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Interpretation under the Multilateral Instrument (MLI) – Part One

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

1. Introduction

This article looks at some of the features that can be identified when interpreting the Multilateral Instrument (MLI).¹ The authors have selected possible issues that may be relevant when interpreting the MLI (see the note at the end of this section). Before elaborating on these different elements of interpretation, the authors will give a brief exposé on the functioning of the MLI and, in particular,

on the design of the MLI.² This design implies that the MLI rules are to be applied alongside existing tax treaties (section 2.1). Section 2.2. addresses the issue of amendments to covered tax agreements (CTAs) after ratification of the MLI and the relationship of these amendments to the BEPS minimum standards. In addition, section 2.3. discusses the meaning and scope of the MLI's compatibility clauses. Section 3. provides a general overview of the interpretation of the MLI and, in particular, its interpretation provision (article 2(2) of the MLI) and its relation to articles 31 et seq. of the Vienna Convention on the Law of Treaties (VCLT). After these more general and introductory sections (which are dealt with in Part One), Part Two discusses the following elements that may be relevant to the interpretation of the MLI:

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

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

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

MLI and the impact that the substantive provisions may have on the CTA;³

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

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

There seems to be a distinction between civil law and common law. Interpreters with a civil law background naturally tend to categorize the various sources of interpretation according to the relevant rules of interpretation, i.e. article 2(2) of the MLI, article 3(2) of the CTA and articles 31 et seq. of the VCLT. This categorization may determine which elements are taken into account and which are considered of no or less relevance. This may explain why much of the literature on the interpretation of the

3. According to article 2(1) of the MLI, a CTA is a tax treaty between two states, both of which are parties to the MLI, and both of which have elected to bring that treaty within the scope of the MLI thereby creating a match.

4. The only case which is identified within these parameters is the decision AU: FCA, 31 Oct. 2024, *Oracle Corporation Australia Pty Ltd v. Commissioner of Taxation (Stay Application)* [2024] FCA 12 62 (the taxpayer has appealed this decision to the Federal Court of Australia Full Court). See for a discussion of this decision, A. Stamoulos, *Royalties in the Spotlight: The Significance of the Oracle Decision in Australian Tax Law*, 32 Intl. Transfer Pricing J. 2 (2025), Journal Articles & Opinion Pieces IBFD.

MLI has been written by civil law authors. Common law practitioners have a certain preference not to discuss the interpretation of the MLI in the abstract but to wait for a concrete case. With the help of that case and depending on its facts, the common law practitioner determines what is relevant to reach an appropriate interpretation result. The results reached in this case may influence future interpretations in other cases. This does not mean, however, that the common law interpreter would be unable to resolve an interpretation issue without an underlying case. The common law interpreter would consider all the relevant materials and balance them less categorically than a civil law interpreter would. It is therefore reasonable to conclude that a common law interpreter would be less categorical at this stage than a civil law interpreter would generally be.

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

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

2. The Functioning of the MLI

2.1. General

Within the framework of BEPS Action 15⁵ the OECD explored the feasibility of an MLI from a public international law perspective. For that purpose, the Committee on Fiscal Affairs of the OECD engaged an informal group of experts.⁶ This group of experts indeed concluded that an MLI to modify and supplement tax treaties in order to give certain BEPS measures the intended effect was feasible and desirable.⁷ The group of experts also addressed

5. S. Austry et al, *The Proposed OECD Multilateral Instrument Amending Tax Treaties*, 70 Bull. Intl. Taxn. 12, p. 683 et seq. (2016), Journal Articles & Opinion Pieces IBFD.

6. OECD/G20 Base Erosion and Profit Shifting Project, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties*, Action 15, Final Report, Annex A (A toolbox for a multilateral instrument for the swift implementation of BEPS measures) (OECD 5 Oct. 2015) [hereinafter BEPS Action 15 Final Report]. Compare also <https://web.archive.org/2017-06-07/441655-legal-note-on-the-functioning-of-the-MLI-under-public-international-law.pdf>. The group of experts included: Philip Baker (United Kingdom), Théodore Christakis (Greece), Frank Engelen (Netherlands), Concepción Escobar Hernandez (Spain), Mathias Forteau (France), Itai Grinberg (United States), Jan Klabbbers (Netherlands), Vaughan Lowe (United Kingdom), Philippe Martin (France), Yoshihiro Masui (Japan), Ekkehart Reimer (Germany), Giorgio Sacerdoti (Italy), Dire Tladi (South Africa).

