text, it could be argued that such consultation may be assumed with respect to South Africa. Even though it extends further, it can also be argued that the pattern that applies to South Africa also applies to the other states for which a synthesized text has been published from the Dutch perspective and which do not already include some form of consultation or shared understanding, such as Australia, India and the United Kingdom (*see* for the United Kingdom below). These are France, India, Japan and possibly Canada (although Canada has not yet produced any synthesized texts). However, France has clearly opted for a unilateral approach and Japan has implied that it will do so, as reflected in their respective versions of the synthesized text of the tax treaty with South Africa.

All synthesized texts produced by the Netherlands are in English, except for France and Luxembourg, which are in French. However, the disclaimer in the French and Dutch versions of the synthesized texts is not identical. The Dutch version refers to the fact that France is unilaterally producing a consolidated text, whereas the French version does not make this reference but also refers to it as a consolidated text in a heading; the Dutch version that is solely in French refers to "*texte de synthèse*".[88] It is also noticeable that the texts are not entirely identical, although in French.[89] Another difference is that the French version does indeed have the characteristics of a consolidated text; it indicates in detail the impact of the MLI on the treaty in question (including strikethroughs and replaced paragraphs). The other version (such as the Dutch version in this case) does not go to this level of detail and indicates the text of the MLI in boxes next to the text of the treaty article affected by the MLI. Also, in view of the disclaimer of the French version, it is emphasized that, as with a regular synthesized text, this is a tool intended to facilitate the use of the MLI and its impact. This is not altered by the fact that the beginning of the disclaimer refers to the CTA being modified by ("*modifiée par*") the MLI. This is sufficiently nuanced and framed. The MLI and the underlying CTA are and remain decisive for the interpretation and are not replaced by this "consolidated text". Therefore, from the French point of view, this "consolidated text" in the disclaimer does not lead to a special or more weighty status than a regular synthesized text.[90]

The UK version of the synthesized text of the tax treaty with Japan refers to prior consultation and shared understanding,[91] while the Japanese version (both in the English and Japanese language) implies that it was drafted unilat-

retary in his capacity as executor of the law. Compare the decisions of the Dutch Supreme Court of 7 July 1993, *BNB* 1993/336 and of 21 Sept. 2007, *BNB* 2008/91-92.

81. The South African Revenue Service publishes synthesized texts on its website (and not in an official government publication), in English alone, only after consultation: "The synthesised texts for each Covered Tax Agreement are drafted in consultation with the relevant treaty partners but are non-binding". *See* https://www.sars.gov.za/legal-counsel/international-treaties-agreements/double-taxation-agreements-protocols/multilateral-instrument-mli/.
82. No explicit mention in the South African version, available at https://www.sars.gov.za/wp-content/uploads/Legal/Agreements/Legal-Int-A-DTA-MLI-2023-01-Australia-SA-Synthesised-text-MLI.pdf, but the Australian version refers to consultation and shared understanding.
83. No explicit mention of consultation in the South African version, available at https://www.sars.gov.za/wp-content/uploads/Legal/Agreements/Legal-INTA-DTA-MLI-2023-04-Canada-SA-Synthesised-text-MLI.pdf.
84. No explicit mention of consultation in the South African version of the synthesized text of the tax treaty with France, available at https://www.sars.gov.za/wp-content/uploads/Legal/Agreements/Legal-INTA-DTA-MLI-2024-03-France-SA-Model-Synthesised-Text-MLI.pdf.
85. No explicit reference to consultation of the South African version of the synthesized text of the tax treaty with India, available at https://www.sars.gov.za/wp-content/uploads/Legal/Agreements/Legal-INTA-DTA-MLI-2023-08-India-SA-Synthesised-text-MLI.pdf.
86. No explicit mention of consultation in the South African version (*see* https://www.sars.gov.za/legal-inta-dta-mli-2025-06-uk-sa-synthesised-text-mli/).
87. Japan produced an unilateral synthesized text in Japanese and English for the tax treaty with South Africa (*see* https://www.mof.go.jp/tax_policy/summary/international/tax_convention/SynthesisedTextforJapan_SouthAfrica_EN.pdf). There is no reference in the English synthesized text (published in South Africa) to the Japanese version. The English text was prepared in consultation between the two competent authorities, at least from a South African angle.
88. Although this could be seen as a fairly literal translation of "synthesized text", it does not seem to be the most accurate from a French linguistic point of view. In French, there is no distinction between the consolidated text and the synthesized text; both are referred to as "*texte consolidé*" or "*version consolidée*".
89. The changes resulting from the minimum standard of article 6 of the MLI have a number of linguistic differences which do not have a significant impact: the French version mentions "des pratiques d'évasion ou de fraude fiscale (résultant notamment de la mise en place de stratégies de chalandage fiscal destinées à obtenir des allégements prévus dans la présente Convention au bénéfice indirect de résidents d'Etats tiers." The Dutch version refers to (differences in italics) "des pratiques d'évasion ou de fraude fiscale/*évitement fiscal* (résultant notamment de la mise en place de stratégies de chalandage fiscal destinées à obtenir des allégements prévus dans la présente convention au bénéfice indirect de résidents *de juridictions tierces*)." It is worth noting that "évitement fiscal" is rarely used in French, where "évasion fiscale" is generally considered the correct translation for "tax evasion". Also the PPT (art. 7(1) MLI) is not entirely the same in the Dutch and French version. The French version mentions "Nonobstant les autres dispositions de la présente Convention, un avantage au titre de celle-ci ne sera pas accordé au titre *d'un élément de revenu* s'il est raisonnable de conclure" whereas the Dutch versions mentions "d'un élément de revenu *ou de fortune*." However, the difference in the version of the PPT is related to the fact that the France-Netherlands tax treaty only covers income taxes and not wealth taxes (so from the French point of view, there is no need to repeat the provisions of the PPT model as far as the "impôt sur la fortune" is concerned). It is also striking that the arbitration clause added to the CTA by the MLI in the Dutch version contains a comprehensive procedural provision concerning, *inter alia*, the selection and appointment of arbitrators (art. 20 MLI), which is absent in the French version (art. 27 CTA).
90. This is also consistent with the fact that, linguistically speaking, there is no distinction in French between consolidated text and synthesized text (*See also*, *supra*, n. 88).
91. *See* https://assets.publishing.service.gov.uk/media/5c49dbeae5274a6e49801c40/Synthesised_text_of_the_Multilateral_Instrument_and_

erally.[92] However, the UK version of the synthesized text of the tax treaty with France refers to it being drafted unilaterally by both France and the United Kingdom,[93] which is confirmed by the French version.[94]

Australia and India refer in their versions to "shared understanding" which in any case indicates consultation, whereas the Dutch and South African versions make no such reference (*see also* below). In line with France's unilateral approach, the Australian version of the synthesized text of the tax treaty with France does not refer to a "shared understanding". Instead, the disclaimer states that the synthesized text has been prepared by the ATO and represents its understanding of the changes made by the MLI to the underlying CTA.[95] However, the synthesized text produced by the ATO of the Australia-Japan tax treaty indicates that it was prepared in consultation with the Japanese Ministry of Finance and represents the shared understanding of the changes made to the CTA by the MLI.[96] In the Japanese version (both in the English and Japanese language) of this synthesized text of the treaty with Australia there is no mention of consultation and shared understanding; in fact, it implies the unilateral approach.[97] It is noteworthy that the Indian version of the synthesized text of the India-France tax treaty mentions that its text has been prepared in consultation with the competent authority of France and that it represents their shared understanding of the amendments made to the CTA by the MLI.[98] Of course, the French version, in line with the French approach, does not refer to a shared understanding and implies that the French version was drafted unilaterally.[99] Moreover, this is also an indication of the unbalanced disclaimers contained in the respective versions of the synthesized text of the same treaty (*see* above in this section and section 2.3.3.2.2.).

2.3.3.2.2. Legal value

In any case, it would seem appropriate for the jurisdictions concerned to consult each other in advance and arrive at a joint synthesized text. In addition, this should be clearly stated in the disclaimer of the synthesized text and in both versions of the states involved. Alignment with the other treaty state is desirable because a difference in published texts could lead to confusion in the interpretation and application of the MLI. Australia (at least initially), India, and the United Kingdom express, in the disclaimer of their synthesized texts shared understanding on several occasions; however, the Australian and French versions of the synthesized text of the Australia-France tax treaty both refer to the unilateral approach (*see* section 2.3.3.2.1.). For example, the synthesized text of the Australia-United Kingdom tax treaty contains the following passage in the disclaimer of the UK version: "This document was prepared in consultation with the Australian Tax Office and represents our shared understanding of the modifications made to the convention by the MLI".[100] It could be argued that this shared understanding confers a firmer legal status.[101] Ideally, it could be considered whether agreement could be reached between the treaty states to publish the same version. The publication of the same synthesized text may remove ambiguities as to the interpretation and application of the MLI by both states involved, if the synthesized texts do not contain any discrepancies. It can be argued that such a common and identical text has more legal standing than if each state were to produce its own text.

Such individual texts can, in principle, only have legal value in relations between that state and, for example, a taxpayer. The taxpayer may – depending on the principles of good administration applicable there – rely on it if it contains an interpretation in their favour (principle of the protection of legitimate expectations). Of course, not all the jurisdictions referred to in this article apply a principle of protection of legitimate expectations, as is the case in Australia, for example. Moreover, it depends on the domestic legal system whether a state recognizes a reliance on the principle of the protection of legitimate expectations or a variant of it in relation to a synthesized text. The United Kingdom would clearly not attach any legal value to a synthesized text; the text of the MLI and the underlying CTA would be the only sources of interpretation in this respect which is also in line with the disclaimer of the UK synthesized text. A similar view would be followed in India and Australia. South Africa recognizes that taxpayers may have legitimate expectations based

the_2006_Japan_-_UK_Double_Taxation_Convention_-_in_force.pdf.

92. *See* https://www.mof.go.jp/tax_policy/summary/international/tax_convention/SynthesisedTextforJapan_UnitedKingdom_EN.pdf.
93. *See* https://assets.publishing.service.gov.uk/media/5ce2bbf240f0b627e4b147c2/Multilateral_Instrument_and_the_2008_France-UK_Double_Taxation_Convention.pdf.
94. *See* https://www.impots.gouv.fr/sites/default/files/media/10_conventions/royaume-uni/convention_avec_le_ru_modifiee_par_la_cml.pdf.
95. *See* https://www.ato.gov.au/law/view/document?DocID=MLI/MLI-France-agreement.
96. *See* https://www.ato.gov.au/law/view/document?DocID=MLI/MLI-Japan-agreement&PiT=99991231235958. This is also the case for the synthesized text of the 1983 Australia-Ireland tax treaty which was the subject of the decision of AU: FCA, 31 Oct. 2024, *Oracle Corporation Australia Pty Ltd v. Commissioner of Taxation (Stay Application)* [2024] FCA 12 62 (the taxpayer has appealed this decision to the Federal Court of Australia Full Court). This synthesized text was also attached to the Federal Court's decision (Annex A).
97. *See* https://www.mof.go.jp/tax_policy/summary/international/press_release/SynthesisedTextforJapan-AUEN.pdf.
98. *See* https://incometaxindia.gov.in/dtaa/synthesised-text-of-mli-and-india-france-dtac-indian-version.pdf.
99. *See* https://www.impots.gouv.fr/sites/default/files/media/10_conventions/inde/version_consolidee_de_la_convention_avec_inde_modifiee_par_la_convention_multilaterale.pdf.
100. A similar statement is included in the Australian version: "This document was prepared in consultation with her Majesty's Revenue and Customs and represents our shared understanding of the modifications made to the MLI."
101. *See also* AU: FCA, 31 Oct. 2024, *Oracle Corporation Australia Pty Ltd v. Commissioner of Taxation (Stay Application)* [2024] FCA 12 62, regarding the synthesized text of the Australia-Ireland Income Tax Treaty (1983). In para. 6 of its decision, the Federal Court noted that, for ease of understanding, the parties had relied on the "synthesized text", which sought to incorporate into the text of the tax treaty in question the effect of the MLI on it. The court notes that the synthesized text represents the shared understanding of the competent authorities of Australia and Ireland as to the modifications made to the tax treaty by the MLI. For those reasons, the synthesized text was also annexed to the decision. This decision seems to demonstrate to some extent the reliance of the parties and the court on the synthesized text, in which the fact that there was a shared understanding and prior consultation played a role.

on positions adopted by tax authorities, but the requirements to hold tax authorities to these positions are hard to satisfy.[102] The disclaimer in synthesized texts that they are not seen, by the South African Revenue Service, as legally binding means that the requirement for legitimacy, among others, may not be satisfied.[103] In the Netherlands (*see also* section 2.3.3.2.1.), the principle of protection of legitimate expectations is fairly well crystallized in case law.[104] A letter from the Secretary of State for Finance to Parliament stating that the other party will be consulted in advance on the drafting of a synthesized text is generally not in itself sufficient for such an appeal, provided that the Secretary of State for Finance acted as co-legislator rather than as executor of the law.[105] However, if the disclaimer of the other state indicates that prior consultation with the Netherlands has taken place (the Dutch disclaimers do not make this explicit) and that a shared understanding has been reached, then it can be argued that this, together with the letter in question, may contribute to a possible successful reliance on the principle of the protection of legitimate expectations, provided that the hurdle can be overcome that the disclaimer of the other state can be attributed to the Dutch tax authority. The latter, of course, is quite a stretch.

These common and identical texts can contribute to a common interpretation and application of the relevant CTA in conjunction with the MLI. This may give them some interpretative value, i.e. subsequent practice within the meaning of article 31(3)(b) of the VCLT (however, *see also* the alignment with a MAP and the qualification as a subsequent agreement under article 31(3)(a) of the VCLT below in this section).[106] In the case of a shared understanding after consultation this type of text may be given greater weight by the courts.[107] In such a case, both states have a shared understanding which may contribute to the synthesized text having the status of a MAP or being a MAP within the meaning of article 25(3) of the OECD Model (difficulty in the application of the CTA) in conjunction with article 32(1) of the MLI (reference to the MAP of the CTA if questions may arise as to the interpretation or implementation of the CTA as required by the MLI) even if the text expressly contains the usual disclaimer that the CTA and the MLI are the only legally binding texts. In this case, the status of the synthesized text will depend on the interpretation adopted by the relevant jurisdiction. This status, if alignment with the MAP can be sought, is generally quite low, as is the case with the MAP. Even if it can be concluded that the synthesized text (with a shared understanding and consistency in both texts), like a MAP, can be regarded as a subsequent agreement within the meaning of article 31(3)(a) of the VCLT and as a treaty for the purposes of international law,[108] it has no internal effect because of the consti-

102. ZA: HC, 31 Jan. 2013, *MTN International (Mauritius) Ltd v C:SARS* (2013) 75 SATC 171, 182-183.

103. In the case of ZA: SCA, 14 Mar. 2003, *South African Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA), 49E–H, the Supreme Court of Appeal indicated that the "representation underlying the expectation must be 'clear and unambiguous and devoid of relevant qualification'". Furthermore, the same case indicates that the state official must both be competent and it must have been lawful for that person to make the representation, before it can be relied upon. It stands to reason that SARS officials are not competent to produce documents that may contradict an binding legal source such as the ratified MLI.

104. This started with the decisions of the Dutch Supreme Court of 12 April 1978, *BNB* 1978/135 and *BNB* 1978/137 (the landmark decisions of the Dutch Supreme Court regarding the application of the principle of the protection of legitimate expectations to tax law). *See* for an overview of this case law, E. Poelman, *Formeel belastingrecht*, Cursus Belastingrecht, para. FBR.4.3.0 (M.L.M. van Kempen, A.W. Hofman & F.P.G. Pötgens eds. Wolters Kluwer online 2025).

105. NL: HR, 21 Sept. 2007, *BNB* 2008/92; and NL: HR, 27 Sept. 2002, *BNB* 2002/383.

106. It can be argued that a MAP does not qualify as a subsequent agreement within the meaning of art. 31(3)(a) VCLT. The reasoning is that this clause refers to "any subsequent agreement between the parties". Art. 2(1)(h) defines a "Party" as "a State which has consented to be bound by the treaty and for which the treaty is in force". On this basis, it is arguable that a competent authority does not become "the State" (i.e. the party to the subsequent treaty) and that there is no clear authorization that the state has "consented to be bound" by the competent authority. According to the drafting history of the VCLT, the rationale for art. 31(3)(a) was to reflect that states, as contracting parties, also have competence as legislators. Competent authorities are usually not legislators but administrators. While there is some delegation by legislators to competent authorities in art. 25 OECD Model, this delegation is not unlimited. *See also* below in this section.

107. Compare again the decision of AU: FCA, 31 Oct. 2024, *Oracle Corporation Australia Pty Ltd v. Commissioner of Taxation (Stay Application)* [2024] FCA 12 62 regarding the synthesized text of the Australia-Ireland Income Tax Treaty (1983).

108. It could possibly be argued that the synthesized text, based on a shared understanding and where both texts are fully consistent with each other, can be considered a subsequent agreement within the meaning of art. 31(3)(a) VCLT. This would be based on the broad scope followed by the International Court of Justice (ICJ) in its jurisprudence on the identification of a treaty according to public international law standards. The judgment in ICJ, 1994, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, p. 121 et seq. provides guidance as to when an international agreement concluded between states is to be regarded as a treaty on the basis of criteria of international law. This is the case when the parties intend to establish a legal relationship that creates rights and obligations that are binding on the basis of criteria of international law. According to the ICJ, the minutes of the consultations between the foreign ministers of Bahrain and Qatar should be regarded as a treaty based on criteria of international law. This was based on the ICJ's view that (i) the intention of the parties to create international rights and obligations must be determined from the content and circumstances of the agreement, the form being irrelevant; (ii) if it is clear from the wording of the agreement that the parties undertook certain "commitments", rights and obligations under international law have "thus" been created and the agreement must be regarded as a treaty; (iii) the objectively established intention of the parties, not their subjective intention, is of importance – even if it can be demonstrated that their subjective intention is merely geared towards creating a political understanding rather than a legally binding agreement, no departure from the parties' intention as established objectively based on the contents of the agreement and other relevant circumstances is allowed; and (iv) the fact that one of the states' national constitutional rules have not been followed is, in principle, not incompatible with an agreement being binding based on criteria of public international law if it is evident that the parties intended to let either the entire agreement or part thereof take immediate effect. *See also* DE: BFH, 10 July 1996, I R 79/13, BStBl II 1997, p. 15, which held that a MAP between the Dutch and German competent authorities (pursuant to art. 25(2) of the former Germany-Netherlands Income and Capital Tax Treaty (1959), which is comparable to art. 25(3) OECD Model) on the interpretation of the term "temporary" in the 183 days rule (art. 10(2)(1) of the former 1959 Germany-Netherlands tax treaty) was to be qualified as a subsequent agreement under art. 31(3)(a) VCLT. Like the ICJ, the German Federal Tax Court held that such an agreement was binding under international law and a treaty under public international law. *See* for a comparable decision, DE: BFH, 12 Oct. 2011, I R 15/11, BStBl 2012 II, p. 548. This case is discussed in A. Rust, *Germany: Interpreting the 183-day rule*, in *Tax Treaty Case Law around the Globe 2013*, sec. 3 (M. Lang et al. eds., IBFD 2013), Books IBFD. Compare also DE: BFH, 30 May 2018, I R 62/16, BFH/NV 2019, p. 62; and DE: BFH, 10 June 2015, I R 79/13, BStBl II 2016, p. 326. Switzerland would reach a comparable conclusion; *see* V. Rolle & T. Affolter, *Switzerland*, in *Dispute Resolution*

tutional considerations that are not followed; this applies to both Germany and Switzerland.[109] This means that tax judges and taxpayers are not "bound" by such a synthesized text.

One difference between the synthesized text and the MAP is that article 25 of the OECD Model contains a power of delegation.[110] This element seems to be semantic to some extent, since the status of a MAP is already quite low (*see also* below). The Dutch Supreme Court, for instance, has not explicitly ruled on the qualification of an interpretative MAP as a treaty under international public law, but has nevertheless held that the tax court and the taxpayer are not "bound" by an interpretative MAP.[111] The Italian Supreme Court[112] follows a similar approach, i.e. that these types of MAPs are "agreements of administrative nature", which should not bind taxpayers and courts but only the authorities that concluded them.[113] In France an interpretative MAP is an administrative agreement which is not "binding" on the tax courts but which, once published, should be "binding" on each competent authority vis-à-vis the others and vis-à-vis the taxpayers concerned.[114] A UK tax court could take a MAP into account but would not be obliged to follow it.[115] Given the relatively low status of a MAP, the synthesized text would, by analogy, not go beyond that status. For Switzerland, the consolidated text produced is intended to be a MAP and will have that status (*see also* section 2.3.1.).

2.3.3.2.3. Further discrepancies and appreciation

However, Table 1. demonstrates that while shared understanding may be confirmed in both versions of the states involved (as is illustrated in section 2.3.3.1. between the United Kingdom, India and Australia), there may be discrepancies (*see also* section 2.3.3.2.1.). For example, the Dutch version of the disclaimer in the synthesized text of the treaties with India and Australia does not mention the shared understanding. Similarly, in the Japanese version (both in the Japanese and English language) of the synthesized texts of the tax treaties with the United Kingdom and Australia, the preamble to the synthesized text of these treaties in the Japanese version (both in the Japanese and English language) implies that they have been drafted unilaterally by the Japanese Ministry of Finance.

The question arises what impact these imbalances have on the status of the synthesized text in both states concerned. Even more so if one state indicates that the text in question was arrived at unilaterally while the corresponding versions in the other states assume shared understanding, for example, (i) the Indian version of the synthesized text of the tax treaty with France refers to a shared understanding, while the French version expresses that it is unilateral, and (ii) the Japanese version (both in the Japanese and English language) of the synthesized text of the tax treaty with Australia implies Japan's unilateral approach, while Australia refers to a shared understanding. Apart from the principles of good administration that may apply in a state, it seems that in such a case, the status of the synthesized text is diminished. Due to Japan's implied position and France's clear position, shared understanding seems to be lacking. For the Netherlands, the situation is slightly more diffuse. The Dutch state secretary for finance has indicated in a letter to the Dutch parliament that the synthesized text is drafted after consultation with the other state although such a statement is lacking in the disclaimer of the Dutch version. The latter source is decisive so there is doubt about a shared understanding in that respect too. However, the combination of South Africa (consultation), India (shared understanding) and Australia (shared understanding) may shed a different light.

What should be avoided, according to the authors, are complete contradictions in the way the synthesized text is produced. There are many examples of this, as noted in section 2.3.3.2.1. Preferably, a synthesized text on the same tax treaty should not simultaneously indicate a shared understanding and consultation (India) and a unilateral approach (France); another example is the United Kingdom (shared understanding and consultation) and France (unilateral). As indicated above, inconsistencies

under Tax Treaties and Beyond pp. 1110 and 1111 (G. Maisto ed., IBFD 2023), Books IBFD. Critical is G. Maisto, *Reflections on the Scope of the EU Dispute Resolution Directive*, in *Liber Amicorum Luc De Broe*, pp. 427 and 428 (F. Debelva ed., Wolters Kluwer 2024).

109. Although the German Federal Tax Court in its decision DE: BFH, 10 July 1996, I R 79/13, BStBl II 1997, p. 15 considered a MAP to be a subsequent agreement (art. 31(3)(a) VCLT) and a treaty under international law, the court nevertheless held that this MAP was not "binding" under German domestic law because it did not comply with art. 59(2) of the German Constitution. According to the German Federal Tax Court in DE: BFH, 1 Feb. 1989, I R 74/86, BStBl II 1990, p. 4 an interpretative MAP between competent authorities can only be "binding" if it has been transformed into domestic law. *See* for Switzerland, Rolle & Affolter, id., at pp. 1110 and 1111. Compare also DE: BFH, 2 Sept. 2009, I R 111/08, BStBl II 2010, p. 387. Italy would not likely regard interpretative MAPs as a treaty (at least with respect to their binding nature for national courts) because they do not satisfy the requirements of the Italian Constitution (art. 80) and they have not been ratified (*see* G. Maisto, *Oggetto e ambito della Direttiva, in La Risoluzione delle controversie fiscali internazionali nell'Unione Europea*, pp. 103-105 (L. Del Federico, P. Pistone et al. eds., Pacini 2022); *see also* M. Cataldi & M. Severi, *Italy*, in *Dispute Resolution under Tax Treaties and Beyond*, p. 866 (G. Maisto ed. IBFD 2023), Books IBFD. *See also*, although on a slightly different topic, IT: Cass., 24 May 1988, No. 3610. In South Africa, competent authorities have no capacity in terms of sec. 231 of the Constitution (1996), to enter into treaties or to amend them because this power is exclusively given to the responsible Minister and cannot be delegated. Interpretive MAPs can therefore not amount to a treaty binding on the country as a matter of constitutional law.

110. However, in the light of the ICJ decision referred to previously (ICJ, 1994, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, p. 121 et seq.), it can be argued that this should not affect its public international law character.

111. Again pursuant to art. 25(2) of the former 1959 Germany-Netherlands tax treaty; *see* NL: HR, 6 Jan. 2017, *BNB* 2017/91 (in NL: HR, 29 Sept. 1999, *BNB* 2000/16 and 17, there was no such "binding" because the interpretative MAP was not correctly published).

112. IT: Cass., 7 Mar. 2006, No. 4810 mentioned by Cataldi & Severi, *supra* n. 109, at p. 866.

113. *See also* for South Africa, B. Ger, *South Africa*, in *Dispute Resolution under Tax Treaties and Beyond* pp. 1003 and 1004 (G. Maisto ed., IBFD 2023), Books IBFD.

114. C. Pasquier, *France*, in *Dispute Resolution under Tax Treaties and Beyond* pp. 720 and 721 (G. Maisto ed. IBFD 2023), Books IBFD.

