ARTICLE

General Aspects of the Multilateral Instrument

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The Multilateral Instrument (MLI) can be regarded as the most innovative and far-reaching development in the area in the area of tax treaties in recent decades. The implementation of the tax treaty related Base Erosions and Profit Shifting (BEPS) measures through the MLI will have major consequences for the global network of bilateral tax treaties. The actual impact of the MLI on tax treaties depends to a large extent on the choices and reservations made by each participating state, especially with regard to provisions that do not reflect BEPS minimum standards. These positions will also influence the impact of the MLI for each state's participating treaty partners. This article examines certain general and procedural aspects of the MLI, including the scope and interpretation of the MLI. This is followed by a discussion of the operation and legal consequences of the compatibility clauses, the reservations and the notification obligations. The focus is then shifted to various procedural aspects related to the final provisions of the MLI, including the entry into effect and timing aspects.

1 Introduction

This article discusses certain general and procedural aspects of the Multilateral Instrument (in full: 'Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosions and Profit Shifting', hereinafter referred to as the MLI).[1] The emphasis of this contribution is on Part I (Scope and Interpretation of the Terms) and Part VII (Final Provisions) of the MLI. After a general introduction, section 2 discusses the scope and interpretation of the MLI (section 2). This is followed by an examination of the operation and legal consequences of the compatibility clauses (section 3), the reservations (section 4) and the notification obligations (section 5), respectively. The focus is then shifted to various procedural aspects related to the final provisions of the MLI (section 6), including the entry into effect. Following a brief prospect of the future (section 7), section 8 contains some concluding remarks.

On 24 November 2016, the so-called Ad Hoc Group concluded its negotiations on the MLI and adopted the final text of this multilateral convention, accompanied by an explanatory statement (hereinafter: the Explanatory Statement).[2] The Ad Hoc Group consisted of more than 100 states, other jurisdictions and international organizations.[3] The MLI is the final result of Action 15 of the OECD/G20 BEPS project.[4] The multilateral

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[2] The text of the MLI and the Explanatory Statement can be found on http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm (accessed 20 Aug. 2017). For a discussion of the MLI, *see also* (among others): N. Bravo, *The Multilateral Tax Instrument and Its Relationship with tax Treaties*, World Tax J. 279 et seq. (Oct. 2016); D. Kleist, *A Multilateral Instrument for Implementing Changes to Double Tax Treaties: Problems and Prospects*, 44(11) Intertax 823–830 (2016); S. Austry et al., *The Proposed OESO Multilateral Instrument Amending Tax Treaties*, 70(12) Bull. Int'l Tax'n 683 et seq. (Dec. 2016) and (4) Brit. Tax Rev. 454 et seq. (2016); J. Hattingh, *The Multilateral Instrument from a Legal Perspective: What May Be the Challenges?*, 71(3/4) Bull. Int'l Tax'n (2017); P. Valente, *BEPS Action 15: Release of Multilateral Instrument*, 45(3) Intertax 219–228 (2017); L. E. Schoueri & R. A. Galendi Jr., *Interpretative and Policy Challenges Following the OECD Multilateral Instrument (2016) from a Brazilian Perspective*, 71(6) Bull. Int'l Tax'n (2017); M. F. de Wilde, *Lowering the Permanent Establishment Threshold via the Anti-BEPS Convention: Much Ado About Nothing?*, 45(8/9) Intertax 556–566 (2017).

[3] For an overview of the members of the Ad Hoc Group, *see* http://www.oecd.org/tax/treaties/multilateral-instrument-BEPS-tax-treaty-information-brochure.pdf (accessed 20 Aug. 2017).

[4] OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (Paris: OECD Publishing 2015) (hereinafter: the final BEPS Action 15 report). The final BEPS Action 15 report concluded that the development of a multilateral instrument was both desirable and feasible. The MLI was negotiated by the non-permanent Ad Hoc Group, which was not a formal OECD body, but convened under the auspices of the OECD and the G20 and served by the OECD secretariat. The Ad Hoc Group was established under a mandate drafted by the OECD and supported by the G20; *see* OECD/G20, *Action 15: A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS.* The negotiations to develop the MLI started in Nov. 2015, resulting in the presentation of the MLI on 24 Nov. 2016. In the meantime, a public consultation on certain technical issues related to the MLI took place in May/June 2016.

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convention aims to implement the treaty related BEPS measures in a swift, coordinated and consistent manner in bilateral tax treaties of the participating jurisdictions. The substantive content of the MLI is in itself not new, since it was already agreed under the final outcomes of BEPS Action 2 on neutralizing the effects of hybrid mismatch arrangements, Action 6 on preventing the granting of treaty benefits in inappropriate circumstances, Action 7 on preventing the artificial avoidance of permanent establishment (PE) status, and Action 14 on making dispute resolution mechanisms more effective. The novelty is especially in the way these measures are implemented.

On 7 June 2017, representatives of over sixty-seven jurisdictions signed the MLI during a formal signing ceremony in Paris. After the signing ceremony, the MLI covered sixty-eight jurisdictions.[5] At this occasion, nine jurisdictions expressed their intention to sign the MLI at short notice. Of this group, Mauritius, Cameroon and Nigeria have in the meantime signed the MLI (on 5 July 2017, 11 July 2017 and 17 August 2017, respectively). This brings the total number of covered jurisdictions to seventy-one (as at 17 August 2017). The OECD expects that another twenty jurisdictions will sign the MLI before the end of 2017.[6] An up to date list of MLI signatories can be found on the website of the OECD, the depositary of the MLI.[7]

The MLI is a multilateral treaty, i.e. a treaty concluded by three or more parties. The MLI can be characterized as a multilateral implementation agreement, a later agreement that is concluded by some or all of the parties to an original treaty (i.e. bilateral tax treaties) for the purpose of adapting the general rules of that treaty to a specific topic, with a view to enhancing the effectiveness of the original treaty.[8] Since the MLI was not anticipated by bilateral tax treaties, there is no direct relationship between these treaties and the MLI. The MLI exists alongside, and in addition to, existing bilateral tax treaties, changing the application of these existing tax treaties in accordance with the recommendations of BEPS Actions 2, 6, 7 and 14. It thus creates an extra layer of treaty law that is placed on top of the existing bilateral tax treaty network. The MLI is an independent legal instrument which modifies the operation of bilateral treaties in a binding way. It complements existing treaties by introducing new provisions and by amending or replacing the operation of existing clauses. This means that the MLI does not function as an amending protocol, which directly alters the actual wording of an existing treaty. The term 'modify' was deliberately chosen to reflect the MLI's effect, rather than 'amend'.[9]

To implement the various treaty related BEPS measures, the OECD considered various options, such as an independent treaty that would comprehensively replace individual bilateral tax treaties, and a 'one-time' instrument which would operate as a collection of amending protocols, amending the wording of each of the underlying tax treaties (a 'temporary' instrument which would effectively lose its significance after implementation).[10] The OECD considered the first option to be too far-reaching, while the second option was dismissed as being technically complex and inefficient. Other possible options, which would probably have been even more inefficient and non-committal, could have been the bilateral renegotiation of existing tax treaties, for instance on the basis of the updated OECD Tax Model Convention (OECD Model) in accordance with the BEPS recommendations (see the 2017 update) or the development of a standard amending protocol (a template protocol to be used bilaterally, without a legally binding effect).

Historically, countries have preferred bilateral treaties to prevent double taxation. The move towards a multilateral treaty is a highly innovative development in international tax law. To put this in some perspective, however, the concept of a multilateral tax treaty is not completely unknown or even entirely new. For example, various European nations concluded a multilateral tax treaty in the 1920s.[11] Moreover, a multilateral model treaty was already developed in the 1930s under the auspices of the League of Nations.[12] More recent examples of multilateral treaties include the CARICOM treaty,[13]

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[5] China signed the MLI on behalf of Hong Kong.

[6] OECD, *Inclusive Framework on BEPS, Progress Report July 2016–June 2017*, at 13.

[7] *See* http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (accessed 20 Aug. 2017).

[8] *See* C. Kojima & V. S. Vereshchetin, *Implementation Agreements*, Oxford Public International Law (http://opil.ouplaw.com), Oxford University Press 2015. in *Max Planck Encyclopedia of Public International Law* (R. Wolfrum ed., 2013); D. M. Broekhuijsen, *Naar een multilateraal fiscaal raamwerkverdrag*, (1443) WFR (2013), s. 3.2.1.

[9] Final BEPS Action 15 report, at 31; OECD, *Directorate for Legal Affairs, Legal Note on the Functioning of the MLI Under Public International Law*, at para. 15.

[10] Final BEPS Action 15 report, at 20. In an article written prior to publication of the MLI, Austry et al., above n. 2, at 683–684 indicated a preference for an autonomous instrument, which is how the MLI eventually turned out, rather than a one-time amending treaty.

[11] This concerns the 1921 convention between Austria, Hungary, Italy, Poland, the Kingdom of the Serbs, Croats and Slovenes and Romania. Although this treaty was potentially the first multilateral tax treaty, it only entered into force between Austria and Italy. *See* League of Nations, *Double Taxation and Fiscal Evasion: Collection of International Agreements and Internal Legal Provisions for the Prevention of Double Taxation and Fiscal Evasion*, Document C.345.M.102.1928.II, 74 (Geneva, 1928).

[12] *See* the proposals for a 'Plurilateral Convention for the Prevention of Double Taxation of Certain Categories of Income'; League of Nations Fiscal Committee, *Report to the Council on the Work of the Third Session of the Committee, Held in Geneva from May 29th to June 6th, 1931*, Document C.415.M.171.1931.II.A, 10 et seq. (Geneva, 1931.)

