The Multilateral Tax Instrument and Its Relationship with Tax Treaties

The multilateral instrument to modify bilateral tax treaties is one of the most important and innovative initiatives of the last decades in international tax law. The article aims to contribute to the understanding of the relationship between existing tax treaties and the multilateral instrument once it enters into force. After an in-depth assessment of precedents and literature in public international law and international tax law, the author concludes that, since the provisions of the multilateral instrument and the provisions of tax treaties will coexist, conflicts of treaties may arise. To ex ante resolve these conflicts, the multilateral instrument can provide for compatibility clauses. In their absence, according to the Vienna Convention on the Law of Treaties, the lex posterior principle will apply. The convenience of adding compatibility clauses to the multilateral instrument or using the lex posterior principle depends on the object and purpose that the ad hoc Group currently negotiating the multilateral instrument will assign to it. If compatibility clauses are implemented, it can be anticipated that part of the success of the instrument will lie in the good design of these clauses. Therefore, the article also provides suggestions about the ideal design of the compatibility clauses, taking into account that tax treaties often use different terminology and have different enumeration styles, different wording, and even different scopes.

Contents
1. Introduction 279
2. Interaction of Treaties 282
   2.1. Accumulation or conflict of treaties 282
   2.2. Compatibility clauses 285
   2.3. Lex posterior principle 287
   2.4. Lex specialis principle 289
3. Relationship between the Multilateral Tax Instrument and Existing Tax Treaties 291
   3.1. The multilateral tax instrument 291
   3.2. Flexibility in the multilateral tax instrument 293
   3.3. Compatibility clauses 296
   3.4. Lex posterior principle 300
   3.5. Lex specialis principle 302
4. Conclusions 304

1. Introduction

The multilateral tax instrument is envisaged with a view to implementing swiftly the treaty output of the OECD work on addressing base erosion and profit shifting (BEPS). As more

* LLM in International Taxation, PhD candidate Doctoral Program in International Business Taxation (DIBT) and Recipient of the DOC Fellowship of the Austrian Academy of Sciences at the Institute for Austrian and International Tax Law, WU (Wirtschaftsuniversität Wien). The author wishes to thank Prof. Pasquale Pistone, Dr Kasper Dziurdź and Jesse Eggert for their valuable input.

1. Base erosion is understood as the unfair erosion of the tax base that should be subject to tax in the state where the income-generating activity took place (the host or source country). Profit shifting is understood as the unjustified shifting of profits from the host country to a different jurisdiction – normally from a high-tax jurisdiction to a low-tax jurisdiction or a tax haven.
than 3,000 tax treaties for the avoidance of double taxation (tax treaties) are in force today, a monumental effort would be required to renegotiate each of them in a coordinated and timely manner. However, the multilateral instrument could avoid such a cumbersome renegotiation process by modifying the tax treaties of all interested states. It is expected that, with the multilateral instrument, interested states will incorporate into their tax treaty network rules for addressing hybrid mismatch arrangements, abuse of treaties and artificial avoidance of the permanent establishment status, as well as rules for improving dispute resolution mechanisms, including mandatory binding arbitration.

Until now, multilateral experiences in international tax law have been limited to a few cases, such as (i) the Agreement to Avoid Double Taxation between the Member Countries of the Andean Community of Nations, (ii) the Nordic Multilateral Double Taxation Convention and (iii) the Double Taxation Agreement of the Caribbean Community (CARICOM). Also, proposals to adopt multilateral tax treaties among a more extended number of countries in the European Union and Latin America have been developed. However, none of them

2. It has been observed that after a modification of the OECD Model takes place, a period of 5 to 15 years is required for incorporating the respective changes into the tax treaty network. See J. Owens, *International Taxation: Meeting the Challenges – The Role of the OECD*, 46 Eur. Taxn. 12, p. 555 (2006), Journals IBFD.
7. *Decisión 578 Régimen para evitar la Doble Tributación y Prevenir la Evasión Fiscal* (4 May 2004), Treaties IBFD. The first multilateral agreement between the member countries of the Andean Community was signed on 16 Nov. 1971. The signatory states are Bolivia, Colombia, Ecuador and Peru. While Venezuela was initially a signatory state, it resigned from its membership to the Andean Community in 2006, effective as from 2011.
8. *Nordic Multilateral Double Taxation Convention with respect to Taxes on Income and Capital* (23 Sept. 1996), Treaties IBFD. An amending protocol was signed on 6 Oct. 1997 and entered into force on 31 Dec. 1997. A second amending protocol was signed on 4 Apr. 2008 and entered into force on 31 Dec. 2008. The signatory states are Denmark, the Faroe Islands, Finland, Iceland, Norway and Sweden. The first multilateral treaty between the Nordic countries was signed on 22 Mar. 1983 and entered into force on 29 Dec. 1983 and since then it has been amended and replaced several times.
9. *Agreement among the Governments of the Member States of the Caribbean Community for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, Profits or Gains and Capital Gains and for the Encouragement of Regional Trade and Investment* (6 July 1994), Treaties IBFD. The signatory states are Antigua, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, St Lucia, St Vincent and Trinidad and Tobago.
12. Other multilateral tax treaties in force nowadays are the Convention for the avoidance of double taxation and mutual assistance agreement with respect of taxes on income between the states of the Arab Maghreb...
can be compared with the proposal of the OECD in the BEPS Action 15 Final Report.\textsuperscript{13} Effectively, the aforementioned multilateral conventions did not intend to modify existing tax treaties. Once adopted, they completely replaced all tax treaties that were in place between the contracting states. Conversely, with the multilateral instrument, the goal of the OECD is that interested states modify their tax treaties without replacing them, which means that the multilateral tax instrument and the modified tax treaties will coexist.

Although in other fields multilateral treaties have been used before to modify existing bilateral treaties, this has not been the case in international tax law. Among others, the following multilateral treaties have modified various bilateral treaties: the European Convention on Extradition,\textsuperscript{14} the Agreement on Extradition between the European Union and the United States of America,\textsuperscript{15} the Agreement on Mutual Legal Assistance between the European Union and the United States of America,\textsuperscript{16} the European Convention on the Repatriation of Minors,\textsuperscript{17} the International Convention for the Suppression of the Financing of Terrorism\textsuperscript{18} and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.\textsuperscript{19} It is therefore possible to conclude that implementing a multilateral instrument to modify tax treaties is feasible. However, as this will be the first time that such a practice will be used in international taxation, the most appropriate techniques for drafting and implementing such a multilateral instrument are not clear.

The most difficult challenge to be resolved is to ensure that the rules of the multilateral instrument effectively modify all tax treaties without triggering undesirable effects. The main reason is that, despite the fact that most of the time tax treaties follow the OECD Model and/or the UN Model, their provisions frequently use different terminology and have different enumeration styles, different wording and different scopes. A second reason that explains the difficulties of modifying tax treaties through a multilateral instrument is the complexity and breadth of the changes that were agreed to in the course of the BEPS Project. Multilateral treaties that have modified bilateral treaties have not introduced such extensive changes. A last reason is that multilateral treaties that have modified bilateral treaties do not govern fields that have a major and direct economic impact on states’ revenues, as is the case in international tax law.

This article aims to analyse the possible techniques that the multilateral instrument can implement in order to effectively modify tax treaties and thereby contribute to a better understanding of the relationship between both types of treaties once the multilateral instru-


\textsuperscript{14} European Convention on Extradition, art. 28 (13 Dec. 1957).

\textsuperscript{15} Agreement on Extradition between the European Union and the United States of America, art. 3 (25 June 2003).

\textsuperscript{16} Agreement on Mutual Legal Assistance between the European Union and the United States of America, art. 3 (25 June 2003).

\textsuperscript{17} European Convention on the Repatriation of Minors, art. 27 (2 May 1970).

\textsuperscript{18} International Convention for the Suppression of the Financing of Terrorism, art. 11 (9 Dec. 1999).

ment enters into force. In this sense, the article first of all reviews the forms in which treaties interact (section 2.) and, secondly, studies the forms in which the multilateral instrument can interact with the tax treaty network, taking into account that its object and purpose would be to modify existing tax treaties, but that it could also serve as a tool to consistently implement tax rules across the treaty network to counter BEPS practices (section 3.). Finally, conclusions will be offered (section 4.). To reach these conclusions, a review of precedents and literature in public international law and international tax law will be conducted. One important focus of this article lies on the Vienna Convention on the Law of Treaties (the Vienna Convention),\(^\text{20}\) as it provides the general rules for the application and interpretation of treaties, including tax treaties.