7. See, for the effectiveness of the MLI, T.M. Vergouwen, D.M. Broekhuijsen & J.J.H. Reijnen, *The Effectiveness of the Multilateral Instrument in Amending the Bilateral Treaty Network: (On) the Measure of Multilateral Success*, 77 Bull. Intl. Taxn. 4, p. 177 et seq. (2023), Journal Articles & Opinion Pieces IBFD. See also C. Botha, R. Ramfol & O. Swart, *The Impact of Multilateral and Unilateral Measure on Profit Shifting from South Africa to Mauritius*, 2023 Intertax 3, p. 240 et seq. (2023); and R.

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

The authors will give an overview of the most relevant aspects of the MLI and its relationship to CTAs. In this respect, the authors refer to an earlier publication of the group, although this publication was based on the underlying Action Report⁹ and was written before the publication of the MLI and its ES. The MLI ultimately has been shaped along the lines of the preferred option set out in this publication. The OECD did not choose the option which would have allowed the MLI to function in the same way as an amending protocol to a single existing treaty. Under that option the MLI would have directly amended the text of CTAs.¹⁰ If adopted, the MLI would have become largely irrelevant after such implementation.¹¹ In its current form, the MLI contains independent binding multilateral norms of public international law, which apply alongside and supplement existing tax treaties.¹² The application of the MLI to tax treaties qualifying as CTAs cannot so much be characterized as “implementation”, but rather as a co-existing document both modifying and interpreting the CTAs.¹³ Depending on

the circumstances, i.e. the compatibility clauses and the notifications, it may be necessary to interpret both the MLI and the CTA. If a complete provision is added to the CTA or an existing provision is completely replaced in the CTA, the MLI provision and its terms will ultimately be interpreted. As such, the MLI provision should be interpreted with the help of article 2(2) of the MLI.

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

2.2. The design of the MLI

2.2.1. Some advantages and disadvantages of the MLI

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

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

8. OECD, *Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, para. 5 (7 June 2017), Treaties & Models IBFD.
9. BEPS Action 15 Final Report.
10. This feature has been adopted in OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting, *Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule* (2 Oct. 2023); *see* OECD, *Explanatory Statement to the Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule*, para. 13 (15 Sept. 2023).
11. Para. 13 ES. *See also*, for this option, Austrey et al., *supra* n. 5, at p. 663.
12. Compare para. 13 ES and the Opinion of the Conference of the Parties of the MLI, approved on 3 May 2021, para. 3, p. 4. An exception applies to part VI of the MLI (arbitration) that is intended to operate as a “single cohesive arbitration provision”; compare para. 19 and 20 ES. *See also* P.J. Hattingh, *The Multilateral Instrument from a Legal Perspective: What May be the Challenges?*, 71 Bull. Intl. Taxn. 3/4, sec. 4.2 (2017), Journal Articles & Opinion Pieces IBFD; A. Bosman, *General Aspects of the Multilateral Instrument*, 45 Intertax 10, p. 643 (2017); G. Manzi, *The Autonomous Interpretation of the Multilateral Instrument with Particular Relevance to Article 2(2)*, 74 Bull. Intl. Taxn. 12, sec. 2 (2020), Journal Articles & Opinion Pieces IBFD; N. Bravo, *A Multilateral Instrument for Updating the Tax Treaty Network*, sec. 2.2, (IBFD 2020), Books IBFD; M. Herrington & C. Lowell, *The Evolving World of Global Tax Planning: Part II*, 24 Intl. Transfer Pricing J. 2, p. 92 (2017), Journal Articles & Opinion Pieces IBFD; M. Corwin, J. Eggert & M. Zubler, *Practical Questions for Multinationals in an MLI World*, Tax Executive (20 Nov. 2017); and H. Jirousek, *Wohin entwickelt sich das internationale Steuerrecht?*, Steuer und Wirtschaft International 7, p. 533 (2017).
13. *See also* the Opinion of the Conference of the Parties of the MLI, approved on 3 May 2021, para. 3, p. 4; and N. Bravo, *The Multilateral Instrument and its Relationship with Tax Treaties*, 8 World Tax J. 3, pp. 282, 283 (2016), Journal Articles & Opinion Pieces IBFD. *See also* para. 13 ES to the Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule, which emphasises that, unlike the MLI, this Multilateral Convention no longer needs to be read in conjunction with the relevant covered tax convention, following the amendment of this covered tax convention.