115. Compare D. Vines & R. McMahon, *United Kingdom*, in *Dispute Resolution under Tax Treaties and Beyond*, p. 1157 (G. Maisto ed. IBFD 2023), Books IBFD. While there is no case law on MAPs in Australia, the reasoning in AU: HCA, *Minister for Home Affairs of the Commonwealth v. Zentai* [2012] HCA 28, (2012) 246 CLR 213 at paras. 35-36, 63-65 suggests that the same result would be reached in Australia on arguments based on subsequent agreements.

between synthesized texts and the way they are drafted should be avoided. Of course, it is advisable for states to consult each other (as recommended by the OECD) and reach a shared understanding. This gives the synthesized text the greatest weight and contributes to legal certainty for taxpayers. If one state (such as France) wishes to maintain its unilateral approach, the other state should be prevented from talking about shared understanding and consultation. In this respect, the synthesized text of the France-United Kingdom and Australia-France tax treaties is at least balanced by referring to a unilateral approach across the board, although Australia (at least initially) and the United Kingdom normally favour shared understanding and consultation on various occasions.

In addition, it seems that the synthesized texts produced by His Majesty's Revenue and Customs on the one hand and India on the other lead to different positions and interpretations. The synthesized texts of the United Kingdom-India tax treaty published by India differs from the one published by the United Kingdom.[116] The United Kingdom has notified specific principal purpose tests (PPTs) in articles 11(6), 12(11) and 13(9) under article 7(17)(a) of the MLI whereas India has not notified this. This may lead to different interpretations of MLI in the two countries. In the United Kingdom, specific PPTs will be replaced by the general PPT in article 7(1), which has the escape clause, whereas in India, specific PPTs may continue to apply.

2.3.3.2.4. States having some special features

So far, no synthesized and consolidated versions are available in Sweden[117] or Germany.[118] However, such versions are likely to be available in the future as a result of the two-stage implementation of the MLI mentioned previously. Nevertheless, Japan has drafted and published a synthesized text of the tax treaty with Sweden and Germany.[119] A result of this manner of implementing the MLI is the creation of a consolidated text. Switzerland is also obliged under its domestic law to produce a consolidated text, in which context the other state should mutually agree to a document detailing the amendments made to the CTA by the MLI, similar to a bilateral amending protocol. Italy has not ratified the MLI yet, but it appears its competent authority is working bilaterally with other contracting states to agree synthesized texts. As noted in sections 2.3.3.1. and 2.3.3.2., Canada does not appear to have produced any synthesized texts, although other countries (such as the United Kingdom, the Netherlands and Japan[120]) have produced and published synthesized texts of their respective tax treaties with Canada.

2.3.3.2.5. Some recommendations

Although the authors favour consolidated texts, the synthesized texts could alternatively be evaluated as potentially achieving the status of legal instruments at the international level. Elevating the synthesized texts to the status of legal instruments applicable between the parties (with ratification by both contracting states) would perhaps be the best way forward, but this step is entirely dependent on the efforts of the parties to the MLI.[121] This would also result in only one category remaining namely prior consultation and shared understanding. This would then also be expressed as such by the two states concerned. Furthermore, it would then no longer be possible for there to be any differences, including substantive differences, between the synthesized texts. In fact, there would then be only one text even if it was published by both competent authorities.

116. There is no shared understanding but both versions indicate that: "this document was prepared by the Competent Authority of the United Kingdom and represents its understanding of the modifications made to the Convention by the MLI. In preparing this document, the Competent Authority of the United Kingdom consulted with Indian officials."
117. Sweden does not have any synthesized texts. The only texts are those coming out from amending each and every tax treaty, after bilateral agreement, to have them conform with the MLI. Sweden ratified the MLI on 22 June 2018 and it came into force for Sweden on 1 Oct. 2018. It nominated 64 treaties, not including Australia, France, Germany and Switzerland, but deferred the coming into force of the MLI for those treaties by a reservation under art. 35(7) until a later notification specifically covering particular treaties (Germany and Switzerland also make this reservation); *see* section 2.2.1. No such notifications have been made by Sweden or Germany unlike other countries which have relied on this procedure. Even though not among Sweden's CTAs, Australia announced on 13 Dec. 2023 that it will negotiate an update to its treaty with Sweden, presumably to incorporate MLI type amendments agreed on by both countries, *see* https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/media-releases/australia-negotiate-new-tax-treaties-ukraine-and-brazil.
118. The German Ministry of Finance has published the attached draft bill to implement the MLI for nine countries (24 Dec. 2023). After the bill has been enacted, Germany has to notify the nine countries about the change of the tax treaties. As soon as these countries have sent their notifications, the MLI enters into force. Germany is employing art. 35(7) of the MLI. The nine countries in the German Bill are Croatia, Czech Republic, France, Greece, Hungary, Japan, Malta, Slovak Republic and Spain.
119. *See* https://www.mof.go.jp/tax_policy/summary/international/press_release/SynthesisedTextforJapan-SwedenEN.pdf and https://www.mof.go.jp/tax_policy/summary/international/tax_convention/SynthesisedTextforJapan_Germany_EN.pdf.
120. *See* https://www.mof.go.jp/tax_policy/summary/international/tax_convention/SynthesisedTextforJapan_Canada_EN.pdf.
121. Australia and New Zealand are currently negotiating a new treaty. It is understood that this is partly to deal with the issues surrounding synthesized texts even though New Zealand and Australia have published a synthesized text based on a joint understanding and updated it twice (*see* https://www.ato.gov.au/law/view/document?docid=MLI/MLI-NZ-agreement). With reference to art. 30 MLI (*see also* section 2.4.), it is of course possible to enter into a new tax treaty after the MLI has entered into force in both participating states. A striking example is the position between the Netherlands and Belgium. In the first stage, the Belgium-Netherlands Income and Capital Tax Treaty (2001) was not a CTA because the treaty was being renegotiated and this new treaty could, inter alia, include the minimum standards. In the meantime, the Netherlands and Belgium have notified the 2001 treaty as a CTA and the MLI will apply from 1 January 2022. The minimum standards (including the PPT) therefore apply to this CTA; compare also B. Peeters & A. Clocheret, *Deel IX - Gevolgen van het MLI voor de Belgische verdragen*, in *Fiscaal praktijkboek 2023 - 2024 : directe belastingen* pp. 391 and 392 (L. Maes & H. De Cnijf eds. Wolters Kluwer); and R. Smet & J. Huyzentruyt, *DBV België-Nederland: MLI van toepassing, maar vanaf wanneer tegenstelbaar?*, Fiscoloog Internationaal 457, pp. 1-5 (2021). On 21 June 2023, a completely new treaty was concluded between the Netherlands and Belgium in which the minimum standards are also included (e.g. art. 6 MLI in the preamble of this treaty and art. 7(1) MLI in art. 21(1) of this treaty). *See* R. Smet & G. Vanden Abeele, *Deel X - Het nieuwe dubbelbelastingverdrag met Nederland*, in *Fiscaal praktijkboek 2023 - 2024 : directe belastingen*, p. 486 (L. Maes & H. De Cnijf eds., Wolters Kluwer).

2.4. Amending CTAs and the BEPS minimum standards

The question can be raised whether the possibility to amend a CTA bilaterally after the MLI has entered into force for both states (article 30 of the MLI) could also encompass the minimum standards. The objectives of the BEPS Project are reflected in the MLI. The members of the Inclusive Framework are obliged to implement at least the tax treaty-related minimum standards of BEPS Action 6 and 14 in the bilateral tax treaties. Therefore, states that have signed up to these minimum standards are compelled to include them in their tax treaties. This can be done through the MLI or through bilateral negotiation and conclusion of treaties between these states. The minimum standards contain the "hardest" political commitments, whereby states agree to adopt these standards if they do not already have consistent rules in place.[122] The minimum standards must be included in the tax treaties of the states that have committed themselves to them. Article 30 of the MLI is intended to express that CTAs do not become static through the application of the MLI. Theoretically, it may be possible for states to roll back the implementation of the BEPS minimum standards through the MLI on a bilateral basis.[123] However, this does not release the states participating in the inclusive framework from their commitment to implement, inter alia, the tax treaty-related minimum standards, whether or not through the MLI, whose implementation will be monitored. Under article 37 of the MLI, any party may withdraw from the MLI at any time by notifying the OECD. Such withdrawal is effective from the date of receipt of the notification by the OECD. Unilateral withdrawal does not reverse the operation of the MLI. Article 37(2) of the MLI expressly provides that a unilateral withdrawal does not affect the changes that the MLI has already made to a CTA. Thus, a withdrawal in principle allows for grandfathering of the MLI. If a state withdraws from the MLI and wishes to adjust or reverse the operation of the MLI, it should do so on a bilateral basis with the other contracting states. Given the international consensus on this issue, it is less likely that states will bilaterally roll back implemented BEPS minimum standards.

The authors differ on the legal significance of the minimum standards within this framework. A minority considers that the CTA cannot be amended in such a way that the minimum standards are no longer met or that the MLI as such is undermined. They argue that given the purpose and scope of the MLI (a smooth implementation of the tax treaty-related BEPS measures in tax treaties), there is a legal obligation and not just a political obligation at that stage. This object and purpose is also relevant for the interpretation and application of article 30 of the MLI. Another part of the authors considers the wording of article 30 of the MLI to be sufficiently clear (especially considering the equally authentic French text[124]). This provision allows the CTAs to be amended and, strictly speaking, these amendments can be made in such a way that the minimum standards are no longer included. This would only have political (peer review) rather than legal consequences.[125]

2.5. Compatibility clauses and relationship with CTAs

Article 30 of the VCLT is designed to resolve conflicts arising out of successive treaties, i.e. an earlier treaty and a later treaty both in force. A conflict arises when, in a particular case, the provisions of the earlier and the later treaty, although relating to the same subject matter, are incompatible in that they cannot be applied simultaneously. Article 30 of the VCLT goes beyond the notions of conflict and incompatibility by dealing more generally with the rights and obligations of states that are parties to successive treaties on the same subject matter (article 30(1) of the VCLT) and, in particular, with the priority between them. Article 30(2) of the VCLT deals with conflict or compatibility clauses in a treaty, which regulate the relationship between the provisions of that treaty and another treaty on the same subject matter. Article 30(3) of the VCLT provides that where a party to a treaty subsequently becomes a party to a treaty which is incompatible with the former, the earlier treaty will apply only to the extent that its provisions are not incompatible with the later treaty. Under article 30(4) of the VCLT, where a state is party to two treaties and another state is party to only one of them, the treaty to which both are parties will govern the mutual rights and obligations of the states concerned. Article 30(3) and (4) of the VCLT contains the residual rule of the *lex posterior* principle. If the provisions of both treaties cannot be applied simultaneously, the effects and consequences of the later treaty must be

122. Compare also S. Kingma, *Inclusive Global Tax Governance in the Post-BEPS Era*, dissertation University of Maastricht, p. 324 (2019). *See also* para. 14 ES:

> Where a provision reflects a BEPS minimum standard, opting out of that provision is possible only in limited circumstances, such as where a Party's Covered Tax Agreements already meet that minimum standard. Where a minimum standard can be satisfied in multiple alternative ways, the Convention does not give preference to a particular way of meeting the minimum standard. To ensure that the minimum standard can be met in such circumstances, however, in cases where Contracting Jurisdictions each adopt a different approach to meeting a minimum standard that requires the inclusion of a specific type of treaty provision, those Contracting Jurisdictions must endeavour to reach a mutually satisfactory solution consistent with the minimum standard. It should be noted that whether a Covered Tax Agreement (as it may be amended through bilateral negotiations) meets the minimum standard would be determined in the course of the overall review and monitoring process by the Inclusive Framework on BEPS, which brings together a large number of countries and jurisdictions to work on the implementation of the Final BEPS Package.

See further, OECD/G20 Base Erosion and Profit Shifting Project, *BEPS Project Explanatory Statement*, Final Reports, paras 11, 28, 29 and 30 (2015).

123. This should not be the intention; compare also OECD Directorate for Legal Affairs, *Legal Note on the Functioning of the MLI under Public International Law*, para. 18 (2017).

124. Art. 30 MLI reads in French as follows: "Les dispositions de la présente Convention *ne préjugent pas* des modifications ultérieures d'une Convention fiscale couverte susceptibles d'être convenues entre les Juridictions contractantes de la Convention fiscale couverte."

125. Compare I. Mosquera Valderrama, *Throughout Legitimacy of the Peer Review Process of the Four BEPS Minimum Standards: A Case Study*, 52 Intertax 2, pp. 2 and 3 (2024) and OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Action 6: 2015 Final Report* pp. 11-13 (OECD 2015), Primary Sources IBFD.

given precedence over the effects and consequences of the earlier treaty.[126]

The MLI may also conflict with the CTAs. However, it has been chosen that the MLI, in terms of its relationship with existing CTAs is not directly and fully governed by the *lex posterior* principle of article 30(3) and (4) VCLT (or possibly the *lex specialis* principle). Instead, the relationship between the MLI and the CTAs is explicitly designated in the MLI, inter alia, through the compatibility or conflict clauses. The inclusion of these compatibility clauses is based upon article 30(2) of the VCLT as mentioned previously.[127] These clauses express the obligation of the negotiators of the MLI to flag and indicate the relation of the MLI with other treaties. Thus, possible conflicts between the MLI and those other treaties are solved ex ante.[128] The inclusion and functioning of these compatibility clauses are in line with the recommendations of the aforementioned group of experts,[129] the view of certain legal scholars,[130] and the example provided by several other multilateral treaties.[131]

The compatibility clauses explain whether the MLI supplements, replaces or amends (the functioning) of the CTA. They are included in each substantive provision of the MLI, for example, in the anti-abuse provisions of article 7 of the MLI and in the PE related provisions of article 10 et seq. of the MLI. To the extent that the provisions of the MLI may conflict with existing provisions contained in the CTAs on the same subject matter, such conflict is addressed by a compatibility clause. This compatibility clause may describe the extent to which, and the conditions under which a substantive provision of the MLI supersedes the provisions of the CTA covering the same subject matter. In addition, the compatibility clause may determine the effect on a CTA that does not contain a provision of the same type.[132]

The functioning of the compatibility clauses may depend on the notifications made by the parties to the CTAs,[133] since articles that allow a party to choose between alternative provisions require the parties to notify the depositary of their choice. These notifications will enable the relevant states to establish whether a particular compatibility clause regulates the relationship between a provision of the MLI and the CTA. The effects of these notifications are (usually) dependent on a "match" between the parties and vary depending on the type of compatibility clause that is applied. Four types of compatibility clauses can be distinguished describing the effects of the compatibility clauses on a CTA in accordance with the specific wording included therein:[134]

(i) the provision of the MLI applies "in place of" an existing provision of a CTA;[135]
(ii) the provision of the MLI "applies to" or "modifies" an existing provision of a CTA;[136]
(iii) the provision of the MLI applies "in absence of" an existing provision of a CTA;[137]
(iv) the provision of the MLI applies "in the place of or in absence of" an existing provision of a CTA.[138]

The impact and meaning of these various types of compatibility clauses were only included in the ES and not in the MLI itself.[139] This may already be an indication that the ES is of considerable relevance for a correct and consistent application of the MLI on the CTAs (*see further* section 5. of Part Two). Furthermore, the Conference of the Parties' opinion of 3 May 2021[140] reaffirmed the

126. M.E. Villiger, *Article 30*, in *Commentary on the 1969 Vienna Convention on the Law of Treaties*, sec. 5 (Brill 2008); K. von der Decken, *Article 30*, in *Vienna Convention on the Law of Treaties: A Commentary*, sec. 1 (O. Dörr & K. Schmalenbach eds., Springer 2018); p. 31 et seq. BEPS Action 15 Final Report; and Bravo, *supra* n. 12, at sec. 3.3.1 and 3.3.2.
127. Art. 30(2) VCLT provides the following: "When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." Compare also Bravo, *supra* n. 12, at sec. 3.3.1.
128. Compare Bravo, *supra* n. 12, at p. 285; and D.M. Broekhuijsen, *A Multilateral Tax Treaty – Designing an Instrument to Modernise International Tax Law* p. 176, E.M. Meijers Instituut (PhD Leiden University 2017).
129. Annex A, para. 20 et seq. BEPS Action 15 Final Report,.
130. Bravo, *supra* n. 12, at p. 296 et seq.
131. Compare the examples included in BEPS Action 15 Final Report, Annex A, para. 24 et seq, such as art. 28(1) of the European Convention on Extradition of 13 Dec. 1957 and art. 103 of the 1994 North American Free Trade Agreement.
132. Para. 15 ES.
133. Compare Bravo, *supra* n. 12, at sec. 3.5.2.1.
134. Bravo, *supra* n. 12, at sec. 3.5.1.3.
135. Compare para. 15 ES. Where a provision of the MLI applies only "in place of" an existing provision, the provision is intended to replace an existing provision if one exists and is not intended to apply if an existing provision does not exist. In such cases, the notification provision states that the provision of the MLI will apply only in cases where all the relevant states involved made a notification with respect to the existing provision of the CTA as described in the MLI (match).
136. *See also* para. 15 ES indicating that where a provision of the MLI "applies to" or "modifies" an existing provision, the provision of the MLI is intended to change the application of an existing provision without replacing it, and therefore it can only apply if there is an existing provision. In these cases, the notification provision states that the provision of the MLI will apply only in cases where all states involved made a notification with respect to the existing provision of the CTA (match).
137. Para. 15 ES. Where a provision of the MLI applies only "in the absence of" an existing provision, the provision of the Convention will apply only in cases where all states involved notify the absence of an existing provision of the CTA.
138. Para. 15 ES. Where a provision of the MLI applies "in place of or in the absence of" an existing provision, the provision of the MLI will apply in all cases. If all states involved notify the existence of an existing provision, that provision will be replaced by the provision of the MLI (to the extent described in the relevant compatibility clause), i.e. a match. Where the relevant states do not notify the existence of a provision, the provision of the MLI will still apply. If there is in fact a relevant existing provision which has not been notified by all states involved (no match), the provision of the MLI will prevail over that existing provision, superseding it to the extent that it is incompatible with the relevant provision of the MLI. If there is no existing provision, the provision of the MLI will, in effect, be added to the CTA. In addition, it can be noted that the wording "in the place of or in the absence of" has not only the broadest scope but it is also the category that is included in almost all substantive provisions of the MLI. Compare art. 3(4) MLI, art. 4(2) MLI, art. 6(2) MLI, art. 7(2) and (14) MLI, art. 8(2) MLI, art. 9(2) MLI, art. 10(4) MLI, art. 11(2) MLI, art. 14(2) MLI, art. 16(4)(a)(i) MLI and art. 17(2) MLI. Compare also Bravo, *supra* n. 12, sec. 3.5.1.2. For a detailed outline of the effect of this compatibility clause in relation to art. 4 MLI (MAP tie-breaker), *see* J.F. Avery Jones & J. Hattingh, *Tax Treaty Interpretation - Global Tax Treaty Commentaries*, at secs. 5.3.1. and 5.3.2., IBFD Global Topics. These authors have also indicated which reservations are permitted and give examples of countries making use of the various reservations.
139. This guidance is now also included in the Opinion of the Conference of the Parties of the MLI, approved on 3 May 2021, para. 5. Compare further S. Govind & P. Pistone, *Compatibility Clauses in the Multilateral Instrument*, in *The OECD Multilateral Instrument for Tax Treaties - Analysis and Effects* p. 118 (M. Lang et al. eds. Wolters Kluwer 2018).
140. Opinion of the Conference of the Parties of the MLI, approved by the Parties on 3 May 2021, available at https://www.oecd.org/tax/treaties/

impact and meaning of the compatibility clauses (*see also* section 6. of Part Two). Although the effect of the compatibility clauses is explained in the ES, inter alia, the compactivity clause containing the terms "applies to" or "modifies" (sub. ii) may still raise questions; two texts need to be read together and in parallel to determine the meaning of a provision or the terms used in that provision.

In contrast to the matches as regards reservations and optional provisions, the notifications concerning the existing provisions in CTAs that fall within the scope of compatibility clauses do not intend to amend or incur obligations under the CTA. The notifications concerning the compatibility clauses are intended to clarify the relationship between the MLI and a particular CTA. Within this framework the parties are expected to use their best efforts to identify all provisions of the CTAs that fall within the objective scope of the MLI (compatibility clause) and are eligible for notification.[141]

2.6. Flexibility: Opting-in provisions and reservations

The MLI provides the parties flexibility in relation to the implementation of provisions that do not reflect minimum standards.[142] States may also have flexibility in the way that certain measures are satisfied, for instance, with respect to the minimum standard included in article 7 of the MLI (prevention of treaty abuse). In addition, states have a choice concerning which treaties are designated as CTAs within the meaning of article 2(1) of the MLI, entailing that particular tax treaties may be excluded from the MLI's scope.[143]

The major part of the provisions of the MLI will apply to the relevant CTAs after its ratification[144] unless the states make reservations to these provisions, provided that this is permitted by the MLI (article 28(1) of the MLI).[145]

Reservations mainly play a part with respect to the provisions of the MLI that do not reflect minimums standards.[146] According to article 28(3) of the MLI each reservation made in principle has a reciprocal effect, which is in accordance with article 21 of the VCLT. Generally, this reciprocity results in a symmetrical application of a reservation.[147] However, in certain cases asymmetrical application is accepted, e.g. in the case of article 7 of the MLI (the PPT in combination with a simplified limitation on benefits (LOB) provision).

States may at any time withdraw their reservation or replace it with a reservation of narrower scope, thereby extending the scope of the relevant MLI provision (article 28(9) of the MLI). This requires notification to the OECD. Such an amendment only takes effect after a certain period (in accordance with the general entry into force provision of the MLI). States cannot, therefore, make a more far-reaching reservation later.[148] In other words, states cannot weaken their obligations under the MLI at a later stage; they can only strengthen them. An example is Finland (on 25 February 2019, it deposited its list of reservations and notifications under articles 28(5) and 29(1) of the MLI; the MLI entered into force in Finland on 1 June 2019). In 2023, Finland withdrew the reservation it had made on article 9 of the MLI on the taxation of capital gains from alienation of shares or interests of entities deriving their value principally from immovable property.[149] As a result, Finland would apply article 9 of the MLI if the other state had adopted a similar position (match). In case of a match, the withdrawal has been included in (the disclaimer of) various synthesized texts (*see* section 2.3.).[150]

In addition, for several provisions an explicit opt-in is required[151] in which context further choices are possible (including the possibility not to opt in at all).[152] An example of an opt-in provision giving further choices is article 5 of the MLI, i.e. offering various possibilities under which the exemption method should not apply at a CTA level. The various choices made may have an asymmetrical

opinions-of-the-conference-of-the-parties-to-the-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm.

141. Para. 15 ES.
142. Para. 14 ES; and pp. 19 and 22 BEPS Action 15 Final Report.
143. The Inclusive Framework and the peer review by the OECD forming part thereof intend to safeguard that the minimum standards are applied by the states involved. This will at least result in some political pressure. Thereby, even if a treaty is not designated as a CTA by one of the two states (no match), then the minimum standards should be applied to this relationship through other means, for instance by renegotiation of the current treaty; compare also paras. 14 and 26 ES. It is expected that states will not run the risk to obtain a negative score because a treaty is disregarded as a CTA and the tax treaty does not otherwise implement the minimum standards. *See also* Hattingh, *supra* n. 12, at sec. 5.
144. Compare art. 3(1)-(3) MLI, art. 4(1) MLI, art. 6(1) MLI, art. 7(1) MLI, art. 8(1) MLI, art. 9(1) MLI, art. 10(1)-(3) MLI, art. 11(1) MLI, art. 12(1) and (2) MLI, art. 14(1) MLI, art. 15(1) MLI, art. 16(1)-(3) MLI and art. 17(1) MLI.
145. This concerns "authorised reservations". *See also* art. 19 VCLT, which provides the following:

> A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

With respect to the arbitration part of the MLI (part VI of the MLI) reservations are styled differently providing more flexibility to make reservations.

146. Paras. 14 and 15 ES.
147. Para. 270 ES.
148. However, art. 29(5) MLI allows a state to make a new reservation (art. 28(8) MLI) when it designates a new treaty as a CTA, provided that this treaty is the first to fall within the scope of such a reservation.
149. Pursuant to art. 28(9) of the MLI, Finland withdraws the reservation made under art. 9(6) of the MLI on 27 June 2023.
150. *See* for the synthesized text of the tax treaties with Australia https://www.ato.gov.au/law/view/pdf/mli/finland_c2.pdf, Canada https://www.finlex.fi/en/sopimukset/verosopimusteksti/2007/20070002, France (in the Finnish language version; https://www.finlex.fi/en/sopimukset/verosopimusteksti/1970/19700002 and in the French language version; https://www.impots.gouv.fr/sites/default/files/media/10_conventions/finlande/version-consolidee-cml-finlande.pdf), the Netherlands (only in the Finnish version; https://www.finlex.fi/en/sopimukset/verosopimusteksti/1997/19970084) and the United Kingdom (only in the Finnish version; https://www.finlex.fi/en/sopimukset/verosopimusteksti/1970/19700002).
151. These are the following provisions of the MLI: art. 5 MLI, art. 6(3) MLI, art. 7(4) and (8)-(13) MLI, art. 9(4) MLI, art. 13 MLI and part VI pf the MLI (Arbitration).
152. The wording of these opt-in provisions, like, for instance, art. 5 MLI ("or may choose to apply none of the options") does not make it entirely clear whether a state should actively choose for the non-applicability of one of the options.

effect. The option of a state has only an impact on the residents of that state, and it applies regardless of the option of the other state (article 5(1) of the MLI).

3. Article 2(2) of the MLI versus article 31 et seq. of the VCLT

3.1. General

The interpretation provision of the MLI, article 2(2), reads as follows:

> As regards the application of this Convention at any time by a Party, any term not defined herein shall, unless the context otherwise requires, have the meaning that it has at that time under the relevant Covered Tax Agreement.