The importance of studying the relationship between the multilateral instrument and existing tax treaties lies in the mandate to launch the negotiations on the multilateral instrument (published by the OECD on 6 February 2015),\(^\text{21}\) and in the creation on 27 May 2015 of the ad hoc Group that is in charge of negotiating the instrument.\(^\text{22}\) Currently, 96 states are represented in the ad hoc Group,\(^\text{23}\) which means that about 2,000 tax treaties can be modified through the multilateral instrument. The OECD expects that the multilateral instrument will be concluded by the end of 2016 and that immediately thereafter it will be open for signature and ratification.

2. Interaction of Treaties

2.1. Accumulation or conflict of treaties

When the provisions of two or more international treaties are simultaneously (\textit{ratione temporis} overlap) applicable to at least one of the parties (\textit{ratione personae} overlap) in the same circumstances (\textit{ratione materiae} overlap), they can accumulate or conflict with each other. The provisions of two treaties accumulate if both can be applied without generating contradictions,\(^\text{24}\) either because one of the treaties complements the rights and obligations set out in the other or because it confirms them. On the other hand, the provisions of two treaties conflict when the fulfilment of the obligations or exercise of the rights under one treaty results, or potentially may result, in an infringement of the other treaty.

The definition of conflicts of treaties has been the subject of debate for decades. Two main views are found among international law scholars. In 1953, Jenks posited that a conflict of treaty norms “arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties”.\(^\text{25}\) Some scholars, such as Kelsen in his earlier work,
as well as Karl\textsuperscript{26} and Marceau,\textsuperscript{27} have followed this line of thinking. However, this approach has been criticized as being too restrictive because it leads to an a priori exclusion of circumstances that should also be considered a conflict of treaties.\textsuperscript{28} The result of following a strict definition of conflicts of treaties is the non-application of the provisions that serve to resolve those conflicts, whether established in the text of the conflicting treaties or in the Vienna Convention.

Pauwelyn illustrates cases that would be excluded from the definition of a conflict of treaties if the restrictive notion of Jenks was to be used. He identifies them as circumstances in which the norms of the treaties provide for commands that are different but not mutually exclusive, circumstances in which a norm provides for a positive obligation while the other provides for an exception, and circumstances in which a norm provides for a prohibition while the other provides for a right. A case in which a norm provides for a positive obligation while the other provides for an exception would be, for example, if one provision of the World Trade Organization (WTO) prescribes copyright protection for a minimum of 50 years, while a provision of the World Intellectual Property Organization (WIPO) grants an explicit right not to protect certain copyrights without stating that it carves out the scope of application of the WTO provision.\textsuperscript{29} According to the restrictive definition of Jenks, a conflict of treaties would not exist in the case described because a state could simultaneously comply with both provisions by not exercising the right granted by the WIPO. Therefore, the restrictive definition of conflicts of treaties proposed by Jenks would a priori nullify the object and purpose of one of the provisions of the treaties (in the aforementioned example, the WIPO provision) without analysing the intention of the treaty makers. If treaty makers intended to create an exception to a general provision (the provision of the WTO) by granting a right (the provision of the WIPO), the contracting states of both conventions should be allowed to exercise that right.

As a consequence, a broader definition of conflicts of treaty norms has been proposed and defended. For example, Aufricht has held that “[a] conflict between an earlier and a later treaty arises if both deal with the same subject matter in a different manner and if at least one State is party to both treaties”.\textsuperscript{30} This second and broader approach recognizes that not only obligations but also rights should be included in the definition of conflicts of treaties.\textsuperscript{31} This approach inspired Sir Waldock when he drafted article 30 of the Vienna Convention dealing with the application of successive treaties relating to the same subject matter. In the Yearbook of the International Law Commission of 1964, he indicated, with regard to conflicts of treaty norms, that the “idea conveyed by that term was that of a comparison between two treaties which revealed that their clauses, or some of them, could not be reconciled with one another.”\textsuperscript{32} More recently, some scholars have given special relevance to the object and purpose of treaties for defining conflicts of treaties. They have postulated that a

\begin{thebibliography}{9}
\bibitem{28} Pauwelyn, \textit{supra} n. 24, at 171.
\bibitem{29} Id., at 174 and 184-185.
\end{thebibliography}
conflict of treaties also exists when the “higher aim” that contracting states ascribe to one of the treaties is undermined due to the application of the other treaty. This definition seems to respond to the restrictive definition of Jenks that, as illustrated above, can result in the nullification of the object and purpose of one of the treaty norms. This article follows the broader definition of conflicts of treaties, as it is the definition that inspired article 30 of the Vienna Convention.

Given that there is an accepted presumption against conflicts of treaties that, in turn, stems from the premise that new treaty provisions are in conformity with pre-existing norms of international law, most of the time conflicts of treaties are avoided through a harmonious interpretation of the applicable provisions. Such a harmonizing interpretation intends to obtain as a result a compatible reading of the provisions in conflict if it can be understood from the treaties that this was the intention of the contracting states. Nevertheless, cases of conflicts of treaties may still arise if the interpreter cannot achieve a harmonious reading of the provisions.

At least three reasons explain why conflicts of treaties may arise: the lack of legal hierarchy between treaties, the lack of a central legislative body that can provide continuity and systematic congruency to the provisions of the different treaties and the fragmentation of public international law, most of the time due to the disconnected and independent existence of regimes dealing with specific subject matters (i.e. environmental law, trade law, intellectual property law) and occasionally due to regimes dealing with the same subject matter on different levels (e.g. universal v. regional). Conflicts of treaties also arise when a new treaty provision is enacted with the aim of changing an existing treaty provision. Treaty conflicts do not always result from the inadvertent work of treaty makers; sometimes, they are deliberately created to replace old treaty provisions with the text of new ones. To resolve a conflict of treaties, a third provision (different to the provisions that conflict) is required.

34. W. Czaplinski & G. Danilenko, Conflict of norms in International Law, 21 Netherlands Yearbook of International Law 3, p. 13 (1990):
   conflicts arise at the stage of application of the agreements when the later treaty in a particular situation violates the rights of any other party to the earlier treaty, or when the provision of the later treaty seriously infringes provisions of the earlier treaty which are indispensable for the effective implementation of the object or aim of the treaty. See also C.J. Borgen, Resolving Treaty Conflicts, 37 The Geo. Wash. Int’l L. Rev., p. 575 (2005):
   Thus, treaty conflicts can be conceived more broadly as when a state is party to two or more treaty regimes and either the mere existence of, or the actual performance under, one treaty will frustrate the purpose of another treaty.
35. Jenks, supra n. 25, at 427.
38. The contractual formation of treaties is used to explain why they are horizontal instruments without any hierarchy among them. This is in contrast to laws and other regulations that are issued by different bodies of a country, and the hierarchy of which in the legal system is normally established in the respective national constitutions. Maybe the only exception to this is the Charter of the United Nations, which is considered by many scholars to be the constitution of public international law.
Sections 2.2. to 2.4. analyse the types of provisions and principles of interpretation that can be used for this purpose.

2.2. Compatibility clauses

Article 30 of the Vienna Convention provides the rules that apply to successive treaties relating to the same subject matter. Article 30(2) establishes that a treaty can specify in its text whether it is subject to other treaties, in which case the other treaties will prevail. Moreover, a treaty can also claim that its provisions prevail over those of existing treaties. However, this type of clause is not included in article 30 of the Vienna Convention because it only reproduces the effects of the lex posterior principle, which is already established as the residual rule in article 30(3) and (4) of the Vienna Convention. Provisions that claim that a treaty is subject to or prevails over others are known as “compatibility clauses” or “conflict clauses”. They derived from the treaty makers’ task of analysing the relation of the new treaty with other treaties to ex ante resolve conflicts of treaties.42

Compatibility clauses may relate to pre-existing treaties or future treaties – the latter are also known as “looking forward” clauses or “obedience” clauses. According to the Report on Fragmentation on International Law of the International Law Commission, at least the following compatibility clauses can be found in treaties:43

(i) clauses in the subsequent treaty that provide that it shall not affect the earlier treaty;
(ii) clauses in the subsequent treaty that provide that, among the parties, it overrides earlier treaties;
(iii) clauses in the subsequent treaty that expressly abrogate the earlier treaty;
(iv) clauses in the subsequent treaties that expressly maintain earlier compatible treaties;
(v) clauses that promise that future agreements will abrogate earlier treaties;
(vi) clauses that prohibit the conclusion of incompatible subsequent treaties; and
(vii) clauses that expressly permit subsequent “compatible” treaties.

Whereas compatibility clauses of types (i) to (iv) relate to pre-existing treaties, compatibility clauses of types (v) to (vi) relate to future treaties.

Compatibility clauses are often drafted in vague or obscure terms, which often turn the provision into a provision that is not useful in determining the relationship between the new treaty and existing or future treaties. A compatibility clause drafted in vague terms requires interpretation44 to determine whether the provisions of the new treaty should prevail or not over those of the previous treaties. An example of a compatibility clause provided in obscure terms is that included in the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol), which establishes the following:

Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,

Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,

Understanding that the above recital is not intended to subordinate this Protocol to other international agreements.