14. Compare also Hattingh, *supra* n. 12, at sec. 4.2.
15. *See also* Austrey et al., *supra* n. 5, at p. 683 and 684.
16. The Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule seems to be more straightforward as compared to the MLI.
17. Article 14(2) of the Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule provides that, for the purposes of incorporating Annexes I to V (containing the substantive subject to tax provisions) into their CTAs, contracting states may translate and authenticate the Annexes I to V into languages other than English and French (which are the authentic languages of this multilateral convention).
18. Compare the testimonium of the MLI: “Done at Paris, the 24th day of November 2016, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Organisation for Economic Co-operation and Development.” [emphasis added by the authors]
19. An example would be the Austria-Italy Income and Capital Tax Treaty (1981) of which both German and Italian are authentic languages; *see also* J. Schuch & J-P. West, *Authentic Languages and Official Transla-*

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

A disadvantage of the MLI is a certain complexity due to compatibility clauses, reservations and notifications (see sections 2.5. and 2.6.). Of course, a further disadvantage of the current design of the MLI is that it does not entirely take into consideration the wide variance of constitutional frameworks and constitutional positions that may apply to different jurisdictions. For monist states, such as the Netherlands,²² Japan²³ and France²⁴ the “implementation” does not lead to constitutional constraints. Generally, tax treaty provisions are applicable to both the government and taxpayers as per se binding rules. In view of their contents and nature, they can operate directly, and they do not need to be transformed into binding law through enabling legislation. These principles apply *mutatis mutandis* to the MLI entailing that the rules included therein apply alongside the CTA at issue prevailing over the domestic tax legislation. Although the United Kingdom,²⁵ Canada,²⁶

Italy,²⁷ India²⁸ and Australia²⁹ are dualist states there seem not to be additional issues in giving the MLI effect by legislation. This may be different in other jurisdictions which may impede the “implementation” of the MLI, such as in South Africa where the ratification was stalled for 5 years.³⁰ In the end, the MLI was seen as an administrative tax law focused on, inter alia, anti-avoidance. This approach allowed South Africa to avoid the question of whether the MLI would require the implications of each individual CTA to be illustrated.

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

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

20. Austry et al., *supra* n. 5, at p. 686; and R.X. Resch, *The OECD BEPS Multilateral Instrument and the Issue of Language*, 47 *Intertax* 6/7, p. 567 (2019).

21. Following the example of the Austria-Italy Income and Capital Tax Treaty (1981), the current design of the MLI would also allow four languages to remain equally authentic.

22. Article 94 of the Dutch Constitution (*Grondwet van het Koninkrijk der Nederlanden 2023, State Gazette 2023, No. 105*). There is an official translation, *The Constitution of the Kingdom of the Netherlands 2023*, included in https://www.denederlandsegrondwet.nl/id/vkwrfd92rnm/de_tekst_van_de_grondwet_met_toelichting.

23. Compare also M. Takahashi, *Implementing the Multilateral Instrument in Japan*, in *The Implementation and Lasting Effects of the Multilateral Instrument*, WU – Tax Law and Policy Series, sec. 22.7.1 (G. Kofler et al. eds., IBFD 2021), Books IBFD.

24. Once ratified and published in accordance with article 55 of the French Constitution, a treaty is in force. In a monist constitutional system such as France, this treaty then has a higher value than domestic law. If the provisions of a treaty are deemed to be directly applicable, they can be immediately invoked. These principles apply to the MLI. In fact, the administrative comments published by the French tax administration, 16 Dec. 2020, indicate that the MLI entered into force on 1 Jan. 2019 (§1 BOI-INT-DG-20-25) and modified the existing tax treaties (§10 BOI-INT-DG-20-25). See also C. Garcia, *Implementing the Multilateral Instrument in France, in The Implementation and Lasting Effects of the Multilateral Instrument*, WU – Tax Law and Policy Series, sec. 15.7.1. (G. Kofler et al. eds., IBFD 2021), Books IBFD.

25. See also S. Daly, *Implementing the Multilateral Instrument in the United Kingdom, in The Implementation and Lasting Effects of the Multilateral Instrument*, WU – Tax Law and Policy Series, sec. 35.7.1. (G. Kofler et al. eds., IBFD 2021), Books IBFD.

26. C.A. Brown & J.J. Bogle, *Implementing the Multilateral Instrument in Canada, in The Implementation and Lasting Effects of the Multilateral Instrument* WU – Tax Law and Policy Series, sec. 8.7. (G. Kofler et al. eds., IBFD 2021), Books IBFD.

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27. The ratification law bill of the MLI has not been submitted to the Italian Parliament yet, and therefore Italy has not yet deposited its instrument of ratification to the OECD; see <https://www.oecd.org/tax/beps/mli-matching-database.htm#mli-matching-database>. According to authoritative Italian scholars, the distinction between monistic and dualistic states would not have significant ramifications in Italy (see B. Conforti, *Diritto Internazionale*, p. 340 (2018)). Under art. 117(1) of Italy’s Constitution, domestic laws have to comply with Italy’s international obligations, which, according to the consistent case law of the Italian Supreme Court, also include tax treaties, whether bilateral or multilateral (see e.g. IT: Cass., July 2023, no. 21047 and case law cited therein). On the status of the MLI implementation in Italy, see also A. Zaimaj, Italian Branch Report, *Reconstructing the treaty network*, 105 *Cahiers de droit fiscal international*, p. 439 (2020); and P. Ludovici & M. Striato, *Implementing the Multilateral Instrument in Italy, in The Implementation and Lasting Effects of the Multilateral Instrument* WU – Tax Law and Policy Series, sec. 21.1.1. (G. Kofler et al. eds., IBFD 2021), Books IBFD.