This provision not only shares a high similarity with article 3(2) of the OECD Model, but it also establishes an implicit reference to article 3(2) of the OECD Model. Article 2(2) of the MLI contains an interpretation method with two layers. When a term is neither defined in the MLI nor in the CTA, a provision in the CTA equivalent to article 3(2) of the OECD Model may be applicable. As a result, reference is made to the meaning under the domestic law of the states applying the CTA, unless the context of the CTA requires another meaning. Therefore, the meaning resulting from the domestic law to which article 3(2) of the CTA refers should be followed under the MLI unless the context of the MLI otherwise requires.[153] The absence of a direct reference to domestic law in article 2(2) of the MLI may be explained by the problem of whose domestic law would apply in a multilateral treaty. For example, there could be no equivalent to looking at the other state's domestic law as in the CTAs. Since the MLI contains provisions that substitute those in the CTA, but without incorporating them into the CTA as the MLI provision continues to exist, this must be read quite broadly to make the MLI work (compare also section 2.2.).[154] This is done by reading "the meaning that it has" to include "the meaning that it had" before the MLI in the case of an MLI provision applying in place of one in the CTA and also the meaning that it would have in the future if it had been contained in the CTA and domestic law changes.[155] A more difficult case is where the MLI provision applies in the absence of a CTA provision, or modifies an existing provision (*see* section 2.2.) by introducing a term not used in the CTA, where one needs to read "has" as including "would have had" if the provision had been contained in the CTA. While this borders on interpretation as opposed to rewriting, a difference depending on whether the term was originally used in the CTA or is only being applied because of the MLI makes no sense. This leads the authors to conclude that this extended meaning should be implied.[156]

The drafting of article 2(2) of the MLI suggests that it is not possible to refer to domestic law if the term in question is used in the MLI and in domestic law but not in the CTA itself. For example, the domestic laws of both contracting states in relation to the MLI have the same definition of "arrangement" (for the purpose of obtaining CTA benefits) within the meaning of article 7(1) of the MLI (PPT). Of course, it would be a strange result if article 2(2) of the MLI did not allow the congruent domestic law meaning to be taken into account for the purposes of the MLI and therefore for the application of the PPT.[157] According to the authors, there are two ways to avoid this ambiguous result:

(i) considering the relevant term to be interpreted, e.g. "arrangement", which is part of a substantive provision of the MLI, as an inescapable part of the CTA "at the time of application". The "modification" will effectively make the term part of the CTA (as is the case in the example of article 7(1) of the MLI).[158] This approach sees the modification as an integral part of the text of the CTA, allowing the application of article 3(2) of the CTA so as to permit the interpretation of undefined elements of substantive clauses introduced by the MLI with reference to domestic law; and

(ii) finding a solution in the general legal framework of the VCLT. The existence of domestic tax law meanings for terms that are not defined in the MLI at the time when a contracting state signs the MLI could be a relevant circumstance – certainly in the case of the PPT – that could be used as a supplementary means under article 32 of the VCLT to assist in the interpretation of undefined terms.[159]

The context within the meaning of the MLI according to paragraph 38 of the ES comprises of the purpose of the MLI (paragraphs 1-14 of the ES) and the CTA (also reflected in the preamble[160] given by article 6(1) of the MLI)[161] as well as the ES (*see further* section 4.). As mentioned above, the authors abstract from the differences – also in terms of usage – between the context (i) within the meaning of article 31(1) of the VCLT (where it is a defined expression) and (ii) within the meaning of article 2(2) of the MIL and article 3(2) of the CTA (where it is undefined).[162] Article 31(1) VCLT considers the object and

153. W.C. Haslehner, *A Multilateral interpretation of the Multilateral Instrument (and Covered Tax Agreements)?*, 74 Bull. Intl. Taxn. 4/5, p. 227 (2020), Journal Articles & Opinion Pieces IBFD; Avery Jones & Hattingh, *supra* n. 147, at sec. 5.3.3.; F.P.G. Pötgens & D.M. Broekhuijsen, *Het multilaterale instrument met zijn vele bilaterale schakeringen*, Weekblad voor fiscaal recht 2017/150, p. 481 (2017); R.A. Bosman, *Het Multilaterale Instrument (MLI)*, Fed Fiscale Brochures, pp. 13 and 14 (Wolters Kluwer 2020); and Dutch Explanatory Memorandum Re Ratification of the MLI (Memorie van Toelichting), Second Chamber, 2017/18, 34 853, no. 3, p. 13.

154. *See* Avery Jones & Hattingh, *supra* n. 138, at sec. 5.3.3.

155. Id.

156. Id.

157. Haslehner, *supra* n. 153, at p. 228; and Avery Jones & Hattingh, id.

158. Haslehner, id.; and Avery Jones & Hattingh, id.

159. Avery Jones & Hattingh, id.

160. Views differ between legal scholars on the relevance of the preamble within the interpretation process; *See also infra* n. 161; *infra* n. 195 and section 3.2.

161. Para. 38 ES with respect to art. 6(1) MLI. *See also* para. 54 of the Commentary to Article 1 of the OECD Model. Compare for a critical analysis of art. 6(1) of the MLI, A.B. Moreno, *Irrelevant or Even Worse? The Vicious Dilemma of the New Treaty Preamble*, Max Planck Institute for Tax Law and Public Finance, Working Paper 2024-07, p. 5 et seq.

162. Avery Jones & Hattingh, *supra* n. 138, at sec. 4.2 stating that the VCLT uses the term "context" in art. 31(1) to differentiate the primary interpretative material to be used under art. 31 from the supplementary material employed under art. 32. Within this respect the context of art. 3(2) CTA and art. 2(2) MLI have a different purpose, i.e. deciding whether the context would require that the domestic law meaning (or the defi-

purpose of the treaty in question (in this case the MLI) separately from the context.[163] However, the object and purpose in this case plays an important role in the interpretation of the MLI and the CTA. In addition, the ES and the Preamble of the MLI and the CTA are also considered to be part of the context for the purposes of the MLI. The purpose of the MLI is to implement the various underlying BEPS measures into the relevant CTAs. As regards the interpretation of the CTA the same sources of interpretation continue to be relevant, i.e. article 3(2) of the OECD Model, article 31 et seq. of the VCLT, domestic law and context with inclusion of the Commentaries on the OECD Model.

The risk may arise that the interpretation spectrum is blurred to a certain extent. The MLI and the CTAs serve different purposes, and they have different contexts.[164] Because of the effect of article 3(2) of the CTA on the MLI, qualification and interpretation conflicts may continue to exist and have an impact on the MLI. Additional issues may arise when a CTA is not styled on the OECD Model but, for instance, on the UN Model although, the CTA provisions affected by the MLI are quite comparable under the UN Model and the OECD Model. The impact, however, of, e.g. article 7(1) may be different because "a benefit under the Covered Tax Agreement" may differ because of other allocation provisions included in tax treaties styled on the UN Model when compared to the OECD Model, e.g. article 12A of the UN Model and article 21 of the UN Model; compare the India-Netherlands Income and Capital Tax Treaty (1988) being a CTA that is also based upon the UN Model[165] already having effect and more in particular article 7(1) of the MLI in combination with article 12 having a provision for technical fees and the absence of an other income provision. Of course, the CTA, the model on which it is styled and the benefit as enshrined in a specific tax treaty provision also are factors taken into account in evaluating the second prong of article 7(1) of the MLI (the normative or teleological element), i.e. whether granting the benefits would be in accordance with the object and purpose of the provisions of the relevant CTA.[166] In this connection the object and purpose of a specific allocation provision of the CTA should be taken into account but that is not always clear and easy to establish.[167] In addition, the pre-2021 version of the UN Model did not contain a provision similar to article 23A(4) of the OECD Model and the Commentary on Article 23 of the UN Model in its pre-2021 version did not provide the OECD Commentary's solution for qualification conflicts offering another interrelationship with article 5 of the MLI.

The MLI contains only a limited number of definitions of terms used in the MLI itself: "Covered Tax Agreement" (article 2(1) of the MLI), "Party" (article 2(1) of the MLI), "Contracting Jurisdiction" (article 2(1) of the MLI, "Signatory" (article 2(1) of the MLI) and definitions in the LOB provision, such as "qualified person" (article 7(8) of the MLI).[168] The MLI, however, contains a considerable number of terms that are neither defined in the MLI itself nor in the CTA, e.g. gains, alienation (article 9(1) of the MLI), beneficial owner (article 8(1) of the MLI), place of effective management (article 4(1) of the MLI)[169] and various terms and elements of the PPT (article 7(1) of the MLI). From this perspective, the PPT is a striking provision given the relatively new, undefined terms used therein. In interpreting article 7(1) and the elements contained therein, there may be a tendency for interpreters to adopt an autonomous interpretation or to follow the meaning of an equivalent GAAR under domestic law. Some of these terms might be interpreted through article 3(2) of the CTA, provided they have an equivalent domestic law meaning and neither the CTA context nor the MLI context requires another meaning. Therefore, it would have been advisable to address the relevance of domestic tax law more clearly, e.g. in the ES or in the Commentary to Article 29 of the OECD Model, as many countries may have domestic tax law equivalents of, in particular, the undefined terms of the principal purpose test.[170] This

nitions of art. 3(1) CTA that is styled on the OECD Model) should not apply. For art. 2(2) MLI it should be established whether the context of the MLI would require a meaning deviating from the CTA meaning. Any interpretative material can be used to make the required assessment.

163. In F.A. Engelen, *Interpretation of Tax Treaties under International Law*, p. 482 (IBFD 2004), Books IBFD, it is argued that context in a broader sense could mean the text of the treaty, including preambles and annexes as well as *its object and purposes*. According to Engelen this follows from the interpretation of the term "context" in accordance with the ordinary meaning and its context, i.e. art. 31(1) VCLT.

164. Haslehner, *supra* n. 153, at pp. 227 and 228; Bosman, *supra* n. 153, at pp. 13 and 14, D.G. Duff & D. Gutmann, *Reconstructing the treaty network*, IFA, 105A Cahiers de droit fiscal international, General Report, pp. 42 and 43 (2020); N. Bravo, *Interpreting Tax Treaties in the Light of Reservations and Opt-Ins under the Multilateral Instrument*, 74 Bull. Intl. Taxn. 4/5, p. 236 (2020), Journal Articles & Opinion Pieces IBFD; and D.W. Blum, *The Relationship between the OECD Multilateral Instrument and Covered Tax Agreements: Multilateralism and the Interpretation of the MLI*, 72 Bull. Intl. Taxn. 3, pp. 135, 136 (2018), Journal Articles & Opinion Pieces IBFD.

165. Compare NL: HR, 15 Jan. 2016, *BNB* 2016/114.

166. *See also* W. Schön, *The Role of "Commercial Reasons" and "Economic Reality" in the Principal Purpose Test under Article 29(9) of the 2017 OECD Model*, in *Building Global International Tax Law, Essays in Honour of Guglielmo Maisto*, pp. 249 and 250 (P. Pistone ed., IBFD 2022).

167. Compare id., at p. 263 et seq.

168. *See* for an overview of these definitions, S. Wakouning, *Interpretation of Terms Used in the Multilateral Instrument*, in *The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects*, p. 30 et seq. (M. Lang et al. eds., Wolters Kluwer 2018).

169. It should be noted that in most instances the term "place of effective management" will be interpreted with the aid of arts. 31 and 32 VCLT rather than by means of art. 3(2) of the CTA styled on the OECD Model. Compare G. Maisto et al., *Dual Residence of Companies under Tax Treaties*, 1 International Tax Studies 1, p. 27 et seq. (2018), Journal Articles & Opinion Pieces IBFD. *See* for explicit decisions that art. 3(2) could not be used to interpret the "place of effective management" but that reference has to be made to the interpretation rules of art. 31 and 32 VCLT, the decisions of NL: HR, 19 Jan. 2018, *BNB* 2018/68 re the expression "managed and controlled" (art. 3(4) of the Netherlands-Singapore Income and Capital Tax Treaty (1971)) in which connection NL: HR, 2 July 2021, *BNB* 2021/156 explained and reiterated that the term "managed and controlled" has the same meaning as "place of effective management". Of course, one may criticize the assumption that they concern synonymous concepts.

170. Avery Jones & Hattingh, *supra* n. 138, at sec. 5.3.3. mention as examples "tax benefit" and "arrangement" in art. 7(1) MLI that may be defined under statutory general anti-avoidance rules. These authors refer to the definitions of "arrangement" in South Africa and India's general anti-avoidance legislation, which are materially identical ("arrangement" means "any step in, or a part or whole of, any transaction, operation, scheme, agreement or understanding, whether enforceable or not, and includes the alienation of any property in such transaction, oper-

is not altered by paragraph 54 et seq. of the Commentary to Article 1, which devotes attention to domestic SAARs and GAARs and their impact on tax treaties, and which appears to be particularly relevant when a CTA lacks a PTT or a specific anti-abuse provision.[171] Another possible example where a term is not defined in the MLI and the CTA is in the expression "shares or comparable interests such as interests in a partnership or trust" in article 9 of the MLI, where domestic law can be used to interpret "partnership", because it is used in the definition of national in the CTA following the OECD Model (article 3(1)(g)(ii)), but not "trust"[172] or comparable interest,[173] provided that the term is not used elsewhere in the CTA.[174]

In addition, the MLI employs terms that are defined in the CTA,[175] e.g. "resident"(article 4(1) and article 8(1) of the MLI),[176] "dividends" (article 8(1) of the MLI),[177] "permanent establishment" (article 10 and article 14 of the MLI)[178] and "enterprise" (article 12 and article 14 of the MLI).[179] Of course, these treaty definitions may contain elements requiring further interpretation through article 3(2) of the CTA styled on the OECD Model or articles 31 and 32 of the VCLT. The ultimate interpretation result will in principle and in a considerable number of cases via article 2(2) affect the MLI, unless the context of the MLI would require another meaning.

3.2. Article 31 et seq. of the VCLT

The ES accompanying the MLI indicates that the substantive provisions of the MLI (articles 3-17) should be interpreted in accordance with article 31 et seq. of the VCLT.[180] The MLI and the ES do not elucidate the relationship between article 2(2) of the MLI and article 31 et

ation, scheme, agreement or understanding" as per India's sec. 102(1) of the Income Tax Act, 1961, which compares to South Africa's sec. 80A(1) as read with 80H of the Income Tax Act, 58 of 1962). The definition of "arrangement" in the United Kingdom's general anti-abuse rule is similar too ("arrangements" includes "any agreement, understanding, scheme, transaction, or series of transactions (whether or not legally enforceable)", Finance Act 2013, sec. 214). Australia has a definition of arrangement and tax benefit in its GAAR. Two recent additions to the GAAR and one recent SAAR use the "principal purpose test" and refer to it as originating from the MLI/Model/BEPS. The Italian domestic GAAR does not have a definition of "arrangement", but it has a broad definition of "transactions lacking economic substance" and "undue tax benefits". It is likely that the Italian tax authorities and courts will end up interpreting the MLI's PPT in line with the case law and guidance on the Italian domestic GAAR, also because in applying the PPT the Italian tax authorities may have to follow the stricter procedural rules applicable for tax assessments based on the domestic GAAR (*see* G. Maisto, *The Friction of Domestic Anti-Avoidance Rules with Treaty GAARS: EU Experience*, in *General Anti-Avoidance Rules: the Final Tax Frontier? Indian and International Perspectives*, sec. 6, p. 674 (M. Butani and T. Jain eds., Thomson Reuters 2021). This seems to be implicitly confirmed by the Explanatory Memoranda to the ratification laws of certain tax treaties concluded recently by Italy (e.g. the 2015 tax treaty with Chile and the 2018 tax treaty with Colombia), which explicitly relate the new treaty PPT with the domestic legislation that enacted the statutory GAAR in Italy. In the Netherlands the Secretary of State has pointed out on several occasions that there is a strong analogy in terms of interpretation and content between the PPT on the one hand and the anti-abuse provisions of national law on the other, such as the general anti-abuse doctrine (*Fraus Legis*), but also the GAAR from the Parent-Subsidiary Directive implemented in the Dividend Withholding Tax Act 1965 (art. 4) and the non-resident tax liability in the Corporate Income Tax Act 1969 (art. 17); Explanatory Memorandum, Second Chamber, 2015/2016, 34 306, no. 3, p. 5; *See also* the Decree of the State Secretary for Finance of 16 June 2023, no. 2023-11648, *V-N* 2023/34.14, sec. 5. Compare F.P.G. Pötgens, *Internationaal Belastingrecht*, Cursus Belastingrecht (M.L.M. van Kempen, A.W. Hofman & F.P.G. Pötgense eds., Wolters Kluwer online) (last update 25 Mar. 2025), sec. IBR.3.5.6.B.a. Recently, the GAAR from ATAD 1 has also been explicitly incorporated into art. 29j of the Corporate Income Tax Act 1969 (at the insistence of the European Commission that the *Fraus Legis* doctrine was not a sufficiently clear implementation). Art. 29j (but also art. 4(3)(c) of the Dividend Withholding Tax Act and art. 17(3)(b) of the Corporate Income Tax Act) does not contain a definition of "arrangement", but it uses quite a broad description of an artificial arrangement, which may also consist of several steps, and also of a series of arrangements that are considered artificial, i.e. they were not created for valid business reasons that reflect economic realities.

171. Compare also para. 57 of the Commentary to Art. 1 of the OECD Model. *See also* Moreno, *supra* n. 161, at p. 9.

172. Avery Jones & Hattingh, *supra* n. 138, at sec. 5.3.3.

173. In 2023, Italy enacted domestic legislation that substantially mirrors art. 9(4) of the MLI and art. 13(4) of the 2017 version of the OECD Model and that utilizes the Italian term "*partecipazioni*" (participations) rather than the OECD term "shares or comparable interests" (*see* art. 23(1bis) of the Italian Income Tax Act and art. 5(5bis) of Decree No. 461 of 21 Nov. 1997, both as amended by Law No. 197 of 29 Dec. 2022). The Italian Revenue Agency is likely to read the MLI term "comparable interest" in light of the Italian domestic legislation, which is implicitly confirmed by Ruling No. 76/E of 22 Dec. 2023. In this ruling, the Italian Revenue Agency stated that units of an Italian contractual real estate investment fund would not be covered by the new legislation as they are not "*partecipazioni*"; the position is consistent with the traditional approach of the Italian Revenue Agency that qualifies income distributions made by Italian contractual real estate investment funds as interest income for treaty purposes (*see* Circular Letter No. 11/E of 9 Mar. 2011).

174. Taking into account the 2017 version of the OECD Model, art. 1(2) of the OECD Model refers to "arrangements". This provision corresponds to art. 3(1) of the MLI. According to paras. 4, 7 and 10 of the Commentary to Article 1 of the OECD Model (2017), the term "arrangements" includes "trusts". Art. 13(4) of the OECD Model (2017) also refers to "trusts". In 2017, this provision is aligned with art. 9(1) MLI.

175. Compare for an overview thereof, Wakouning, *supra* n. 168, at p. 34 et seq.

176. Art. 4(1) OECD Model.

177. Art. 10(3) OECD Model.

178. Art. 5 OECD Model.

179. Art. 3(1) (c) and (d) OECD Model.

180. Compare para. 12 ES:

> While this ES is intended to clarify the operation of the Convention to modify Covered Tax Agreements, it is not intended to address the interpretation of the underlying BEPS measures (except with respect to the mandatory binding arbitration provision contained in Articles 18 through 26, as noted below in paragraphs 19 and 20). Accordingly, the provisions contained in Articles 3 through 17 should be interpreted in accordance with the ordinary principle of treaty interpretation, which is that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. In this regard, the object and purpose of the Convention is to implement the tax treaty-related BEPS measures.

Furthermore, the ES notes with respect to the compatibility clauses (using the wording "in the place of or in the absence of") that it intends to reflect the ordinary rule of interpretation of art. 30(3) VCLT. Under this provision an earlier treaty between parties that are also party to a later treaty will apply only to the extent that its provisions are compatible with those of the later treaty. Para. 16 ES. *See* for these compatibility clauses section 2.5. of this article. *See also* AU: FCA, 31 Oct. 2024, *Oracle Corporation Australia Pty Ltd v Commissioner of Taxation (Stay Application)* [2024] FCA 1262, at para. 22, which held that both the CTA

seq. of the VCLT. The authors presuppose that article 2(2) of the MLI and article 3(2) of the tax treaties styled on the OECD Model have similar relationship vis-à-vis article 31 et seq. of the VCLT.

The question arises how this should be understood if the domestic civil law conception (for instance in the Netherlands), i.e. application of the *lex specialis* excludes the application of the *lex generalis*,[181] is transposed to an international public law level.[182] Under the case law of the Dutch Supreme Court and the view of some legal scholars, article 3(2) of the CTA (and therefore article 2(2) of the MLI) should be regarded as *lex specialis*, whereas the interpretation rules of article 31 et seq. of the VCLT should be considered as *lex generalis*.[183] This could mean that the terms of a substantive provision which are not defined in the MLI, but which have a counterpart in the applicable CTA should be interpreted through article 2(2) of the MLI, under reference to article 3(2) of the CTA. Terms which do not have a counterpart in a CTA (whether or not after implementation of the MLI), should be interpreted in accordance with article 31(1) of the VCLT.[184] This approach would mean that article 31 et seq. of the VCLT are applicable if article 2(2) of the MLI and article 3(2) of the CTA are inapplicable.[185]

The authors are of the opinion that this view and the application of the canon *lex specialis* versus *lex generalis* should not govern the relationship between article 2(2) of the MLI and article 3(2) of the CTA on the one hand and article 31 et seq. of the VCLT on the other[186] at least not in such a way that the *lex specialis* would take precedence over the *lex generalis* and would exclude its application:

(i) it could be argued that the *lex specialis* as a priority rule only comes into play in the event of a conflict with the *lex generalis*, which does not seem to be the case with regard to article 2(2) of the MLI/article 3(2) of the CTA in relation to articles 31 et seq. of the VCLT.[187] Even if the relationship between the *lex specialis* principle and the rules of interpretation of article 31 of the VCLT were to be regarded as unsettled (as indicated above in this section) within this framework, it would seem sensible to adopt a reading that reconciles the two and allows them to be applied concurrently (*see also* (iii) below);[188]

(ii) this is unknown in common law countries (which do not consider that interpretation is ever a matter of applying formulaic rules)[189] and also in some civil law countries; and

(iii) thirdly, this approach seems to turn the relationship between article 2(2) of the MLI/article 3(2) of the CTA on its head. Article 3(2) is part of the text of the CTA and article 2(2) is part of the text of the MLI. They are therefore also part of the "context" within the meaning of article 31(2) of the VCLT. Consequently, article 3(2) of the CTA/article 2(2) of the MLI do not supersede or exclude the application of article 31 of the VCLT but rather complement it. Article 3(2) of the CTA/article 2(2) of the MLI modify to some extent the ordinary meaning to be given to the terms of the CTA/MLI in their context, in the light of its object and purpose and in good faith.[190] In the view of the authors, article 3(2) of the CTA/article 2(2) of the MLI, therefore, must be understood as rules that are embedded in the general framework of article 31 et seq. of the VCLT and supplement it in order to meet the specific needs addressed by the MLI/CTA. As a

(the Australia-Ireland Income Tax Treaty (1983)) and the MLI must be interpreted in accordance with arts. 31 and 32 of the VCLT.

181. In some legal systems such as that of the Netherlands, *lex specialis* is seen as a high standard of law (*metanorm*) (P.W. Kamphuisen, RMTh 1942, p. 330), which signifies its central role in the systemisation and orderly application of the Civil Code of the Netherlands (*Burgerlijk Wetboek*).

182. In international law, the status and function of legal maxims such as *lex specialis* are not settled (nor can they be), although they form part of the law on treaty interpretation. *See* E. Vranes, *Lex Superior, Lex Specialis, Lex Posterior – Zur Rechtsnatur der "Konfliktlösungsregeln"*, Zaro 65, pp. 391-405 (2005), who in summary describe the different statuses and functions of the *lex specialis* and *lex posterior* maxims in public international law as follows: "They may be seen as i principles of legal logic, ii general legal principles, iii rules of interpretation, iv presumptions, v. (conditionally applicable) legal rules, vi. common law, vii. mere legal proverbs for a 'pause to reflect'", also listing several authors that question their legal status as rules or principles. *See also* D. Pulkowski, *Lex Specialis Derogat Legi Generali/Generalia Specialibus Non Derogant*, in *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law*, p. 106 (J. Klingler, Y. Parkhomenko & C. Salonidis eds., Wolters Kluwer 2019). Gardiner indicates that generally in international law "[m]odern tribunals are unlikely to consider the canons of treaty interpretation as complete collections, tending just to use the odd one as a buttress for a particular interpretation" (R. Gardiner, *Treaty Interpretation*, p. 62 (Oxford University Press 2015)). Gardiner notes that in 1935, under The Harvard Draft Convention on the Law of Treaties, a subsidiary role was envisaged for legal maxims or canons of construction, as follows:

> [T]he function of interpretation is to discover and effectuate the purpose which a treaty is intended to serve, and that this is to be accomplished, not automatically by the mechanical and unvarying application of stereotyped formulae or 'canons' to any and every text, but instead by giving considered attention to a number of factors which may reasonably be regarded as likely to yield reliable evidence of what that purpose is and how it may best be effectuated under prevailing circumstances.

This approach found favour in the preparatory work that lead to art. 31 VCLT (id., at pp. 64, 182). *See* especially for the element that legal maxims like *lex specialis* form part of the law on tax treaty interpretation, Pulkowski, n. 3, at pp. 161-163.

183. Engelen, *supra* n. 163, at pp. 471 and 418. Compare also R.X. Resch, *Tax Treaty Interpretation*, p. 215 and 216 tredition GmbH 2020).