The Cartagena Protocol establishes international procedures for the safe handling, transport and use of living modified organisms resulting from modern biotechnology that may have adverse effects on biological diversity and human health. As the provisions of the Cartagena Protocol could conflict with the provisions of the WTO agreements dealing with the trade of living modified organisms, treaty makers included in the text of the Cartagena Protocol the compatibility clause quoted above to ensure that its signatory states would not infringe their WTO obligations. Nevertheless, from the text of the compatibility clause, it is unclear what should be done in cases where conflicts emerge. The International Law Commission considers that this compatibility clause pushes the resolution of the conflicts to the future with a view to mutual accommodation, which implies that the compatibility clause fails to provide an ex ante solution to resolve potential conflicts between the Cartagena Protocol and the WTO agreements.

Nevertheless, if treaty makers devote themselves to the study of the relationship of the new treaty with existing and future treaties, they can draft compatibility clauses in more precise and effective terms. Particularly relevant for this article is the compatibility clause of type (iv), which, as recognized by the International Law Commission, is a case of the modification of treaties. Among compatibility clauses of type (iv) it is possible to find examples established in multilateral treaties with the purpose of modifying bilateral treaties. The following are two examples of those compatibility clauses:

- “[t]he offences set forth in Article 11 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention”; and
- “[t]he European Union, pursuant to the Treaty on European Union, and the United States of America shall ensure that the provisions of this Agreement are applied in relation to bilateral extradition treaties between the Member States and the United States of America, in force at the time of the entry into force of this Agreement, under the following terms: (a) Article 4 shall be applied in place of bilateral treaty provisions that authorise extradition exclusively with respect to a list of specified criminal offences; (b) Article 5 shall be applied in place of bilateral treaty provisions governing transmission, certification, authentication or legalisation of an extradition request and supporting

47. Safrin, supra n. 37, at 607.
48. International Law Commission, supra n. 43, at 140.
49. Id., at 136.
documents transmitted by the requesting State; (c) Article 6 shall be applied in the absence of bilateral treaty provisions authorising direct transmission of provisional arrest requests between the United States Department of Justice and the Ministry of Justice of the Member State concerned; (d) Article 7 shall be applied in addition to bilateral treaty provisions governing transmission of extradition requests [...]).

The two quoted compatibility clauses entail, as a common characteristic, a reference to specific provisions of a new multilateral treaty that should be considered to replace, supersede or be added to the provisions of earlier bilateral treaties dealing with the same subject matter and that will continue to be in force after the conclusion of the multilateral treaty. Although the quoted compatibility clauses reproduce the effects of the lex posterior principle, including this type of clause in the text of treaties has an advantage: they allow interpreters to know, in situations that otherwise could be confusing, which provisions of the earlier treaties are to be considered as modified. Therefore, compatibility clauses drafted in precise terms can avoid diverse interpretations about which provision of a new treaty should prevail over the provisions of the previous treaty and which of the provisions of the previous treaty were superseded or modified. Precise compatibility clauses can ex ante resolve conflicts of treaties.

2.3. Lex posterior principle

If a treaty neither terminates an earlier treaty in its entirety nor defines its relation with other treaties through compatibility clauses, the lex posterior principle established in article 30(3) and (4) of the Vienna Convention applies. According to the residual rule of the lex posterior principle, if the provisions of both treaties cannot be implemented at the same time, the effects and consequences under the later treaty must be implemented, giving them preference over the effects and consequences of the earlier treaty. The lex posterior principle is the corollary of the contractual freedom of the states which are free to change their intention over time. As a consequence, the latest expression of the contracting states’ intention has to prevail over the earlier, which results in the suspension of the provisions of the earlier treaty that conflict with the later treaty.

Although many experts in public international law have criticized the residual rule of article 30 of the Vienna Convention and its limitations have been acknowledged by the United Nations, they have also recognized that the lex posterior principle is relatively unambiguous and helpful in resolving conflicts of treaties in some cases, notably when the conflicting

51. Agreement on Extradition between the European Union and the United States of America, art. 3 (25 June 2003). Similar compatibility clauses are provided in the Agreement on Mutual Legal Assistance between the European Union and the United States of America, art. 3 (25 June 2003).

52. Aufricht, supra n. 30, at 661.

53. Article 30 Vienna Convention applies only if the termination or suspension of the earlier treaty as a whole does not follow, explicitly or implicitly, from the later treaty. See UN, Yearbook of the International Law Commission 1966, vol. II, p. 253 (UN 1967). See also Borgen, supra n. 34, at 602-603.


58. Ghouri, supra n. 33, at 70; Pauwelyn, supra n. 24, at 380; International Law Commission, supra n. 43, at 138.
treaties have been concluded between identical contracting states and the later treaty has not terminated or suspended the earlier treaty in its entirety, which means that the earlier treaty survives and both treaties are equally valid. The reason for this is that contracting states act in a similar way as a legislator that intends to amend an earlier piece of legislation with a later one.\(^{59}\) Article 30(3) of the Vienna Convention\(^{60}\) governs these cases, which can be represented by situations where treaties have been concluded between states AB+AB or ABC+ABC. As a consequence of the *lex posterior* principle, the provisions of the earlier treaty will still apply as long as they are not incompatible with those of the later treaty. Conversely, if a conflict of treaty norms arises, only the provisions of the later treaty will apply. The fact that the compatible provisions of the earlier treaty survive is the result of the *pacta sunt servanda* principle, according to which every treaty in force is binding upon the parties to it and must be performed by them in good faith.\(^{61}\)

Nevertheless, the *lex posterior* principle does not completely work to solve cases of conflicting treaties concluded among different contracting states, which can be represented by situations where treaties have been agreed between states AB+AC, ABC+AC or ABC+ACD. The reason is that the legislative intent that explains the effectiveness of the *lex posterior* principle for resolving conflicts of treaties concluded between the same contracting states cannot be translated to cases of treaties among different contracting states, as the intention of all the states that ratified the earlier treaty would not be expressed in the later treaty. This, on the other hand, is the result of the principle of *pacta tertiis nec nocent nec prosunt*, which translates as “the impossibility to create obligations and rights for third states without their consent”.\(^{62}\)

The types of cases referred to in the previous paragraph are governed by article 30(4) of the Vienna Convention,\(^{63}\) which divides the relations among the contracting states of the conflicting treaties and provides that states must apply one or another treaty based on whether they are parties to the earlier treaty, the later treaty or both of them. Article 30(4) of the Vienna Convention sometimes leads to situations in which a contracting state is not capable of fulfilling all of its rights and obligations under the conflicting treaties.

In the example of conflicting treaties ABC+ACD, assuming that the treaty ABC is the earlier and treaty ACD is the later, contracting state B would need to comply only with the earlier treaty whereas contracting state D would need to comply only with the later treaty. Moreover, between contracting states A and C, in the case of a conflict between the provisions of the two treaties, these states would need to comply only with the later treaty. Nevertheless, they will still need to comply with both treaties where the treaties do not conflict. If state A or C is confronted with a situation in which it simultaneously has obligations with states B (under

\(^{59}\) Pauwelyn, *supra* n. 24, at 368.

\(^{60}\) Art. 30(3) Vienna Convention:
When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

\(^{61}\) Art. 26 Vienna Convention.

\(^{62}\) Art. 34 Vienna Convention.

\(^{63}\) Art. 30(4) Vienna Convention:
When the parties to the later treaty do not include all the parties to the earlier one: (a) As between States parties to both treaties the same rule applies as in paragraph 3; (b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
the treaty ABC) and D (under the treaty ACD) that conflict, state A or C will be obliged to comply with both treaties. As complying with both treaties in such a situation often would not be possible for state A or C, experts posit that article 30(4) of the Vienna Convention does not effectively resolve this type of conflict of treaties. Frequently, contracting states of the conflicting treaties need to become involved in diplomatic negotiations to resolve the incompatibility of their treaty obligations and to try to reach a beneficial solution for all parties. Where a solution cannot be found among all parties to the conflict, the contracting state of both conflicting treaties – in the example, state A or C – would need to decide which of the two treaties it will comply with. If its decision leads it to breach one of the treaties, the affected state – whether state B or D – can invoke the state responsibility of state A or C.

Additionally, some practical difficulties relate to the application of the *lex posterior* principle. One of them is determining when treaties relate to the same subject matter. Some scholars opine that the expression “same subject-matter” should be interpreted in a strict manner, while others believe it is enough that two provisions of treaties overlap in their *ratione materiae*. Another difficulty relates to determining which treaty is the earlier one. Scholars disagree in respect to the date that should be taken as the time point for this purpose. The debate focuses on whether the relevant date should be the date of adoption, the date of ratification or the date on which the treaty enters into force. This problem gets even more complicated if it is taken into account that in multilateral treaties, contracting states may accede after the treaty has been adopted or entered into force, which means that there could be different relevant dates for different states. A final difficulty relates to the fact that, as evidenced in the previous paragraphs, when conflicting treaties have been concluded among different contracting states, the same matter might be resolved differently depending on the contracting states involved in the conflict. These difficulties have led to the conclusion that the *lex posterior* principle is not an absolute legal principle. Thus, some experts support the application of the *lex specialis* principle as a tool to resolve conflicts of treaties.