28. India deposited the instrument of ratification to the OECD on 25 June 2019. The MLI entered into force for India on 1 Oct. 2019. See also A. Prasad Kotha & P. Preshori, *Implementing the Multilateral Instrument in India, in The Implementation and Lasting Effects of the Multilateral Instrument* WU – Tax Law and Policy Series, sec. 19.1.1. (G. Kofler et al. eds., IBFD 2021), Books IBFD.

29. In Australia implementing the MLI did not raise additional issues. Sec. 5 of the International Tax Agreement Act 1953 provides that a tax treaty “has the force of law according to its tenor”. A new treaty is added to the list of treaties in sec. 5 by an amending act and this was the case for the MLI done by the Treasury Laws Amendment (OECD Multilateral Instrument) Act 2018.

30. C. West & J. Hattingh, *Implementing the Multilateral Instrument in South Africa, in The Implementation and Lasting Effects of the Multilateral Instrument* WU – Tax Law and Policy Series, sec. 31.7.1.6 (G. Kofler et al. eds., IBFD 2021), Books IBFD.

31. This was done by law dated 12 Oct. 2020, Federal Law Gazette II 2020, p. 1138.

32. D. Dominguez, *Implementing the Multilateral Instrument in Germany, in The Implementation and Lasting Effects of the Multilateral Instrument* WU – Tax Law and Policy Series, sec. 16.7. (G. Kofler et al. eds., IBFD 2021), Books IBFD.

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

Switzerland has also made a reservation under article 35(7)(a) of the MLI.³⁷ Switzerland has signed and ratified the MLI³⁸ but has notified very few of its treaties as CTAs.³⁹ The main reason for this is the legal uncertainty as to whether the MLI “amends” the CTAs or whether it “coexists” with them.⁴⁰ For this reason, Switzerland has taken the position that it can only notify treaties as CTAs if the other contracting state confirms that it shares the “amending view” and is prepared to mutually agree on a document (pursuant to article 25(3) of the Swiss tax treaties modelled on the OECD Model and/or article 32(1) of the MLI⁴¹) detailing the changes made to the CTA by the

MLI. The use of the MAP is certainly a somewhat novel approach to amending the text of a treaty, although it is in line with the amending view.⁴²

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

2.2.2. The FTI versus the MLI

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

33. See also D. Edvinsson, *Swedish Branch Report, Reconstructing the treaty network*, 105 Cahiers de droit fiscal international, IFA, pp. 792 and 793 (2020). The Swedish Parliament approved the MLI Proposal on 16 May 2018. The MLI has entered into force in Sweden. However, under the Swedish dualist system, domestic legislation is required to transpose the rights and obligations of the MLI into domestic law. Subsequently, the Swedish government must submit proposals to Parliament to amend the laws by which the tax treaties have been transposed into Swedish domestic law in order for the provisions of the MLI to come into effect in Sweden. Such an amendment, for instance, has been proposed with the United Kingdom.

34. See on the Swedish government position in Government Bill to Parliament Proposition 2017/18:61 Multilateral konvention för att genomföra skatteavtalsrelaterade åtgärder, pp 8-9.

35. See id. at pp. 31-32. For a description on the Swedish tax legislative process, see e.g. B. Wiman, *Constitutional Issues in Developing International Tax Norms: A Swedish perspective*, in *Current Tax Treaty Issues*, pp. 157-178 (G. Maisto ed., IBFD 2020), Books IBFD.

36. See e.g. the treaties with Russia (2018), Switzerland (2019), the United Kingdom (2021), Germany (2023) and France (2023).

37. A. Brunner & M. Seiler, *Implementing the Multilateral Instrument in Switzerland*, in *The Implementation and Lasting Effects of the Multilateral Instrument WU – Tax Law and Policy Series*, sec. 33.1.1. (G. Kofler et al eds., IBFD 2021), Books IBFD.

38. The MLI is approved by the Federal Assembly on 22 Mar. 2019 (RO 2020 2625) and ratified on 29 Aug. 2019.

39. 12 tax treaties have been nominated as CTAs, namely Argentina, Austria, Chile, Iceland, Italy, Lithuania, Luxembourg, Mexico, Portugal, South Africa, the Czech Republic and Türkiye (see <https://www.fedlex.admin.ch/eli/cc/2020/486/fr>, art. 2).