[13] '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' between Antigua and Barbuda, Jamaica, the

the Andean treaty,[14] the Nordic convention[15] and the Mutual Assistance Treaty.[16] In other fields of international law, states and international organizations have already gained extensive experience with multilateral conventions, some of which have served as inspiration for the MLI. This includes multilateral treaties in the areas of free trade, extradition, the prevention of terrorism, international civil aviation and the law of the sea.[17]

Beyond the more rigid minimum standards, the MLI provides flexibility to parties, for instance through opt-out mechanisms. In addition, the MLI provides parties with options, for example by providing various alternative provisions or a main rule complemented by optional add-ons. Optional provisions in principle only apply if both parties make the same choice.[18] The substantive MLI provisions that are included in Parts II through V of the MLI generally have the following structure:[19]

– A description of the BEPS measure forming the basis of the MLI provision.
– A 'compatibility clause' which regulates the relation between the MLI provision and existing Covered Tax Agreements (CTAs) (see section 3 below).
– A 'reservation clause' stipulating the permitted reservations (see section 4 below).
– Various types of 'notification clauses' regarding parties' choices of optional provisions and pointing out the CTA provisions which are within the scope of the compatibility clauses (see section 5 below).

The Secretary-General of the OECD acts as the depositary of the MLI (Article 39 of the MLI). In this capacity, the OECD is entrusted with keeping custody of all the acts, notifications and communications relating to the MLI.[20] The parties have to notify the OECD of their treaties designated as CTAs, and inform the OECD of their choices and reservations on the basis of Article 28(7) of the MLI and Article 29(4) of the MLI (see in more detail sections 4 and 5 below). At the occasion of the signing ceremony, the signatories have submitted their provisional lists of reservations and notifications to the OECD.[21] The OECD published the provisional positions of the signatories on a website dedicated to the MLI.[22] When a subsequent jurisdiction signs the MLI, the OECD will add the (provisional) list of this jurisdiction on its website.

To facilitate the application of the MLI in practice, the OECD has also published various materials online, including an information brochure, an FAQ list and a 'toolkit', containing, among other things, a 'matching database', a matrix of choices and reservations and a legal note on the operation of the MLI.[23] The 'matching database' shows whether, and if so, how the MLI affects a specific bilateral tax treaty on the basis of the provisional notifications of the signatories. The database is tool developed by the OECD for purposes of the application of the MLI, which will be improved and expanded over time. I trust that the database will prove to be a useful aid in practice, but in any case where the MLI is applied alongside an existing tax treaty, my recommendation is to revert to the original source documents, i.e. the lists of notifications and reservations of each of the parties to the MLI.

2 Scope and interpretation of the MLI

2.1 *Scope of the MLI*

The MLI modifies all tax treaties which have been designated as a 'Covered Tax Agreement'; see Article 1 of the MLI. The term CTA is therefore a key concept in establishing the scope of the MLI. Any agreement for the avoidance of double taxation with respect to taxes on income[24] can qualify as a CTA, provided it meets a twofold test. First, the agreement must be made between two (or more) states or other jurisdictions which are parties to the MLI (i.e. which have ratified the MLI). Second, each of those parties must notify the treaty concerned to the OECD as a treaty that it wishes to bring

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Bahamas, Montserrat, Barbados, St. Kitts and Nevis, Belize, Saint Lucia, Dominica, St. Vincent and the Grenadines, Grenada, Suriname, Guyana, and Trinidad and Tobago, 1994, IBFD Tax Treaty Database.

14 'The Commission of the Andean Community Decision 578, Regime for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion' between Bolivia, Colombia, Ecuador and Peru, 2004, IBFD Tax Treaty Database.

15 'Convention between the Nordic Countries for the avoidance of double taxation with respect to taxes on income and on capital' between Denmark, the Faeroe Islands, Finland, Iceland, Norway and Sweden, 1996, IBFD Tax Treaty Database. *See* M. Helminen, *The Nordic Multilateral Tax Treaty as a Model for a Multilateral EU Tax Treaty* (IBFD 2013) for an examination of the changes that would be required for the Nordic convention to function as an example for an EU multilateral tax treaty.

16 'Convention between the member States of the Council of Europe and the Member countries of the OECD on Mutual Administrative Assistance in Tax Matters', 1988 as amended by 2010 protocol, IBFD Tax Treaty Database.

17 OECD, Final BEPS Action 15 report, Annex A and the examples cited there.

18 For an exception *see* e.g. Art. 5 of the MLI regarding the methods for the elimination of double taxation and the option for asymmetrical application of the simplified LOB provision in addition to the principle purpose test pursuant to Art. 7(7)(b) of the MLI.

19 *See* para. 15 of the Explanatory Statement.

20 *See also* Art. 77 of the Vienna Convention on the Law of Treaties (VCLT).

21 With the exception of Norway, which submitted its provisional list at a later moment.

22 *See* above n. 7.

23 *See* http://www.oecd.org/tax/treaties/application-toolkit-multilateral-instrument-for-beps-tax-treaty-measures.htm. (accessed 20 Aug. 2017).

24 This also includes tax treaties which cover capital taxes, or taxes on capital gains, in addition to income taxes. *See* para. 25 of the Explanatory Statement.

within the scope of the MLI.[25] The MLI in principle complements all CTAs which have been notified as such. Where one of the contracting states is not a party to the MLI (or both), or if the treaty has not been notified by both contracting states, the treaty does not fall within the ambit of the MLI. States are free to keep certain treaties outside the scope of the MLI, for instance if they wish to renegotiate a specific treaty on a bilateral basis to implement the BEPS measures.[26]

Making a tour d'horizon after the signing ceremony, the signatories have notified over 1,100 bilateral tax treaties as CTAs (based on more than 2,350 individual notifications). These treaties will therefore fall under the scope of the MLI, provided both treaty partners will ratify the MLI. It is expected that the total number of CTAs will rise as more parties accede to the MLI. However, it seems that the current number of notified CTAs is still below the OECD's previous expectation of over 2,000 covered treaties[27] – which was already lower than the MLI's initially communicated potential impact on more than 3,000 tax treaties.[28] Looking at the preliminary notifications of treaties by the various signatories, the approaches are diverse. Some states have notified all or nearly all of their tax treaties, such as the Netherlands which has notified eighty-two out of ninety-four treaties. Other countries have taken a more conservative approach, such as Switzerland which has only notified fourteen out of ninety-four treaties.

At this time, forty-six members of the Ad Hoc Group have not (yet) signed the MLI. It is noted that the MLI is also open for signature by jurisdictions which are not members of the Ad Hoc Group. Although, as mentioned, various jurisdictions will still join the multilateral convention at a later moment, it is expected that others will not sign on. Notable absentees on the list include, for the time being, Brazil[29] and the United States (US).[30] The latter is not expected to sign the MLI at all.[31] The MLI will not have an impact on the tax treaties concluded by these states, even if their treaty partners signed the MLI or unilaterally notified these treaties as CTAs.

Where an existing bilateral relation is affected, the scope of the MLI corresponds to that of the underlying CTA. If a specific treaty has been designated as CTA, the MLI does not modify the personal scope of the CTA (cf. Article 1 of the OECD Model), nor does it affect the treaties to which the CTA applies (cf. Article 2 of the OECD Model). Equally, the MLI does not influence the geographical scope of existing CTAs (cf. Article 29 of the OECD Model).[32] The temporal scope of existing CTAs also remains unaffected by the MLI (Articles 30 and 31 of the OECD Model).[33] If one of the contracting states terminates a CTA, the MLI also loses its effect in the bilateral relation between these states.

2.2 *Interpretation*

Article 2 of the MLI contains various specific definitions as well as a general interpretation clause. In addition to the term CTA (see section 2.1 above), Article 2(1) of the MLI defines the terms 'Party' (a state or other jurisdiction for which the MLI is in force pursuant to Article 34; see section 6), 'Contracting Jurisdiction' (a state or other jurisdiction which is a party to a specific CTA) and 'Signatory' (a state or other jurisdiction which signed the MLI but for which the MLI is not yet in force). The term 'Contracting Jurisdiction' is used instead of the commonly used 'contracting state' when referring to bilateral tax treaties (since the MLI can also cover non-state jurisdictions).[34]

Pursuant to the general interpretation provision of Article 2(2) of the MLI, any term not defined in the MLI has to be interpreted in accordance with the meaning of such term under the relevant CTA, unless the context otherwise requires. In fact, Article 2(2) of the MLI prescribes a two-step approach. Terms not defined in a CTA, in turn, should be interpreted with the aid of the specific interpretation clause of Article 3(2) of tax treaties

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[25] In this article, for the sake of simplicity, any reference to 'states' concerns states and other types of jurisdictions that can accede to the MLI. The term 'jurisdiction' is broader; a state can for example consist of multiple jurisdictions. Where appropriate, I follow the terminology of the MLI more closely, referring to 'jurisdictions'. Where I refer to a 'contracting state' or a 'contracting jurisdiction', this concerns a party to a particular CTA (the terms are used interchangeably). Furthermore, for purposes of this article it is assumed that CTAs are of a bilateral nature (even if a CTA can also have more than two parties).

[26] Cf. para. 26 of the Explanatory Statement. Mauritius, e.g. adopts this approach for a number of its tax treaties, as explained in its press release dated 5 July 2017 (accessible via the list of MLI signatories). The BEPS measures were also implemented bilaterally in the 2016 Australia-Germany tax treaty; *see* L. Maurer, C. Port, T. Roth & J. Walker, *A Brave New Post-BEPS World: New Double Tax Treaty Between Germany and Australia Implements BEPS Measures*, 45(4) Intertax 310–321 (2017).

[27] *See* the OECD press release issued on the occasion of the adoption of the MLI on 24 Nov. 2016; http://www.oecd.org/ctp/treaties/countries-adopt-multilateral-convention-to-close-tax-treaty-loopholes-and-improve-functioning-of-international-tax-system.htm (accessed 20 Aug. 2017).

[28] Final BEPS Action 15 report, at 16. *See also* OECD, above n. 9, at para. 12.

[29] *See* Schoueri & Galendi Jr., above n. 2.

[30] Other non-participating members of the Ad Hoc Group include Albania, Bosnia-Herzegovina, Kazakhstan, Kenia, Malaysia, Mongolia, Morocco, Peru, the Philippines, Saudi Arabia, Thailand, Ukraine, the United Arab Emirates and Vietnam.

[31] *See* e.g. the report, *US Treasury Official Comments on US Decision not to Sign MLI*, IBFD News (13 June 2017).

[32] *See* para. 31 of the Explanatory Statement.

[33] *See* s. 6 for some comments on the temporal scope of the MLI itself.