### 2.4. Lex specialis principle

Although the rule *lex specialis derogat legi generali* is not established in article 30 of the Vienna Convention, when the *lex posterior* principle amounts to unacceptable results, some scholars accept the application of the *lex specialis* principle to resolve conflicts of treaties.

64. See the authors cited in supra n. 56. Additionally, see Odendahl, supra n. 39, at 516.
65. International Law Commission, supra n. 43, at 61.
66. Art. 30(5) Vienna Convention:
Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.
67. Art. 30(1) Vienna Convention:
Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
68. Sinclair, supra n. 56, at 98. According to the view defended by Sinclair the expression “relating to the same subject matter” would “not cover cases where a general treaty impinges indirectly on the content of a particular provision of an earlier treaty.”
69. Vierdag, supra n. 56, at 100.
70. Pauwelyn, supra n. 24, at 380.
Since it results in the non-application of article 30 of the Vienna Convention, whether the lex specialis principle may come into play to resolve conflicts of treaties must be determined on a case-by-case basis.

As a result of the application of the lex specialis principle, the more special rule prevails over the more general rule, despite the fact that the more special rule is the earlier of the rules. The rationale behind the lex specialis principle as a tool to resolve a conflict of treaties lies in the belief that “the special norm reflects most closely, precisely and/or strongly the consent or expression of will of the states in question”.72 Thus, as the special rule is the most specific one and approaches most closely the subject at hand,73 it should be given preference. As with the lex posterior principle, the application of the lex specialis principle is a consequence of the contractual freedom of the states that may agree to more specific rules in order to govern a common matter. Because both principles focus on the intention of the contracting states, the lex specialis principle may be applied together with the lex posterior principle, which means that the later treaty prevails in two cases: (i) if the scope of the later treaty is of the same degree of generality as the earlier one and (ii) if the later treaty is lex specialis and cancels out the general rule.74

In practice, the lex specialis principle is rarely applied alone to resolve a conflict of treaties. The fragmentation that characterizes international law makes it hard for interpreters to determine which treaty is the general one and which treaty is the special one when these treaties govern different regimes. Therefore, experts acknowledge that the lex specialis principle is more appropriate in cases of conflicting provisions within the same regime or even within the same treaty.75 This argument actually explains why tribunals have frequently applied the lex specialis principle to resolve conflicts of treaties within the same regime, as for example within the WTO context,76,77 but tribunals have applied this principle alone – i.e. without also applying the lex posterior principle – rather limitedly when the conflicting rules belonged to different regimes.

Even in a scenario of conflicting treaty provisions within the same regime, difficulties in connection with the application of the lex specialis principle to resolve a conflict of treaties can be found. These difficulties include the impossibility of determining ex ante which norm should be considered to be the special one, because a rule is not general or special in itself but always in relation to some other rule.78 Furthermore, the lex specialis principle does not provide guidance for determining which rule is the special one and, as such, should prevail over the more general rule.79 Therefore, a case-by-case analysis is required. As a consequence

72. Pauwelyn, supra n. 24, at 387.
73. International Law Commission, supra n. 43, at 36.
74. Aufricht, supra n. 30, at 698.
75. Lindroos, supra n. 71, at 41.
76. Some cases in which the lex specialis principle has been applied by the WTO tribunals with the purpose of resolving a conflict of treaties are: Panel Report, Brazil – Export Financing Programme for Aircraft WT/DS46/R (14 Apr.1999), Panel Report, Turkey – Restrictions on Imports of Textile and Clothing Products WT/DS34/R (31 May 1999), and Panel Report, Indonesia – Certain Measures Affecting the Automobile Industry WT/DS54/R, WT/DS55/R, WT/DS59/R and WT/DS64/R (2 July 1998). However, the application of the lex specialis principle to resolve a conflict of treaties in the WTO context has been criticized by many scholars, including Lindroos and Pauwelyn.
77. For detailed analysis about these cases, see Lindroos, supra n. 71, at 56-64.
78. International Law Commission, supra n. 43, at 61.
of this case-by-case analysis, interpreters may introduce some level of subjectivity into their decision on which provision should be considered the special one. The fact that interpreters need to resort to their own values in order to reach such a decision may be the reason why some scholars are opposed to the *lex specialis* principle as a valid tool for resolving conflicts of treaties.80

3. Relationship between the Multilateral Tax Instrument and Existing Tax Treaties

3.1. The multilateral tax instrument

The aim of the multilateral instrument is to incorporate the treaty changes proposed in the course of the BEPS Project into the more than 3,000 tax treaties in force, without renegotiating each of those tax treaties. To accomplish this objective, the multilateral instrument will either modify the provisions of existing tax treaties that differ from the BEPS Project’s output or supplement the existing tax treaties when a provision of the multilateral instrument has not been previously incorporated into their text. The provisions of the multilateral instrument will apply if two states that have previously entered into a tax treaty also decide to ratify the multilateral instrument.81 If one of the contracting states of an existing tax treaty decides to become part of the multilateral instrument but the other does not, their tax relations will continue to be exclusively ruled by their existing tax treaty. Therefore, the multilateral instrument will be the result of multilateral negotiations but will have effects only on a bilateral basis in respect of the states that have already concluded a tax treaty. Similar approaches with the purpose of amending tax treaties on a multilateral basis while preserving their bilateral nature were previously proposed by Avery Jones and Baker82 in 2006 and by Innamorato83 in 2008. However, until now, these proposals were not put into force. The multilateral instrument is the first step to moving in this direction.

As the multilateral instrument and the existing tax treaties will coexist, according to the analysis of section 2.1., their norms could accumulate or conflict. A norm of the multilateral instrument may accumulate with the norms of the existing tax treaties in two cases: (i) when it confirms the norms already contained in the existing tax treaties and (ii) when it adds or complements the norms of the existing tax treaties. Conversely, a norm of the multilateral instrument may conflict with the norms of the existing tax treaties when the solutions offered by them amount to different results.

A conflict of treaties could arise, for example, when the changes proposed in the BEPS Action 7 Final Report to modify the definition of agency permanent establishment are implemented through the multilateral instrument. The proposed modification of article 5(5) of the OECD Model clarifies that an agency permanent establishment will exist if the agent habitually

81. See OECD, *supra* n. 13, at 20.
82. J. Avery Jones & P. Baker, *The Multiple Amendments of Bilateral Double Taxation Conventions*, 60 Bull. Intl. Taxn. 1, p. 21 (2006), Journals IBFD. Avery Jones and Baker proposed the adoption of “multilateral framework agreements” for amending existing tax treaties. In their view, the OECD would prepare the multilateral agreements which would be the framework within which each pair of states would agree to the amendments. The agreements would apply to a tax treaty only after each pair of states has declared that they have accepted the amendments.
83. C. Innamorato, *Expeditious Amendments to Double Tax Treaties based on the OECD Model*, 36 Intertax 3, p. 120 (2008). Her proposal was the implementation of a “single issue multilateral protocol” through which the member states of the OECD could amend their network of tax treaties. The protocol would apply after states have completed the ratification process without requiring of any additional declarations.
concludes contracts that are in the name of the principal or that are to be performed by the principal, or if the agent habitually plays the main role in leading to the conclusion of contracts which are routinely concluded without material modification by the principal. The provisions currently in place in most of the existing tax treaties, in contrast, recognize the existence of an agency permanent establishment only when the agent habitually exercises the authority to conclude contracts in the name of the principal. The proposed modification to article 5(5) of the OECD Model expands the cases in which an agent can be considered to be a permanent establishment of the principal, which is the reason why it would be in conflict with the provisions contained in existing tax treaties.

Another example of a conflict of treaties could arise if the multilateral instrument implements the principal purpose test (PPT) rule proposed in the BEPS Action 6 Final Report, which aims at denying treaty benefits when arrangements or transactions have as one of their principal purposes obtaining treaty benefits. Many treaties contain general anti-abuse rules referring to “the main purpose”, “mainly for the purpose”, “the principal purpose” or “primarily for the purposes of avoiding tax”. All of them seem to be more restrictive tests for the tax administrations than the PPT rule. Therefore, conflicts could arise between the multilateral instrument and the existing tax treaties that currently use a more restrictive language in their general anti-abuse rules. The new PPT rule would allow tax administrations to deny treaty benefits derived from an arrangement or transaction if they can prove that one of the principal purposes of such an arrangement was to obtain a more favourable tax treatment, regardless of whether other valid reasons for entering into the arrangement exist, such as obtaining the protection provided in a bilateral investment treaty. In contrast, when more restrictive language is used in treaty general anti-abuse rules, tax administrations would not be allowed to deny treaty benefits if obtaining bilateral investment protection happens to be the main reason why an arrangement was established, since, in that case, saving taxes would not be the main or principal purpose.