40. See Swiss Federal Council, *Botschaft zur Genehmigung des multilateraleren Übereinkommens zur Umsetzung steuerabkommensbezogener Massnahmen zur Verhinderung der Gewinnverkürzung und Gewinnverlagerung*, Swiss Federal Gazette, p. 5389 et seq. (Bundesblatt; BBl 2018), available at <https://www.admin.ch/opc/de/federal-gazette/2018/5389.pdf>.

41. Some of the MAPs at issue also refer to art. 32(1) MLI.

42. Brunner & Seiler, *supra* n. 37, at sec. 33.7.1.

43. See Mutual Agreement between the Competent Authority of the Swiss Confederation and the Competent Authority of Iceland RO 2023 110 (16 Dec. 2022), available at <https://www.fedlex.admin.ch/eli/oc/2023/110/fr>; Mutual Agreement between the Competent Authority of the Swiss Confederation and the Competent Authority of the Czech Republic RO 2021 29 (24 Nov. 2020), available at <https://www.fedlex.admin.ch/eli/oc/2021/29/fr>; Mutual Agreement between the Competent Authority of the Swiss Confederation and the Competent Authority of the Republic of Lithuania RO 2021 28 (16 Nov. 2020), available at <https://www.fedlex.admin.ch/eli/oc/2021/28/fr>; and Mutual Agreement between the Competent Authority of the Swiss Confederation and the Competent Authority of the Grand Duchy of Luxembourg RO 2020 2715 (27 May 2020), available at <https://www.fedlex.admin.ch/eli/oc/2020/487/fr>. See also <https://www.fedlex.admin.ch/eli/oc/2023/132/fr>.

44. See the tax treaties with Iceland (consolidated version), available at <https://www.fedlex.admin.ch/eli/cc/2015/793/de>; Lithuania (consolidated version), available at <https://www.fedlex.admin.ch/eli/cc/2003/176/de>; Luxembourg (consolidated version), available at https://www.fedlex.admin.ch/eli/cc/1994/333_333_333/de; and the Czech Republic (consolidated version), available at https://www.fedlex.admin.ch/eli/cc/1997/961_961_961/de.

45. The MAP between on the one hand Switzerland and the Czech Republic, and Lithuania and Luxembourg on the other also refers to art. 35(7) of the MLI (compare also the Swedish and German position within this respect).

46. S. Bernasconi & B. Peyer, *Reconstructing the treaty network*, 105A Cahiers de droit fiscal international, IFA, p. 789 (2020). See Swiss Federal Council, *supra* n. 40, at p. 5389 et seq.

47. The background is to support developing countries that do not have the resources to negotiate amending protocols and to provide them with a tool to incorporate amendments to the UN Model into their respective tax treaties. Compare also P. Baker, *A Fast-Track Instrument to Update Developing Countries’ Tax Treaties*, 52 Intertax 10, p. 584 (2024) and Baker, *supra* n. 1, at p. 616.

48. See Annex 2 of 22 Sept. 2023, prepared by Philip Baker for the 27th Session of the Committee of Experts on International Cooperation in Tax Matters, Geneva 17-20 Oct. 2023. This was given its second reading at the 28th Plenary Session of the UN Tax Committee in New York on 19 Mar. 2024. The current text of the draft FTI is set out at Annex A of UN document E/C.18/2024/CRP.8, Draft 28th Session Report on the Digitalized Economy, 4 Mar. 2024. The work was referred to in

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

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

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

49. For possible future developments within the UN and whether the United Nations Framework Convention on International Tax Cooperation will lead to a multilateral Framework Convention; see Baker, *supra* n. 47, at p. 617; P. Baker, *Reform of the International Tax Architecture: the UN Fails to Reach Consensus*, Tax Journal, p. 12 (Sept. 2024); F. Heitmüller, *Scenarios for Negotiating a UN Framework Convention on International Tax*, ICTD Working Paper 218, Institute for Development Studies, pp. 7-9 (2025); Y. Brauner, *What Can the UN Do That the OECD Can't or Won't?*, 53 Intertax 1, pp. 45 and 45 (2025); and D.M. Broekhuijsen & L.C.J. van Apeldoorn, *International Tax Cooperation in a Multipolar World*, 53 Intertax 1, p. 57 (2025).