[34] Para. 35 of the Explanatory Statement. *See also* above n. 25.

patterned on the OECD Model, where necessary complemented with the general rules of treaty interpretation included in Articles 31 through 33 of the Vienna Convention on the Law of Treaties (hereinafter: VCLT).[35] If an undefined MLI term is not defined in the applicable CTA, the term at issue in principle has to be interpreted with the aid of the domestic law of the state applying the MLI (and the underlying CTA), unless the context requires otherwise. The Explanatory Statement appears to indicate a preference for the application of Article 3(2) of the OECD Model.[36] This function of Article 2(2) of the MLI is in my view logically restricted to terms which are used in the substantive MLI provisions and which have a counterpart in the applicable CTA, or in the domestic law of the state applying the MLI/CTA. Terms which do not have a counterpart in a CTA (whether or not after implementation of the MLI), or terms which do not affect the substantive scope of the CTA, should in my opinion be interpreted in accordance with the main rule of Article 31(1) of the VCLT.[37] This concerns, for example, terms used in the procedural clauses of the MLI, such as the language of the compatibility clauses and the notification clauses. This includes the concepts of 'Covered Tax Agreement', 'jurisdiction' and 'notification'.

The Explanatory Statement seems to disregard the fact that persons interpreting and applying a tax treaty, such as taxpayers, tax authorities and judges, may have different views on the role of Article 3(2) of the OECD Model in the interpretation of tax treaties. In various countries, such as Germany, judges seem to have a certain preference for autonomous treaty interpretation (possibly on the basis of the interpretation rules of the VCLT). In this approach, Article 3(2) and the domestic law meaning of undefined terms are hardly significant.[38] Where two states apply a different interpretation method, this may give rise to interpretation conflicts under Article 2 of the MLI, as it would under bilateral tax treaties.[39] Since the MLI does not provide a solution for these types of conflicts, taxpayers facing double taxation as a result of such a conflict should resort to the mutual agreement procedure (MAP) under the applicable CTA (cf. Article 25 of the OECD Model). This approach is confirmed by Article 32(1) of the MLI, according to which any question as to the interpretation or implementation of provisions of a CTA, as modified by the MLI, has to be resolved in accordance with the MAP under the relevant CTA. A potential source of disputes could be the interaction between the MLI and CTAs under the compatibility clauses (see section 3 below).[40]

Since the MLI does not create a highest international judicial body dealing with MLI matters, conflicts regarding the interpretation of the MLI will ultimately be resolved by the highest courts in each participating state. This, in my opinion, poses a significant threat of diverging and possibly conflicting interpretations of the MLI provisions, such as the anti-abuse provisions of Article 7 of the MLI (which is not helped by the unclarity as to the available interpretational guidance, see below). Pursuant to Article 32(2) of the MLI, questions regarding the interpretation or implementation of the MLI may be addressed by a Conference of the Parties (see section 6.5 below). An 'interpretation conference' could be a very effective instrument in ensuring a uniform application of the MLI, although I have some doubts about the actual usefulness of this option. Only a party to the MLI can initiate such a conference, so that this alternative is not a means of recourse open to taxpayers or judges. Moreover, an interpretation conference seems to be a drastic remedy, which in any case requires broad support. Therefore, it

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35 Art. 3(2) of the OECD Model contains a specific clause for the interpretation of terms (i.e. words, coherent expressions or sentences) not defined in the treaty, which prescribes a *renvoi* to the domestic tax law of the state applying the treaty, unless the context otherwise requires. Art. 3(2) operates as a *lex specialis* in relation to the general rules of treaty interpretation included in Arts 31 through 33 of the VCLT. Under the main rule of Art. 31(1) of the VCLT, a treaty has to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. For this purpose, the context includes the entire text of a treaty, including the preamble and any annexes (Art. 31(2) of the VCLT).

36 Para. 38 of the Explanatory Statement. In addition, para. 12 of the Explanatory Statement – which is notably not part of the explanations to Art. 2(2) of the MLI – explains that the Arts 3 through 17 of the MLI should be interpreted in accordance with the ordinary principle of treaty interpretation, which is that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. This is clearly a reference to Art. 31 of the VCLT, even though this provision is not explicitly mentioned. An explicit reference to the VCLT can be found in para. 16 of the Explanatory Statement (*see also* s. 4 below).

37 Compare the decisions of the Dutch Supreme Court (*Hoge Raad*), according to which Art. 3(2) cannot be applied if the undefined treaty term at issue is not defined in domestic tax law (e.g. the *Hoge Raad* decisions of 1 Dec. 2006, *BNB* 2007/75–79) or if it does not have a specific legal meaning (e.g. the *Hoge Raad* decisions of 28 Sept. 1999, *BNB* 2000/16 and 29 Sept. 1999, *BNB* 2000/17). Moreover, the Dutch *Hoge Raad* ruled that Art. 3(2) cannot be applied to interpret a term that is not used in a similar context under the domestic law (*Hoge Raad* decisions of 21 Feb. 2003, *BNB* 2003/177 and 178). In these cases, Art. 3(2) is inapplicable and, therefore, Arts 31 and 32 of the VCLT govern the interpretation of the treaty term at issue. A similar approach is, in my view, required with regard to Art. 2(2) of the MLI. Furthermore, Art. 2(2) of the MLI itself must be interpreted in accordance with the rules of the VCLT.

38 *See* e.g. E. Reimer, *Germany – Interpretation of Tax Treaties*, Euro. Tax'n 458 et seq. (1999)

39 *See* the OECD Commentary on Art. 23 A and 23 B, para. 32.5, addressing disputes between states regarding the interpretation of facts and conflicts between states regarding the correct interpretation of the treaty itself. On the one hand, according to the Commentary, where these conflicts result in unresolved double taxation, they should be resolved by applying the mutual agreement procedure of Art. 25 of the OECD Model. On the other hand, Art. 23 A(4) of the OECD Model intends to avoid double non-taxation as a result of these conflicts. The latter provision coincides in substance with the optional provision of Art. 5(2) of the MLI with specific regard to the method of avoidance of double taxation. These types of conflicts are distinguished from so-called qualification conflicts. The term 'qualification conflicts' is, according to the OECD Commentary, generally reserved for situations where two states apply different treaty provisions on the basis of differences in their domestic law (OECD Commentary on Art. 23 A and 23 B, para. 32.3). The MLI does not address qualification conflicts arising under CTAs.

40 Para. 315 of the Explanatory Statement.

will in practice probably be reserved for compelling interpretation issues relevant to many parties to the MLI.

In my view, the term 'context' referred to in Article 2 (2) of the MLI should be interpreted broadly, and may comprise any material which indicates that the domestic law meaning – through the applicable CTA – should not be used when interpreting a treaty term.[41] Both internal and external instruments and elements may be taken into account as context within the meaning of Article 2(2). The context within this meaning comprises, in my opinion, at least the Explanatory Statement. According to the Explanatory Statement, the 'context' referred to in Article 2(2) of the MLI includes both the purpose of the MLI, as described in paragraphs 1 through 14 of the Explanatory Statement, and the purpose of the applicable CTA, which is reflected in the Preamble as modified on the basis of Article 6 of the MLI.[42]

A related issue concerns the legal status of the Explanatory Statement under the VCLT when the MLI is interpreted and applied. The status of the Explanatory Statement could have been explicitly addressed in the MLI itself, but the convention is silent on this matter.[43] In any case, the Explanatory Statement appears to have a much higher status than the Commentaries on the OECD Model have when interpreting tax treaties based thereon. Although the OECD Commentaries are widely used in the interpretation of tax treaties, the legal status of the Commentaries is not entirely clear (to put it mildly).[44] Should the Explanatory Statement belong to the context within the meaning of Article 31(2) of the VCLT, then it is an important – and binding – element in determining the 'ordinary meaning' of the terms employed by the MLI. It is noted that the scope of the context referred to in Article 31 (2) of the VCLT is not necessarily similar to the context referred to in Article 2(2), even though the former may include more than just the 'textual' or internal context.[45]

The participants in the Ad Hoc Group have 'adopted' the Explanatory Statement together with the final text of the MLI, and the Explanatory Statement reflects the agreed understanding of the negotiators with respect to the MLI.[46] The question is whether this is sufficient to elevate the Explanatory Statement to the level of context within the meaning of the VCLT. To qualify as such, all parties should reach agreement on the Explanatory Statement, as the VCLT puts it, 'in connexion with the conclusion' of the MLI. In addition to the fact that the text of the Explanatory Statement has been adopted by the negotiators participating in the Ad Hoc Group, this seems to require that the parties recognize the Explanatory Statement as such upon signature of the MLI.[47] This recognition could take place, for instance, explicitly or implicitly at the moment of signing. In my opinion, jurisdictions signing the MLI implicitly accept the Explanatory Statement as an agreement or instrument relating to the MLI and, therefore, the Explanatory Statement obtains the status of context as referred to in Article 31(2) of the VCLT. Alternatively, should the Explanatory Statement not belong to the context, then it may be considered a supplementary means of interpretation within the meaning of Article 32 of the VCLT (including the preparatory work of the treaty and the circumstances of its conclusion). Such means of interpretation have a lower rank than context, and can only serve to confirm the meaning resulting from the application of the main rule of Article 31(1), or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. In my view, the drafting of the Explanatory Statement clearly shows that the negotiators of the Ad Hoc Group intended to assign a higher status to the Explanatory Statement.

A related issue is the status of the final BEPS reports in the interpretation of the substantive MLI provisions. The Explanatory Statement does not reproduce the detailed explanations to the treaty related BEPS measures, as laid down in the final BEPS reports and elaborated in the substantive MLI provisions, except for the comprehensive commentary on the provisions of Part VI (Arbitration). This concerns, for instance, the explanations and examples

Notes

41 *See* my dissertation, *Other Income Under Tax Treaties* 58 et seq. (Kluwer Law International 2015) and the references cited there.

42 Para. 38 of the Explanatory Statement. Art. 6(1) of the MLI adds the following preamble language to CTAs: 'Intending to eliminate double taxation with respect to the taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions).'