184. Compare also Bosman, *supra* n. 12, at p. 645.

185. In fact, of the jurisdictions represented by the authors, only the Dutch Supreme Court seems to follow this approach. *See also* the following decisions of the Hoge Raad as regards the inapplicability of art. 3(2) of the Dutch tax treaties styled on the OECD Model; NL: HR, 29 Sept. 1999, no. 33 267, *BNB* 2000/16; NL: HR, 29 Sept. 1999, no. 34 482, *BNB* 2000/17; NL: HR, 21 Feb. 2003, no. 37 011, *BNB* 2003/177; NL: HR, 21 Feb. 2003, no. 37 024, *BNB* 2003/178; NL: HR, 1 Dec. 2006, no. 38 850, *BNB* 2007/75; NL: HR, 1 Dec. 2006, no. 38 950, *BNB* 2007/76; NL: HR, 1 Dec. 2006, no. 39 535, *BNB* 2007/77; NL: HR, 1 Dec. 2006, no. 39 710, *BNB* 2007/79; NL: HR, 1 Dec. 2006, no. 40 088, *BNB* 2007/79; and NL: HR, 19 Jan. 2018, no. 16/03321, *BNB* 2018/68.

186. *See* from a somewhat different perspective, Bravo, *supra* n. 12, at sec. 3.6.

187. Compare Pulkowsi, *supra* n. 182, at p. 171 under reference to the Report of the International Law Commission to the General Assembly, Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/1-.358 (2011); and E.W. Vierdag, *The Time of Conclusion of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions*, British Tear Book International Law, no. 75, p. 100 (1988).

188. Pulkowski, *supra* n. 182, at p. 196.

189. Legal maxims such as *lex specialis* play no central part in the systemisation of law and are less likely to be regarded as relevant in resolving questions of ostensible overlap in tax treaty interpretation. Certainly no decision would be made solely on the basis of a legal maxim.

190. Avery Jones &. Hattingh, *supra* n. 138, at sec. 4.1.; and Resch, *supra* n. 183, at p. 216.

result, this complementary coexistence of article 3(2) of the CTA/article 2(2) of the MLI vis-à-vis article 31 et seq. of the VCLT must be applied in a compatible manner (*see also* (i) above). In other words, article 3(2) of the CTA/article 2(2) of the MLI may not be understood as completely replacing article 31 et seq. of the VCLT.[191] Instead, article 3(2) of the CTA/article 2(2) of the MLI must be applied in a meaningful and sensible combination with the general rules of interpretation of articles 31-33 of the VCLT. As indicated previously, article 3(2) of the CTA/article 2(2) of the MLI modify what is to be understood as the ordinary meaning within the meaning of article 31(1) of the VCLT.[192]

A contrary view minimizing the role of article 2(2) of the MLI also has been taken by some. The ES remarks that the substantive provisions of the MLI are to be interpreted in accordance with articles 31 et seq. of the VCLT.[193] This remark which underlines the relevance of these general rules of interpretation for the interpretation of the substantive provisions of the MLI makes no reference to the priority of article 2(2) of the MLI. Some legal commentators read this remark as meaning that article 2(2) only applies to the procedural rules of the MLI.[194] In the view of the authors, this view would mistakenly lead to the exclusion of article 2(2) of the MLI in favour of the general rules of interpretation of articles 31 et seq. of the VCLT, in contrast with the approach according to which article 2(2) of the MLI is recognized as embedded in these general rules of interpretation.

Article 6 of the MLI (preamble) forms part of the context within the meaning of article 31(2) of the VCLT. Further, the preamble may express the intention of the contracting states.[195]

191. This view seems to be followed by the Hoge Raad in the aforementioned decisions. *See* in particular NL: HR, 19 Jan. 2018, *BNB* 2018/68 as set out above, *supra* n. 185
192. Avery Jones &. Hattingh, *supra* n. 138, at sec. 4.1., Resch, *supra* n. 183, at pp. 216 and 217; E. van der Bruggen, *Unless the Vienna Convention Otherwise Requires: Notes on the Relationship Between Article 3(2) of the OECD Model Tax Convention and Articles 31 and 32 of the Vienna Convention on the Law of Treaties*, 43 Eur. Taxn. 5, pp. 154, 155 (2003), Journal Articles & Opinion Pieces IBFD; and J.F. Avery Jones et al., *The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model – II*, 19 British Tax Review 2, p. 104 (1984).
193. Para. 12 ES.
194. Bosman, *supra* n. 153.
195. Compare the 2020 Dutch Tax Treaty Policy Memorandum, para. 3.2.1. *See also* the Dutch Explanatory Memorandum (*Memorie van Toelichting*), Second Chamber 2017/18, 34 853, no. 3, p. 17; and para. 68 ES. *See* further F.P.G. Pötgens & E.M.L. Kool, *Nederland en het Multilaterale Instrument: een stand van zaken*, Weekblad voor fiscaal recht 2018/206, p. 1427; L. De Broe, *Role of the Preamble for the Interpretation of Old and New Tax Treaties and the Policy of the Prevention of Treaty Abuse*, 74 Bull. Intl. Taxn. 4/5, p. 164 (2020), Journal Articles & Opinion Pieces IBFD; and J. Schwarz, *The Impact of the New Preamble on the Interpretation of Old and New Treaties and on the Policy of Abuse Prevention*, 74 Bull. Intl. Taxn. 4/5, p. 176 (2020), Journal Articles & Opinion Pieces IBFD. According to Duff and Gutmann, *supra* n. 164, at pp. 24, 49 and 50, various national reports indicate that preambles to tax treaties play a limited role in the interpretation thereof. In line with this consideration De Broe, id., at p.171 and Schwartz, id., at pp. 177 and 178 adopt a comparable approach as regards the preamble to the MLI (art. 6) or to the OECD Model.

4. Conclusions

In this article, the authors have considered the interpretation of the MLI. First, the current design of the MLI was considered, namely that the MLI contains independent binding multilateral norms of international law that apply alongside and supplement existing tax treaties. This may involve the interpretation of both the CTA and the MLI. The authors have compared the MLI to the possibility of amending protocols, which is what the UN Fast Track Instrument amounts to. According to the authors, the MLI is an appropriate means given the purpose it seeks to achieve, i.e. the MLI, BEPS measures – some of which are mandatory (the minimum standards) – need to be laid down in many tax treaties. However, an advantage of amending protocols (and the FTI) is that there are no or fewer constitutional concerns with countries such as Switzerland, Sweden and Germany (all of which have made the reservation under article 35(7) of the MLI). The MLI may be somewhat complex due to the compatibility clauses, reservations and notifications.

The OECD does not favour consolidated texts but rather synthesized texts. According to the authors, it is appropriate for states to strive to produce consolidated texts. This would ensure consistency and greater legal certainty. Synthesized texts, as a tool without legal status advocated by the OECD, lead to uncertainty and ambiguity.

A categorization is made of the synthesized texts drafted by the states represented by the members of this group where relevant (this is the case for the Netherlands, Canada, France, the United Kingdom, Japan, South Africa, India and Australia, of which Canada has not yet drafted any synthesized texts). States have different approaches: (i) Australia (at least initially) and India are in favour of shared understanding and prior consultation; (ii) the United Kingdom, South Africa and the Netherlands are in favour of consultation, although the United Kingdom mainly expresses this in the disclaimers; and (iii) France unilaterally drafts a synthesized text and Japan implies so. The authors have given examples of imbalances in the disclaimers contained in the respective versions of the synthesized text of the same treaty. In addition, in the synthesized texts of the India-United Kingdom tax treaty, there are even significant differences with regard to the PPT.

As to the legal status of the synthesized texts, taxpayers could rely on them, depending on the possibilities under the domestic legal system, on the basis of the principle of the protection of legitimate expectations. The variant of the synthesized text with the strongest legal value is a shared understanding and prior consultation in both states. This means that even if it can be concluded that the synthesized text (with a shared understanding and consistency in both texts), like a MAP, can be regarded as a subsequent agreement within the meaning of article 31(3)(a) of the VCLT and as a treaty within the meaning of public international law, it has no internal effect due to the lack of constitutional considerations (Switzerland and Germany). Also, for the other jurisdictions the conclusion

is that the courts and taxpayers are not obliged to follow the outcome ("non-binding").

According to the authors, inconsistencies between synthesized texts and the way they are drafted should be avoided. States should consult each other (as recommended by the OECD) and reach a shared understanding. This is the maximum weight to be given to the synthesized text. It can at least contribute to a certain degree of legal certainty for taxpayers if a principle of legitimate expectations can be relied upon.

The authors do not agree on whether a bilateral amendment of a CTA, after the MLI has entered into force for both states (article 30 of the MLI), could also negate the minimum standards. The majority is of the opinion that this is the case, while a minority of the authors is of the opinion that such an amendment of the CTA cannot result in the minimum standards no longer being met.

After giving an overview of the functioning of compatibility clauses, reservations (including their withdrawal), notifications and opting-in provisions, the authors analyse the interpretation of the MLI. This analysis begins with article 2(2) of the MLI. The authors argue that this provision does not contain a direct reference to the domestic law of the relevant states for undefined terms in the MLI, but rather to article 3(2) of the CTA, which is modelled on the OECD Model, because it is unclear whose domestic law should be applied under a multilateral treaty such as the MLI.

The interpretation of the MLI may be somewhat blurred in view of the two-layer interpretation that may result from article 2(2). The MLI and the CTA serve different purposes and have different contexts. However, the interaction with domestic law also requires attention. For example, various terms and elements of the PPT (article 7(1) of the MLI) are not defined, which may lead to a tendency to use domestic anti-abuse concepts or anti-avoidance laws (SAARs and GAARs) either through article 3(2) of the CTA or through an autonomous interpretation.

Regarding the relationship between (i) article 2(2) of the MLI/article 3(2) of the OECD Model/CTA and (ii) article 31 of the VCLT, the authors are of the opinion that the canon of *lex specialis* versus *lex generalis* should not govern this relationship. At least not in such a way that the *lex specialis* would take precedence over the *lex generalis* and exclude its application (this view is developed by the Dutch Supreme Court with respect to the relationship between article 3(2) of a tax treaty/CTA on the one hand and article 31 of the VCLT on the other).

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Interpretation under the Multilateral Instrument (MLI) – Part Two

This article, the second of a two-part series, focuses on specific aspects of MLI interpretation, including the Explanatory Statement and Opinion of the Conference of the Parties, the BEPS Action Reports, the 2017 OECD Commentaries and future amendments, the impact of reservations and language issues.

5. What Is the Status of the Explanatory Statement?

The Explanatory Statement (ES) to the MLI intends to clarify the approach adopted in the MLI and illustrates how each (substantive) provision will affect CTAs.[196] The ES states the following on its status and functioning:

> While this Explanatory Statement is intended to clarify the operation of the Convention to modify Covered Tax Agreements, it is not intended to address the interpretation of the underlying BEPS measures (except with respect to the mandatory binding arbitration provision contained in Articles 18 through 26, as noted below in paragraphs 19 and 20). Accordingly, the provisions contained in Articles 3 through 17 should be interpreted in accordance with the ordinary principle of treaty interpretation, which is that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.[197]

The ES makes several references to, inter alia, the final BEPS Action 6 reports, while a relatively small number of states that are party to the MLI have also agreed to these reports. Such a reference could therefore create a democratic deficit with respect to those states that have not directly subscribed to the BEPS reports, if the ES is considered part of the context of the MLI and the references to the BEPS reports therein are given a similar status. However, states that participated in the negotiation of the MLI, or that acceded to the MLI after its establishment, could be considered as having signed and agreed to the whole package (*see also* this section below). Nevertheless, if the last argument is not accepted the question may be raised whether the ES's status qualifies as the MLI's context within the meaning of article 31(2) of the Vienna Convention on the Law of Treaties (VCLT).[198] The ES would qualify as context if it was made between all parties in connection with the conclusion of the MLI within the meaning of article 31(2)(a) of the VCLT or eventually as an instrument which was made by one or more parties in connection with the conclusion of the MLI and accepted by the other parties as an instrument related to the MLI within the meaning of article 31(2)(b) of the VCLT (*see also* this section below).

The ES clarifies that it was prepared by the same members of the steering group involved in drafting the MLI and that it "reflects the agreed understanding of the negotiators with respect to the Convention".[199] If the question is

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196. OECD, *Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, paras. 89-90 (7 June 2017), Treaties & Models IBFD [hereinafter ES].

197. Para. 12 ES.

198. UN, *Vienna Convention on the Law of Treaties* (23 May 1969), Treaties & Models IBFD.

199. ES, para. 11. Both the text of the MLI and that of the ES were negotiated by the participants of the ad hoc group, which consisted of 99 countries – participating as members – and four non-State jurisdictions and seven international or regional organizations participating as observers (ES, para. 7). However, members of the ad hoc group likely had more influence on the outcome than observers, since the mandate for the ad hoc group merely provides that members participate on equal footing and remains silent on the role of observers; *see* OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, p. 11, para. B(2) (OECD Publishing 2015). A Sub-Group on Arbitration, established by the ad hoc group and consisting of 27 countries participating as members, negotiated the mandatory binding arbitration provision (ES, para. 9). The ad hoc group and Sub-Group on Arbitration should therefore be seen as "the negotiators". However, it is not entirely clear whether the references to "members of the ad hoc Group", "participants

raised whether the ES can be regarded as an agreement that is made in connection with the conclusion of in this case the MLI, the authors take the view that the phrase should, at minimum, cover agreements that have been adopted in connection with and at the time of signing.[200] The MLI and the ES were adopted at the same time, i.e. on 26 November 2016, by the members of the ad hoc group. However, several states signed the MLI much later and were not part of the negotiating group.[201] Although parties to the MLI do not explicitly adopt the ES,[202] their (implicit) acceptance of the ES may be inferred from the signing of the MLI without making a reservation or objection to the ES.[203] Although there is no indication of a formal channel through which such reservations or objections could have been made,[204] jurisdictions could express their views on the content of the ES by issuing an interpretative declaration.[205] Such an interpretative declaration – which is not prohibited by the MLI[206] – could then constitute an element to be taken into account in the interpretation of the treaty in accordance with article 31 of the VCLT.[207] A tacit (or verbal) agreement can similarly be considered an agreement within the meaning of article 31(2) of the VCLT.[208] However, domestic courts may decide otherwise. One may argue that the ES forms part of the general *corpus* of the mutual agreement that the parties have reached when concluding the MLI, at least that is the case for the negotiators of the MLI and the 99 members of the ad hoc group.[209] These states accepted the ES along with their acceptance of the MLI and at the same time.[210] It seems reasonable that even jurisdictions that were not members of the ad hoc Group nonetheless based their decision to sign or ratify the MLI on the understanding that its provisions would align with the meaning given to them in the accompanying ES. In addition, the ES has a clear juridical link with the MLI and with the agreement that is reached upon concluding the MLI.[211] The ES is "adopted" by representatives of the states participating in the MLI and having drafted the MLI. From that perspective the ES, therefore, has a closer connection to the context within the meaning of the VCLT than to the supplementary means of interpretation (article 32 of the VCLT).[212] Furthermore, the guidance provided by the ES on how the MLI modifies tax agreements is essential to ensure the intended application of the MLI is achieved (*see also* section 2.5. of Part One of this article regarding compatibility clauses); parties to the MLI would be expected to accept the authority of the ES on that matter. Therefore, the signatories to the MLI accept that the ES would be relevant to the (interpretation of the) MLI.[213]

The Explanatory Report of one of the few other multilateral conventions regarding taxation, i.e. the OECD Convention on Mutual Administrative Assistance in Tax Matters of 1988 (MAAC), contains the statement that the report "does not constitute an instrument providing an authoritative interpretation of the text and the Convention although it may facilitate the understanding of the Convention's provisions". Nevertheless, it has been argued that this Explanatory Report qualifies as context within the meaning of the VCLT, because the parties to the MAAC would have reached tacit agreement on the Explanatory Report.[214] This agreement would make the Explanatory Report a mandatory part of the interpretation process under article 31 of the VCLT, which should therefore always be considered. The ES to the MLI contains a similar comment on its status which mainly addresses the interpretation of the procedural operation

in the ad hoc Group" and "negotiators" in para. 11 of the ES are all the same.

200. S. Austry et al, *The Proposed OECD Multilateral Instrument Amending Tax Treaties*, 70 Bull. Intl. Taxn. 12, p. 685 (2016), Journal Articles & Opinion Pieces IBFD.
201. Various States have signed the MLI at a later stage and were therefore not part of the "members of the ad hoc Group", "participants in the ad hoc Group" and 'negotiators" in para. 11 ES at all, e.g. Estonia (signed 29 June 2018), Kazakhstan (signed 25 June 2018), Kenya (signed 26 Nov. 2019), Malaysia (signed 24 Jan. 2018), Morocco (signed 25 June 2019) and Mongolia (signed 6 Oct. 2022).
202. *See also* J. Hattingh, *The Multilateral Instrument from a Legal Perspective: What May be the Challenges?*, 71 Bull. Intl. Taxn. 3/4, sec. 6.3 (2017), Journal Articles & Opinion Pieces IBFD.
203. F.P.G. Pötgens & D.M. Broekhuijsen, *Het multilaterale instrument met zijn vele bilaterale schakeringen*, Weekblad voor fiscaal recht 2017/150, pp. 484-485 (2017).
204. Art. 28 MLI merely addresses reservations to the MLI itself.
205. The International Law Commission's Guide to Practice on Reservations to Treaties (Adopted by the International Law Commission at its sixty-third session, in 2011, and included in the Yearbook of the International Law Commission, 2011, vol. II, Part Two) defines interpretative declarations, which must be distinguished from reservations, as "unilateral statement[s], however phrased or named, made by a State or an international organization, whereby that State or international organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions" in para. 1.2. *See also* G. Maisto, *The Observations on the OECD Commentaries in the Interpretation of Tax Treaties*, 59 Bull. Intl. Taxn. 1, pp. 14, 16 & 17. (2005), Journal Articles & Opinion Pieces IBFD.
206. According to paras. 2.4.4 and 3.5 of the ILC'S Guide to Practice on Reservations to Treaties, signatories to a treaty may at any time formulate an interpretative declaration unless the interpretative declaration is prohibited by the treaty.
207. *See* para. 4.7.1 of the ILC'S Guide to Practice on Reservations to Treaties.
208. *See also* the opinion of the Conference of the Parties of 3 May 2021, sec. 2.2.; F.A. Engelen, *Interpretation of Tax Treaties under International Law*, pp. 217-218 (IBFD 2004), Books IBFD. Engelen draws this conclusion from the Explanatory Report drafted for the multilateral conventions regarding the International Bank of Reconstruction and Development (1966), which was adopted by its executive directors. A similar inference is made by I. Sinclair, *The Vienna Convention on the Law of Treaties*, pp. 129 and 130 (Manchester University Press 1984). *See* Pötgens & Broekhuijsen, *supra* n. 203, at p. 475.
209. Para. 11 ES.
210. Compare J.F. Avery Jones & J. Hattingh, *Tax Treaty Interpretation - Global Tax Treaty Commentaries*, sec. 3.4.5.3., IBFD Global Topics.
211. Id., at sec. 3.4.5.3; Pötgens & Broekhuijsen, *supra* n. 203, at p. 484; and para. 12 ES.
212. Compare also Sinclair, *supra* n. 208, at p. 119; A. Aust, *Modern Treaty Law and Practice*, pp. 211 and 212 (Cambridge University Press 2013); and N. Bravo, *A Multilateral Instrument for Updating the Tax Treaty Network*, sec. 2.5. (IBFD 2020), Books IBFD.
213. OECD, *Explanatory Statement to the Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule*, para. 8 (19 Sept. 2024), that it is prepared by Working Party 1 to provide clarification of the approach taken in this multilateral convention and how it amends CTAs. The ES reflects the agreed understanding of the negotiators with respect to this multilateral convention. According to the ES, the OECD/G20 Inclusive Framework on BEPS adopted the ES on 15 September 2023 at the same time as adopting this multilateral convention. A comparable phrase is included in the Multilateral Convention to Implement Amount A of Pillar One, para. 16 (although this multilateral convention was negotiated by the Task Force on the Digital Economy (TFDE), the members of which participated on an equal footing, and was approved by members of the IF.
214. Avery Jones & Hattingh, *supra* n. 210, at sec. 3.4.5.3; and Pötgens & Broekhuijsen, *supra* n. 203, at p. 485.

of the MLI as is illustrated by the quotation given above, i.e. paragraph 12 of the ES. This paragraph clarifies that the primary scope of the ES is to facilitate a proper operation of the MLI when modifying the CTA. In addition, the ES provides further substantive guidance on the mandatory binding arbitration provision.[215] However, the ES indicates that it has no further relevance for the interpretation of other underlying BEPS measures.

The opinion of the Conference of the Parties of 3 May 2021[216] forms part of the "context" for the purpose of the interpretation of the MLI pursuant to the ordinary rules of treaty interpretation as reflected in article 31(2) of the VCLT (*see* section 6.). Most legal scholars agree that the ES belongs to the context in the sense of article 31 of the VCLT.[217]

6. The Status of Opinions by the Conference of the Parties

In this section, the authors address the legal value of the Opinion of the Conference of the Parties Regarding the Interpretation and Application of the MLI, which was approved under written procedure on 3 May 2021. Moreover, the status of possible future opinions is considered.

The fact that the MLI and ES are silent on most procedural aspects of the Conference of the Parties (CoP)[218] and give no guidance on the legal status of its opinions, may complicate the classification of CoP opinions under articles 31 or 32 of the VCLT. Nonetheless, it is clear that the opinions cannot have legal relevance for the MLI on the basis of article 31(1), (2) or (4) of the VCLT, since their publication postdates and is unrelated to the conclusion of the MLI.[219] The opinions of the CoP should also not qualify as relevant rules of international law within the meaning of article 31(3)(c) of the VCLT. They could, however, constitute a subsequent agreement between parties to the MLI regarding the interpretation of the treaty or application of its provisions under article 31(3)(a), or give rise to a subsequent practice in the application of the treaty which establishes the agreement of the parties of the MLI regarding its interpretation under article 31(3)(b), or to a subsequent practice under article 32 of the VCLT.[220] According to the Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, adopted by the International Law Commission at its seventieth session in 2018:

> a decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under Article 31(3), in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including adoption by consensus.[221]

It is therefore essential that a decision by a CoP expresses agreement in substance between the parties, which may be achieved through adoption by consensus, but may also take another form.[222] The notion of consensus in public

215. The Federal Court of Australia's decision of 31 October 2024, *Oracle Corporation Australia Pty Ltd v. Commissioner of Taxation (Stay Application)* [2024] FCA 12 62, indicated at para. 23 that the ES should be considered when interpreting, inter alia, the MLI (in this case, the arbitration provision of article 19 MLI). However, the Court did not assess the status of the ES for the purposes of interpreting the MLI. The Court also stated that the ES informs the functioning of the MLI (para. 23) and referred to the ES on several occasions to clarify the relationship between the MAP (article 16 MLI) and the arbitration provision (article 19 MLI) and domestic proceedings (*see* paras. 35(2), 36 and 43).
216. Opinion of the Conference of the Parties of the MLI, approved by the Parties on 3 May 2021, sec. 2.2., available at https://www.oecd.org/tax/treaties/opinions-of-the-conference-of-the-parties-to-the-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm (accessed 1 June 2025).
217. Pötgens & Broekhuijsen, *supra* n. 203, at pp. 484 & 485; and R.A. Bosman, *Het Multilaterale Instrument (MLI)*, Fed Fiscale Brochures, pp. 16 and 17 (Wolters Kluwer 2020). The view that the ES belongs to the context within the meaning of article 31 of the VCLT is endorsed by Austry et al., *supra* n. 200, at p. 685; W.C. Haslehner, *A Multilateral interpretation of the Multilateral Instrument (and Covered Tax Agreements)?*, 74 Bull. Intl. Taxn. 4/5, p. 228 (2020), Journal Articles & Opinion Pieces IBFD; and Bravo, *supra* n. 212, at p. 236. D.G. Duff & D. Gutmann, *Reconstructing the treaty network*, IFA, 105A Cahiers de droit fiscal international, General Report, p. 44 (2020) are more reluctant with respect to the conclusion that the ES forms part of the context but they regard the ES in any case as a supplementary means of interpretation in accordance with article 32 of the VCLT (an exception applies to Belgium where both the MLI and the ES are subject to parliamentary approval).
218. The impact of "silence" is further discussed below in this section.
219. R. Holzinger, *The Relevance of the Conference of the Parties for the Interpretation and Amendment of the Multilateral Instrument*, in *The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects*, p. 62 (Wolters Kluwer 2018); and *see also* O. Dörr, *Vienna Convention on the Law of Treaties: A Commentary*, pp. 533-540 and 541-552 ((O. Dörr & K. Schmalenbach eds., Springer-Verlag 2012). The identification of a "special meaning" within the meaning of art. 31(4) VCLT depends on all interpretive sources to be considered under the general rule of interpretation; *see* Engelen, *supra* n. 208, at sec. 6.5.7.
220. ILC, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties* (2018), to be included in the *Yearbook of the International Law Commission*, vol. II, Part Two (2018). Compare also Commentary to Conclusion 4 of the *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, para. 23 et seq. (2018).
221. Conclusion 11(1) defines a Conference of States Parties as a meeting of parties to a treaty for the purpose of reviewing or implementing the treaty, except where they act as members of an organ of an international organization. Conclusion 11(2) and (3) also deals with the question whether COP decisions can be subsequent practice or an agreement for purposes of art 31(3) of the VCLT. The answer is that "it depends on the circumstances". Para. 12-22 of the Commentary to Conclusion 11 gives several examples from a variety of treaty regimes (nothing concerning tax) where interpretive positions by COPs are seen as a subsequent agreement for purposes of art 31(3)(a) of the VCLT. It is argued that the intention of the COP to interpret, as opposed to address another matter (e.g. implementation or revision) should guide but that a: "relevant consideration may be whether States parties uniformly or without challenge apply the treaty as interpreted by the Conference of States Parties' decision. Discordant practice following a decision of the Conference of States Parties may be an indication that States did not assume that the decision would be a subsequent agreement under article 31, paragraph 3 (a)." (Para. 27 of the Commentary to Conclusion 11).
222. Conclusion 11(2) of the *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties* states that: "[t]he legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure." *See further* with respect to the forms of agreement, United Nations, *Report of the International Law Commission*, Seventieth session (30 April-1 June and 2 July-10 August 2018), UN Doc A/73/10, that agreement is established not only by acts, but also by omissions, including relevant silence (p. 31). Conclusion 10(2) of the *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties* indicates the following: "The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction." *See* UN Doc A/73/10, id., at pp. 79, 80 and 81. *See further* G. Nolte, *Special Rapporteur*, in *Fourth Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, A/CN

international law is usually understood as the absence of objection rather than as a particular majority.[223] Although it is unclear how the parties to the MLI formally arrive at the decisions published in an opinion of the CoP, the opinion[224] of 3 May 2021 was, according to its text, approved by the parties to the MLI under written procedure, and makes no mention of any objections. This opinion sets out six "guiding principles" for the interpretation and application of the MLI. According to this opinion, these guiding principles are derived from public international law, the design of the MLI itself and its drafting history. Therefore, considering the text of the MLI, the ES and the general rules of interpretation of articles 31 to 33 of the VCLT, this opinion contains little that is new.[225] This raises the question of why the CoP then felt it necessary to publish this opinion. Apparently, there were recurring questions about how the MLI modifies the operation of the CTAs, and the opinion aims to contribute to a consistent interpretation of the MLI in this regard. This opinion expressly addresses only the interpretation of the MLI itself.