Nonetheless, the PPT rule and existing treaty general anti-abuse rules could also accumulate. This would be the case with general anti-abuse rules that, although using a “one of the principal purposes” test or a “one of the main purposes” test with regard to the arrangement or transaction, have a limited scope of application. Normally treaty general anti-abuse rules with a limited scope apply to arrangements or transactions created with the purpose of obtaining tax treaty benefits for the payments of dividends, interest, royalties and other income, whereas the PPT rule would have a broader scope and apply to all types of arrangements created to obtain a more favourable tax treatment.

From a legal standpoint, conflicts between the provisions of the multilateral instrument and analogous provisions in existing tax treaties could be resolved through the inclusion of compatibility clauses, through the application of the lex posterior principle as the residual rule established in article 30 of the Vienna Convention or through the lex specialis principle as a recognized general principle of public international law. The author will argue in sections 3.3. to 3.5. that compatibility clauses and the lex posterior principle can serve as tools to resolve conflicts between the multilateral instrument and existing tax treaties and that, therefore, they can serve as tools to update existing tax treaties. The convenience of using one or another tool depends on the object and purpose that the multilateral instrument will have.

84. OECD, supra n. 5, at 17.
Moreover, the author will posit that the *lex specialis* principle will probably not be an effective tool for resolving conflicts between the multilateral instrument and existing tax treaties.

Since 96 states are participating in the negotiations of the multilateral instrument, it represents a unique opportunity to consistently implement international tax rules across the treaty network. The consistent implementation of the tax treaty rules developed over the course of the BEPS Project, particularly those that have been agreed as minimum standards, is desirable in order to eliminate disparities that allow multinational enterprises to succeed in BEPS practices. The consistent implementation of the BEPS Project output through the multilateral instrument can diminish the competitive advantages and disadvantages derived from the use of certain tax treaties and, consequently, can diminish treaty-shopping opportunities as well as unintended cases of double non-taxation. However, it is still not clear whether the consistent implementation of those rules will be part of the object and purpose of the multilateral instrument. The vague language included in the BEPS Action 15 Final Report may lead to two different results: the negotiating states may agree that the object and purpose of the multilateral instrument is the consistent implementation of the tax treaty rules developed in the course of the BEPS Project, as suggested above, or they may agree that the object and purpose of the multilateral instrument is limited to the swift implementation of certain treaty modifications, providing for a high level of flexibility in the implementation of the BEPS Project output. If the negotiating states agree that the consistent implementation of the BEPS Project output across the treaty network is part of the object and purpose of the multilateral instrument, two possible approaches could be adopted: (i) the BEPS Project output could be implemented with the same wording across the treaty network, or (ii) states could retain some of the provisions contained in their existing tax treaties if they already achieve the same purpose as the BEPS Project output, although worded differently.

### 3.2. Flexibility in the multilateral tax instrument

The BEPS Action 15 Final Report acknowledges that the multilateral instrument must offer flexibility in order to allow countries with different tax policies and economic interests to join. If the multilateral instrument does not offer some degree of flexibility, the level of participation may be affected. The disadvantage of introducing flexibility in the multilateral instrument is that it may negatively impact the consistent implementation of the international tax rules that seems necessary to counter BEPS practices. Flexibility can be achieved in the multilateral instrument at least through the following four means:

(i) states can formulate reservations to the provisions of the multilateral instrument;
(ii) states may choose from different alternative provisions, as it is foreseeable that it will happen with the proposed rules against treaty abuse (the BEPS Action 6 Final Report suggests that states may choose between adopting a PPT rule, a limitation on benefits (LOB) clause, or implement both of them in their tax treaties);
(iii) states can make additional commitments through additional protocols or unilateral declarations; and

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85. M. Helminen, *The Nordic Multilateral Tax Treaty as a Model for a Multilateral EU Tax Treaty* p. 6 (IBFD 2014), Online Books IBFD.
86. OECD, *supra* n. 13, at 19 and 22.
87. OECD, *supra* n. 4, at 18-19.
(iv) compatibility clauses may be used to preserve some of the provisions contained in existing tax treaties if their effects are equal to or go beyond the new measures proposed in the course of the BEPS Project (this will be explained in more detail in section 3.3.).

Even though reservations are not directly related to conflicts of treaties and they are not the focus of this article, some attention must be drawn to them. Reservations may be helpful in order to increase the breadth and depth of treaty participation, as they can be used to tailor treaty provisions to the needs of contracting states. Therefore, reservations can provide flexibility in multilateral treaties. Nevertheless, as reservations exclude or modify the legal effect of treaty provisions, they impair treaty uniformity and consistency.

Tax scholars have defended that the most appropriate solution against BEPS practices lies in the introduction of multilaterally coordinated measures. Notably, Pistone has indicated that “[i]nsofar BEPS succeeds to give global problems of international taxation a global (or globally coordinated) answer, BEPS can become an unprecedented form of long-sighted reform that aligns the exercise of national taxing sovereignties in the desirable direction.” Furthermore, Brauner has pointed out that “[e]stablishing a forum for international tax policy coordination is the most important achievement the OECD can accomplish here [in reference to BEPS Action 15]”. Although in the context of the multilateral instrument reservations can offer flexibility to increase the breadth and depth of treaty participation, they can also limit the scope and legal effect of treaty provisions. Thus, reservations can jeopardize the implementation of consistent provisions across the treaty network. The failure by states to ratify some of the provisions of the multilateral instrument may even result in new inconsistencies between tax treaties and, as such, provide opportunities to multinational enterprises to design and implement aggressive tax planning schemes.

Therefore, it seems desirable that negotiating states agree that the object and purpose of the multilateral instrument will not only be the swift implementation of certain tax treaty rules developed in the course of the BEPS Project across the treaty network, but also its consistent implementation. If states agree that the consistent implementation of the BEPS treaty output will be part of the object and purpose of the multilateral instrument, based on article 19(b) of the Vienna Convention the text of the instrument should provide for the cases in which reservations will be allowed in order to avoid undermining the instrument’s effectiveness. Ideally, reservations would be allowed only in cases in which it can be a priori determined

88. Art. 2(1)(d) Vienna Convention:
Reservation means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.


90. 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. 5 (2014), Journals IBFD.

91. Y. Brauner, BEPS: An Interim Evaluation, 6 World Tax J. 1, sec. 3. (2014), Journals IBFD.


93. Art. 19(b) Vienna Convention:
A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: … (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made... .

This is actually the case of the Mutual Assistance Convention, see Convention on Mutual Assistance in Tax Matters: Amended by the 2010 Protocol, art. 30 (1 June 2011).
that if states do not ratify the provisions this will not create new opportunities for BEPS practices. Reservations to the provisions that reflect minimum standards should thus not be allowed. In this sense, reservations to both the PPT rule and the LOB clause at the same time should not be allowed in the multilateral instrument. However, contracting states could still formulate reservations to specific anti-abuse rules (i.e. the new rules dealing with dividends transfer transactions and transactions on capital gains derived from the alienation of shares) – since arrangements and transactions created for BEPS purposes could still be disregarded through the application of the PTT or the LOB clause. To counter BEPS, treaty makers should opt for limiting the number and types of reservations to the provisions of the multilateral instrument that states may formulate.

States sometimes choose different tax policies for different counterparties. Reservations, especially treaty-by-treaty reservations, may be useful in the context of the multilateral instrument to implement such different tax policies. However, it seems that only the consistent implementation of the BEPS tax treaty output will avoid further distortions to the international tax playing field and, thus, avoid the creation of new disparities, which could be used for aggressive tax planning. To further enhance the consistent implementation of the tax treaty rules developed in the course of the BEPS Project, reservations should affect the entire treaty network of contracting states instead of being formulated on a treaty-by-treaty basis. If a consistent implementation of the BEPS tax treaty output is part of the multilateral instrument’s object and purpose, the multilateral instrument needs to provide equilibrium between the breadth of participation, depth of treaty participation and treaty integrity. Treaty-by-treaty reservations do not seem to be the right solution. Conversely, providing for the cases in which reservations will be allowed in the text of the multilateral instrument and requiring that those reservations affect the entire treaty network of a contracting state would ensure a minimum level of coordination and consistent implementation of the new international tax rules.