43 Cf. Austry et al., above n. 2, at 685.

44 The author adheres to the view that, based on principles of logic and good sense, it is appropriate to refer to the OECD Commentaries as they exist at the time a treaty based on the OECD Model is concluded for the purpose of establishing the meaning of particular tax treaty provisions. *See* D. A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* 29 (Amsterdam: IBFD 2006).

45 Art. 31(2) of the VCLT defines the context for purposes of treaty interpretation. Generally, the entire text of a treaty, including the preamble and the annexes, if any, constitutes context. In addition, the context comprises any agreements relating to the treaty, to the extent that these were agreed upon by all contracting states and made in connection with the conclusion of the treaty, as well as other instruments relating to the treaty made by one or more parties and accepted by the other parties. The former category includes protocols, memoranda of understanding, and notes and letters exchanged during the signing of the treaty. The latter category includes certain declarations of policy and reservations made upon the signing of the treaty.

46 Para. 11 of the Explanatory Statement.

47 *See* Austry et al., above n. 2, at 685. Hattingh, above n. 2, at s. 6.3, however, considers the Explanatory Statement primarily as an agreement made in connection with the future conclusion of the MLI by signatories that were members of the Ad Hoc Group (equally leading to the conclusion that the Explanatory Statement constitutes context for purposes of the VCLT).

provided in relation to the anti-abuse rules or the changes to the PE definition as set out in the relevant reports on BEPS Actions 6 and 7, respectively. The Explanatory Statement by its own admission does not address the interpretation of the underlying BEPS measures, but it does consider the commentary that was developed during the course of the BEPS project and reflected in the final BEPS reports to be of particular relevance in establishing the object and purpose of the MLI.[48] This suggested approach would indirectly rank the final BEPS reports among the elements of the main rule of Article 31(1) of the VCLT. Certain parts of the Explanatory Statement's explanations to the substantive MLI provisions refer directly to specific paragraphs of the various BEPS reports on Actions 2, 6, 7 and 14. I take the view that these specific references are part of the context, along with the Explanatory Statement itself. However, since the final BEPS reports were not adopted by the parties in connection with the conclusion of the MLI, as they were drafted in a different forum and at an earlier moment, I believe that the remaining parts of these reports are not part of the context within the meaning of the VCLT.[49] These reports therefore have the status of supplementary means of interpretation within the meaning of Article 32 of the VCLT, as they are part of the preparatory work of the MLI.[50] This would concern a large portion of the content of these reports, including many of the explanations. It is somewhat speculative, but the Explanatory Statement may designate the BEPS reports as object and purpose of the MLI to prevent that the reports are classified as a lower ranking interpretation instrument under the VCLT. Nevertheless, I have some problems with this approach because it gives the BEPS reports a role under the main rule of the VCLT, which seems difficult for the reasons set out above.

The treaty related BEPS measures and the accompanying explanations will also be included in the 2017 update of the OECD Model and Commentaries (the draft contents of which have been published on 11 July 2017).[51] Since the parties to the MLI cannot be said to adopt the 2017 version of the OECD Model and Commentaries in connection with the conclusion of the MLI, I doubt whether the updated commentaries can play a role in the interpretation of the MLI on the basis of Article 31 of the VCLT.[52] To my belief, the 2017 update of the OECD Model and Commentaries can at best be considered a supplementary means of interpretation within the meaning of Article 32 of the VCLT.[53] Nevertheless, the updated commentaries could be considered as relevant context for purposes of the interpretation of underlying CTAs to which the MLI applies (a 'bottom-up' approach).[54] If this approach is accepted, the relevance of the 2017 update would in my view be limited to treaties concluded on the basis of the revised version of the OECD Model, and would not extend to tax treaties predating the 2017 update. In any case, the above considerations will probably not dissuade practitioners from consulting the BEPS reports for guidance on the substantive MLI provisions.

3 Compatibility clauses

Under the general rules of treaty interpretation, a subsequent treaty takes precedence over an earlier treaty concerning the same subject matter. This rule, also referred to as *lex posterior derogat legi priori*, can be considered customary international law and has been codified in Article 30 (3) of the VCLT. Accordingly, the provisions of an earlier treaty between parties that are also parties to a later treaty apply only to the extent that its provisions are compatible with those of the later treaty.[55] This rule in principle governs the interaction between the MLI and CTAs.[56] However, to ensure clarity and transparency, the MLI employs so-called 'compatibility clauses': specific rules which explicitly regulate the relation between the MLI and existing CTAs. The compatibility clauses identify the provisions of tax treaties to which they relate in general descriptive terms. Because of the significant variations found in existing tax treaties, it was not feasible to refer to specific article and paragraph numbers in the MLI, even if many treaties are patterned on the OECD Model or the UN Model. Each substantive MLI provision in principle

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48 Para. 12 of the Explanatory Statement.

49 In the same sense, Hattingh, above n. 2, at s. 6.3.

50 The fact that not all MLI signatories participated in the drafting of the BEPS reports does not appear to prevent these reports from being able to qualify as 'travaux préparatoires'. *See* the commentary on Draft Art. 28 in the UN International Law Commission's Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission, 1966*, Vol. II, 223 (1996).

51 OECD, *Draft Contents of the 2017 Update to the OECD Model Tax Convention* (2017).

52 The OECD Commentaries may play a role in the interpretation of existing terms used in CTAs which are also employed in the MLI, as indicated by the Dutch State Secretary of Finance, Parliamentary Proceedings, Second Chamber, 2016–2017, 25 087, no. 148, at 22.

53 Those parts of the updated OECD Commentaries that coincide with paragraphs of het BEPS reports to which the Explanatory Statement explicitly refers, could in my view – similar to the relevant passages from the BEPS reports – be part of the context.

54 Cf. F. P. G. Pötgens & D. M. Broekhuijsen, *Het Multilaterale Instrument met zijn vele bilaterale schakeringen*, (76) WFR (2017), ss 3.5.1 and 3.5.2.

55 Art. 30(3) of the VCLT reads as follows: '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.'

56 *See also* the final BEPS Action 15 report, at 31–32, para. 16 of the Explanatory Statement and OECD, above n. 9, at para. 16.

has its own compatibility clause.[57] These compatibility clauses establish the priority of the substantive MLI provisions when an existing CTA provision conflicts with the MLI provision in question, as well as the consequences if a CTA does not contain a provision of the type described in the compatibility clause. The various compatibility clauses also involve notification obligations (see section 5 below).

The MLI employs various types of compatibility clauses. The interaction with specific CTAs depends on the terminology used in these compatibility clauses. The following types of compatibility clauses can be distinguished:[58]

– 'In place of': the MLI provision replaces an existing CTA provision, provided the CTA contains such a provision (see for example Article 12(3) of the MLI, which refers to the definition of dependent agent PE in CTAs). No modifications are made if a CTA does not contain the described provision.
– 'Applies to' or 'modifies': the MLI provision changes the application of an existing CTA provision without replacing it, and therefore only applies if there is an existing provision (see for example Article 5(3) of the MLI, which modifies the scope of the method article concerning the elimination of double taxation).
– 'In the absence of': the MLI provision supplements CTAs lacking a described provision (see for example Article 16(4)(b), under (i) and (ii), of the MLI, which applies in the absence of a provision similar to Article 25(2), first sentence, of the OECD Model).
– 'In place of or in the absence of': the MLI provision applies in all cases (see for example Article 3(4) of the MLI, which refers to existing CTA provisions concerning income derived by or through hybrid entities or instruments). Accordingly, the MLI provision replaces any existing CTA provision, and where none exists, the MLI provision is effectively added to the CTA. This type of compatibility clause is by far the most used in the MLI.[59]

It remains to be seen whether the application of the compatibility clauses to specific tax treaty provisions is as straightforward in practice. For instance, questions could arise as to the effect of the MLI on certain exceptions to or extensions of the existing CTA provisions as described in the compatibility clauses (e.g. deviations from the OECD Model standards). To give just one example, the corporate tie-breaker of Article 4 (4) of the 2008 Netherlands-UK tax treaty is more or less comparable to the proposed tie-breaker rule of Article 4(1) of the MLI. Based on Article 4(4) of the 2008 Netherlands-UK tax treaty, the contracting states shall determine in a MAP the contracting state of which the dual resident company is a resident for purposes of the treaty. In the absence of a mutual agreement, the company is not considered a resident of either contracting state for the purposes of claiming any treaty benefits, except those provided by Article 21 (elimination of double taxation), Article 24 (non-discrimination) and Article 25 (MAP). Article 4(1) of the MLI does not contain such a precise exception, but more vaguely allows treaty benefits to be granted as far as agreed by the competent authorities of the contracting states. Should Article 4(1) of the MLI substitute Article 4(4) of the 2008 Netherlands-UK tax treaty, it seems that the existing exception is invalidated, in particular since the compatibility clause seems to have an 'all or nothing' approach. In my view, this would also be in line with the *lex posterior* rule of Article 30(3) of the VCLT.[60]

4 Reservations

Where a substantive MLI provision does not reflect a BEPS minimum standard, states can generally choose to opt out of that provision by making a reservation. This allows states to fully or partially withdraw from the operation of the MLI. The permitted reservations are specifically defined in each MLI provision. Article 28(1) of the MLI contains an exhaustive list of permitted reservations, with reference to the relevant substantive MLI provisions.[61] States cannot make other reservations, or reservations with a broader or narrower scope, than those explicitly allowed under the MLI.

A reservation applies to all CTAs of the reserving state. Accordingly, the modifications envisioned by the substantive MLI provision are not made to any of the CTAs of the reserving state. In other words, states cannot make reservations for individual CTAs (no cherry picking).[62] Moreover, if a state makes a reservation regarding a specific MLI provision, then this reservation applies reciprocally in relation to all other parties to the MLI, unless the reservation itself

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[57] By way of exception, Art. 26 of the MLI is the compatibility clause for all of the provisions of Part VI (Arbitration).

[58] Para. 15 of the Explanatory Statement.

[59] *See* e.g. Art. 3(4), Art. 4(2), Art. 6(2), Art. 7(2) and (14), Art. 8(2), Art. 9(2), Art. 10(4), Art. 11(2), Art. 14(2), Art. 16(4)(a) under (i) and Art. 17(2) of the MLI.