The fact that the MLI does not prescribe a certain decision-making procedure for the CoP further suggests that the parties to the MLI must have reached some consensus in respect of the opinion either on the content of the opinion or on the decision-making process itself. Absent indications to the contrary, the opinion thus constitutes objective evidence of the understanding of the parties as to the meaning of the treaty and may therefore qualify as a subsequent agreement under article 31(3)(a) of the VCLT.[226] Importantly, a subsequent agreement does not only bind states that were a party to the convention at the time of the agreement's conclusion but also states that become a party afterwards.[227]

Perhaps it is superfluous to point out that the opinion cannot constitute a subsequent practice under article 31(3)(b), but may give rise to such a practice if the conduct of parties in the application of the treaty is in line with the content of the opinion[228] and this conduct constitutes a common understanding regarding the interpretation of the treaty which parties are aware of and accept.[229] Given the large number of signatories for the MLI, however, the identification of a subsequent practice would be challenging. It is more likely that the opinion will give rise to a subsequent practice under article 32 of the VCLT, which consists of the conduct by one or more parties in the application of the treaty after its conclusion.[230]

The opinion may therefore constitute a subsequent agreement under article 31(3)(a) of the VCLT, which means that it must always be considered together with the context for the interpretation of the MLI. The fact that it is designated an *opinion*, and does not bind parties, should make no difference in this respect.[231] Its weight in the interpretation process depends on its clarity and specificity.[232] Again, the nuance here is that the opinion in question does not add that much to what is already apparent from other sources of interpretation, such as the ES and the wording of the MLI.[233]

In addition, consideration should be given to whether an opinion will have binding effect as a subsequent agreement.[234] The latter may depend on the domestic law of the states involved. In this respect, there is also some convergence in the way certain states deal with the status of a MAP (*see* section 2.3.3.2.2. of Part One of this article). This may lead to the conclusion that, as in the case of a MAP, an opinion is not binding on taxpayers or courts when interpreting the MLI. However, as explained above, the opinion in question will not lead to such discussions on its status, as it does not contain anything that is not already apparent from the ES and the wording of the MLI. In addition, it may be difficult to determine the status of the CoP's opinions under the VCLT in advance. An important factor in this regard is how participating states react to the CoP's adopted interpretive position.

The quorum requirement of 1/3 to convene a CoP (article 31(3) of the MLI) may impact the decisions made by the CoP (*see* section 11.1.); compared to CoP instruments

4/694, Sixty-eighth session (2 May-10 June and 4 July-12 August 2016), pp. 40 and 41 (7 Mar. 2016); and G. Maisto, *Interpretation of Tax Treaties and the Decisions of Foreign Tax Courts as a "Subsequent Practice" under article 31 and 32 of the Vienna Convention on the Law of Treaties (1969)*, 75 Bull. Intl. Taxn. 11/12, sec. 3.2.3. (2021), Journal Articles & Opinion Pieces IBFD.

223. *UN Juridical Yearbook 2005*, p. 457; F. Pascual-Vives, *The Notion of Consensus in Public International Law*, in: *Consensus-Based Interpretation of Regional Human Rights Treaties*, p. 14 (Brill 2019); and R. Wolfrum & J. Pichon, *Consensus*, in *Max Planck Encyclopedia of Public International Law*, p. 5 (R. Wolfrum ed., Oxford University Press 2010).
224. Opinion of the Conference of the Parties of the MLI, approved by the Parties on 3 May 2021, available at https://www.oecd.org/tax/treaties/opinions-of-the-conference-of-the-parties-to-the-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm (accessed 1 June 2025).
225. *See also* R.A. Bosman, *OESO publiceert leidende beginselen voor interpretatie en implementatie van MLI*, NTFR 2021/2856.
226. *See* Conclusion 3 of the *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.*
227. The commentary of the ILC indicates that subsequent agreements provide assistance in determining the presumed intention of the parties upon the conclusion of the treaty, which suggests that such agreements do not only have a special status for the states party to the treaty when the agreement was made; *see* Conclusion 8 of the *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties* and ILC Report on the Work of its Sixty-fifth Session, 2013, General Assembly Official Records, Sixty-eighth Session, Supplement No. 10 (A/69/10), chapter IV, p. 12.
228. Conclusion 4(2) of the *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.*
229. Conclusion 10(1) of the *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.*
230. Conclusion 4(3) of the *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.*
231. Conclusion 10(1) of the *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.*
232. Conclusion 9(1) of the *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.*
233. Compare para. 23 of the Commentary to Conclusion 11 of the *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties* states that the character of a decision of the Conference of States Parties must always be carefully identified. For this purpose, the specificity and the clarity of the terms chosen in the light of the text of the Conference of States Parties' decision as a whole, its object and purposes and the way in which it is applied, need to be taken into account. Often, the parties do not intend for such a decision to have any particular significance.
234. *See also* para. 4 of the Commentary to Conclusion 3 of the *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.*

included in other multilateral treaties, the quorum is relatively low (*see further* section 11.2.).[235] However, when a Conference of the Parties decision cannot be classified under article 31(3) of the VCLT as a subsequent agreement or subsequent practice, the interpreter must give such a decision appropriate weight without necessarily treating it as "legally binding".[236]

7. What Is the Relevance of the 2015 BEPS Action Reports for the Interpretation of the MLI?

As is generally acknowledged[237] and made explicit in its preamble,[238] the objective of mandate of the ad hoc group,[239] the ES[240] and the opinion of the CoP of 3 May 2021,[241] the MLI – born out of the OECD/G20 BEPS Project[242] – implements the tax treaty-related measures contained in the final BEPS Reports of Actions 2, 6, 7 and 14. This raises the question of whether these BEPS Reports, released in the autumn of 2015, are of any relevance to interpreting the MLI's substantive provisions. Although most scholars agree that the commentaries included in the Final Reports may qualify as one of the interpretive tools given in the VCLT, they diverge widely in their exact characterization of the reports; suggestions include classifying (parts of) the reports as giving the ordinary meaning of the MLI,[243] its context,[244] object and purpose,[245] a special meaning[246] or supplementary means of interpretation[247] within the meaning of articles 31 and 32 of the VCLT.

The main reason that the Final BEPS Reports are difficult to place[248] is that they were developed in a different forum than the ad hoc group, years before the conclusion of the MLI.[249] Whereas accession to the MLI is open to all states, the decisions made in the course of the BEPS Project and culminating in the 2015 Final Reports were made by G20, OECD and OECD accession countries. It may therefore seem inappropriate to assign the Final BEPS

235. Compare para. 31 of the Commentary to Conclusion 11 of the *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties*:

> [A]doption by consensus is not a sufficient condition for an agreement under article 31, paragraph 3 (a) or (b) to be established […] rules of procedure only determine how the Conference of States Parties shall adopt its decisions, not their possible legal effect as a subsequent agreement under article 31, paragraph 3. Although subsequent agreements under article 31, paragraph 3 (a), need not be binding as such, the 1969 Vienna Convention attributes them a legal effect under article 31 only if there exists agreement in substance among the parties concerning the interpretation of a treaty. The International Court of Justice has confirmed that the distinction between the form of a collective decision and the agreement in substance is pertinent in such a context.

and "decisions, despite having been adopted by consensus, cannot represent a subsequent agreement under article 31, paragraph 3 (a), is especially true when there exists an objection by one or more States parties to that consensus".

236. Para. 38 of the Commentary to Conclusion 11 of *the Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties*. It is interesting to refer to South African case law regarding the Conferences of the Parties. This case law demonstrates that the courts in South Africa would treat the opinions of the Conferences of the Parties like any other extra-textual material. Consequently, these opinions must be considered, though not necessarily followed, and reasons must be given to explain why they are not followed. *See*, for example, the "resolutions" adopted by the Conference of the Parties under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), as well as South African courts, which have held that the CoP resolutions (amendments) are "binding" on the local designated authorities responsible for implementing the convention; *see National Council of the Society for Prevention of Cruelty to Animals v. Minister of Environmental Affairs* [2019] 4 All SA 193 (GP), at [15]-[23] for the time being of the Humane Society International – *Africa Trust and others v Minister of Forestry, Fisheries and the Environment* [2022] 3 All SA 616 (WCC), at [14]-[29]). *See also* sec. 10.2.2.
237. *See*, for example, J. Hattingh, *The Relevance of BEPS Materials for Tax Treaty Interpretation*, 74 Bull. Intl. Taxn. 4/5, sec. 3.1.2. (2020), Journal Articles & Opinion Pieces IBFD.
238. According to the preamble, the parties to the MLI are conscious "of the need to ensure swift, co-ordinated and consistent implementation of the treaty-related BEPS measures in a multilateral context".
239. OECD/G20 Base Erosion and Profit Shifting Project, *Action 15: A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS*, p. 8 (OECD 2015): "The Group shall develop a multilateral instrument to modify existing bilateral tax treaties solely in order to swiftly implement the tax treaty measures developed in the course of the OECD-G20 BEPS Project."
240. Paras. 1-5, 8, 12 ES.
241. Opinion of the Conference of the Parties of the MLI, approved by the parties on 3 May 2021, sec. 2.1., available at https://www.oecd.org/tax/treaties/opinions-of-the-conference-of-the-parties-to-the-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm (accessed 1 June 2025).
242. *See* the *OECD Action 15 Final Report, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties* (Oct. 2015).
243. G. Manzi, *The Autonomous Interpretation of the Multilateral Instrument with Particular Relevance to Article 2(2)*, 74 Bull. Intl. Taxn. 12, sec. 4.2.3.1. (2020), Journal Articles & Opinion Pieces IBFD.
244. R. Prokisch & F. Souza de Man, *Chapter 7 – Multilateralism and International Tax Law: The Interpretation of Tax Treaties in Light of the Multilateral Instrument*, in *International and EU Tax Multilateralism: Challenges Raised by the MLI*, sec. 7.5.2. (A.P. Dourado, ed., IBFD 2020), Books IBFD; Manzi, id., at sec. 4.2.3.1; and Haslehner, *supra* n. 217, at p. 228-229. Bosman has proposed that where the ES quotes sections of the BEPS Final Reports, these sections could be considered as context to the MLI, along with the ES; A. Bosman, *General Aspects of the Multilateral Instrument*, 45 Intertax 10, p. 648 (2017). Bravo has taken Bosman's suggestion to be a viable option; N. Bravo, *Interpreting Tax Treaties in the Light of Reservations and Opt-Ins under the Multilateral Instrument*, 74 Bull. Intl. Taxn. 4/5 (2020), p. 237, Journal Articles & Opinion Pieces IBFD,
245. Avery Jones & Hattingh, *supra* n. 210, at sec. 5.3.3 and Duff & Gutmann, *supra* n. 217, at sec. 2.2.4.
246. Manzi, *supra* n. 243, at sec. 4.2.3.1. In this context it is worth mentioning that Vogel has argued that enough time must pass before statements in OECD Commentaries may qualify as a special meaning and suggested a period of 10 years; K. Vogel, *The Influence of the OECD Commentaries on Treaty Interpretation*, 54 Bull. Intl. Taxn. 12, p. 612 (2000), Journal Articles & Opinion Pieces. *See also* A. Langer, *The Legal Relevance of the 'Minimum Standard', in: The OECD Multilateral Instrument for Tax Treaties - Analysis and Effects*, pp. 103 and 104 (M. Lang et al. eds., Wolters Kluwer 2018).
247. Bravo, *supra* n. 244, at p. 237; Bosman, *supra* n. 244, at p. 648; and J. Schwarz, *The Impact of the New Preamble on the Interpretation of Old and New Treaties and on the Policy of Abuse Prevention*, 74 Bull. Intl. Taxn. 4/5, p. 177 (2020), Journal Articles & Opinion Pieces IBFD; and Duff & Gutmann, *supra* n. 217, at sec. 2.2.4. *See also* Pötgens & Broekhuijsen, *supra* n. 203, at sec. 3.5.2.
248. This is true of many multilateral treaties and even of the VCLT itself. For example, the MAAC was developed and drafted by the OECD and the Council of Europe, working to some extent separately; *see* Explanatory Report on the MAAC, para. 1. It was based on a draft prepared by the OECD in 1981, which in turn was based on the Nordic Convention on Mutual Administrative Assistance in Tax Matters, concluded by Finland, Sweden, Norway, Denmark and Iceland. Compare also M. Valkama, *The Nordic Mutual Assistance Convention on Mutual Administrative Assistance in Tax Matters*, in *Exchange of Information for Tax Purposes* Series on International Tax Law, vol. 80, p. 199 (*Schriftenreihe zum Internationalen Steuerrecht, Band 80*) (O-C Günther & N. Tüchler eds., Linde Verlag, 2013).
249. Bravo, *supra* n. 244, at p. 237, and Duff & Gutmann, *supra* n. 217, at sec. 2.2.4. For a general discussion on the legitimacy of the BEPS Reports and the MLI, *see* I.J. Mosquera Valderrama, *Legitimacy in the BEPS Project and the Multilateral Instrument, in: Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism*, World Tax J. 3 (2015), Journal Articles & Opinion Pieces.

Reports any higher interpretive status than supplementary means of interpretation.[250] The BEPS Project in 2015 involved around 60 countries working on an equal footing including some small/medium developing countries so as to have a fair representation (*see also* the comments on the status of the ES and the fact that states participating in the BEPS project may be deemed to have agreed to these reports at a later stage). All these countries had the opportunity to participate in the drafting of the MLI and ES by becoming a member of the ad hoc group.[251] The ES touches on the status of the BEPS Reports in paragraph 12:

> The development of the BEPS measures that are implemented by the Convention also included development of commentary which was intended to be used in the interpretation of those provisions. […] the provisions contained in Articles 2 through 17 should be interpreted in accordance with the ordinary principle of treaty interpretation, which is that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. In this regard, the object and purpose of the Convention is to implement the tax treaty-related BEPS measures. The commentary that was developed during the course of the BEPS project and reflected in the Final BEPS Package has particular relevance in this regard.

The drafters of the ES thus seem to suggest that the commentary, contained in the Final BEPS Reports, reveals the object and purpose of the substantive provisions in the MLI within the meaning of article 31(1) of the VCLT.[252] The validity of this inference depends on the status that is attributed to the ES.[253] Supposing that the ES qualifies as context under the VCLT (*see also* section 5.), it is nonetheless questionable whether the position taken in paragraph 12 is sufficiently clear and authoritative to mark the relevant BEPS Reports as object and purpose to the MLI.[254] One might argue, for instance, that the primary interpretive value of the BEPS Reports is limited to the sections that are expressly mentioned in the ES for clarifying the meaning of specific provisions.[255] Another factor, of course, is that the MLI ultimately serves to implement BEPS measures in the various CTAs. There is a difference between the more concrete measures being implemented and the underlying reports. The opinion of the CoP [256] (*see* section 6.) also referred to the BEPS reports and to paragraph 12 of the ES, without explicitly stating the precise status of these reports for the interpretation of the MLI. The opinion emphasised that all questions of interpretation and implementation of the BEPS tax treaty measures themselves – which are contained in the substantive provisions of articles 3-17 of the MLI – should be considered in light of the policy objectives of the relevant BEPS measure. According to this opinion, with the exception of the arbitration provisions in part VI of the MLI, all substantive provisions in the MLI are intended to be identical in effect to the provisions developed in the BEPS project. In fact, the opinion reiterated paragraph 12 of the ES without adding any new elements regarding the impact of the underlying BEPS reports on the interpretation of the substantive provisions of the MLI.

Another possibility is dismissing references to the BEPS Reports in the ES altogether as an attempt by G20 and OECD member states to sneak the reports through the "back door".[257] However, these positions do not fully justify the general approach chosen by the ad hoc group with respect to the MLI and the guidance thereon. The authors gather from the ES that the negotiation in the ad hoc group was focused on how the tax treaty-related BEPS measures, the substance of which was presumed to be fixed under the Final BEPS Package, could be implemented into many bilateral or regional tax agreements at once.[258] The commentary in the Final BEPS Reports was intended to be used in the interpretation of the substantive provisions of the MLI,[259] and it appears to be for that reason that the ES does not give guidance on the meaning of these provisions.[260] The MLI therefore seems to be inextricably linked to the results of the OECD BEPS Project

250. C. Silberztein, B. Granel & J-B. Tristram have observed that MLI signatories that did not take part in the negotiation of the Final BEPS Package may not give much legal weight to the commentary included in the Package in *OECD Multilateral Convention to Prevent BEPS: Implementation Guide and Initial Thoughts*, Intl. Transfer Pricing J. 9/10, p. 330 (2017), Journal Articles & Opinion Pieces IBFD. T. Magalhães seems to have similar reservations against assigning high interpretive value to the BEPS Reports in: *Chapter 6: The OECD Multilateral Instrument: Challenge or Opportunity of Multilateralism in International Tax?*, in *The Aftermath of BEPS*, sec. 6.2.1 (IBFD 2020), Books IBFD.

251. Para. 7 ES. The mandate for the development of the MLI determined that all members of the group would participate on equal footing; *see* OECD, *Action 15: A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, p. 8 (OECD 2015). *See also* Manzi, *supra* n. 243, at sec. 4.2.3.1.

252. The ES seems to refer to art. 31(1) VCLT for the interpretation of the substantive provisions of the MLI, since its description of the "ordinary principle of treaty interpretation" corresponds directly to the wording of art. 31(1) VCLT. This link is reinforced by the explicit reference to the VCLT in relation to another "ordinary rule of treaty interpretation" in para. 16. The ES then clarifies that the object and purpose of the MLI in this respect is to implement the tax treaty-related BEPS measures, and that the commentary in the Final Reports is particularly relevant in this regard. It follows that the commentary contained in the Final Reports is particularly relevant for understanding the object and purpose of the substantive provisions of the MLI. *See also* Avery Jones & Hattingh, *supra* n. 210, at sec. 5.3.3; D.W. Blum, *The Relationship between the OECD Multilateral Instrument and Covered Tax Agreements: Multilateralism and the Interpretation of the MLI*, Bull. Intl. Taxn. 3, pp. 138-39 (2018), Journal Articles & Opinion Pieces IBFD; and Silberztein, Granel & Tristram, *supra* n. 250, at p. 330.

253. *See* sec. 4.

254. Haslehner, *supra* n. 217, at p. 228.

255. *See* Bosman, *supra* n. 244, at p. 648; and Bravo, *supra* n. 244, at p. 237.

256. Opinion of the Conference of the Parties of the MLI, approved by the Parties on 3 May 2021, sec. 2.1, available at https://www.oecd.org/tax/treaties/opinions-of-the-conference-of-the-parties-to-the-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm.

257. As is done by Y. Brauner, *McBEPS: The MLI – The first Multilateral Tax Treaty that Has Never Been*, Intertax 1, p. 16 (2018).

258. Para. 8 ES.

259. Para. 12 ES reads: "The development of the BEPS measures that are implemented by the Convention also include development of commentary which was intended to be used in the interpretation of those provisions."

260. Para. 12 ES reads: "While this Explanatory Statement is intended to clarify the operation of the Convention to modify Covered Tax Agreements, it is not intended to address the interpretation of the underlying BEPS measures (except with respect to the mandatory binding arbitration provision contained in articles 18 through 26)." Additionally, the ES clarifies (also in para. 12) that the substantive provisions of the MLI are not intended to be substantively different from the model provisions produced through the BEPS Project, which is indicative of an assumption that the Final Reports will (or should) be relied on for interpretive guidance. The Annex to the ES contains a reference list of the substantive provisions of the MLI and the corresponding BEPS Action Report pages.

and should be read in that light.[261] Perhaps in this context, more should not be expected from the ES. After all, the MLI is mainly a formal instrument that determines the relationship with existing tax treaties via compatibility clauses, etc. Beyond the text of the substantive provisions, the ES does not provide any further explanation beyond a reference to the relevant passages of the BEPS reports, as is the case for certain MLI provisions; *see* paragraph 39 of the ES (article 3 of the MLI which refers to the BEPS Action 2).[262]

Proceeding from that premise, the Final BEPS Reports may either qualify as an indication of Parties' object and purpose or as context under article 31(2)(b) of the VCLT.[263] The latter category is applicable, where an instrument is made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. Although the BEPS Reports have a certain bearing on the MLI by virtue of their interpretative character and were developed before the MLI's conclusion,[264] it is debatable whether the parties that were not involved in their drafting – especially those states that were also not part of the MLI ad hoc group – have (tacitly) assented to the BEPS Reports' status as context.[265] On the other hand, object and purpose of a treaty are found within the text and context of a treaty,[266] not through an investigation into the subjective intention of parties.[267] The preamble of a treaty is of particular relevance in this respect.[268] The preamble of the MLI states the following:

> The Parties to this Convention, […]
>
> Welcoming the package of measures developed under the OECD/G20 BEPS project (hereinafter referred to as the "OECD/G20 BEPS package");
>
> Noting that the OECD/G20 BEPS package included tax treaty-related measures to address certain hybrid mismatch arrangements, prevent treaty abuse, address artificial avoidance of permanent establishment status, and improve dispute resolution;
>
> Conscious of the need to ensure swift, co-ordinated and consistent implementation of the treaty-related BEPS measures in a multilateral context; […]
>
> Have agreed as follows:

These declarations suggest that implementation of the tax treaty-related measures included in the OECD/G20 BEPS Package constitutes the object and purpose of the MLI. Although the Final BEPS Reports are not directly mentioned in the preamble, these reports contain the measures that the MLI seeks to "swiftly, co-ordinately and consistently implement".[269] It would not be a far stretch to then view the commentary included in the reports as integral to the meaning of the BEPS measures, a view which is reinforced by the ES.[270]

All things considered, it seems most likely that the 2015 BEPS Action Reports, including the commentary contained therein, reveal the object and purpose of the MLI under article 31(1) of the VCLT. This follows from the preamble of the MLI, the ES, and the approach chosen by the ad hoc group. Although developing countries that are party to the MLI may have had little say in the content of the BEPS Reports, they have entered into a treaty which is effectively inseparable from the BEPS Project which preceded it, having had (to some degree) the possibility to steer the ad hoc group in a different direction.

8. The Relevance of the 2017 Commentary on the OECD Model

In this section, the authors assess the relevance for interpretation of the MLI of the 2017 Commentary on the

261. Prokisch & Souza de Man, *supra* n. 244, at sec. 7.5.2.
262. In certain situations, there are discrepancies between the ES on the one hand and the 2017 OECD Commentary and the BEPS reports on the other. A possible example is para. 58 ES, which explicitly states that the arbitration clause is inapplicable if the competent authorities cannot reach an agreement under the MAP tiebreaker of art. 4(1) MLI. Such an explicit comment is not included in the BEPS Action 6 Report or the 2017 OECD Commentary. However, this difference is not material as the conclusion of the ES can also be drawn for the 2017 OECD Model; *see* G. Maisto et al., *Dual Residence of Companies under Tax Treaties*, 1 International Tax Studies 1, p. 58 et seq. (2018). This deviation is also discussed by M. Lang, *Mutual Agreement Procedure and Article 4(3) of the OECD Model Convention*, in *Liber Amicorum Luc de Broe* pp. 344 and 345 (F. Debelva ed., Wolters Kluwer 2024).
263. A characterization as supplementary means of interpretation (such as preparatory work or the treaty's circumstances) underscores the importance of the BEPS Reports. Since the Reports were not drafted by all parties to the MLI, they cannot qualify as context under art. 31(2)(a) VCLT. Labelling the BEPS Reports as "the ordinary meaning" of terms used in the MLI is not entirely accurate; the ordinary meaning of terms may emerge in the context in which they are used and in light of their object and purpose, but then the Reports should be classified as one of these; *see* Waldock, United Nations Conference on the Law of Treaties, First Session (26 March-24 May 1968), Official Records: Summary Records, p. 184, para. 70. The same applies to a "special meaning" under art. 31(4) VCLT; Engelen, *supra* n. 208, at sec. 6.5.7.
264. Therefore, the BEPS Reports may be said to be drafted "in connexion with the conclusion of the treaty"; *see* Engelen, *supra* n. 208, at sec. 6.7.4.1.
265. It may be noted that for art. 31(2)(b) VCLT it is not required that all parties agree on the substance of the instrument, merely that they accept the text as an instrument related to the treaty; Engelen, *supra* n. 208, section 6.7.4.2.
266. Avery Jones & Hattingh, *supra* n. 210, at sec. 3.4.10
267. R. Gardiner, *Treaty Interpretation*, sec. 1 (Oxford University Press 2015); UN Conference on the Law of Treaties, Official Records: Documents of the Conference, A/CONF.39/11/Add2, p. 40; Yearbook of the ILC, 1996, no. 2, p. 220.
268. Avery Jones & Hattingh, *supra* n. 210, at sec. 3.4.10; Engelen, *supra* n. 208, at sec. 6.6.2.5; Gardiner, id., at sec. 5.3.2; and B. Michel, *Anti-Avoidance and Tax Treaty Override: Pacta Sunt Servanda?*, 53 Eur. Taxn. 9, p. 418 (2013), Journal Articles & Opinion Pieces.
269. The object and purpose following from the preamble is supported by the content of the substantive provisions in the treaty, which closely mirrors the measures included in the Final BEPS Reports and only diverge from them to the extent that they are adapted for a multilateral context; para. 12 ES. *See* I. Buffard & K. Zemanek, *The "Object and Purpose" of a Treaty: An Enigma?*, 3 Austrian Review of International and European Law 3, pp. 332-333 (1998).
270. Para. 12 ES. *See also* the opinion of the Conference of the Parties of 3 May 2021, sec. 2.1. Compare also the decision of AU: FCA, 31 Oct. 2024, *Oracle Corporation Australia Pty Ltd v. Commissioner of Taxation* (Stay Application) [2024] FCA 12 62; in this ruling, the court does not give an explicit appreciation as to the status of the BEPS reports. The court does, however, take these BEPS reports into account when interpreting the MLI and the relevant CTA (the Australia-Ireland Income Tax Treaty (1983)). It seems that the court places the BEPS Reports on a par with the ES (*see* sec. 3) in terms of interpretation of the MLI. The court's ruling concerned the BEPS Action 14 Report ("Making Dispute Resolution Mechanisms More Effective") -2015 Final Report which reflects a minimum standard; *see* para. 23 of the decision. *See further* paras. 36 and 43. Further alignment with the Commentary on the OECD Model (in this case, on art. 25) has been established in paras. 36 and 40 of the decision. *See also* A. Stamoulos, *Royalties in the Spotlight: The Significance of the Oracle Decision in Australian Tax Law*, 32 Intl. Transfer Pricing J. 2, sec. 4.6. (2025), Journal Articles & Opinion Pieces IBFD.