Additional reasons to avoid treaty-by-treaty reservations are the need to accomplish the multilateral instrument’s object and purpose of swiftly updating the tax treaty network. If treaty-by-treaty reservations are allowed in this instrument, its negotiations will resemble those of bilateral treaties or amending protocols to bilateral treaties rather than the negotiations of multilateral treaties. Each pair of states would need to agree to each of the provisions that would be added to their underlying tax treaty and, of course, agree to the reservations that they would formulate in order to achieve such changes, all of which might require as much time as any bilateral renegotiation of a tax treaty. This approach would probably phase out all advantages that the multilateral instrument may bring, as neither an expeditious nor a consistent implementation of the BEPS treaty output would probably be attained. It is important to highlight that swift implementation was precisely one of the reasons why a multilateral instrument was preferred in the BEPS Action 15 Final Report over concluding amending protocols to the existing tax treaties.

Although pertaining to domestic procedures, it is relevant to mention that treaty-by-treaty reservations may add complexity to the ratification process of the multilateral instrument.

94. OECD, supra n. 4, at 70-71.
95. OECD, supra n. 4, at 71-72.
and may delay its entry into force. If treaty-by-treaty reservations are allowed, it is highly probable that parliaments will wish to review and approve each of the reservations to the multilateral instrument related to their country because this would be the only way to know for sure what the final text of the underlying tax treaties would be as modified by the multilateral instrument. Complexity increases if third states would be allowed to join the multilateral instrument after it had entered into force. If this is the case, probably parliaments will need to repeat the parliamentary ratification process each time a state with whom it has an underlying tax treaty signs the multilateral instrument, so that they can review and approve the respective reservations. The complexities described above can be avoided through the implementation of reservations in the multilateral instrument that would affect the entire treaty network of contracting states, as parliaments will know in advance from the text of the instrument the consequences of the possible reservations of their treaty partners.

3.3. Compatibility clauses

In many cases, contracting states opt to include clauses stipulating the relationship between new treaties and existing treaties to ex ante resolve conflicts of treaties. As discussed in section 2.2., such clauses can claim that the new treaty is subject to other treaties or that the new treaty prevails over existing treaties. However, as determining whether treaties conflict depends on the analysis of each applicable provision and not on the analysis of treaties in their entirety, compatibility clauses can also refer to specific provisions, as is, for example, the case in article 11 of the International Convention for the Suppression of the Financing of Terrorism (see section 2.2.). This is particularly relevant in the case of modifications of bilateral treaties through multilateral treaties.

Based on the complexity and breadth of the tax treaty modifications proposed in the course of the BEPS Project as well as on the number of existing tax treaties that can be modified, each provision of the multilateral instrument should ideally include a compatibility clause that explicitly indicates how that provision relates to existing tax treaties. Alternatively, a unique compatibility clause could reflect how each provision of the multilateral instrument would interact with existing tax treaties. For this purpose, the compatibility clause should contain the details described below, as it was actually done in article 3 of the Agreement on Extradition between the European Union and the United States of America (see section 2.2.). Otherwise, it could be unclear for interested stakeholders (e.g. taxpayers, tax administrations and tax courts) which provisions of the multilateral instrument should prevail over those of the existing tax treaties and which provisions of existing tax treaties were modified. If the compatibility clause included in the multilateral instrument only indicates that it modifies or prevails over existing tax treaties – without referring to the specific provisions that were modified – the outcome of the compatibility clause would be very limited. A compatibility clause drafted in such general and vague terms would only reproduce in the text of the multilateral instrument the effects of the lex posterior principle, i.e. that the multilateral instrument, as the later treaty, would prevail in the case of conflict with the provisions of existing tax treaties. This would not help interpreters to know which exact provisions of existing tax treaties are to be considered as modified.

The language of the compatibility clauses should describe the effects that each of the provisions of the multilateral instrument will have over the provisions of existing tax treaties, that is, whether the provision of the multilateral instrument will replace the provisions of existing tax treaties, whether the provision of the multilateral instrument should be added to treaties
The Multilateral Tax Instrument and Its Relationship with Tax Treaties

that do not contain an analogous provision or whether the provision of the multilateral instrument will accumulate with the provisions of existing tax treaties. The first-mentioned potential effect that a provision of the multilateral instrument may have over the provisions of existing tax treaties (replacement) can be illustrated with the modification of the definition of an agency permanent establishment, as most treaties follow the definitions provided in the OECD and the UN Models. The second-mentioned potential effect (addition) can be illustrated with the inclusion of the PPT rule and/or the LOB clause in existing tax treaties that do not contain anti-abuse rules. Finally, the last-mentioned potential effect (accumulation) can be illustrated with the inclusion of the PPT rule in existing tax treaties that contain general anti-abuse rules with a “one of their principal purposes” test, but where such anti-abuse rules are limited to dividends, interest, royalties and/or other income.

Moreover, as tax treaties use different terminology and have different enumeration styles, different wording and even different scopes, the language of the compatibility clauses should describe in general terms the type of provisions of existing tax treaties that will be modified through the multilateral instrument. The aforementioned differences do not allow that, for example, the compatibility clause of the multilateral instrument’s provision that will modify the definition of an agency permanent establishment refers to article 5(5) or article 5 of existing tax treaties. Some of those treaties contain the definition of agency permanent establishment in a different paragraph or even the definition of “permanent establishment” in a different article. Neither do the aforementioned differences allow that the compatibility clause refers to “agency permanent establishment”, because some of those treaties use a different term to refer to a “permanent establishment”, for example “representation”. Phrasing the exact language of each compatibility clause is a difficult task. The compatibility clauses need to balance the detail of the description of the provisions that will be modified with the level of certainty that needs to be offered to stakeholders, so that the compatibility clauses can catch provisions with different terminology, wording and scopes while providing enough clarity. Therein lies the biggest difficulty in drafting the compatibility clauses of the multilateral instrument. An approach that could have been useful but was rejected in the BEPS Action 15 Final Report is the use of numerical cross-references to the articles of the OECD Model. Nonetheless, this is understandable, taking into account that the multilateral instrument intends not only to modify existing tax treaties that follow the current structure of the OECD Model, but also existing tax treaties that follow previous versions of

97. The term “agency permanent establishment” is defined in art. 5(6) Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Nigeria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains, art. 5 (9 June 1987), Treaties IBFD.

98. The term “permanent establishment” is defined in art. 2 Convention between Ireland and France for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, art. 2 (21 Mar. 1968), Treaties IBFD. The term permanent establishment is defined in art. 3 Agreement between the Federal Republic of Germany and the Republic of South Africa for the Avoidance of Double Taxation with respect to Taxes on Income, art. 3 (25 Jan. 1973), Treaties IBFD.

99. Convention between the United States of America and the Union of Soviet Socialist Republics for the Avoiding of Double Taxation with respect to Taxes on Income, art. IV (20 June 1973), Treaties IBFD. The United States still applies this treaty in its relations with Armenia, Azerbaijan, Belarus, Georgia, Moldova, Tajikistan, Turkmenistan and Uzbekistan. Although Armenia, Azerbaijan, Georgia, Moldova, Tajikistan, Turkmenistan and Uzbekistan usually do not apply the treaty, Belarus does apply the treaty in its relations with the United States.

100. OECD, supra n. 13, at 22.
Nathalie Bravo

that Model, existing tax treaties that follow the UN Model and existing tax treaties that do not follow any of these models.

Whether the multilateral instrument will effectively modify existing tax treaties that contain particular wording will depend on the content of the articles of the instrument. The task can be especially complicated in relation to existing tax treaties that do not follow the OECD or the UN Models. For example, if an existing tax treaty does not provide for a definition of “permanent establishment” in the form that is established in the OECD Model,101 the modification of the provisions dealing with agency permanent establishment, independent agent and activity exceptions may achieve no result. Thus, the provision of the multilateral instrument may need to modify the whole permanent establishment definition in relation to this type of treaty. To a lesser extent, some complications may also arise in the case of existing tax treaties that follow the UN Model. The activity exceptions provided in the UN Model are more generous for developing countries than those provided in the OECD Model.102 If the activity exceptions are modified in the form suggested in the BEPS Action 7 Final Report, developing countries may not preserve some of the exceptions that come from the UN Model. The design of the multilateral instrument and the content of each of its articles are key to overcoming similar such obstacles.