[60] This example is merely intended as an illustration. The permitted reservations of Art. 4(3)(b) through (e) of the MLI should generally offer sufficient possibilities to avoid this issue. Nevertheless, the Netherlands and the UK have not applied this reservation in their provisional notifications.

[61] By way of exception, Art. 28(2) of the MLI stipulates that parties choosing to apply Part VI (Arbitration) can make one or more reservations with respect to the scope of cases that are eligible for arbitration under Part VI. Such a reservation must be accepted by the other party concerned before it has effect.

[62] An exception to this rule can be found, e.g. in Art. 5(8) of the MLI, which allows states to opt out of Art. 5 with regard to one or more of its CTAs.

explicitly provides otherwise (Article 28(3)(a) and (b) of the MLI).[63] Thus, reservations in principle apply symmetrically, even if the other party to the CTA has not made a reservation.[64] This system entails that the effect of the substantive MLI provisions on the CTAs of a party to the MLI depends not only on that state's own reservations, but also on the reservations made by that state's treaty partners.

The BEPS minimum standards concern the implementation of Action 7 (Articles 6 and 7 of the MLI) and Action 14 (Article 16 of the MLI). With regard to these minimum standards, there are only limited possibilities of opting out of these provisions, for example where a CTA already satisfies the minimum standard. If a minimum standard can be met in various alternative ways, the MLI in principle does not favour any particular way of meeting the minimum standard. However, where contracting states each adopt a different approach to meeting a minimum standard that requires the inclusion of a specific type of CTA provision, those states must endeavour to reach a mutually satisfactory solution consistent with the minimum standard.[65] This approach is evident, for example, in the possibility to opt out of the Principal Purpose Test (PPT) prescribed by Article 7(1) of the MLI, provided that parties choosing to do so endeavour to meet the minimum standard on treaty abuse by adopting, on a bilateral basis, a detailed Limitation on Benefits (LOB) provision in combination with either a PPT or an anti-conduit provision (Article 7(15)(a) of the MLI).

The other substantive MLI provisions are not minimum standards, and with respect to these articles the MLI offers more flexibility. Parties can generally opt out of an MLI provision entirely, but in some cases a partial opt-out is allowed (for instance per sub clause). Moreover, in derogation from the main rule that a reservation applies to all of the reserving party's CTAs, in certain cases the MLI permits a party to make a reservation on a subset of CTAs. Such a subset concerns CTAs with specific, objectively defined characteristics (for instance existing CTA provisions that have a similar effect to that of the relevant MLI provision; see for instance Article 3(5)(b) of the MLI regarding CTAs which already contain a provision targeting hybrid mismatches). From a treaty policy perspective, states can therefore choose to leave certain existing CTA provisions unaffected.

States have to make their reservations at the time of signature of the MLI, or when they deposit their instrument of ratification, acceptance or approval (Article 28(5) of the MLI). States have the possibility to submit a provisional list of expected reservations at the moment of signing the MLI (Article 28(7) of the MLI). The final list of reservations, whether or not amended, must then be provided to the depositary at the moment of ratification. The system of provisional and final lists is intended to give other MLI signatories a preliminary indication of the signatory's intended position, so that they can coordinate their positions where necessary.[66] Reservations made at the time of signature of the MLI have to be confirmed upon deposit of the instrument of ratification, unless the document containing the reservations explicitly specifies that it is to be considered definitive (Article 28(6) of the MLI).[67] States are only bound by their reservations after completion of the domestic ratification procedure. Before this time, changes can still be made to the list of reservations, including the addition or deletion of reservations or the modification of reservations made at the time of signature. Since the lists of reservations will normally be part of the domestic ratification procedures, this allows national parliaments to change the reservations that are included on the provisional list.[68]

Many reservations are subject to the condition that the reserving states provide a list of CTAs that are within the scope of the reservation, including the article and paragraph number of specific CTA provisions covered by the reservation. Article 28(8) of the MLI enumerates the permitted reservations that are subject to this notification obligation. Such notification is a constitutive requirement for a reservation to have effect. Consequently, if states fail to notify the relevant CTA provisions to the OECD, the reservation is not effective. In determining the impact of the MLI on a specific CTA, it is therefore relevant to verify whether a state that has made a reservation has also 'checked' its specific CTA provisions.

Parties may at any time withdraw or replace a reservation with a more limited reservation, expanding the scope of the relevant MLI provision (Article 28(9) of the MLI).[69] This requires a notification addressed to the OECD. Such a change only has effect after a certain period (in accordance with the general entry into effect

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[63] *See also* Art. 21(1) of the VCLT, which contains the same principle.

[64] At the same time, various substantive MLI provisions explicitly offer the possibility of an asymmetrical scope, such as Art. 5 of the MLI regarding the methods for the elimination of double taxation and the option for asymmetrical application of the simplified LOB provision in addition to the principal purpose test pursuant to Art. 7(7)(b) of the MLI. However, this asymmetrical effect is not based on the permitted reservations.

[65] The Inclusive Framework on BEPS has the task of monitoring through a peer review mechanism whether these states actually comply with the minimum standard.

[66] Para. 280 of the Explanatory Statement. The OECD facilitated this process, for instance by organizing a 'speed matching week' in Feb. 2017 during which representatives of the states were able to compare and discuss their choices and reservations.

[67] *See also* Art. 23(2) of the VCLT. It seems unlikely that there are many states that can make final reservations upon signature of the MLI under their constitutional law.

[68] *See also* OECD, above n. 9, at para. 24.

[69] E.g. a state can replace a full reservation on the article concerning hybrid mismatches (Art. 3(5)(a) of the MLI) by a reservation not to apply Art. 3(1) of the MLI to CTAs containing a provision which already addresses hybrid mismatches (Art. 3(5)(b) of the MLI). However, the reverse order is not possible. *See* para. 282 of the Explanatory Statement.

provision; see section 6.2 below). Therefore, states cannot make a more extensive reservation at a later moment.[70] In other words: parties cannot relax the obligations imposed on them by the MLI, but only tighten them. Some states could perceive this as a policy incentive to make as much reservations as possible, and as broadly as possible, upon signature, since these reservations can be limited at a later moment, but the reverse route is not open.[71]

The below Table 1 gives a high-level overview of the preliminary positions taken by signatories on the various substantive MLI provisions (as at 17 August 2017). This overview is not comprehensive and is intended only for illustration purposes. It shows that the MLI signatories have generally made a substantial number of reservations on, in particular, the non-minimum standards of the MLI. Since these reservations in principle apply symmetrically, they will also influence the impact of the MLI on the non-reserving treaty partners. Based on these provisional reservations, the MLI provisions are applicable in ever changing configurations, and the optional MLI provisions will often not modify existing tax treaties. I expect that this global picture will not be very different based on the final reservations.

Table 1

Measure	*Summary*	*Reservations*
Transparent entities (Article 3)	According to Article 3(1) of the MLI ('look through provision'), income derived by or through a transparent entity is only considered to be income of a resident of a jurisdiction (and thus eligible for CTA benefits) to the extent that the income is treated as income of a resident under that jurisdiction's domestic law. Based on Article 3(2) of the MLI, the residence jurisdiction is not obliged to avoid double taxation (exemption or credit method) solely on the basis of the residence of a (hybrid) entity in the other jurisdiction. The residence jurisdiction is only required to avoid double taxation if the other jurisdiction has the taxation right as source jurisdiction or if the income is attributable to a PE in that jurisdiction.	Forty-six jurisdictions (out of seventy-one) reserve the right for the entirety of Article 3 not to apply to their CTAs (full opt-out).
Dual resident entities (Article 4)	The state of residence of a dual resident entity for purposes of a CTA is determined in a MAP between the contracting states. No CTA benefits are in principle available until the residence is settled in a MAP.	Forty-three jurisdictions (out of seventy-one) reserve the right for the entirety of Article 4 not to apply to their CTAs (full opt-out).
Elimination double taxation (Article 5)	Provides a choice to apply one – or none – of three options with respect to elimination of double taxation: (A) the credit method and not the exemption method applies (switch over) to any income that is exempt or taxed at a reduced tax rate by the other jurisdiction pursuant to the CTA (cf. Article 23 A(4) of the OECD Model); (B) the credit method and not the exemption method applies (switch over) to dividends that are deductible in the other jurisdiction; (C) the credit method applies to all income that may be taxed in the other jurisdiction. These options in principle apply unilaterally (i.e. to a jurisdiction's own residents).	Five jurisdictions choose option A, none choose option B and eleven choose option C. In addition, twenty-five jurisdictions have not (yet) made a choice, therefore applying none of the options. Jurisdictions that wish to apply none of the options can neutralize the asymmetrical effect of Article 5 by making a reservation on this provision in respect of one or more of their CTAs (Article 5 (8) of the MLI). This has been done by thirty jurisdictions. In that case, Article 23 of these CTAs is not affected, regardless of the choice of the treaty partner.

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[70] *See* however, Art. 29(5) of the MLI, which allows a state to make a new reservation if a tax treaty is added to the list of notified CTAs and the CTA is the first treaty to fall within the scope of that reservation.

[71] This potential effect was recognized by the Dutch government; *see* Parliamentary Proceedings, Second Chamber, 2016–2017, 25 087, no. 148, at 16.