OECD Model to the extent that BEPS measures were included. Many CTAs are patterned on earlier OECD Models or a different prototype like the UN Model.

Roughly a year after the conclusion of the MLI in November 2016, the OECD published the 2017 OECD Model and the updated Commentary thereon. With this update the tax treaty-related measures developed under the BEPS Project and implemented under the MLI have been introduced into the OECD Model. The Commentary on these model provisions may prove useful for the interpretation of the corresponding MLI provisions; however, it might be difficult to classify the 2017 Commentary as an interpretive tool under article 31 of the VCLT with respect to CTAs concluded before 2017. The status of the Commentaries for the interpretation of tax treaties has been the subject of much debate since the OECD first updated its Model and Commentaries in 1977.[271] The Commentary accompanying the OECD Model on which a tax treaty is based (anterior Commentary) is generally held in high regard for the interpretation of the treaty's provisions, but later updates to the Commentary (posterior Commentaries) are usually approached with more caution:[272] where parties can be expected to be aware of the Commentaries prevailing at the time of conclusion of the tax treaty, they may not have intended the outcomes envisaged by later Commentaries.[273] The question is whether the 2017 Model and Commentary are to be regarded as merely another update, having limited substantive relevance for treaties based on a previous model, or whether they should be given more interpretive weight since they form an implementation of the results of the BEPS Project – of which the MLI is likewise a result.[274]

An explanation provided by the Commentary to the OECD Model is more likely to be respected by courts, where it demonstrates the common understanding of the parties to the relevant tax treaty.[275] If one supposes that, when ratifying the MLI, parties accepted the meaning of the substantive measures as developed in the course of the BEPS Project (*see* section 7.), it is not a far stretch to regard the 2017 Commentary as a reflection of the common understanding of the parties. This would mean that where there is a match between parties in respect of a substantive provision of the MLI, the OECD Commentary is relevant for the interpretation thereof.[276] The 2017 Update to the OECD Model Tax Convention itself states that "the 2017 Update primarily comprises changes to the OECD Model Tax Convention (the OECD Model) that were approved as part of the BEPS Package or were foreseen as part of the follow-up work on the treaty-related BEPS measures".[277] However, some of the guidance in the Commentary was clearly conceived independently from the BEPS Package;[278] even if these elements "had been foreseen as part of the follow-up work" of the Project, it may be problematic to consider them on equal footing to the Commentary

271. For example, Ward noted that considering the 1977 Commentaries for interpretation of tax treaties based on the 1963 models posed legitimacy concerns; *see* D.A. Ward, *Principles to be Applied in Interpreting Tax Treaties*, Canadian Tax Journal 263 (1977).

272. *See*, for example, H.J. Ault, *The Role of the OECD Commentaries in the Interpretation of Tax Treaties*, Intertax 4, pp. 144-148 (1994); D.A. Ward, Ward's Tax Treaties 1996-1997, Carswell 1996, p. 37-41; J.F. Avery Jones, *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded*, 56 Bull. Intl. Taxn. 3, pp. 102-104 (2002), Journal Articles & Opinion Pieces IBFD; M. Lang, *The Application of the OECD Model Tax Convention to Partnerships: A Critical Analysis of the Report Prepared by the OECD Committee on Fiscal Affairs*, 11 Schriftenreihe zum Internationalen Steuerrecht, p. 20 (Linde Verlag 2000); M. Edwardes-Ker, *Tax Treaty Interpretation*, chs. 23.15-16 and 26.04 (Alfa Print 1995); and P.J. Wattel & O. Marres, *The Legal Status of the OECD Commentary and Static or Ambulatory Interpretation of Tax Treaties*, 43 Eur. Taxn. 7, pp. 222-235 (2003). Nevertheless, in *Fowler v. HMRC* the UK Supreme Court found that posterior Commentaries "are to be given such persuasive force as aids to interpretation as the cogency of their reasoning deserves"; see UK: UKSC, *Fowler v. HMRC,* [2020] UKSC 22, Case Law IBFD, para. 18. Cf. UK: CA, 8 July 2010, *HMRC v. Smallwood*, [2010] EWCA Civ 778, Case Law IBFD, para. 26; CA: FCA, 26 Feb. 2009, *Prévost* , A-252-08, Case Law IBFD, para. 11. The Australian High Court in *Addy* in 2021 took a similar position while leaving open the issue of later Commentaries for a case where it matters, *see* https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2021/34.html, paras 32-35 and citations there. The Dutch Supreme Court has taken a clear position on the later OECD Commentary. According to NL: HR, 14 Oct. 2022, no. 21/00747, BNB 2023/33: (1) the treaty anterior OECD Commentary, i.e. the Commentary that was in place when the treaty in question was signed, is of great significance if the text of the tax treaty provision is as close as possible to the OECD Model; (2) the treaty posterior OECD Commentary is of limited importance because it can be regarded as a supplementary means of interpretation within the meaning of art. 32 VCLT. Treaty posterior OECD Commentary may be relevant if (i) the text of the tax treaty provision is as close as possible to the OECD Model and (ii) there is a clarification of the relevant provision of the OECD Model or Treaty anterior OECD Commentary that is considered to be of great significance; (3) Treaty posterior OECD Commentary is not considered to have any significance beyond clarification. Compare also F.P.G. Pötgens, *Het begrip 'werkgever' onder artikel 15, lid 2, onderdeel b OESO-Modelverdrag*, *Liber Amicorum Luc de Broe* pp. 1245 and 1246 (F. Debelva ed., Wolters Kluwer 2024). The Italian Supreme Court generally favours a dynamic application of the OECD Commentaries and held that a tax treaty must be interpreted "taking into account the Commentary" (unofficial translation), including clarifications inserted after the conclusion of the relevant treaty, provided that the clarifications do not relate to substantial changes to the OECD Model "and reflect the evolution in the interpretation of a provision of the OECD Model which is shared between the OECD Member States" (*see* e.g. decision No. 36679 of 14 Dec. 2022). It is however unclear whether the Italian Supreme Court considers posterior Commentaries within the scope of art. 31 or art. 32 of the VCLT. *See* G. Maisto - C. Silvani, *Italy: Application of Later Versions of the OECD Commentary to Older Double Tax Treaties,* in *Tax Treaty Case Law around the Globe 2023*, pp. 33-40 (G. Kofler et al. eds., IBFD 2024), Books IBFD.

273. *See* Wattel & Marres, id., at pp. 222-235; and M. Sada Garibay, *An Analysis of the Case Law on Article 3(2) of the OECD Model*, Bull. Intl. Taxn. 8, sec. 9 (2011), Journal Articles & Opinion Pieces IBFD.

274. *See* Prokisch & Souza de Man, *supra* n. 244, at sec. 7.5.2, who argue that the latter approach is correct, if it is assumed that the Commentary correctly mirrors the results of the BEPS Project. This also appears to be the approach taken by the AU: FCA, 31 Oct. 2024, *Oracle Corporation Australia Pty Ltd v. Commissioner of Taxation (Stay Application)* [2024] FCA 12 62, which takes into account the 2017 Commentary to Article 25 of the OECD Model in relation to the Australia-Ireland Income Tax Treaty (1983), which incorporates the results of the BEPS Action 14 Report ("Making Dispute Resolution Mechanisms More Effective") -2015 Final Report (*see also* sec. 5 above). *See* para. 23 of the decision. For further references *see* paras. 26, 32, 36 (which also mentions the ES and the BEPS Action 14 Report), paras. 37, 38 40 (including a reference to the BEPS Action 14 Report), para. 43 (including a reference to the ES and the BEPS Action 14 Report), and paras. 45 and 76.

275. Engelen, *supra* n. 208, at sec. 10.9.4.1; cf. Wattel & Marres, *supra* n. 272, at p. 222-235.

276. Compare AU: FCA, 31 October 2024, *Oracle Corporation Australia Pty Ltd v. Commissioner of Taxation (Stay Application)* [2024] FCA 12 62, para. 23.

277. *OECD Model Tax Convention on Income and on Capital*, p. 2 (27 Nov. 2017), Treaties & Models IBFD.

278. For example, the 2017 Commentary includes three examples of the PPT not found in the 2015 BEPS Action 6 Final Report; *see* Examples K to M, para. 182 of the 2017 OECD Model: Commentary on Article 29(9).

already included in the BEPS Final Reports.[279] It is therefore useful to make some distinction between the parts of the 2017 Commentary that reflect the content of the BEPS package and the parts that have been agreed separately by the OECD Committee on Fiscal Affairs,[280] even though the members of the Inclusive Framework appear to participate in some of the OECD WP1 meetings when BEPS issues are discussed.[281] For the former category, a qualification as context appears appropriate.[282] The opinion of the CoP of 3 May 2021[283] stated that the Commentary developed in the course of the BEPS project, which was reflected in the final BEPS package and is now included in the 2017 version of the OECD Model, is of particular importance (*see* section 6.). Again, the Opinion does not clarify the exact status and importance of the OECD Commentary in this regard.

A problem that arises when giving the *full* 2017 Commentary interpretive status is that it was drafted exclusively by OECD member countries, while ratification of the MLI is open to all states.[284] The Final BEPS Reports were drawn up before the MLI was concluded, with the ES and the text of the MLI alluding to these BEPS Reports, giving these reports some legitimacy. Unlike the BEPS reports the link between the MLI and 2017 Commentary is less pronounced. It has therefore been proposed that the OECD Commentaries do not carry the same interpretive weight for non-OECD member countries as they do for OECD member countries.[285] However, it should be borne in mind that the Commentary on the UN Model often follows the corresponding OECD Commentary literally, which is all the more the case when the text of the OECD Model and the UN Model are identical. However, there are also cases where the Commentary on the UN Model diverges from the Commentary on the OECD Model, even though the underlying model treaty provisions are identical. Other issues are (i) that the Commentary to the UN Model refers with some regularity to a minority position held by countries and (ii) that the Commentary on the UN Model does not reflect the position of a particular country.[286]

In relation to tax treaties based on earlier versions of the OECD Model, the 2017 Model may at first glance appear posterior Commentary with limited relevance for interpretation. However, the MLI poses a unique situation in the sense that parties do not actually amend their bilateral tax treaties to include the new provisions of the 2017 OECD Model – which would have rendered the 2017 Commentary as authoritative as any other anterior Commentary – but the parties when first signing the MLI (June 2017)[287] also were aware of the 2017 Commentary[288] at the time of that signing,[289] which may have a comparable effect on the legal position of parties as would an amendment of CTAs on the basis of the 2017 Model. The role of the 2017 OECD Commentary for bilateral treaties based thereon and for CTAs modified by the MLI should therefore be equivalent, at least for OECD member countries that signed the MLI after the publication of the 2017 Model.[290] After all, it is at the time of signature that a state establishes its commitment to a convention on the basis of the information available at the time. Similarly, if a bilateral tax treaty is amended after its conclusion to reflect the wording of a more recent model convention, it is that model and not the model prevailing at the time of the treaty's conclusion that determines the meaning of these amendments.[291]

Moreover, it stands to reason that for interpretation purposes OECD member countries and their judicial bodies may be expected to give great weight to the Commentaries – which reflect the consensus of member countries[292] – in absence of indications that another meaning

279. According to Blum, "Since the OECD published the draft version of the OECD Model (2017) in July 2017, i.e. well over half a year after the MLI's text had been finalized, it would require well-established evidence to the effect that the two signatories of the MLI had intended to anticipate the future changes to the Commentaries on the OECD Model (2017) beyond the Final Reports of the OECD/G20 BEPS initiative as existing in November 2016." *See* Blum, *supra* n. 252, at p. 139.
280. Manzi, *supra* n. 243, at sec. 4.2.4.
281. Compare https://www.oecd.org/tax/beps/background-brief-inclusive-framework-for-beps-implementation.pdf and https://web-archive.oecd.org/2018-01-02/444007-oecd-releases-draft-contents-2017-update-model-tax-convention.htm. Presumably, members of the Inclusive Framework would not have been allowed to join WP1 meetings of the OECD until after 1 July 2016.
282. *See* Blum, *supra* n. 252, p. 139, Manzi, *supra* n. 243, at sec. 4.2.4; and Prokisch & Souza de Man, *supra* n. 244, at sec. 7.5.2. Bosman comes to a similar conclusion but would restrict the qualification of context to passages that are not only included in the 2017 Commentary and Final BEPS Reports but are also referred to in the ES to the MLI; Bosman, *supra* n. 217, at p. 20. A comparison could be made to the tax treaties that were negotiated on the basis of the revised texts of 20 articles that were issued by the OECD in 1974, before these texts were taken up in the 1977 OECD Model; according to Avery Jones & Hattingh, it is permissible to refer to the 1977 Commentaries in interpreting these treaties to the extent that it corresponds to the 1974 texts. *See* Avery Jones &. Hattingh, *supra* n. 210, at sec. 3.10.
283. Opinion of the Conference of the Parties of the MLI, approved by the Parties on 3 May 2021, sec. 2.1, available at https://www.oecd.org/tax/treaties/opinions-of-the-conference-of-the-parties-to-the-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm.
284. *See*, for example, C. Elliffe, *The Meaning of the Principal Purpose Test: One Ring to Bind Them All?*, 11 World Tax J. 1, sec. 4 (2019), Journal Articles & Opinion Pieces IBFD.
285. I. Valderrama, *Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism*, 7 World Tax J. 3, (2015), Journal Articles & Opinion Pieces IBFD. *See also* A. Christians, *BEPS and the New International Tax Order*, Brigham Young University Law Review, p. 1603 (2016); and P. Pistone, *Coordinating the Action of Regional and Global Players during the Shift from Bilateralism to Multilateralism in International Tax Law*, 6 World Tax J. 1, p. 3 (2014), Journal Articles & Opinion Pieces IBFD.
286. Rather than being drawn up by countries, the UN Model and its Commentaries are designed by experts. Consequently, the UN Model and its Commentaries do not allow countries to note positions, reservations or observations. The UN Model is not adopted by any group of ministers either. Countries that have not participated in the OECD Model do not automatically participate in the UN Model. In fact, some experts from OECD countries are included in the group of experts who draft the UN Model and its Commentaries. *See also* D. Orzechowski, *The Relevance of the Commentaries on the OECD and UN Models for the Interpretation of the UN Model*, in *The UN Model Convention and Its Relevance for the Global Tax Treaty Network*, sec. 1.2.2 (M. Lang et al., eds., IBFD 2017), Books IBFD.
287. With the exception of the United States, all OECD member countries have signed the MLI. Of these OECD member countries, all signed the MLI on 7 June 2017, with the exception of Estonia, which signed the MLI on 29 June 2018.
288. On 21 Nov. 2017, the OECD Council approved the contents of the 2017 Update to the OECD Model Tax Convention.
289. Of course, if there is a change of reservation or position at signature, ratification of the MLI is also relevant.
290. This only applies to Estonia.
291. *See also* Avery Jones, *supra* n. 272, at p. 103.
292. *OECD Model Tax Convention on Income and on Capital*, Introduction, para. 35 (27 Nov. 2017), Treaties & Models IBFD.

must be assigned to the provision or term in question.[293] OECD members were unlikely to formulate meanings for terms used in the MLI that are different from the BEPS materials and the 2017 Commentaries because the MLI negotiation process did not allow for signatories to negotiate the meaning of terms. Thus, there is no reason for OECD members that are parties to the MLI to treat the 2017 Commentary any differently than they would anterior Commentary in respect of the modifications made in their CTAs.

The same holds true for non-OECD states whose observations are included in the OECD Model, as they may be treated on the same footing as OECD members.[294] However, more care should be taken when CTAs involving non-OECD states are based on the OECD Model, since their wording may not always clarify that the OECD Model formed the starting point of the conclusion and negotiation of that CTA.[295] In addition, it should be noted that several countries do not use the OECD Model as a starting point for treaty negotiations, but rather their own models or drafts, e.g. the United States,[296] although they may bear some similarities to the OECD Model. However, because of the common language used in the models and the tax treaties in question, it may be difficult to determine whether a particular CTA is indeed based on the OECD Model. Whether the tax treaty is based on the OECD Model or the UN Model,[297] and the implications for the relevant Commentaries, is particularly relevant for civil law countries.[298] Common law countries are unlikely to get too involved in the question of which model a CTA is based on, unless there is material that declares which model was used for negotiation.[299] Instead, in common law countries, the OECD and UN Commentaries will be weighted according to the wording of the treaty provision, rather than the precise model on which the CTA is based.[300]

Formal considerations aside, there are also practical reasons for taking the Commentaries into account for interpreting the modified CTA. For example, the Simplified Limitation on Benefits provision given by article 7(8)-(13) of the MLI only partly mirrors the version proposed in the BEPS Action 6 Report,[301] additionally incorporating certain elements that were only added to the provision in the 2017 Model.[302] The ES clarifies that the provision included in the MLI is "the version of the provision produced by WP1 as it stood when the Convention was developed".[303] Seeing as the BEPS Reports will be of no use for interpreting these new elements, states may feel compelled to take notice of the updated OECD Commentary (or the UN Commentary, if more appropriate) even if article 31 of the VCLT would assign the Commentary little interpretive value under the circumstances.[304]

In light of the framework set out above, the authors would argue that the 2017 Commentary should qualify as context or quasi-context within the meaning of article 31 of the VCLT with respect to CTAs based on the OECD Model and concluded between OECD states (or their equals) that ratified the MLI after the 2017 update was published.[305] Non-OECD member countries need not recognize the authority of the 2017 Commentary with respect to treaties that are not clearly based on the OECD Model. There are, however, indications that some non-OECD states will take the full Commentary into account for interpreting the MLI because of their persuasive value.[306] Lastly, the parts of the 2017 Commentary that mirror the content of the BEPS Package form context to the MLI and should therefore be taken into account, i.e. cannot be ignored, in any event that article 2(2) of the MLI is applied, or the convention is interpreted autonomously.

Views on the status and relevance of the 2017 OECD Commentary for CTAs amended by the MLI vary in the juris-

293. *See also* Valderrama, *supra* n. 285, at secs. 3.2 and 4.1; and NL: HR, 21 Feb. 2003, Case 37.024, Case Law IBFD.
294. Avery Jones & Hattingh, *supra* n. 210, at sec. 3.10; Wattel & Marres, *supra* n. 272, at p. 224.
295. Avery Jones & Hattingh, *supra* n. 210, at sec. 3.10. *See*, for instance, NL: HR, 15 Jan. 2016, *Indian Diver*, Case 14/03647, Case Law IBFD, paras. 2.3.1-2.3.2.
296. As noted above, the United States has not signed the MLI but is used as an example of a state using its own model tax convention when negotiating and signing tax treaties.
297. There is, of course, a difference between the Commentaries on the OECD Model and the UN Model, as the latter are, among other things, written by experts in their individual capacity (*see also* the remarks made above). However, a considerable part of the OECD Commentary has been incorporated into the UN Commentary. *See also* F. De Lillo, *A Farewell Seminar in Honour of Wim Wijnen: Tax Treaties - What Are We Going to Do with Them?*, 78 Bull. Intl. Taxn. 4, p. 134 (2024), Journal Articles & Opinion Pieces IBFD.
298. Compare NL: HR, 14 Oct. 2022, No. 21/00747, BNB 2023/33. The Dutch Supreme Court has ruled that the decisive factor for the status of tax treaty anterior OECD Commentary is whether the treaty provision to be interpreted is as close as possible to the corresponding provision in the OECD Model. This approach is a further clarification of the previous case law of the Dutch Supreme Court, which required that the treaty as a whole be as close as possible to the OECD Model.
299. For example, South Africa stated in an Explanatory Memorandum submitted to Parliament for the ratification of the tax treaty with France that a combination of the OECD and UN Models were used during negotiations, as opposed to the Explanatory Memorandum for the UK tax treaty that states only the OECD Model was used.
300. As noted above, although the Netherlands is a civil law country, the Dutch Supreme Court appears to have changed its approach by looking at the individual provision of a tax treaty and considering whether that provision is as close as possible to, for example, the OECD Model, rather than examining whether the treaty as a whole is based on that model; NL: HR 14 Oct. 2022, No. 21/00747, BNB 2023/33. Compare also Pötgens, *supra* n. 272, at pp. 1245 and 1246.
301. OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, Action 6 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, p. 21 et seq. (OECD Publishing 2015).
302. For example, "agency or instrumentality" in para. 9(b), para. 9(d)(ii)(A) and (B), and the 12-month period of para. 9(e) find no counterpart in the BEPS Action 6 Report.
303. Para. 104 ES.
304. *See also* AU: FCA, 31 Oct. 2024, *Oracle Corporation Australia Pty Ltd v. Commissioner of Taxation* (Stay Application) [2024] FCA 12 62, para. 23.
305. *See also* Pötgens & Broekhuijsen, *supra* n. 203, at sec. 3.5.2. Although the 2017 Commentary as well as other OECD Commentaries are hard to classify as context under art. 31(2) VCLT; R.A. Bosman, *Tax Treaty Interpretation*, in *Other Income under Tax Treaties: An Analysis of Article 21 of the OECD Model Convention*, p. 51 (Kluwer Law Intl. 2015), points out that there is no indication that the scope of "context" in art. 31(1) VCLT may not be wider than the elements mentioned in article 31(2). Austry et al, *supra* n. 200, at p. 684 nevertheless use the term "quasi-context" to show that the Commentaries may be equated to context due to their relevance for interpretation of tax treaties.
306. Duff & Gutmann, *supra* n. 217, at sec. 2.3.

dictions represented by this group of authors. In some jurisdictions, the authorities or legislators only make a general comment on the status of the pre-2017 version of the OECD Model Commentary. In other jurisdictions, it is necessary to rely on the case law on the meaning of the OECD Commentary [307] for the interpretation of tax treaties.[308]

307. In this context, it is interesting to note the Australia-Germany Income and Capital Tax Treaty signed in November 2015, shortly after the BEPS 2015 reports were published. It incorporated many of the BEPS 2015 changes, and the Australian Explanatory Memorandum to the treaty referred extensively to the 2015 reports for interpretation. This was well before the MLI was finalised and before the 2017 Commentary and was done only to make clear that the negotiators intended the BEPS developed draft Commentary adopted in the 2017 OECD Model to apply. However, based on existing Australian case law at the time, this does not appear to be necessary but was probably done out of caution.
Another interesting case is the Chile-Italy Income Tax Treaty signed in October 2015, which also incorporates many of the BEPS 2015 changes. The Italian Explanatory Memorandum to the ratification law extensively refers to BEPS Actions 6 and 7, especially in relation to the definition of permanent establishment and the PPT. Therefore, although this treaty was not listed by Italy when it signed the MLI (as it was considered to be already BEPS-compliant), it is expected that the Italian tax authorities and courts will rely heavily on both the BEPS Reports and the corresponding paragraphs of the 2017 Commentary for its interpretation. This is instead more doubtful with respect to the specific anti-abuse rule for permanent establishments located in third jurisdictions because, although the Explanatory Memorandum cites Action 7 also in relation to this rule, article 27(2) of the treaty resembles more closely the corresponding provision in the almost contemporary 2016 US Model than art. 10 MLI or art. 29(8) of the 2017 version of the OECD Model. This specific choice might have been due to Chile's treaty policy.
Sweden relies on the 2017 OECD Model and its Commentaries. When, for example, the treaty with Germany was amended in 2023, reference was only made to the 2017 Model and not to the MLI, *see Government prop. 2022/23:118 Ändring i skatteavtalet mellan Sverige och Tyskland*, p. 60.