Until now, the author has argued that compatibility clauses and the lex posterior principle serve equally as tools to resolve conflicts of treaties between the multilateral instrument and existing tax treaties, and that the main advantage of using compatibility clauses in comparison to the lex posterior principle is that they provide stakeholders with a greater level of certainty. This conclusion is based on the idea that negotiating states will agree to a consistent implementation of the output of the BEPS Project across the treaty network as part of the object and purpose of the multilateral instrument and that provisions in existing tax treaties that deal with the same subject matter as the multilateral instrument should be updated with the same wording across the treaty network. However, if the negotiating states disagree on such an implementation of the output of the BEPS Project across the treaty network, com-

101. That is for example the case with the tax treaty between Greece and United Kingdom. As this treaty was signed in 1953, that is before the first OECD Model, its definition of “permanent establishment” included in art. II(k) is different to that of the OECD Model. The definition reads as follows:

The term 'permanent establishment', when used with respect to an enterprise of one of the territories, means a branch, management, factory or other fixed place of business, and a farm, mine, quarry or other place of natural resources subject to exploitation, but does not include an agency unless the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of such enterprise or has a stock of merchandise from which he regularly fills orders on its behalf. In this connection:

(i) An enterprise of one of the territories shall not be deemed to have a permanent establishment in the other territory merely because it carries on business dealings in that other territory through a bona fide broker or general commission agent acting in the ordinary course of his business as such; (ii) The fact that an enterprise of one of the territories maintains in the other territory a fixed place of business exclusively for the purchase of goods or merchandise shall not of itself constitute that fixed place of business a permanent establishment of the enterprise; (iii) The fact that a company which is a resident of one of the territories has a subsidiary company which is a resident of the other territory or which carries on a trade or business in that other territory (whether through a permanent establishment or otherwise) shall not of itself constitute that subsidiary company a permanent establishment of its parent company.

See Convention between the Government of Great Britain and Northern Ireland and the Government of the Kingdom of Greece for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income, art. II (25 June 1953), Treaties IBFD.

102. The activity exceptions of the UN Model exclude the delivery of goods or merchandise belonging to the enterprise, while the OECD Model refers to the storage, display or delivery of goods or merchandise belonging to the enterprise. See UN Model Double Taxation Convention between developed and developing countries, art. 5 (2011), Models IBFD.
Compatibility clauses will acquire higher relevance. Flexibility can be achieved by allowing states to formulate reservations, to choose between alternative provisions or to adopt additional commitments through additional protocols or unilateral declarations; however, compatibility clauses can be used to achieve flexibility too.

Indeed, compatibility clauses may be used to preserve some provisions of existing tax treaties by expressly indicating that those of the multilateral instrument will not modify them. The compatibility clauses in these cases will stipulate that the norms of the multilateral instrument are subject to the provisions of existing tax treaties, as expressly established in article 30(2) of the Vienna Convention. The possibility to opt for this approach and still to achieve the consistent implementation of the BEPS Project output can be foreseen in a couple of cases in which negotiating states may prefer to retain the provision of their existing tax treaties, making it necessary to add flexibility to the multilateral instrument. More specifically, this approach could be adopted if the provisions in existing tax treaties already fulfil the minimum standards set out in the BEPS Action 6 Final Report and the BEPS Action 14 Final Report, if the provisions in existing tax treaties go beyond the effects of the new tax treaty provisions resulting from the BEPS Project and if provisions coming from the UN Model are to be preserved for the benefit of developing countries. In this scenario the implementation of the new tax rules with the same wording across the treaty network would not be achieved. Nonetheless, this would be a logical result, as the negotiating states would have agreed that the multilateral instrument serves only to achieve the minimum level of coordination that is needed to counter BEPS practices.

Imagine that negotiating states agree to preserve the LOB clauses contained in existing tax treaties that already fulfil the minimum standard set out in the BEPS Action 6 Final Report. The compatibility clause could be along the lines of:

the following LOB clause should be applied to existing tax treaties that do not contain an analogous provision or to existing tax treaties that, while containing an analogous provision, do not reflect the minimum standard…

Two questions related to this compatibility clause can be raised:

- how can it be determined that an existing LOB clause fulfils the minimum standard?;
- who can determine that an existing LOB clause fulfils the minimum standard?

An option is that the compatibility clause itself provides for the requirements an LOB clause needs to meet in order to fulfil the minimum standard. In most of the cases, by interpreting the compatibility clause of the multilateral instrument and the LOB clause of the underlying tax treaty, it would be possible to determine whether the latter should be considered to be modified by the multilateral instrument or not. However, a disagreement may still arise. If the disagreement concerns a taxpayer, he could resort to domestic courts or initiate a mutual agreement procedure before the competitive authorities. If the disagreement is between the contracting states themselves, resolving it could be more difficult. The OECD launched

103. Mike Williams, chair of the ad hoc Group that negotiates the multilateral instrument, recently indicated that the multilateral instrument needs to address potential situations in which two countries have already gone beyond the minimum standards in their tax treaties. For more detail, see S. Soong, OECD Unlikely to Release Draft Multilateral Instrument, 82 Tax Notes International 11, p. 1038 (2016).

104. OECD, supra n. 4, at 10.
in Kyoto last June\textsuperscript{105} an inclusive framework that will support and monitor the implementation of the BEPS Project output.\textsuperscript{106} The creation of the inclusive framework is a positive development. Along this same line, or even within the inclusive framework, a forum for the discussion of the multilateral instrument could be created. This forum could, among other tasks, resolve disagreements such as the one described above. Thus, the forum could determine whether an LOB clause fulfils the minimum standard and thereby enhance a consistent application of the provisions of the multilateral instrument.

To sum up, most likely negotiating states will wish to incorporate flexibility into the multilateral instrument and retain some of the provisions of their existing tax treaties. Therefore, the multilateral instrument will probably incorporate compatibility clauses that will try to accomplish that result. Ideally, each provision of the multilateral instrument will include a compatibility clause. The compatibility clauses should indicate whether the provisions of the multilateral instrument will modify or not those of the existing tax treaties and should describe the provisions that will be modified to provide stakeholders with certainty. Designing the compatibility clauses for the multilateral instrument is a complicated task because existing tax treaties use different terminology and have different enumeration styles, different wording and different scopes. If compatibility clauses are included in the multilateral instrument, part of the success of the instrument will lie in the good design of such clauses. It must be said that if negotiating states, in contrast, decide to implement all of the BEPS Project’s output without retaining the provisions already contained in their existing tax treaties, i.e. adopting the BEPS Project output with the same wording across the treaty network, compatibility clauses can still be convenient tools in the context of the multilateral instrument in order to offer certainty to stakeholders.

3.4. Lex posterior principle

In the absence of compatibility clauses, the residual rule of article 30(3) of the Vienna Convention will come into play to resolve conflicts between the multilateral instrument and existing tax treaties. Since the multilateral instrument has as a purpose the modification of existing tax treaties, its provisions, although negotiated on a multilateral basis, will only have bilateral effect. Thus, as explained in section 2.3., the parties affected by conflicting provisions of the multilateral instrument will always be identical to those of the respective underlying tax treaty.\textsuperscript{107} This bilateral effect of the provisions of the multilateral instrument means that the conflicting provisions will always be in a situation AB+AB, with the possible exception of the implementation of a multilateral mutual agreement procedure. Accordingly, due to the lex posterior principle, the provisions of the multilateral instrument, as they will be implemented later in time, will prevail over the provisions of existing tax treaties, while the provisions of existing tax treaties will continue to apply as far as they are compatible with those of the multilateral instrument. If the contracting states of an existing tax treaty that is identical to the OECD Model join the multilateral instrument and, in so doing, do


\textsuperscript{107} See also N. Bravo, The Proposal for a Multilateral Tax Instrument for Updating Tax Treaties, in Base Erosion and Profit Shifting p. 335 (M. Lang et al. eds., Linde Verlag 2016).
not formulate any reservations or take different options (e.g. both contracting states opt for the PPT, both contracting states opt for the LOB or both contracting states opt for the LOB and the PPT), then, according to the *lex posterior* principle, the multilateral instrument will govern their relationship in respect to hybrid mismatch arrangements, abuse of treaties, artificial avoidance of the permanent establishment status and dispute resolution. On the other hand, their existing tax treaty will govern their relationship in respect to all other matters typically contained in the OECD Model, as long as it does not conflict with the provisions of the multilateral instrument.

Remember that treaty conflicts do not always result from the inadvertent work of treaty makers. Sometimes, they are deliberately created to replace provisions of old treaties with the text of new ones. Concluding a new treaty is a plausible way to change an existing treaty; the *lex posterior* principle allows contracting states to achieve this result. The *lex posterior* principle implies that the new treaty overrides and updates the treaties applicable to the same subject matter to the extent of their incompatibility. Because this is precisely the expected effect of the multilateral instrument, the *lex posterior* principle can serve as a tool to update the provisions of existing tax treaties.

Section 2.3. introduced some difficulties related to the application of the *lex posterior* principle to successive treaties. However, as it will be shown below, those difficulties would not arise in the case of the multilateral instrument and the existing tax treaties. The first difficulty that an interpreter must face when he applies article 30 of the Vienna Convention is determining when treaties relate to the same subject matter. In the case of the multilateral instrument and the existing tax treaties, the fact that they relate to the same subject matter is not debatable. Not only do they deal with the allocation of taxing rights between contracting states, but the object and purpose of the multilateral instrument is actually to update the content of the existing tax treaties so that they take into account the challenges of today’s digital and globalized economy. Therefore, it is clear that the provisions of the multilateral instrument and the provisions of existing tax treaties would apply to the same set of facts or actions, leading sometimes to incompatible results. This means that the test of sameness would be satisfied, even if sameness is interpreted in a strict manner as suggested by more conservative scholars.