Measure	*Summary*	*Reservations*
Purpose of a CTA (Article 6)	Includes language in the preamble of tax treaties stating that treaty jurisdictions do not intend to create opportunities for tax evasion or avoidance. As a BEPS minimum standard this provision is mandatory. Optionally, additional reference to the desire to develop an economic relationship and to enhance co-operation in tax matters can be included in the preamble.	Forty-five jurisdictions (out of seventy-one) choose to include the optional preamble text on developing an economic relationship and enhancing co-operation in tax matters.
Prevention of treaty abuse (Article 7)	As a BEPS minimum standard, this provision adds the principal purpose test (PPT) to CTAs. The PPT is the 'default' mode of Article 7. Parties may opt to supplement the PPT with a simplified limitation on benefits (LOB) provision (Article 7(6) of the MLI). The simplified LOB provision is in principle only added to CTAs if both jurisdictions make the same choice. However, the MLI offers the option of an asymmetrical application of the simplified LOB (Article 7(7)(b) of the MLI). This option only applies to a specific CTA if the other jurisdiction confirms this choice. Parties are only permitted to opt out of Article 7 in a limited number of circumstances, for instance if they commit to bilaterally negotiate a detailed LOB provision in combination with an anti-conduit provision or a PPT. The MLI allows jurisdictions to declare that they wish to apply the PPT as an interim measure until they are able to bilaterally negotiate a detailed LOB provision (Article 7(17)(a) of the MLI). Article 7(4) of the MLI provides the option of supplementing the PPT with a discretionary relief provision. At the taxpayer's request, the competent authority of the jurisdiction applying the PPT can choose to grant the treaty benefits that would have been available in the absence of the transaction or arrangement covered by the PPT (after consultation with the other jurisdiction's competent authority). Jurisdictions can notify existing anti-abuse provisions in CTAs under Article 7(17) of the MLI. If the other jurisdiction notifies the same provisions, the PPT (optionally supplemented with discretionary relief) substitutes these existing provisions. In other cases, the PPT applies in addition to these existing anti-abuse provisions, which are only inapplicable to the extent that they contravene the PPT.	No jurisdiction has reserved the right for Article 7(1) of the MLI not to apply in order to negotiate a detailed LOB provision on a bilateral basis. However, nine jurisdictions indicated that they wish to apply the PPT as an interim measure.[72] Twenty-seven jurisdictions (out of seventy-one) choose to apply the discretionary relief provision. This provision is only added to CTAs if both jurisdictions make the same choice. Twelve jurisdictions (out of seventy-one) choose to supplement the PPT with the simplified LOB provision, including Argentina, Chili, India, Indonesia, Mexico and Russia (the simplified LOB is in principle only added to a specific CTA if the treaty partner makes the same choice). One jurisdiction (Greece) has indicated a preference for asymmetrical application of the simplified LOB (which only applies if the treaty partner confirms this choice).
Dividend transfer transactions (Article 8)	A reduced rate of source state taxation on dividends pursuant to a CTA only applies if a minimum ownership threshold required by the CTA is met throughout a retrospective 365-day testing period.	Thirty-nine jurisdictions (out of seventy-one) reserve the right for the entirety of Article 8 not to apply to their CTAs (full opt-out).

Notes

[72] This concerns Canada, Chili, Colombia, Kuwait, Mauritius, Norway, Poland, Senegal and the Seychelles.

Measure	*Summary*	*Reservations*
Capital gains on interests in immovable property companies (Article 9)	Article 9(1) of the MLI applies to CTA provisions similar to Article 13(4) of the OECD Model, allowing source state taxation on gains on the disposal of interests in 'immovable property companies'.[73] An 'immovable property company' is generally defined as an entity of which a certain defined proportion of total value is derived from immovable property (a 'value threshold'). Article 9(1)(a) MLI provides that an entity is an 'immovable property company' if the value threshold is met at any time during a retrospective 365-day testing period. Article 9(1)(b) MLI provides that ownership interests that are comparable to shares are also covered by CTA provisions similar to Article 13(4) of the OECD Model. Alternatively, Article 9(3) of the MLI provides the option of replacing existing CTA provisions entirely with the new Article 13(4) of the OECD Model as per the final BEPS Action 6 report, or adding this provision to CTAs currently lacking a provision on immovable property companies.	Thirty-eight jurisdictions (out of seventy-one) reserve the right for Article 9(1) of the MLI not to apply to their CTAs (opt-out for both testing period and expansion of scope). Thirty jurisdictions (out of seventy-one) choose to add the revised Article 13(4) of the OECD Model to their CTAs (which is only effective if the treaty partner makes the same choice).
Low-taxed PEs in third jurisdictions (Article 10)	Denies treaty benefits with respect to income that the state of residence of the taxpayer attributes to a low-taxed PE of the taxpayer in a third jurisdiction, unless an active trade or business is carried out in that PE.	Forty-nine jurisdictions (out of seventy-one) reserve the right for the entirety of Article 10 of the MLI not to apply to their CTAs (full opt-out).
'Saving clause' (Article 11)	The 'saving clause' clarifies that a jurisdiction is allowed to tax its own residents notwithstanding the provisions of a CTA. This provision is often applied by the US (cf. Article 1(4) and (5) of the 2016 US Model Convention).[74]	Forty-nine jurisdictions (out of seventy-one) reserve the right for the entirety of Article 11 of the MLI not to apply to their CTAs (full opt-out).
Commissionaire arrangements (Article 12)	Lowers the threshold for a dependent agent PE, for instance in commissionaire structures. A person that acts on behalf of a foreign enterprise in that jurisdiction constitutes a PE in that jurisdiction if that person 'habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise'.	Forty jurisdictions (out of seventy-one) reserve the right for the entirety of Article 12 of the MLI not to apply to their CTAs (full opt-out).
Specific activity exemptions (Article 13)	Provides a choice to apply one – or none – of the following options with respect to the exemption for preparatory and auxiliary activities (Article 5(4) of the OECD Model): (A) restricting existing specific activity exemptions in CTAs explicitly to preparatory or auxiliary activities (Article 13(2) of the MLI); (B) preserving existing specific activity exemptions in CTAs, while ensuring that those exceptions apply irrespective of whether the activity is of a preparatory or auxiliary character (Article 13(3) of the MLI).	Twenty-seven jurisdictions (out of seventy-one) reserve the right for the entirety of Article 13 of the MLI not to apply to their CTAs (full opt-out). Furthermore, thirty-four jurisdictions choose to apply option A, and 7 choose to apply option B. Only four jurisdictions have made a full reservation on the anti-fragmentation rule.

Notes

[73] *See also* F. Haase, *Reconceptionalization of the 'Immovable Property Clause' in Article 13 Paragraph 4 OECD Model Convention by Means of the Multilateral Instrument?*, 45(4) Intertax 284–295 (2017).

[74] *See* https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/treaties.aspx (accessed 20 Aug. 2017).

Measure	*Summary*	*Reservations*
	Under the optional additional anti-fragmentation rule, activities carried out by several 'closely related enterprises' (as defined in Article 15 of the MLI) in the same contracting state constitute a PE if those activities taken as a whole are not of a preparatory or auxiliary character and constitute complementary functions that are part of a cohesive business operation (Article 13(4) of the MLI).	
Splitting-up of contracts (Article 14)	For the determination if a building site, a construction or installation project constitutes a PE, the following activities are aggregated for purposes of the testing period of existing CTA provisions similar to Article 5(3) of the OECD Model (standard twelve months): – activities at a place that constitutes a building site or construction or installation project or other activities specified in the relevant CTA provision or supervisory or consultancy activities in connection with such a place, that are carried on during one or more periods of time that, in the aggregate, exceed thirty days; and – connected activities at the same building site or construction or installation project by one or more 'closely related enterprises' (as defined in Article 15 of the MLI) during different periods of time each exceeding thirty days.	Forty-five jurisdictions (out of seventy-one) reserve the right for the entirety of Article 14 of the MLI not to apply to their CTAs (full opt-out).
Improving dispute resolution (Part V)	Implements the BEPS minimum standard for MAPs which is intended to ensure an effective and timely resolution of treaty-related disputes. The BEPS minimum standard is complemented by optional best practices. Article 16 of the MLI, the minimum standard, implements the wording of Article 25(1)–(3) of the OECD Model in CTAs (including the amended version of Article 25(1) suggested in the final BEPS Action 14 report). Under Article 16(1) of the MLI, a MAP request can be directed to either competent authority (and not only to the competent authority of the taxpayer's jurisdiction of residence). Article 17(1) of the MLI, which is a best practice based on Article 9(2) of the OECD Model, requires jurisdictions to make an adjustment to the profits of a taxpayer if the other contracting state makes an at arm's length pricing adjustment to the profits of a taxpayer in that other contracting state. Any increase or decrease in that other jurisdiction would be mirrored by a corresponding adjustment to the profits of the taxpayer in the first jurisdiction.	Various jurisdictions make one or more of the limited permitted reservations on Article 16 of the MLI, which are based on permitted variances of the minimum standard. For instance, twenty-four out of seventy-one jurisdictions choose for the opt-out allowing that a MAP request can be addressed only to the residence jurisdiction, provided this jurisdiction implements a bilateral notification and consultation process (Article 16(5)(a) of the MLI).
Binding arbitration (Part VI)	The optional provisions of Part VI of the MLI provide for mandatory and binding arbitration as a dispute resolution mechanism for disputes that prove unable to be solved through a MAP.	Twenty-six jurisdictions choose to apply part VI of the MLI, adding mandatory binding arbitration to around 150 tax treaties.[75]

Notes

[75] OECD, *MLI FAQs July 2017*, at 7.

5 Notification clauses

Where the substantive MLI provisions allow states to make a reservation or to choose between various options, the states are required to notify their choices to the OECD as depositary. To achieve this, the MLI provisions contain so-called 'notification clauses'. The substantive MLI provisions contain two different types of notification clauses:

- A notification clause with regard to choices of optional provisions. These clauses also describe the consequences if the contracting states make a different choice (a so-called mismatch). Normally, optional provisions apply only if both contracting states to a CTA make the same choice.

A notification clause specifying existing CTA provisions that are within the scope of compatibility clauses, where an MLI provision supersedes or modifies specific types of existing CTA provisions. These clauses also describe the consequences if the contracting states do not notify the same CTA provision (a so-called notification mismatch).