50. Including a specific reference to pension funds (Schedule 1), a provision on gains in relation to natural resources and offshore indirect capital gains (Schedule 2), a provision on fees of technical services (Schedule 3, reflecting article 12A of the UN Model), a provision on income from automated digital services (Schedule 4, article 12B UN Model), arbitration (Schedule 5), subject to tax rule (Schedule 6), a provision on capital gains deriving from the value of immovable property (Schedule 7) and a provision on a definition of a services permanent establishment (Schedule 8).

51. The Framework Convention establishes a Conference of the Parties, which will meet at least once a year and will provide an opportunity for countries to “speed date” and agree amendments to their bilateral treaties based on the UN Model amendments. See art. 12 of the Framework Convention.

52. Art. 1(c) gives a definition of a covered tax agreement.

53. Baker, *supra* n. 47, at p. 584. See also arts. 3 and 4.

54. Compare also Ahmed, *supra* n. 48.

55. Baker, *supra* n. 47, at pp. 584 and 585.

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

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

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

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

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56. *Id.*, at p. 585.

57. *Id.*, at p. 586.

58. However, see A. Hohmann, *The limited impact of the BEPS Multilateral Instrument*, The International Centre for Tax & Development, Blogs (1 June 2023), available at <https://www.ictd.ac/blog/the-limited-im->

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

2.3. Synthesized and consolidated texts

2.3.1. General

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

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

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

2.3.2. Synthesized texts: General features

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

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

59. Baker, *supra* n. 47, p. 586.
 60. Compare para. 13 ES. However, they might qualify as agreements between competent authorities under the MAP foreseen in bilateral tax treaties according to the Note by the OECD Directorate for Legal Affairs, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Functioning under Public International Law*, para. 33 and fn. 27 (2017); para. 13 of the ES to Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule states that since this multilateral convention directly amends the relevant CTAs, contracting jurisdictions may wish to develop consolidated versions of their CTAs as amended by this multilateral convention.
 61. Australia has various consolidated synthesized texts, the version with New Zealand having been amended three times to achieve uniformity in presentation rather than substance.
 62. OECD, *Guidance for the development of synthesised texts - Multilateral Convention to Implement Tax Treaty Measures to Prevent BEPS*, pp. 9 and 10 (2018).
 63. See for an example of an attempt to draft consolidated texts by IBFD, A. Perdelwitz, D. Calderón Manrique, R. Hamzaoui & V. Arruda Ferreira, *MLI – Its Entry into Force and the Consolidated Texts of Impacted Articles of the First Affected Treaties* (3 July 2018), Talking Points, Journal Articles & Opinion Pieces IBFD, re the Austria-Poland tax treaty, the Austria-Slovenia tax treaty and the Poland-Slovenia tax treaty.
 64. According to OECD, *Guidance for the development of synthesised texts - Multilateral Convention to Implement Tax Treaty Measures to Prevent BEPS*, pp. 9 and 10 (2018).

65. <https://www.admin.ch/gov/de/start/bundesrecht/systematische-sammlung.html>. See also Brunner & Seiler, *supra* n. 37, at sec. 33.7.4.
 66. Bernasconi & Peyer, *supra* n. 46, at p. 798.
 67. See Swiss Federal Council, *supra* n. 40, at p. 5359 et seq.: In Switzerland's view, the BEPS Agreement therefore requires that the exact wording of the amendments to the relevant DTAs be recorded separately in writing with the partner countries concerned. Such agreements on the exact wording of the amendments constitute a bilaterally agreed determination of the textual effects that the BEPS Agreement has on the relevant DTA. However, these agreements are not revision protocols. They are based on the BEPS Agreement and result from the reservations and notifications made by Switzerland and the respective DTA partner countries. These mutual understanding agreements serve only to formally incorporate the amendments made by the BEPS Agreement into the consolidated texts of the DTA concerned and do not create any new obligations for Switzerland or result in the waiver of existing rights. The DTAs contain a provision that allows for the conclusion of mutual agreement procedures to resolve difficulties and doubts arising from the interpretation or application of the agreements. On this basis, the FDFA can consolidate the texts and conclude the corresponding agreements. See also Bernasconi & Peyer, *supra* n. 46, at p. 789 noting that in case of any divergence between the published consolidated text of a CTA, the ratified texts of the MLI as approved by the parliament should prevail over the consolidation of a CTA which only has the legal value of a mutual agreement concluded by the administration. For a different view, see Brunner & Seiler, *supra* n. 37, at sec. 33.7.4, which states that in the future it will be this consolidated version that Swiss courts and tax authorities will refer to when applying the CTA.