308. In its judgment of 29 October 2009 (https://www.courts.go.jp/app/hanrei_en/detail?id=1030) the Supreme Court of Japan held that the Commentary on the OECD Model, which was prepared by the OECD Committee on Fiscal Affairs, could be construed as the information to be referred to in interpreting the Japan-Singapore Income Tax Treaty (1994), as a "supplementary means of interpretation" under art. 32 VCLT. Based on the ruling, as well as the fact that Japan approved the MLI in the Diet (Parliament) in May 2018 and deposited the instrument of acceptance in September 2018, one may assume that Japan would consider the 2017 Commentary as a widely accepted view in the international community when interpreting the relevant provisions of the tax treaty covered by the CTA, which are substantially equivalent to those of the 2017 OECD Model.
Australian domestic courts have taken different views on the issue of the 2017 Commentary, with the High Court of Australia declining to make a final decision in 2021 [*see Addy* case, *supra* n. 272]. The issue of the weight to be given to the retrospective Commentary has been before the Australian courts since 1991; Compare P. Stinson, *Impact of the Multilateral Instrument on the Interpretation of Australia's Income Tax Treaties*, 49 Australian Tax Review 4, pp. 291-293 (2020). However, the common consensus of these courts is likely to be that the MLI should not have a different meaning in relation to an OECD member than it does in relation to a non-OECD member. A different approach would be contrary to the idea that a multilateral treaty has the same meaning for each party to the extent that a particular part of the treaty applies to a particular party.
The Dutch Supreme Court (NL: HR, 14 Oct. 2022, no. 21/00747, BNB 2023/33) would also consider the 2017 OECD Commentary to be anterior (high importance and context) even if the Netherlands and the other OECD member country signed the MLI before the 2017 update of the OECD Model and its Commentaries. This could also be the case if the treaty is concluded with a non-OECD member if the treaty is based on the OECD Model (*see* NL:HR 21 February 2003, no. 37 011, BNB 2003/177, re tax treaty with Brazil, Brazil is a non-OECD member that has determined its position; and NL:HR 21 Feb. 2003, no. 37 024, BNB 2003/178, re tax treaty with Nigeria, Nigeria is a non-OECD member that has not determined its position with respect to the OECD Model and its Commentaries).

9. What Is the Relevance of Future Changes to the Commentary on the OECD Model Having an Impact on the MLI Provisions?

Newer updates of the OECD Model and its Commentary undoubtedly lie ahead, prompting the question whether future guidance on the model provisions that correspond to the MLI measures may be relevant for the interpretation of these measures when the guidance differs from that of the 2017 Model. Where it concerns the interpretation of the MLI under articles 31 and 32 of the VCLT, future additions to the Commentary will presumably carry little weight,[309] as they are not reflected in the BEPS reports or ES. Future Commentaries, or the treaty practices that they give rise to, could qualify as supplementary means of interpretation under article 32 of the VCLT,[310] but as such would only be considered when interpretation under article 31 of the VCLT renders the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. The supplementary means of interpretation laid down within article 32 of the VCLT may also be used as confirmation to the meaning given to a term as a result of interpretation under article 31 of the VCLT. However, article 2(2) of the MLI opens the door to dynamic interpretation of MLI terms under CTAs, since a party applying the MLI must consider "the meaning that [the term] has *at that time* under the relevant Covered Tax Agreement" [emphasis added].[311]

The status of future Commentary for the interpretation of modified provisions in CTAs thus follows from the conclusions reached under section 8. In respect of CTAs based on the OECD Model and concluded between OECD states (or non-OECD states whose observations are included in the model) that ratified the MLI after the 2017 update was published, for which the authors concluded that the 2017 Commentary forms (the equivalent of) anterior Commentary, future updates could constitute posterior Commentary.[312] For CTAs to which the 2017 Commentary relates as posterior Commentary, future updates may likewise rank as posterior Commentary. The future updates to

309. Blum, *supra* n. 252, at p. 139.

310. According to Engelen, supplementary means of interpretation do not only include the treaty's preparatory work and the circumstances of its conclusion:

> Recourse may also be had to any other extrinsic evidence that could throw light on the parties' intention such as, for example, any practice of one or more individual parties in the application of the treaty that does not establish an agreement between all the parties regarding its interpretation, and similar treaties between one or more of the parties and a third state or between different parties altogether, particularly if they form part of the same, more or less standardised network of treaties that also comprises the treaty being interpreted.

See Engelen, *supra* n. 208, at sec. 7.4. Cf. P. Reuter, *Introduction to the Law of Treaties*, p. 37 (2nd edn., Kegan Paul International Limited 1995). Future OECD Models, their Commentaries and even state practices based thereon could therefore constitute supplementary means of interpretation for the MLI.

311. The authors therefore find themselves in disagreement with Blum, *supra* n. 252, at p. 139 on this point.

312. The Australian Explanatory Memorandum accompanying the bill that approved the MLI (Treasury Laws Amendment (OECD Multilateral Instrument), para. 1.78 (2018)) stipulated that subsequent changes to the OECD Commentaries will continue to be relevant unless the text of the CTA has changed. This is consistent with para. 108 of the ATO Taxation Ruling TR 2001/13.

the Commentaries to the OECD Model should therefore generally qualify as supplementary means of interpretation under article 32 of the VCLT for both categories of CTAs.[313]

Of course, one should be cautious about qualifying future changes to the OECD Commentaries. It is only after the Commentary has been amended that the precise impact of the amendments on the interpretation of a CTA provision becomes clear. Amendments to the Commentaries may even have the purpose of correcting an error or omission contained in an earlier version of the Commentaries. A possible and current illustration can be found in the PPT examples added to the 2017 Commentary on Article 29 of the OECD Model compared to the 2015 BEPS Action Report 6. According to the authors, these examples and their analysis are helpful and relevant to the application of the PPT. For this reason, they are widely discussed by legal scholars and practitioners.[314] Although the Commentary to Article 29 of the OECD Model (paragraph 182) expressly states that the examples should not be regarded as evidence of the application or non-application of the PPT, as they are merely "illustrative" and do not set out any conditions for the application of the PPT, but instead require individual consideration. However, an important difference between the text of article 7(1) of the MLI (and article 29(9) of the OECD Model) on the one hand and the examples in the OECD Commentary to the PPT on the other is that the importance of "commercial reasons" for the transaction or arrangement is explicitly stated in the examples[315] but not in the text of these provisions.[316] According to the OECD Commentary, there is no abuse under article 7(1) of the MLI and article 29(9) of the OECD Model in the case of conclusive commercial reasons. Some examples justify a result on the basis that the purpose of tax treaties is to promote cross-border investment, and because there is real investment there is no abuse.[317] The MLI's rewording of the preamble (article 6(1) of the MLI) explicitly does not refer to tax treaties promoting cross-border investment as an objective. There is no language on investment promotion in the PPT (article 7(1) of the MLI and article 29(9) of the OECD Model),[318] but the reference in the new preamble (article 6(1) of the MLI) to "desiring to further develop their economic relationship" may be understood in the same way.[319]

10. How to Deal with Differences between the BEPS Action Reports and the 2017 Commentary on the OECD Model, for Instance, as Regards the Commentary on the PPT?

The previous sections have shown that interpretation of the MLI should generally be guided by the full 2017 Commentary on the OECD Model as well as the BEPS Action Reports,[320] begging the question how the interpreter should proceed when faced with a difference between the two. This problem does not arise for CTAs with a weaker link to the updated Commentary – for instance for CTAs that are not based on the OECD Model – since in those cases only the sections of the Commentary that mirror the content of the BEPS Package would be able to have strong relevance for the interpreter. However, even where the BEPS Reports and the full 2017 Commentary are equally authoritative, the two texts are likely to be easily reconciled in practice. The deviations from the BEPS Reports contained in Commentary almost exclusively constitute additions or clarifications which merely supplement the BEPS Package, leaving its original meaning intact; it stands to reason that these extensions to the text should be considered alongside and on equal footing with the sections in the Commentary that reproduce the BEPS Reports.[321] For instance, examples K through M on the application of the PPT rule, which are included in the 2017 Commentary, but not in the BEPS Action 6 Report,[322] should exercise just as much authority with regard to the interpretation

313. *See*, for instance, Wattel & Marres, *supra* n. 272, at p. 222 et seq. However, not all posterior Commentaries are equivalent, as is illustrated by Avery Jones & Hattingh, *supra* n. 210, at sec. 3.12.3 et seq. Later commentaries may, for instance, clarify, amplify or correct earlier commentaries, illustrate the presence or absence of state practice, or simply give handrails to guide the interpreter. The status that should be attributed to posterior Commentaries should therefore differ according to their type.
314. K. Franchuk, *The Assistance of Examples of the Application of the Principal Purpose Test Listed in the Commentary on Article 29(9) of the OECD Model in Establishing the Legal Certainty of the Test*, 5 Intl. Tax Stud. 11, p. 12 et seq. (2022), Journal Articles & Opinion Pieces IBFD; S. *van Weeghel*, *A Deconstruction of the Principal Purposes Test*, 11 World Tax J. 1, para. 8 (2019), Journal Articles & Opinion Pieces; and I. Zahra, *The Principal Purpose Test: A Critical Analysis of Its Substantive and Procedural Aspects, - Part 1*, 73 Bull. Intl. Taxn. 12, pp. 610 et seq. (2019), Journal Articles & Opinion Pieces IBFD. *See also* R.H.M.I. Offermans, *Report on the Symposium "The Freedom of the Judge in the Interpretation of Regulations"*, 63 Eur. Taxn. 6, pp. 227-230 (2023), Journal Articles & Opinion Pieces IBFD.
315. Para. 182 of the Commentary to Article 29 of the OECD Model, example C and example G.
316. W. Schön, *The Role of "Commercial Reasons" and "Economic Reality" in the Principal Purpose Test under Article 29(9) of the 2017 OECD Model*, in *Building Global International Tax Law, Essays in Honour of Guglielmo Maisto*, pp. 245-248 (P. Pistone ed., IBFD 2022), Books IBFD.
317. Para. 182 of the Commentary to Article 29 of the OECD Model, example K.
318. *See also* A.B. Moreno, *Irrelevant or Even Worse? The Vicious Dilemma of the New Treaty Preamble*, Max Planck Institute for Tax Law and Public Finance, Working Paper 2024-07, pp. 23, 25 and 27.
319. This is not altered by the fact that the promotion of cross-border investment can be considered part of the preamble of the OECD Model prior to the MLI and the 2017 revision of the OECD Model ("developing economic relationship"); *see also* para. 15.5 of the Introduction to the Commentary on the OECD Model.
320. Where sec. 6 argued that the BEPS Final Reports should (always) be taken into account under art. 31 VCLT for the interpretation of the MLI, sec. 7 concluded the same in respect of the 2017 OECD Commentary in situations where the applicable CTA is based on the OECD Model and concluded between OECD States – or non-OECD states whose observations are included in the Model – that ratified the MLI after the 2017 Commentary was published.
321. Even where such additions in the Commentary could be construed as derogating from the meaning set out in the Final BEPS Reports, it follows from the "integration approach" prescribed by art. 31 VCLT that the interaction between the two texts – rather than one text alone – gives the legally relevant interpretation; *see* Yearbook of the ILC, no. 2, pp. 219-220, para. 8 (1966); and Engelen, *supra* n. 208, at sec. 6.2. A comparison of the updated Commentary and the BEPS Reports for Actions 2, 6 and 7 indicates that the content of the BEPS Reports will likely not be adverse to the adjustments made in the 2017 Commentary.
322. *See* para. 182 of the 2017 Commentary to Article 29 and OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing: Paris 2015, para. 14. Compare also Franchuk, *supra* n. 314, at p. 12 et seq.; and *Van Weeghel*, *supra* n. 314, at sec. 8.

of article 7 of the MLI as the examples that are included in both texts. Seeing as the 2017 Commentary essentially expands upon the BEPS Commentary rather than replaces it, an integrative approach to the two texts would in most instances correspond to the reading of the 2017 Commentary alone. Although this observation may diminish the practical value of the BEPS Reports, it does do justice to their preliminary character; some paragraphs within the reports even express anticipation of later additions or refinements to the text.[323]

A provision for which the relationship between the relevant BEPS Report and 2017 Commentary is not as straightforward, however, is the Limitation on Benefits (LOB) rule included in article 7(8)-(13) of the MLI. As was already mentioned in section 8., this provision incorporates the version of the LOB rule as it stood when the convention was drawn up, but the rule was developed further by the OECD's Working Party No. 1 for its inclusion in the 2017 Model and Commentary. Although many of its elements have remained unchanged since their introduction in the BEPS Action 6 Final Report[324] – despite the fact that their positioning in either the simplified or detailed version may have switched[325] – some of the terms and phrases used in the MLI's LOB provision are only explained in the 2017 Commentary.[326] It would therefore make sense to let the interpretation of the applicable LOB rule to be guided by the explanatory document that best matches the wording in question.[327] Where such wording is found both in the BEPS Report and the 2017 Commentary, the interaction between the two documents will provide the legally relevant interpretation.[328]

323. *See*, for instance, fn. 4 of OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements*, Action 2 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, p. 143 (OECD Publishing 2015).
324. L. Ramharter & R. Szudoczky, *Limitation on Benefits Clauses: Limiting the Entitlement to Treaty Benefits*, in *Tax Treaty Entitlement*, chap. 3, sec. 3.3.2 (M. Lang et al. eds., IBFD 2015), Books IBFD.
325. The BEPS Action 6 Final Report included both a detailed and simplified version of the LOB clause, which were weaved together to some extent to produce the simplified version that was included in the MLI. The 2017 OECD Model again contains both a detailed and simplified version of the LOB rule.
326. For instance, where both the MLI and 2017 Commentary designate as a qualified person "a person other than an individual, if, … on at least half the days of a twelve-month period that includes the time [when the benefit would otherwise be accorded], persons who are residents of that [Contracting Jurisdiction] and that are entitled to benefits of [the Covered Tax Agreement] own, directly or indirectly, at least 50 per cent of the shares of the person", the simplified version of the BEPS Report refers to "a person other than an individual, provided that persons who are residents of that Contracting State and are qualified persons by reason of subparagraphs a) to d) own, directly or indirectly, more than 50 per cent of the beneficial interests of the person". *See* article 7(9)(e) MLI, para. 43-45 of the Commentary on Article 29 of the 2017 OECD Model Tax Convention and OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, p. 30 (OECD Publishing 2015).
327. For a similar problem, *see* the specific anti-abuse rule for permanent establishments in third jurisdictions in article 27(2) of the Italy-Chile Income Tax Treaty (2015) (*see* n. 316).
328. Yearbook of the ILC, no. 2, pp. 219-220, sec. 8 (1966).

11. Mechanisms to Resolve Questions of Interpretation and Implementation

In this section, the authors consider the meaning of article 32(1) of the MLI, which includes MAP as a mechanism to resolve questions of interpretation and implementation of a CTA. The relationship with the CoP included in article 32(2) is addressed.

11.1. Distinction between article 32(1) and 32(2) of the MLI

Article 32 of the MLI governs through which mechanism questions of interpretation or implementation should be addressed, thereby making a distinction between questions about the interpretation or implementation of provisions of a modified CTA and those about the interpretation or implementation of the MLI itself. While under article 32(1) the first category of questions is to be resolved in accordance with the (modified) provisions of the CTA relating to the MAP, article 32(2) provides that questions relating to the MLI itself may be addressed by a CoP.[329] The procedure for convening a CoP is set out in article 31 of the MLI: a party may initiate a CoP by communicating a request to the depositary (i.e. the OECD Secretary-General),[330] who will then inform all parties of the request.[331] If the request is supported by one third of the parties within 6 calendar months of the communication by the depositary of the request, the depository convenes a CoP.[332] According to the ES, parties may decide to invite signatories – who, by definition,[333] do not qualify as part of the CoP – to participate therein.[334] Signatories who should principally be excluded from the CoP by definition are, under article 2(1)(d), states or jurisdictions that have signed the MLI but for which the MLI is not yet in force. The format of the conference is unfixed: parties may either meet in person or remotely and may decide together by which means decisions are to be made.

The ES clarifies that the word "may" is used in paragraph 2 of article 32 of the MLI to convey that there could be other means by which to address questions of interpre-

329. According to art. 31 MLI, parties may convene a Conference of the Parties for the purposes of taking any decisions or exercising any functions as may be required or appropriate under the provisions of the MLI. Art. 32(2) ensures that the consideration of questions on the interpretation or implementation of the MLI falls within these functions of the Conference of the Parties as required or appropriate under the MLI; similarly, art. 33(2) provides that when a party proposes an amendment to the MLI, a Conference of the Parties may be convened to consider the proposed amendment. The Conference of the Parties is not the only forum through which parties or signatories may reach decisions; art. 27(1)(c) MLI for instance provides that a decision by consensus of the parties and signatories may authorize any jurisdiction not covered by paragraph a or b to become a signatory. *See also* R. Holzinger, *The Relevance of the Conference of the Parties for the Interpretation and Amendment of the Multilateral Instrument*, in *The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects*, pp. 47-49 (Wolters Kluwer 2018).
330. Art. 39(1) MLI.
331. Art. 31(3) MLI.
332. Art. 31(3) MLI.
333. According to art. 2(1)(b), a "Party" is a state or jurisdiction for which the MLI is in force pursuant to article 34 MLI. Under article 2(1)(d), a "Signatory" is a state or jurisdiction that has signed the MLI but for which the Convention is not yet in force.
334. Para. 312 ES.

tation and implementation of the MLI rather than convening a CoP, such as the competent authorities agreeing between themselves on how the MLI will operate in relation to a particular CTA.[335] Yet this particular example may raise some eyebrows, since the ES expresses elsewhere that "questions as to how the MLI has modified a specific CTA pursuant to the compatibility clauses and other provisions set out in the MLI" are questions relating to the provisions of the (modified) CTA and are therefore governed by paragraph 1. Although it is clear that questions on how the MLI modifies a particular CTA may be resolved by mutual agreement, it is not clear whether these questions also fall within the competent scope of the CoP.[336] A recent opinion issued by a CoP (the legal status of such opinions is discussed in section 6.) touches on its own competence in these matters:[337] questions governed by article 32(2) would include "*recurrent questions about how the provisions of the MLI modify Covered Tax Agreements*" [emphasis added].[338] This comment initially seems to further blur the distinction between questions that relate to the modified CTAs and those that relate to the MLI itself, since both categories could cover questions about how the provisions of the MLI modify a CTA.[339]

Given that article 32 of the MLI does not preclude questions on the same subject matter from falling within both paragraphs 1 and 2, however, the distinction between the two perhaps has little to do with the provisions of the MLI that the question relates to but instead pertains to the context in which the question arises. Under this reading, any questions relating to the MLI's effect that arise in the course of a CTA's application cannot be brought before a CoP but must be resolved by mutual agreement. This broad scope of MAP in this regard also would improve efficiency in making determinations, as well as the need to protect taxpayer confidential information through normal MAP procedures. Conversely, general questions on the effect of the MLI – which do not relate to a specific CTA – can be addressed by a CoP under the procedure foreseen in article 31 of the MLI. The ES and the CoP's recent opinion (*see* section 6.) should then be read as clarifying that competent authorities may also resolve amongst themselves more general questions on the MLI's effect that arise outside of a specific dispute, but if these questions prove common or recurrent, it could be sensible to convene a CoP. This distinction seems consistent with the requirement that a CoP is only convened at the request of a party if one third of parties show their support for the request within 6 months (*see* section 6. on the relevance of this quorum requirement).

A similar distinction between specific and general questions is made in article 24 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAAC): paragraph 4 provides that a party may ask the treaty's coordinating body – an intergovernmental body similar to the CoP – to furnish opinions on the interpretation of the provisions of the convention, and paragraph 5 provides that where difficulties or doubts arise between two or more parties regarding the implementation or interpretation of the convention, the competent authorities of those parties shall endeavour to resolve the matter by mutual agreement. The MAAC's Explanatory Report clarifies that the questions submitted to the coordinating body should be of a general character and should not relate to specific disputes that might exist between two parties, since the latter type of questions are to be resolved through mutual agreement or in the framework of other international instruments.[340]

The function of article 32(1) of the MLI is thus to ensure that questions arising in the application of a particular CTA, even when they relate to the autonomous meaning of MLI terms, will not be addressed by a CoP.[341] For this reason it is unlikely that the establishment of the CoP will form a first step towards the operation of a permanent international conflict resolution institution.[342] As such, paragraph 1 of article 32 emphasizes that – despite the multilateral nature of the MLI and the possibility that its provisions could see a variety of different interpretations – questions about the interpretation of the MLI that arise in the application of CTAs are ultimately for the contracting jurisdictions themselves to determine.

335. Para. 316 ES. *See also* para. 18 ES: "any disagreement between the Contracting Jurisdictions as to whether existing provisions are within the scope of a compatibility clause could be settled through the mutual agreement procedure provided for in the Covered Tax Agreement or, if necessary, through a CoP".
336. According to Prokisch & Souza de Man, *supra* n. 244, at sec. 7.6; and M. Lang, *Die Auslegung des multilateralen Instruments*, Steuer und Wirtschaft International 1, p. 16, these questions do not fall within the competency of the CoP.
337. The CoP thereby indirectly responds to Prokisch & Souza de Man, *supra* n. 244, at sec. 7.4: "Whether such [compatibility clause] issues can be resolved in a mutual agreement procedure remains doubtful and may require a CoP."
338. *Opinion of the CoP of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, Interpretation and Implementation Questions,* 20 May 2021, p. 1. *See also* p. 7, where the Opinion states "Where Contracting Jurisdictions disagree about whether a provision in a Covered Tax Agreement is within the scope of a compatibility clause, they can endeavor to settle the matter through the Agreement's mutual agreement procedure or, if it is a recurrent issue, through a Conference of the Parties convened in accordance with Article 31(3) of the MLI."
339. Another question that arises from the assumption that paras. 1 and 2 of art. 32 pertain to questions of a different subject matter is whether a question regarding the interpretation of an MLI term under arts. 31 and 32 of the VCLT – that is in the situation that there is no appropriate meaning for the term in question under the relevant CTA – qualifies as a question regarding the modified CTA or as a question regarding the MLI itself. As shall be seen further on, such questions, if they arise in the interpretation or application of a specific CTA, should qualify as questions regarding the modified CTA.
340. Explanatory Report, para. 240.
341. This would also explain why art. 32(1) MLI states that such questions *shall* be determined by a MAP; clearly, this word cannot be read to mean that national courts no longer have the competence to determine questions on the modified CTA, or that such questions must be resolved by mutual agreement and cannot be resolved by mandatory binding arbitration. Cf. Holzinger, *supra* n. 219, at p. 55; Haslehner, *supra* n. 217, at p. 224-225; and M. Lang, *The Interpretation of the Multilateral Instrument*, Skattepolitisk Oversigt 1, p. 6 (2017). However, as Haslehner notes, art. 32(1) could never reasonably have been construed to make the CoP the sole arbiter of the MLI, let alone the CTAs; *see* Haslehner, *supra* n. 217, at p. 225.
342. As was predicted by Prokisch & Souza de Man, *supra* n. 244, at sec. 7.6.

11.2. The Conference of the Parties in light of other intergovernmental bodies

11.2.1. MAAC

The CoP as created under the MLI is not a unique concept. Multiple other multilateral treaties similarly establish an institutionalized intergovernmental body with legislative, executive or quasi-judicial powers (*see also* section 6. and 11.1.).[343] The MAAC, which is the treaty most comparable to the MLI in terms of its subject matter and number of signatories,[344] establishes a coordinating body composed of representatives of the competent authorities of parties in article 14(3).[345] Similar to the MLI CoP, the coordinating body may recommend revisions or amendments to the convention and furnish its opinion on questions of application or interpretation of provisions of the convention. However, the Explanatory Report accompanying the MAAC stresses that the coordinating body merely has an advisory function; although its aim is to encourage uniform solutions to questions of application and interpretation, parties are free to deviate from its recommendations.[346] The coordinating body is further governed by the detailed set of Rules of Procedure.[347] These rules elaborate upon several procedural aspects of the coordinating body, e.g. its mandate and composition, the designation and functions of its chair and vice-chairs, the frequency of its meetings, composition of its annual reports and the decision-making procedure. The Rules of Procedure provide that a decision to recommend revisions or amendments to the convention or a decision to provide an opinion on the interpretation of provisions of the convention shall be taken by mutual agreement of the coordinating body delegates, i.e. consensus among delegates, or otherwise by mutual agreement of the parties to the convention.[348]

In contrast to the MAAC, the MLI and ES leave many procedural aspects of the CoP undiscussed. Although article 32(3) of the MLI provides that the depositary must convene a CoP, if one third of parties support a request for a CoP, the MLI does not impose a quorum of attendance or give any guidance on the decision-making process of the CoP. In the absence of specific provisions, the VCLT provides in article 9(2) that the amendment of a treaty takes place by the vote of two thirds of the states present and voting at an international conference, unless by the same majority they shall decide to apply a different rule.[349] This two thirds rule cannot, however, automatically be extended to the adoption of opinions on interpretation or implementation questions; while CoP opinions may have legal consequences for all parties (*see* section 6. for the legal effect of such opinions), amendments to a treaty do not bind parties that do not become a party to the amended treaty.[350] The MLI additionally does not stipulate a time frame within which the depositary must inform all parties of any request or convene a CoP when it becomes clear that one third of parties supports the request. The wording of article 31 of the MLI further leaves some doubt as to whether the parties may convene a CoP in a different way than is prescribed by paragraph 3, although article 31(3) should likely be read as limiting the general description given in the first paragraph of that article.[351] Lastly, the MLI does not clarify what legal status should be attributed to the decisions reached by the CoP (*see also* section 6.). Given these many uncertainties, the MLI CoP would certainly benefit from the adoption of detailed rules of procedure similar to those that exist for the MAAC.