The effect of the latter category of notification clauses varies depending on the wording of the applicable compatibility clause (see section 3 above), and can be summarized as follows:[76]

- 'In place of': pursuant to the notification clause, the MLI provision applies only if both contracting states notify the existing CTA provision (see for example Article 12(5) of the MLI, requiring notification of the definition of dependent agent PE in the contracting states' CTAs). The MLI provision has no effect in case of a notification mismatch.
- 'Applies to' or 'modifies': pursuant to the notification clause, the MLI provision applies only if both contracting states notify the existing CTA provision which is intended to be modified without being replaced (see for example Article 5(10)(a) of the MLI, requiring notification of the applicable provisions concerning the exemption method in the states' CTAs). The MLI provision has no effect in case of a notification mismatch.
- 'In the absence of': pursuant to the notification clause, the MLI provision applies only if both contracting states notify the absence of an existing CTA provision (see for example Article 16(6)(c), under (i), of the MLI, requiring notification of CTAs that do not contain a provision along the lines of Article 25(2) of the OECD Model). The MLI provision has no effect in case of a notification mismatch.
- 'In place of or in the absence of': if both contracting states notify an existing CTA provision, this provision is replaced by the MLI provision. If both contracting states do not notify the existence of an existing CTA provision, for instance in case of a notification mismatch, the MLI provision will nevertheless apply. In that case, if there is an existing CTA provision, the MLI will supersede the existing provision to the extent that it is incompatible with the relevant MLI provision (and the existing CTA provision thus survives to the extent that it is compatible with the MLI). If there is no existing CTA provision, the MLI provision is effectively added to the CTA (see for example Article 3(6) of the MLI, requiring notification of existing CTA provisions concerning income derived by or through hybrid entities or instruments).[77]

Considering the legal consequences of possible mismatches and notification mismatches, it is important to verify in each case which choices the contracting states to a CTA have notified, whether they have made the required notifications under the relevant compatibility clauses, and whether they have notified the same CTA provisions. In this respect, notification mismatches only affect one particular CTA, whereas options, as well as reservations, in principle apply to all CTAs of a state. Notification mismatches may have an unforeseen impact on the effect of the MLI provisions. A notification mismatch could for instance occur if the contracting states to a CTA disagree about whether a particular provision is within the scope of a compatibility clause at all, or if they have different views as to which CTA provision should be notified as relevant provision.[78] These types of cases should be settled through the MAP provided for under the applicable CTA, which is referred to in Article 32(1) of the MLI, or through a conference of the parties. Besides the MAP, taxpayers do not have any formal legal remedy to address notification mismatches, for instance if they believe that a jurisdiction has incorrectly, either knowingly or unknowingly, omitted to notify a specific CTA provision. States can repair inadvertent notification errors by making an additional notification under Article 29(6) of the MLI (but only prospectively, see below).

The procedural aspects of the notification obligations are laid down in Article 29 of the MLI. Firstly, the notification requirement under the MLI comprises all tax treaties which a state wishes to designate as CTA, thus bringing these treaties within the scope of the MLI (Article 29(1)(a) of the MLI). Secondly, Article 29(1)(b)

Notes

[76] The examples mentioned here refer to the notification clauses belonging to the compatibility clauses which are mentioned in s. 4 above.

[77] According to para. 16 of the Explanatory Statement, this approach is in line with the 'main rule' of Art. 30(3) of the VCLT. *See also* the final BEPS Action 15 report, at 31–32.

[78] *See* para. 18 of the Explanatory Statement. According to para. 15 of the Explanatory Statement, parties are expected use their best effort to identify all provisions that are within the scope of a compatibility clause. Parties are expected to not consciously omit the notification of certain provisions.

through (t) of the MLI contains an exhaustive list of notification requirements, referring to the relevant notification clauses of the substantive MLI provisions. The system of these notifications is comparable to that of the reservations. States have to make their notifications at the time of signature of the MLI, or when they deposit their instrument of ratification, acceptance or approval (Article 29(1) of the MLI). At the moment of signature, states have to submit a provisional list of expected notifications (Article 29(4) of the MLI). Final notifications (possibly amended) are made at the moment of deposit of the instrument of ratification. If notifications are made at the time of signature of the MLI, these have to be confirmed upon deposit of the instrument of ratification, unless the document containing the notifications explicitly specifies that it is to be considered definitive (Article 29(3) of the MLI). States are only bound by their notifications as of the moment of ratification. Since the notifications will be subject to the domestic ratification procedure in most states, national parliaments can still influence the notifications which are ultimately made.

States have the possibility to expand their list of CTAs, and to make additional notifications to the OECD (Article 29(5) and (6) of the MLI). Such changes are only effective after a certain period (in accordance with the general entry into force provision, see section 6.2 below).

6 Final provisions

6.1 *Signing and Ratification*

The MLI was open for signature as of 31 December 2016 (Article 27(1) of the MLI). A large group of states signed the convention at the signing ceremony held in June 2017 (see section 1). The MLI is open for signature by all states. It can therefore also be signed by jurisdictions that are not members of the Ad Hoc Group (or the Inclusive Framework on BEPS). At the same time, signature is also not dependent on participation in the Ad Hoc Group. Therefore, members of this group are free to refrain from signing the MLI. If they are also members of the Inclusive Framework on BEPS, however, then they will need to fulfil their commitment to implement the treaty related BEPS minimum standards in another way, for instance through bilateral negotiations.

States that have signed the MLI need to ratify the convention in accordance with their own domestic procedures (the MLI consistently uses the term 'ratification, acceptance or approval'). Ratification, acceptance and approval all refer equally the international act whereby a state establishes its consent to be bound by a treaty at the international level.[79] The domestic constitutional aspects and the timing of these ratifications will vary from signatory to signatory.[80] Once the appropriate domestic procedures have been completed, a signatory must deposit its instrument of ratification, acceptance or approval with the OECD. The signatory will then become a party to the MLI (subject to the timing provisions of Article 34 of the MLI; see section 6.2 below).

The MLI can also apply to non-state jurisdictions or territories. Where a state is responsible for the international relations of another jurisdiction or territory, and this jurisdiction or territory is able to conclude tax treaties independently, a state can include the CTAs of this jurisdiction or territory (see Article 2(1)(a)(i)(B) of the MLI) in the list of notified CTAs. Such jurisdiction or territory does not formally become a party to the MLI, even though the MLI applies to its tax treaties.[81] In this situation, the state which is party to the MLI submits the reservations and notifications in respect of the jurisdiction or territory in question, which will apply to all CTAs of that jurisdiction or territory. These reservations and notifications can deviate from those of the state party itself (see Articles 28 (4) and 29(2) of the MLI). Alternatively, a non-state party can become a party to the MLI in its own right by a consensus decision of the parties and signatories to the MLI (pursuant to Article 27(1)(c) of the MLI).[82] This means that all parties and signatories have a veto right.[83]

6.2 *Entry into Force and Entry into Effect*

The MLI enters into force when five jurisdictions have ratified the convention, to be precise on the first day of the month following a period of three months, which begins on the date the fifth instrument of ratification, acceptance or approval is deposited. As of that moment, the five jurisdictions which have deposited their instrument of ratification will become parties to the MLI. For each subsequent jurisdiction, the MLI enters into force on the first day of the month following a period of three months beginning on the date of the deposit by that signatory of its instrument of ratification, acceptance or approval (Article 34 of the MLI).

The moment of entry into force (i.e. when a state becomes a party to the MLI) must be distinguished from the moment of entry into effect. The latter moment

Notes

[79] *See* Art. 2(1)(b) of the VCLT.

[80] *See* e.g. OECD, above n. 9, at para. 23 et seq.

[81] E.g. China signed the MLI on behalf of Hong Kong.

[82] In addition, the jurisdictions listed in Art. 27(1)(b) of the MLI can become parties in their own right. This concerns Guernsey, the Isle of Man and Jersey.

[83] Para. 262 of the Explanatory Statement.

concerns the moment as of which the MLI has consequences for the taxes covered by a particular CTA. This normally includes personal income taxes, corporate income taxes, capital gains taxes, wage withholding taxes and withholding taxes on dividends, interest and royalties.

With regard to the entry into effect, the MLI makes a distinction between taxes withheld at source and other taxes (Article 35 of the MLI).[84] For both types of taxes a certain 'waiting period' applies before the MLI enters into effect. As regards withholding taxes, the MLI takes effect with respect to taxable events occurring on or after the first day of the calendar year that begins on or after the latest of the two dates on which the MLI enters into force for each of the two contracting states. For example, if the MLI enters into force for Country A on 1 March 2018 and for Country B on 1 March 2019, the MLI will take effect with respect to withholding taxes relating to an event occurring as of 1 January 2020.

With respect to other types of taxes, for example corporate income taxes, the MLI enters into effect for taxable periods beginning on or after expiration of a period of six calendar months from the latest of the two dates on which the MLI enters into force for each of the two contracting states. The parties may also agree on a shorter period than six months, provided they notify the OECD of the agreed period. For instance, if the MLI enters into force for Country A on 1 March 2018 and for Country B on 1 September 2018, the MLI will take effect with respect to taxable periods beginning on or after 1 March 2019. If the taxable year coincides with the calendar year, the MLI will therefore take effect as of 1 January 2020.

The OECD expects the first modifications pursuant to the MLI to enter into effect in 2018.[85] Given the relevant waiting periods, the earliest moment of entry into effect seems to be 1 January 2018, which requires ratification to take place before Q4 2017. Considering the duration of ratification procedures in most states, even in case of a swift ratification, this seems rather optimistic. In my view, widespread entry into effect of the MLI as of 2019 or 2020 is more realistic. For instance, if both contracting states to a CTA ratify the MLI during the first half of 2018, the MLI can take effect as of 1 January 2019.

In connection with the entry into force of a treaty, temporal issues may arise, including questions as to de facto retroactive effect and doctrines referred to as 'compartmentalization' or 'partitioning'.[86] Based on Article 35 of the MLI, the temporal scope of the MLI is defined in the convention itself. The effect of the MLI on specific CTAs concerns taxable events and taxable periods as of the moment the MLI enters into effect.[87] When the MLI regime becomes applicable to a certain situation, compartmentalization does not seem to be in order, i.e. it does not seem necessary to split income, profits or gains between a pre-MLI period and an MLI period. Where a source state obtains a more extensive taxation right under the MLI, for instance through the addition of the 365-day testing period to the provision on immovable property companies (Article 9 of the MLI), the 'new' MLI regime will, in my view, apply to the entire relevant income or gain, as calculated in accordance with domestic law, even if the income or gain accrued in a period before the MLI took effect.[88] This approach would be in line with paragraph 3.1 of the Commentary on Article 13 of the OECD Model.[89] Since Article 9 of the MLI introduces a retrospective testing period, the provision could be said to have a certain retroactive effect, since its application depends on facts which may have occurred before the MLI took effect. The same applies to the minimum shareholding period pursuant to Article 8 of the MLI (dividend transfer transactions).