Another difficulty related to the application of the *lex posterior* principle to successive treaties is how to determine which treaty is the earlier one, particularly because treaties may be ratified or may enter into force at different times for different contracting states. This can result in disparities, that is, a treaty may be the later treaty for one state but the earlier treaty for another state. This problem, however, would hardly occur in the case of the multilateral instrument because its purpose is to modify tax treaties that are already in force. Nonetheless, to avoid any possible disagreements about which treaty should be considered the later treaty and, thus, which treaty should prevail, the multilateral instrument could define its scope of application. At least two techniques are available for this:


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108. Ranganathan, *supra* n. 41, at 450.
109. Id, at 452.
110. Vierdag, *supra* n. 56, at 100.
111. It is expected that the BEPS tax treaty output will be included in the OECD Model in 2017 and that in future negotiations or renegotiations of tax treaties countries will use the updated version of the Model.
(i) choosing a date and providing in the text of the multilateral instrument that it applies to all tax treaties entered into force before that date; or
(ii) asking contracting states to list all the tax treaties that they wish to modify and including this list as an annex to the multilateral instrument.

The last difficulty related to the application of the lex posterior principle to successive treaties concerns the fact that when conflicting treaties have been concluded among different contracting states, the same matter might be resolved differently depending on the contracting states involved in the conflict. This is a problem that typically materializes in cases of conflicts of multilateral treaties agreed, for example, between states ABC+ACD. However, this will not be a problem in the case of the multilateral instrument, as its provisions will apply to different bilateral tax treaties in order to update them. This means that the effects of the provisions of the multilateral instrument will result in a situation AB+AB. In this sense, if two contracting states have opted only for the application of the LOB clause of the multilateral instrument, the potential existence of abusive arrangements will be resolved between them through the application of the LOB clause. Conversely, if two countries have opted only for the application of the PPT of the multilateral instrument, the potential existence of abusive arrangements will be resolved between them through the application of the PPT.

Even though the lex posterior principle can serve as a tool for updating the provisions of existing tax treaties, it has an important disadvantage in comparison with compatibility clauses. The lex posterior principle would only work in the context of the multilateral instrument if all the negotiating states agree that its provisions should always prevail over those of the existing tax treaties, which implies that the consistent implementation of the BEPS Project output will be achieved through the same wording across the treaty network. However, it is highly possible that the negotiating states will not reach an agreement in this sense and that in some cases they would want to preserve some provisions of their existing tax treaties. Consequently, even when technically the lex posterior principle could prove to be as good as compatibility clauses for updating existing tax treaties through the multilateral instrument, in practice it may not produce the results expected by the negotiating states. The presumption in article 30(3) of the Vienna Convention is that the later treaty always prevails in cases of incompatibility. If states wish that in some circumstances the norms of the existing tax treaties prevail over those of the multilateral instrument, this cannot be achieved through the lex posterior principle. The inclusion of compatibility clauses in the text of the multilateral instrument in the form established in article 30(2) of the Vienna Convention would be required.

3.5. Lex specialis principle

The lex specialis principle most likely would not resolve conflicts between the multilateral instrument and the existing tax treaties. In most of the cases, the provisions of the multilateral instrument and the existing tax treaties would probably end up having the same degree of generality. And, as a result, it would not be possible to conclude that some of the provisions are superior over the provisions of the other treaty.

112. That is, for example, the approach adopted in the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, art. 1 (10 Dec. 2014). The purpose of this multilateral convention was also to update bilateral treaties.
113. See Soong, supra n. 103, at 1038.
114. UN, supra n. 57, at 85; International Law Commission, supra n. 43, at 84-86.
Once again, imagine the case of the modification, through the multilateral instrument, of the definition of an agency permanent establishment proposed in the BEPS Action 7 Final Report in comparison with the current definition of an agency permanent establishment contained in existing tax treaties that follow the OECD or the UN Model. Or take into account the implementation, through the multilateral instrument, of the holding period of shares proposed in the BEPS Action 6 Final Report in order to obtain the reduced withholding rate applicable to dividends in comparison with existing tax treaties that do not ask for such a requisite. Most probably it would not be possible to consider that the provisions implementing such modifications would be more special than the provisions contained in the existing tax treaties. The scopes of the provisions of the multilateral instrument and of the provisions of existing tax treaties will most likely overlap, completely or partially, without one provision being fully encompassed by another, which means that in comparing the provisions, it will be impossible to determine which of them is the lex specialis and which is the lex generalis. As a consequence, the most probable conclusion of this comparison is that none of the provisions will regulate the same situation in a more special way; they will end up regulating the same situation in a different way.

Some scholars have suggested that the number of members of a treaty should also be considered in order to determine whether a treaty is lex specialis in connection to other treaties. Treaties with a lesser number of partners are considered lex specialis, maybe because they also normally deal with a subject matter in a more detailed and precise form; often, a deeper consensus can be reached among a lesser number of contracting states. For example, where EU treaties and WTO agreements apply to the same subject matter, i.e. trade and liberalization, the EU treaties will be lex specialis for EU members since the membership of the European Union is included in the membership of the WTO. If this argument was taken into account, then the existing tax treaties would always be lex specialis and prevail over the multilateral instrument. Tax treaties are in their vast majority concluded between two contracting states, while the multilateral instrument might be concluded among +96 contracting states. However, this is clearly not the intention of the treaty makers of the multilateral instrument: the multilateral instrument has the object and purpose of modifying existing tax treaties and, as such, its provisions should prevail, at least most of the times, over those of the existing tax treaties. This example illustrates once again the vagueness of the lex specialis principle and the difficulties that derive from it if it is used to resolve conflicts of treaties (see section 2.4.).

Consequently, it is probable that, interpreters would not be able to resort to the lex specialis principle in order to resolve conflicts between the multilateral instrument and the existing tax treaties. Moreover, to the knowledge of the author, there are no cases in which the lex specialis principle has been applied in such a situation.
specialis principle has been used as a tool to deliberately modify existing treaties, something that is different to the use of compatibility clauses and the lex posterior principle.

4. Conclusions

The provisions of the multilateral instrument and the provisions of existing tax treaties will coexist. Therefore, their norms can accumulate or conflict. In cases of conflicts between a provision of the multilateral instrument and the provisions of existing tax treaties dealing with the same subject matter, only one of the conflicting provisions should be applied. To resolve this conflict, a third provision or a principle of interpretation is required. According to the Vienna Convention, compatibility clauses contained in the text of the conflicting treaties or the lex posterior principle can be used to resolve conflicts of treaties.

Compatibility clauses and the lex posterior principle can serve as tools to resolve conflicts of treaties and, therefore, to update existing tax treaties through the multilateral instrument. The convenience of adding compatibility clauses to the multilateral instrument or using the lex posterior principle depends on the object and purpose that the multilateral instrument will have. If the negotiating states agree that the object and purpose of the multilateral instrument does not include the implementation of the tax treaty rules developed in the course of the BEPS Project with the same wording across the treaty network, the use of compatibility clauses should be preferred in order to preserve the norms contained in the existing tax treaties that, for instance, already fulfil the minimum standards or come from the UN Model and are to be preserved for the benefit of developing countries. Conversely, if the consistent implementation of the BEPS Project tax treaty output with the same wording across the treaty network is part of the object and purpose of the multilateral instrument, the only advantage of compatibility clauses over the lex posterior principle is offering a higher degree of certainty and clarity to stakeholders. If the lex posterior principle is preferred, flexibility may still be introduced in the multilateral instrument through the use of reservations, alternative provisions and additional protocols or declarations. In connection with reservations, the multilateral instrument should provide in its text which reservations will be allowed and require that the reservations affect the entire treaty network of the contracting states. This level of flexibility will allow countries with different tax policies and economic interests to join the multilateral instrument while achieving the minimum level of coordination that is needed to counter BEPS practices.

For compatibility clauses to be effective in the context of the multilateral instrument, a compatibility clause should be added to each provision of the multilateral instrument. Compatibility clauses should indicate which provisions of the multilateral instrument will modify the provisions of existing tax treaties and describe the provisions of existing tax treaties that will be modified. Designing compatibility clauses for the multilateral instrument is a difficult task as the provisions of the more than 3,000 existing tax treaties that can be modified through the multilateral instrument often use different terminology and have different enumeration styles, different wording and even different scopes. If compatibility clauses are preferred, it can be anticipated that part of the success of the multilateral instrument will lie in the good design of these clauses.