11.2.2. UN Conventions

Many UN conventions, notably multilateral environmental agreements, likewise establish a CoP.[352] Under these agreements, all decision-making powers are reserved for the CoP unless delegated to other organs,[353] and the CoP is generally supported by subsidiary bodies with scientific, technological or other expertise.[354] The functions of

343. Other designations synonymous with Conference of the Parties are, e.g. Executive Committee, Consultative Meeting, and Assembly of States Parties. *See* V. Röben, *Conference (Meeting) of States Parties,* in: *Max Planck Encyclopedias of International Law*, OUP: Online 2010, secs. 2-3.
344. As of 23 Apr. 2025, 150 jurisdictions participate in the Multilateral Convention on Mutual Administrative Assistance in Tax Matters; see *OECD, Jurisdictions participating in the Convention on Mutual Administrative Assistance in Tax Matters: Status – 23 April 2025*, available at: https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/convention-on-mutual-administrative-assistance-in-tax-matters/status_of_convention.pdf.
345. The coordinating body was established in response to concerns that the multilateral character of the MAAC and its use of open norms would lead to differences in execution, thus hampering the effectiveness of the convention; *see* Explanatory Report, para. 239.
346. Explanatory Report, para. 253.
347. OECD, *Rules of Procedure of the Co-ordinating Body of the Convention on Mutual Administrative Assistance in Tax Matters*, June 2015 (28 May 2021), available at: https://www.oecd.org/ctp/exchange-of-tax-information/co-ordinating-body-rules-of-procedure.pdf.
348. Id., at art. IX(3) and (4).
349. It is worth noting that article 33(2) MLI merely invites parties to consider a proposed amendment, but does not oblige the Conference of the Parties to reach a decision on the proposal; *see* L.O. Živković, *The Conference of the Parties: A future for a more profound multilateralism in tax matters?*, *Zbornik radova Pravnog fakulteta Novi Sad* 3, p. 1131 (2020); and Holzinger, *supra* n. 219, at p. 57.
350. Art. 40(3) VCLT. Conversely, one could argue that an opinion of the CoP cannot have more substantial ramifications on the understanding of the MLI than what could be expected in the event of its amendment. *See* Haslehner, *supra* n. 217, at p. 226 and Živković, id., at p. 1133.
351. *See also* Haslehner, *supra* n. 217, at p. 226.
352. Examples of UN treaties establishing a Conference of the Parties include the United Nations Framework Convention on Climate Change, the Vienna Convention for the Protection of the Ozone Layer and the Convention on Biological Diversity. Additionally, the UN Charter provides in article 109 that a General Conference of the Members of the UN may alter the text of the Charter by a two-thirds vote. Compare also the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) mentioned in section 6 with the South African case law relating to it; ZA: HC GNP *National Council of the Society for Prevention of Cruelty to Animals v. Minister of Environmental Affairs* [2019] 4 All SA 193 (GP), at [15]-[23]; Trustees for the time being of the Humane Society International – ZA: HC WCC, *Africa Trust and others v. Minister of Forestry, Fisheries and the Environment* [2022] 3 All SA 616 (WCC), at [14]-[29]. These cases concerned hunting quotas for elephants, lions, rhinos and so on. The CITES Conference of the Parties (COP) meets every 2 to 3 years to review the treaty and agree on any amendments, especially to move species between lists that afford greater or lesser protection as science and circumstances evolve. Art. XI CITES expressly authorizes the Conference of the Parties to "consider and adopt amendments", and under art. IX, signatory countries must establish a designated local authority to grant permits and hunting quotas pursuant to CITES. South Africa created legislation, the National Environmental Management: Biodiversity Act 10/2004, with a specific clause to give effect to CITES. *See* n. 245 for more information.
353. Röben, *supra* n. 343, at sec. 4.
354. Röben, *supra* n. 343, at sec. 7. *See*, for example, the Chemical Review Committee of the Rotterdam Convention on the Prior Informed

the CoP under UN agreements may include the adoption of abstract instruments of general application (legislative function), such as amendments to the treaty[355] or secondary law instruments,[356] the monitoring of the implementation of the treaty (executive function)[357] and the resolution of disputes (quasi-judicial function).[358]

Article 31(1) of the MLI states that "Parties may convene a Conference of the Parties for the purposes of taking any decisions or exercising any functions as may be required or appropriate under the provisions of this Convention". This could include the addressing of questions of interpretation or implementation of the MLI as foreseen in article 32(2), but also the consideration of a possible amendment to the MLI as foreseen in article 33(2). Article 31(1) seems to give both a material (required or appropriate) and a formal prerequisite (under the provisions of this convention).[359] One could therefore argue that since the MLI only explicitly refers to the CoP for the settling of interpretation and implementation questions (article 32) and the consideration of proposed amendments (article 33), the function of the CoP is limited to these tasks.[360] Yet the ES clarifies that the reasons for convening a CoP may *include* those given in article 32 and 33 of the MLI.[361] It is for this reason conceivable that the CoP may adopt secondary instruments setting forth abstract provisions of general application for future conduct, which would not be binding per se, but could contribute to the interpretation and development of the treaty.[362] While the legislative area holds several possibilities for the MLI's CoP, article 32(1) of the MLI expressly prevents the CoP from taking on a quasi-judicial function. It further seems unlikely that the CoP will exercise executive functions in view of the freedom given to contracting jurisdictions in article 32(1) for deciding matters on the MLI's implementation amongst themselves and the fact that the provisions on the CoP do not provide for periodic meetings, which would have facilitated such executive oversight.[363] Compared to the intergovernmental bodies typically established under UN conventions, the competencies of the MLI's CoP thus appear rather limited. However, seeing as most obligations created under the MLI apply in bilateral relations rather than vis-à-vis all other parties, this is perhaps unsurprising.

One area in which the CoP could have an essential role in the future is in the adaption of the MLI to changing circumstances. Over time, the measures incorporated in the MLI might need some fine-tuning to respond to harmful tax practices presently unaccounted for in the MLI or to fit in with changing perspectives, but the authors can also imagine future additions to the OECD Model to be included in new provisions of the MLI by amendment. Such additions would likely see a swifter implementation into bilateral tax treaties if optional clauses in the MLI would facilitate their modification than if these treaties were to be renegotiated bilaterally. Under article 9(2) of the VCLT, the amendment of the treaty by the CoP should take place by the vote of two thirds of the states present and voting, unless by the same majority they decide to apply a different rule. However, the VCLT also provides for the possibility that only a selection of the parties to the MLI modify the treaty between themselves,[364] which could facilitate the uptake of future additions to the OECD Model further since it would not depend on the proportion of states in favour of the amendment. In any case, the amended MLI would not "bind" any state already a party to the MLI that does not become a party to the amended MLI.[365]

12. Reservations and Interpretation[366]

Most of the provisions of the MLI,[367] once ratified, apply in principle to all CTAs. However, states may formulate reservations to the provisions of the MLI, provided that the MLI allows them (*see* article 28(1) of the MLI). These reservations are prescribed, i.e. the state can only make the reservations listed in the text of MLI. This enables the states to streamline their commitments vis-à-vis the other states by taking account of the tax policies pursued.[368] By allowing the states to make only the reservations listed in the text of the MLI, it aims to ensure an efficient, effective and consistent implementation of the tax treaty-related BEPS measure. Each article of the Multilateral Instrument that

Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Commission on the Limits of the Continental Shelf of the UN Convention on the Law of the Sea.

355. Examples include the Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer, Article 21 of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Article 12 of the Stockholm Convention on Persistent Organic Pollutants and Article 51 of the International Covenant on Civil and Political Rights, Article 17 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and Article 29 of the International Covenant on Economic, Social and Cultural Rights.
356. Röben, *supra* n. 343, at sec. 17.
357. Röben, *supra* n. 343, at sec. 29-34.
358. Röben, *supra* n. 343, at sec. 35-37.
359. Holzinger, *supra* n. 219, at p. 49.
360. Id., at pp. 49-50.
361. Para. 311 ES.
362. Röben, *supra* n. 343, at secs. 21-26. Examples of this type include the Assembly of States Parties of the ICC Statute adopting "elements of crime" which should assist the ICC in interpreting and applying the crimes provided for in arts. 6, 7 and 9 ICC Statute, the Conference of the Parties to the International Convention on the Wetlands of International Importance Especially as Waterfowl Habitat ("Ramsar Convention"), which has normatively developed the convention's criteria for the listing of protected wetlands, and the successive decisions taken by the Conference of the Parties to the UNFCCC, which make up a detailed set of rules for the effective implementation of the convention.
363. For example, this is the case for the Conference of the Parties under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). *See* nn. 245 and 361.
364. *See* art. 41(1)(b) and (2) VCLT. This possibility is conditional on the fact that the modification does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations and does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole. Lastly, the parties must notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.
365. Art. 40(4) VCLT.
366. *See also* Bravo, *supra* n. 212, at ch. 4.5.
367. The provisions concerned are art. 3(1) to (3) MLI; art. 4(1) MLI; art. 6(1) MLI; art. 7(1) MLI; art. 8(1) MLI; art. 9(1) MLI; art. 10(1) to (3) MLI; art. 11(1) MLI; art. 12(1) and (2) MLI; art. 14(1) MLI; art. 15(1) MLI; art. 16(1) to (3) MLI and art. 17(1) MLI.
368. BEPS Action 6 Report, pp. 19 and 22.

provides for substantive provisions includes an exhaustive list of reservations that states can make.

Reservations play a role when the measures of the MLI are not mandatory,[369] as in the case of the transparent entities of article 3 and the tightening of the agent PE concept in connection with the counteraction of commission agent structures under article 12 of the MLI. According to article 28(3) of the MLI, any reservation made is reciprocal (based on article 21 of the VCLT). This means that, for example, a reservation made by State A in the form of an opt-out has the effect that the substantive provision to which the reservation relates does not in principle apply in the relationship of a CTA with another State B; reciprocity thus ensures that State B is also not obliged to apply the substantive provision in its relationship with State A under the CTA. In principle, therefore, the reciprocity in question results in symmetry with respect to the effects of the reservation (in the example, the substantive provision is not applied by either State A or State B in their respective bilateral relations).[370] In certain cases, however, asymmetry is accepted, e.g. the situation of a PPT (article 7(1) of the MLI) and the same test but supplemented by a simplified LOB provision (article 7(8) et seq. of the MLI).

Nevertheless, views on the interpretation of reservations and their impact on a CTA may differ. A striking example[371] is the CTA between Romania and Slovenia, and in particular Romania's position on article 17 of the MLI (non-minimum standard). Article 17(1) of the MLI mirrors article 9(2) of the OECD Model on corresponding adjustments. According to article 17(3)(a) of the MLI, a contracting jurisdiction may reserve the right to apply article 17(1) of the MLI to CTAs which already contained a provision reflecting the corresponding adjustments. Romania reserved the right under article 17(3)(a) of the MLI not to apply the whole of article 17 to CTAs that already contained a provision similar to article 17(1) of the MLI. Among these, Romania mentioned the CTA with Slovenia, which, however, does not contain an obligation to make such a corresponding adjustment, but only the possibility ("may make an appropriate adjustment"). This is also confirmed by the position of Slovenia itself, which reserved its right under article 17(3) of the MLI. Therefore, the question may arise whether the CTA between Slovenia and Romania is to be considered as amended despite the reservation, which may not be in line with the MLI. In the opinion of the authors, this is not the case. There is no (sufficient) match regarding the application of article 17 of the MLI.

Another example can be found in the Hong Kong-Italy Income Tax Agreement (2013). This concerns article 7 of the MLI. Pursuant to article 7(15)(b) of the MLI, Italy reserved the right not to apply article 7(1) to the treaty with Hong Kong, as it considered that this treaty already contained provisions denying all the benefits of the treaty in abusive situations. Hong Kong also made the reservation under article 7(15)(b) of the MLI but did not list the tax treaty with Italy. Instead, the tax treaty with Italy was listed in the article 7(17)(a) notification as a CTA not subject to the article 7(15)(b) reservation. This inconsistency may arise from a different reading of article 27 (Miscellaneous) of the Hong Kong-Italy tax treaty, which provides as follows: "Nothing in this Agreement shall affect the right of each Contracting Party to apply its domestic laws and measures to prevent tax evasion and tax avoidance, whether or not so described." Italy reads this clause as a pre-existing general PPT for treaty purposes, but in reality, it is just a saving clause for domestic anti-abuse rules. Italy may have taken this approach because it already uses its domestic GAAR in treaty situations; this would not be the case for Hong Kong. Again, the authors conclude that articles 7(1) and 7(4) do not apply.

13. Language Issues

13.1. General

In a previous article of the group[372] the language issues with respect the MLI have been extensively discussed. The form of the MLI and the MLI being drawn up in French and English, which are equally authentic languages,[373] have been clarified with respect to the previous article.[374] It would be interesting to see whether states having given up their language in favour of French and English for purposes of the MLI are also willing to do so with their own treaties and accepting, for instance, English also as the only authentic language.

Although the MLI must be applied alongside the relevant CTA, where the effect is determined by the compatibility clauses, reservations, notifications and options, language issues may arise even under the MLI in its current form. The latter is particularly the case where the authentic languages of the CTA are different from those of the MLI (English and French), e.g. the Germany-Spain Income and Capital Tax Treaty (2011) where German and Spanish are equally authentic languages (the treaty is a CTA and the MLI is in effect in both states)[375] or the Belgium-Nether-

369. Para. 14 and 15 ES.
370. Para. 270 ES.
371. This example is taken from Maisto, *supra* n. 262, at pp. 424 and 425.
372. Austry et al, *supra* n. 200, at p. 683 et seq.
373. In Mexico, the statutory language is Spanish, which is the mandatory language for domestic tax legislation. This may impact the interpretation of the MLI. There is also an impact on the MLI because the reservations and notifications of Mexico are in Spanish; *see* J.A. Becerra Cantu, *The OECD Multilateral Instrument from a Mexican Perspective: What Are the Most Significant Challenges?*, 77 Bull. Intl. Taxn. 9, sec. 3.2. (2023), Journal Articles & Opinion Pieces IBFD.
374. The choice for French and English as the authentic language may be explained by referring to the OECD Model and its Commentaries. This Model and these Commentaries are also drafted in English and French being the official languages of the OECD; compare the testimonium of the Convention for European Economic Co-operation (1960) ("Done in Paris, this fourteenth day of December, Nineteen Hundred and Sixty, in the English and French languages, both texts being equally authentic."). *See also* J. Schuch & J.-P. Van West, *Authentic Languages and Official Translations of the Multilateral Instrument and Covered Tax Agreements*, in *The OECD Multilateral Instrument for Tax Treaties* p. 80 (eds. M. Lang et al., Wolters Kluwer 2018). These authors note that it is not uncommon that multilateral treaties are negotiated and authenticated in the official language of the hosting organization, e.g. treaties negotiated under the framework of the United Nations,
375. For sake of completeness, it should be noted that the mutual agreement procedure of art. 24 of that treaty should be used to resolve any divergence of interpretation between these texts.

lands Income and Capital Tax Treaty (2001) where Dutch and French are equally authentic languages (also a CTA and the MLI is in effect in both states).[376] However, it should also be noted that the vast majority of tax treaties already have English as the prevailing language or one of the authentic languages, i.e. 83.92%. French plays a more marginal role (7.68%).[377] However, as French is an authentic language of the MLI, the French language version of the MLI can still be used and is useful to clarify the English version if necessary. Thus, even if the CTA has English as its authentic language, language issues remain (*see also* section 13.2.).

These different language versions may, of course, lead to differences in interpretation. Articles 31-33 of the VCLT should be used to resolve them if the tax treaty does not specify a language as the prevailing authentic language. In addition, if the comparison of the authentic texts reveals a difference in meaning, the interpretation rules of the VCLT should be applied to find a solution. If the rules of interpretation of the VCLT do not resolve this difference in meaning resulting from the different language versions, the meaning that best reconciles the texts, having regard to the object and purpose of the treaty, should be adopted (article 33(4) of the VCLT). [378]

13.2. Multilingual interpretation and authentic languages of the MLI

It remains possible that the MLI will modify a CTA of which English and French are not authentic languages. According to the ES, "where questions of interpretation arise in relation to Covered Tax Agreements concluded in other languages or in relation to translations of the [MLI] into other languages, it may be necessary to refer back to English or French authentic texts of the [MLI]."[379]

Only the French and English versions of the provisions "inserted" by the MLI into CTAs are considered authentic. In accordance with article 33 of the VCLT, the official translations produced by the participating jurisdictions are not authoritative because they do not have an explicit value from the point of view of international public law.[380] Where the MLI modifies provisions of the CTA concerned, the provisions affected by the MLI need to be interpreted in English and French. Differences between the English and French versions or other ambiguities must be resolved by applying articles 31 and 32 of the VCLT and, ultimately, article 33(4) of that convention, i.e. by adopting the meaning that best reconciles the texts, having regard to the object and purpose of the treaty.

376. Originally the Belgium-Netherlands Income and Capital Tax Treaty (2001) was not a CTA because that treaty was being renegotiated. On 25 Nov. 2021, this treaty was nevertheless notified by the Netherlands and Belgium as a result of which it is a CTA and the MLI applies as of 1 Jan. 2022.
377. R.X. Resch, *The OECD BEPS Multilateral Instrument and the Issue of Language*, 47 Intertax 6/7, p. 565 (2019). Compare also Avery Jones & Hattingh, *supra* n. 210, at sec. 3.7.2.
378. Schuch & Van West, *supra* n. 374, at p. 77.
379. Para. 317 ES.
380. Compare J. Wouters & M. Vidal, *Non-tax treaties: Domestic Courts and Treaty Interpretation*, in *Courts and Tax Treaty Law*, EC and International Tax Law Series, p. 21 (G. Maisto ed., IBFD 2007), Books IBFD.

In this respect, Mexico can be cited as an example. The Mexican Senate has approved the text of the MLI in Spanish and sent it to the Executive for final ratification. The final publication in the Federal Official Gazette of the MLI's incorporation into Mexican law was also published in Spanish. As a result, when applying the MLI in practice to CTAs from a Mexican perspective, practitioners (courts and tax authorities) will revert to Spanish, although it is recognised that the authentic languages of the MLI are English and French.[381] This may mean that an interpreter will have to read the CTA in its authentic languages, the MLI in its authentic languages (French and English), the MLI in its statutory language, i.e. Spanish in Mexico, and the notifications and reservations made by Mexico in its statutory language, i.e. Spanish.[382] Of course, this also raises additional language issues in relation to the MLI. This would mean that, even though Mexican domestic law provides that Spanish is a statutory language of the MLI and that the reservations and notifications made by Mexico are also in Spanish, this does not mean that Spanish will also become an authentic language of the MLI from a public international law perspective.

A further clarification in the ES would have been helpful, but in the case of multilingual issues, i.e. on the one hand, French and English as authentic languages of the MLI and, on the other hand, the CTA using other authentic languages, the authors consider that a distinction should be made between (i) the provision of the CTA if and to the extent that it is affected by the MLI (French and English being equally authentic) and (ii) the part of the provision that is not affected by the MLI to which the languages of the CTA apply, even if the CTA provides that either French or English shall prevail in case of divergence, e.g. the Italy-Netherlands Income and Capital Tax Treaty (1990) (CTA and the MLI is applicable), of which the Italian, Dutch and French texts are equally authentic, but in case of divergence in the interpretation of the Dutch and Italian texts, the French text prevails. Nevertheless, the possible application of several languages may lead to difficulties in the interpretation of the CTA and the MLI.

Given the broad wording of article 30 of the MLI, which is supported by the ES (paragraph 310), it may be possible for the parties to conclude a new CTA in which they incorporate the minimum standards of the MLI, but in which they have chosen a language other than English or French as the authentic language. This would be a permissible modification of the CTA resulting in a change of authentic languages. This would effectively overcome the language issues surrounding the MLI. Some countries have chosen this option or are even required by their domestic law to conclude a new (or amend a) CTA to transform the MLI into domestic law, e.g. Germany.

13.3. Conference of the Parties

According to the authors, the CoP can also be used to resolve interpretation issues arising from inconsisten-

381. *See* Becerra Cantu, *supra* n. 373, p. 358.
382. Becerra Cantu, *supra* n. 373, p. 359.

cies between the French and English versions of the MLI.[383] This is supported by the wording of article 32(2) of the MLI ("any question concerning the interpretation or implementation of [the MLI]")(*see also* section 11.1.). An interpretation issue arising from an inconsistency between the French and English versions of the MLI may be considered to fall within the scope of "questions arising as to the interpretation or implementation" of the MLI.[384]

In view of the distinction made by the authors in section 13.2., interpretation issues caused by inconsistencies between the French and English versions of the MLI in a case where the MLI modifies the provision of the CTA may be resolved by means of article 32(1) of the MLI ("question arising as to the interpretation of provisions of a Covered Tax Agreement") and the mutual agreement procedure of the CTA (article 25 of the CTA styled on the OECD).[385] Of course, the mutual agreement procedure of the CTA is only a solution to a language issue if the CTA contains a final clause referring to the mutual agreement procedure to resolve interpretation issues as a consequence of the authentic languages of the CTA (*see*, for example, the Germany-Spain Income and Capital Tax Treaty (2011); *see also* section 11.1.). This is therefore a last resort solution which is rather limited in scope.[386]

14. Conclusions, Summary and Recommendations

In Part Two of this article, the authors have further illustrated how various sources and documents may need to be valued in the MLI interpretation process.

According to the authors, the ES belongs to the context within the meaning of article 31 of the VCLT. The ES is part of the general corpus of the joint agreement reached by the parties when concluding the MLI, or jurisdictions based their decision to sign or ratify the MLI on the understanding that its provisions would be consistent with the meaning given to them in the accompanying ES.

The opinion of the CoP of 3 May 2021 (guiding principles for the interpretation and application of the MLI) constitutes objective evidence of the understanding of the parties as to the meaning of the MLI and may therefore qualify as a subsequent agreement under article 31(3)(a) of the VCLT. However, its weight in the interpretation process depends on its clarity and specificity. This opinion does not add much to what is already apparent from other sources of interpretation, such as the ES and the wording of the MLI.

The authors consider that the 2015 BEPS Action Reports, including the Commentary contained therein, reveal the object and purpose of the MLI under article 31(1) of the VCLT. This follows from the preamble to the MLI, the ES and the approach taken by the ad hoc group.

For OECD member countries, the 2017 Commentary on the OECD Model, to the extent that it reflects the BEPS measures, should be treated like prior commentary on the changes to the CTA made by the MLI (where there is an appropriate match). This is also the case if the OECD member countries signed the MLI before the 2017 OECD Model. This is the case for all OECD member states except the United States (which did not sign the MLI) and Estonia (which signed the MLI on 29 June 2018). For Estonia, the 2017 OECD Commentary is akin to anterior commentary. For the other OECD member states – being represented among this group of authors – the legal value of the 2017 Commentary may further depend on domestic case law about the status of the OECD Commentaries for the interpretation of tax treaties, especially if the CTA is concluded with a non-OECD member.

Future amendments to the OECD Commentary, i.e. after the 2017 update, will generally be regarded as posterior commentary and as a supplementary means of interpretation within the meaning of article 32 of the VCLT. In principle, it is irrelevant whether the MLI was signed by OECD member countries before or after the 2017 update of the OECD Model and its Commentaries. However, this may be different if the amendments to the Commentaries are intended to correct an error or omission in an earlier version of the Commentaries. This is not inconceivable now that the Commentaries (and the underlying OECD Model) include relatively new concepts such as the PPT.

Differences between the BEPS reports and the 2017 Commentary are noted in relation to the PPT and the LOB provision. These differences can be reconciled because (i) the Commentary (PPT) either expands on the BEPS Reports or (ii) develops the rules contained therein (LOB provision). The texts of the BEPS reports and the Commentaries must be interpreted in an integrated manner (sub (i)) or the documents that give the best insight into the expression in question should be used (sub (ii)).

With respect to a CoP opinion on the one hand (article 32(2) of the MLI) and a MAP under a CTA on the other hand (article 32(1) of the MLI), questions relating to the effect of the MLI that arise during the application and interpretation of a CTA cannot be brought before a CoP. They must be resolved by mutual agreement in accordance with article 25 of the CTA styled on the OECD Model. General questions concerning the effect of the MLI – which do not relate to a specific CTA – may be dealt with by a CoP in accordance with the procedure provided for in article 31 of the MLI.

The authors have compared the MLI CoP with CoPs under other multilateral conventions, namely the MAAC and the UN Conventions. As in the case of the MAAC CoP, the authors would recommend the inclusion of clear procedural rules for the MLI CoP, e.g. regarding the decision-making process, and clarifying the legal status of decisions taken by the MLI CoP. One area where the CoP

383. Schuch & Van West, *supra* n. 374, at p. 83.
384. Compare also the above-quoted para. 317 of the ES which is a commentary on art. 32(2) MLI. In this connection the ES referred to the authentic languages of the MLI in relation to questions of interpretation and implementation of the MLI.
385. Compare also Resch, *supra* n. 377, at p. 570; and Schuch & Van West, *supra* n. 374, at p. 83.
386. Resch, *supra* n. 377, at p. 570; and R.X. Resch, *The Interpretation of Plurilingual Tax Treaties: Theory, Practice, Policy* (dissertation), ch. 10, sec. 10.2.3 (2018).

could play an important role in the future is in adapting the MLI to changing circumstances.

The authors have noted interpretation issues as regards the reservations that can be made by the contracting jurisdictions to the MLI. In addition, the authors have addressed language issues that may arise when the authentic languages of the CTA are different from those of the MLI (English and French). These different language versions may of course lead to differences in interpretation. Articles 31-33 of the VCLT should be used to resolve them.

In the case of multilingual issues, the authors consider that a distinction should be made between (i) the provision of the CTA if and to the extent that it is affected by the MLI (French and English being equally authentic) and (ii) the part of the provision that is not affected by the MLI to which the languages of the CTA apply, even if the CTA provides that either French or English shall prevail in case of divergence. According to the authors, the CoP can also be used to resolve interpretation issues arising from inconsistencies between the French and English versions of the MLI.

In conclusion, the following recommendations are made:

- The current design of the MLI should be retained, but other instruments – such as the FTI – may be considered if specific amended model tax treaty provisions (UN or OECD) are to be incorporated into various tax treaties.
- To ensure consistency and greater legal certainty, the OECD should encourage the development of consolidated texts.
- The authors are more in favour of consolidated texts because it is difficult to give the synthesised texts a proper legal status in the jurisdictions concerned, apart from possible reliance on the principle of legitimate expectations.
- The ES or OECD Commentary could address the relevance of domestic law more clearly.
- The MLI CoP should include clear procedural rules that would contribute to the functioning of this CoP and use the CoP to address interpretation issues and to establish and clarify the status of interpretation sources.
- The ES should address multilingual issues.

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