6.3 *Amendments of Tax Treaties and the MLI*

The MLI does not prohibit states from agreeing on changes to their CTAs on a bilateral basis after implementation of the MLI (Article 30 of the MLI). Therefore, CTAs are not rendered static by the application of the MLI. In principle, this would allow states to reverse the modification of CTAs by the MLI, effectively overriding the MLI. Accordingly, a reversal of the BEPS minimum standards on a bilateral basis is in

Notes

[84] Art. 36 of the MLI contains a separate provision with regard to the entry into effect of Part VI (Arbitration).

[85] OECD, above n. 6, at 13.

[86] *See* generally, inter alia, K. Zembala, *Chapter VII. Final Provisions*, in *Klaus Vogel on Double Taxation Conventions* 2013 et seq. (Alphen aan den Rijn: Kluwer Law International 2015); J. Wheeler, *Time in Tax Treaties*, in *Global Tax Treaty Commentaries*, IBFD, online; D. S. Smit, *Timing Issues Under Double Tax Treaties: The Dutch Approach*, 44(1) Intertax 29–39 (2016).

[87] Compare the 'main rule' of Art. 28 of the VCLT ('non-retroactivity of treaties'), pursuant to which a treaty does not bind a party in relation to any act or fact which took place before the entry into force of the treaty with respect to that party, unless a different intention appears from the treaty.

[88] In my view, this is in accordance with case law of the Dutch Supreme Court (*Hoge Raad*), confirming that compartmentalization cannot be applied in case of a change of the applicable tax treaty. *See* the *Hoge Raad* judgment of 12 July 2002, *BNB* 2002/402, concerning the attribution of taxation rights in respect of capital gains on immovable property under the consecutive former tax treaties between the Netherlands and the UK (1967 and 1980). In this decision, the *Hoge Raad* in my opinion applied compartmentalization based on domestic law (*see also* the annex to the advisory opinion of Advocate-General Wattel accompanying the *Hoge Raad* decision of 11 June 2004, *BNB* 2004/344, ss 2.6 through 2.9). *See also* F. P. G. Pötgens & R. A. Bosman, *Het vermogenswinstartikel en het element 'tijd' onder belastingverdragen*, (123) WFR (2015).

[89] The relevant passage reads as follows: 'where the Article allows a Contracting State to tax a capital gain, this right applies to the entire gain and not only to the part thereof that has accrued after the entry into force of a treaty (subject to contrary provisions that could be agreed to during bilateral negotiations), even in the case of a new treaty that replaces a previous one that did not allow such taxation'.

theory possible, but I believe this to be an unlikely scenario, considering that parties to the MLI will most likely also participate in the Inclusive Framework on BEPS, and would therefore need to meet the minimum standards in another way.

The MLI also explicitly provides for amendments to the convention itself. Any party to the MLI can propose an amendment by submitting this to the OECD (Article 33 (1) of the MLI). The OECD may then convene a conference of the parties to considered the proposal (Article 33 (2) of the MLI; see also section 6.5 below). An actual amendment to the MLI requires all parties to the convention to ratify the proposed change. Considering the large number of signatories (and anticipated parties) and the required unanimity, it seems unlikely that the MLI will be amended frequently.

6.4 *Withdrawal*

Based on Article 37 of the MLI, any party may, at any time, withdraw from the MLI by submitting a notification to the OECD.[90] The withdrawal will be effective as of the date on which the OECD receives the notification. A unilateral withdrawal does not reverse the operation of the MLI; Article 37(2) of the MLI stipulates that if the MLI has entered into force for two particular parties to a CTA before such withdrawal, the CTA in question shall remain as modified by the MLI. The effects of a unilateral withdrawal from the MLI are therefore prospective only, and such withdrawal would not reverse the modifications already made to a specific CTA. If a state would like to change the CTA following its withdrawal from the MLI, thereby amending or reversing the modifications made by the MLI, then it will have to reach agreement on these changes with the other contracting state on a bilateral basis. Considering the international consensus on the minimum standards and the peer review mechanism of the Inclusive Framework on BEPS, I believe it is not very likely that states will withdraw from the MLI with a view to reversing the agreed minimum standards on a bilateral basis.

6.5 *Conference of the Parties*

Where necessary for the operation of the MLI, Article 31 of the MLI allows for the organization of a conference of the parties, to be facilitated by the OECD as depositary. A conference of the parties can be organized to deal with, for example, interpretation or application issues, or a possible amendment of the MLI. Each party can send a request for a conference to the OECD. The OECD then informs the other parties of the request (within a month, see Article 39(2) of the MLI) and convenes the conference at a date to be determined, provided the request is supported by one-third of the parties to the MLI within six months of the OECD's communication. This appears to require an affirmative action by the other parties.

6.6 *Authentic Languages*

According to the final clause, the English and French texts of the MLI are equally authentic, without offering states a choice as to which version applies to a specific CTA. The MLI does not have authentic versions in any other language. However, it is expected that unofficial translations of the MLI will be drafted by the OECD or individual parties to the MLI.[91] Such translations, however, are not authentic and do not have any official status. They can be no more than an auxiliary resource in the application and interpretation of the MLI.

Multilateral treaties normally only have a limited number of authentic language versions. From a practical perspective, this is understandable. Bilateral tax treaties are usually equally authentic in one language or in the languages of the contracting states, in some cases supplemented by a third authentic language (for example English). Since the English and French MLI texts also apply to tax treaties concluded in other languages (possibly in languages other than English of French), this may give rise to interpretation issues.[92] It is difficult to predict to which extent these issues will indeed occur, since over 80% of tax treaties globally have an English version.[93] It cannot be excluded that the MLI will have a harmonizing effect on the official languages of tax treaties.

In connection with the signing ceremony, the OECD published translations of the MLI in the Arabic, German, Italian and Spanish languages on its website. Translations in Dutch, Greek, Swedish, and Russian, are being prepared, and translations in other languages have been announced. These translations do not have any official status, although they can obviously be helpful in practice. According to the OECD, various countries are also working on consolidated versions of tax treaties as modified by the MLI

Notes

[90] Since the MLI is a multilateral convention, the term 'terminate' was considered inappropriate.

[91] OECD, *Information Brochure on the MLI*, at 4. *See also* the final BEPS Action 15 report, at 52.

[92] Para. 317 of the Explanatory Statement.

[93] Austry et al., above n. 2, at 686 and fn. 23.

for informational purposes.[94] These consolidated versions may serve as a practical aid in applying the MLI, but in principle have no official legal status.[95]

7 Future expectations

The scope of the MLI is limited to the implementation of the agreed BEPS measures. However, the MLI can be amended, and the convention can also be supplemented by one or more protocols (Articles 33 and 38 of the MLI). Therefore, the MLI provides for a mechanism to change or expand its scope in the future. This may include, for example, the implementation of non-BEPS related issues, such as future updates of the OECD Model. The OECD has expressed an interest in such a dynamic instrument, as follows clearly from the final BEPS Action 15 report.[96] The MLI could be a prelude to further harmonization of international tax law, either as a precedent or as an existing framework that can be further expanded.[97] An extension of the MLI to a comprehensive multilateral tax treaty based on the OECD Model could have advantages, such as reducing competition distortions and increasing legal certainty.[98] However, the question is whether this is a realistic prospect, considering the significant differences between tax systems and the international tax policies of countries. Furthermore, an amendment of the MLI requires unanimity between the parties. Even within the OECD it can be difficult to reach consensus (taking into account the large number of reservations on the OECD Model). Moreover, where a large number of countries are asked to give up their sovereignty, there will be a need for flexibility, which would affect the effectiveness and harmonizing effect of a multilateral treaty. Now that the MLI exists, however, it is not inconceivable that states will take further steps towards multilateralization in the area of international taxation.

8 Final remarks

The MLI can be regarded as the most innovative and radical development in tax treaties of the last decades. The implementation of the MLI will undoubtedly have a major impact on the global bilateral treaty network. The June 2017 signing ceremony has been a major step towards the implementation of the treaty related BEPS measures. Although the number of signatory states will still rise, the number of participants is not as high as the OECD may have wished. A number of important parties in the international BEPS discussion, like the US, will even not sign the MLI at all.

The actual impact of the MLI on tax treaties of the participating states depends to a large extent on the choices and reservations made by each state, especially with regard to the non-minimum standards, and these positions will also influence the impact of the MLI for their participating treaty partners. The MLI signatories have generally submitted a substantial number of reservations on the various MLI provisions which do not include minimum standards, such as the provisions on hybrid mismatches, dual resident entities and the changes of the PE definition. Consequently, these MLI provisions are applicable in ever changing configurations, and they will often not modify existing tax treaties. This aspect seems to diminish the effectiveness of these measures, but it is an inherent consequence of the chosen MLI system that offers a lot of flexibility.

After the implementation of the MLI, there will be a situation where tax treaties and the MLI apply in parallel, and both should be consulted. The interaction between the MLI and individual tax treaties can be complex in practice, and will probably give rise to all kinds of interpretation issues. Since disputes about the application and interpretation of the MLI are in principle reserved to national courts, the question arises to which extent uniformity is guaranteed. Nevertheless, in my view the MLI holds great promise for the further harmonization of international tax law.

Notes

94 OECD, above n. 75, at 4.

95 *See also* OECD, above n. 9, at paras 32 and 33, where it is noted that under the constitutional laws of a limited number of states (in particular with a dualist system) it may be necessary to produce 'consolidated' versions of tax treaties as modified by the MLI in order to transpose the modifications under the MLI into domestic legislation. Such consolidated versions would be part of domestic implementing legislation.

96 Final BEPS Action 15 report, at 26. However, the Explanatory Statement does not address this possibility at all.

97 *See also* Kleist, above n. 2, at 830.

98 *See* e.g. H. Loukota, *Multilateral Tax Treaty Versus Bilateral Treaty Network*, in *Multilateral Tax Treaties* 85 et seq. (M. Lang red., Kluwer Law International 1997).