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

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

2.3.3.1. General overview and Table

The Netherlands,⁷⁰ the United Kingdom,⁷¹ Japan,⁷² France,⁷³ Australia,⁷⁴ India, South Africa and Germany⁷⁵

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68. OECD, *Guidance for the development of synthesised texts - Multilateral Convention to Implement Tax Treaty Measures to Prevent BEPS*, p. 9 (2018).
 69. *See* e.g. the introduction drafted by HMRC to the synthesized texts as regards Canada and India.
 70. Compare <https://www.rijksoverheid.nl/documenten/publicaties/2021/06/01/synthesised-texts-belastingverdragen-waarvoor-het-mligeldt> and <https://www.rijksoverheid.nl/documenten/brochures/2022/07/12/multilateraal-instrument-mlie-nederlandse-belastingverdragen>. This concerns synthesized texts for the tax treaties with: Australia, Bosnia and Herzegovina, Canada, Czech Republic, France, Finland, Georgia, Iceland, India, Indonesia, Israel, Japan, Kazakhstan, Korea (Rep.), Latvia, Lithuania, Luxembourg, Malta, New Zealand, Norway, Qatar, Serbia, Singapore, Slovakia, Slovenia, South Africa, United Arab Emirates and the United Kingdom.
 71. The United Kingdom produces synthesized texts of the MLI. This involves producing a text, ideally by agreement with the other contracting state, that shows the modifications made by the MLI alongside the original text. So far there is no guidance in the United Kingdom on how these synthesized texts are to be applied in practice.
 72. The Ministry of Finance of Japan takes a position to prepare a consolidated version shortly after the MLI becomes applicable to a certain covered agreement. As of April 2025, 39 consolidated versions in both English and Japanese have been published, while two others are in preparation, available at https://www.mof.go.jp/english/policy/tax_policy/tax_conventions/mli.htm. The production of what is called a consolidated text is in fact a reflection of Japan's implied unilateral approach.
 73. In France consolidated versions of the tax treaties as amended by the MLI are available online as they come into effect with the concerned states (*see* for instance with Austria https://www.impots.gouv.fr/sites/default/files/media/10_conventions/autriche/convention_avec_lautriche_modifiee_par_la_cml.pdf). General remarks at the beginning of each consolidated version indicate that "This document is not a substitute for the authentic texts of the Treaty and the MLI, which remain the only applicable legal instruments".
 74. Compare <https://www.ato.gov.au/general/international-tax-agreements/in-detail/multilateral-instrument/>.
 75. The synthesized texts of Germany's double taxation agreements (DTAs) as modified by the MLI are published by the Federal Ministry of Finance. These documents provide consolidated versions of the DTAs, integrating the changes introduced by the MLI, and are essential for the interpretation of the modified agreements. These synthesized texts are available on the official website of the Federal Ministry of Finance in the section on international tax law and double taxation agreements. Not all synthesized texts may be available immediately, as their publication depends on the ratification and implementation status of the MLI with each treaty partner. For a comprehensive list of Germany's DTAs and their current status regarding the MLI, including available synthesized texts, *see* [draft synthesized texts. The way in which the synthesized texts are prepared may differ from one jurisdiction to another. A survey of the various jurisdictions represented by the members of this group has been carried out. This gives an overview of these differences, even between states involved in a similar synthesized text. The authors have included in Table 1. the various reactions of the countries involved \(the table reflects the situation in the various countries concerned up to and including 30 April 2025\). The table should be treated with caution and cannot be considered in isolation. The necessary nuances and inconsistencies are explained in the following paragraph \(in summary and then in more detail\). The table is intended to be used for categorization and to show how different countries deal with synthesized texts in different ways.](https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerecht/Allgemeine_Informationen/synthetisierte-texte-DBA-BEPS-MLI-An-</div><div data-bbox=)

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

- (1) those (Australia, India, United Kingdom) that distinguish between (i) unilateral texts where the other country was not consulted; (ii) those where the other country was consulted but did not explicitly agree (and there is at least one example of this category (India-United Kingdom) where the texts differ); and (iii) those where the other country agrees that the text represents a shared understanding (at least initially for Australia);
- (2) those (France, Japan, the Netherlands and South Africa) that, at least in some cases (though never for France and Japan), state that they have consulted the other country (for the Netherlands this is in a statement to Parliament rather than in the text); sometimes one country (South Africa) states that it has consulted the other (the Netherlands), while the Netherlands is silent on this point in its version. These countries never state whether the text represents a shared understanding or not. In a few cases (e.g. Australia and India in relation to the Netherlands) the other country states that there was a shared understanding, which can therefore be inferred for the country in this category; and
- (3) those (Germany, Sweden, Switzerland) that adopt the MLI by separate protocols, thus creating a legally binding instrument containing the MLI amendments rather than a synthesized text. Moreover, Switzerland publishes a consolidated text where a mutual agreement is in place to modify the relevant tax treaty pursuant to the MLI.

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

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wG-newsletter.html. The respective synthesized texts of the tax treaties can be found in the country-specific information on Croatia, France, Greece, Hungary, Malta, Slovakia and Spain.

Table 1. Responses to synthesized texts in the involved jurisdictions

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

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

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

2.3.3.2. Analysis and further explanation

2.3.3.2.1. Imbalances

The focus will be mainly on the countries in (1) and (2). For the synthesized texts drafted by some of these countries in relation to their treaties, such as the Netherlands, France and Japan, the disclaimer,⁷⁶ in the view of the Netherlands, actually only contains the ratification

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

clause⁷⁷ while the Japanese⁷⁸ and French⁷⁹ versions imply (for Japan) and stipulate (for France) that the synthesized text is drafted unilaterally. The Dutch State Secretary for Finance indicated in a letter to the Dutch parliament that the relevant treaty partners would be consulted in advance on the preparation of the synthesized texts.⁸⁰ However, it

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 Guidance (sec. 2.4.2) also contains a disclaimer on the entry into effect of the MLI provisions.
 77. See the Dutch version of the synthesized text of the Australia-Netherlands tax treaty:
 The document was prepared on the basis of the MLI position of the Netherlands submitted to the Depositary upon acceptance on 29 March 2019 and of the MLI position of Australia submitted to the Depositary upon ratification on 26 September 2018. These MLI positions are subject to modifications as provided in the MLI. Modifications made to MLI positions could modify the effects of the MLI on the Agreement.
 Compare <https://open.overheid.nl/documenten/ronl-2907dcc2-5c64-4b43-99ee-da07ec8795b8/pdf>.
 78. According to the preambles of the synthesized texts of the treaties published by the Japanese Ministry of Finance (MOF), they were all prepared by the MOF alone.
 79. See the French version of the synthesized text of the France-Netherlands Tax Treaty: "La France a publié de manière unilatérale une version consolidée disponible à l'adresse suivante: https://www.impots.gouv.fr/sites/default/files/media/10_conventions/pays-bas/pays-bas_modifie_cml_20190805.pdf".
 80. The letter of the State Secretary for Finance of 21 Sept. 2020, no. 2020-0000166279. The Netherlands applies principles of good governance including the principle of protection of legitimate expectations (*vertrouwensbeginsel*). However, a letter to parliament (and framing questions about Dutch treaty policy) is made by the State Secretary of Finance in his capacity as co-legislator. According to the Supreme Court this is not covered by the principle of the protection of legitimate expectations. That principle only applies to statements made by the State Sec-

is not clear from the published texts whether and to what extent the Netherlands consulted relevant treaty partners in advance. The published synthesized texts have been drafted in accordance with the OECD guidelines, but the disclaimer suggested by the OECD on whether and to what extent prior consultation with the relevant treaty partner has taken place in the drafting of the synthesized text is missing. Nevertheless, the South African version of the synthesized text of the tax treaty with the Netherlands implies that it was drafted in consultation with the Netherlands. In fact, South Africa also publishes the other synthesized texts only after consultation with the other relevant state,⁸¹ which in addition to the Netherlands, includes Australia,⁸² Canada,⁸³ France,⁸⁴ India,⁸⁵ the United Kingdom⁸⁶ and Japan.⁸⁷ Although the Netherlands is silent on prior consultation in the relevant synthesized text, it could be argued that such consultation may be assumed with respect to South Africa. Even though it extends further, it can also be argued that the pattern that applies to South Africa also applies to the other states for which a synthesized text has been published from the Dutch perspective and which do not already include some form of consultation or shared understanding, such as Australia, India and the United Kingdom (see for the United Kingdom below). These are France, India, Japan and possibly Canada (although Canada has not yet produced any synthesized texts). However, France has clearly opted for a unilateral approach and Japan has implied that it will do so, as reflected in their respective versions of the synthesized text of the tax treaty with South Africa.

All synthesized texts produced by the Netherlands are in English, except for France and Luxembourg, which are

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

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

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

81. The South African Revenue Service publishes synthesized texts on its website (and not in an official government publication), in English alone, only after consultation: “The synthesised texts for each Covered Tax Agreement are drafted in consultation with the relevant treaty partners but are non-binding”. See <https://www.sars.gov.za/legal-counsel/international-treaties-agreements/double-taxation-agreements-protocols/multilateral-instrument-ml/>.

82. No explicit mention in the South African version, available at <https://www.sars.gov.za/wp-content/uploads/Legal/Agreements/Legal-IntA-DTA-MLI-2023-01-Australia-SA-Synthesised-text-MLI.pdf>, but the Australian version refers to consultation and shared understanding.

83. No explicit mention of consultation in the South African version, available at <https://www.sars.gov.za/wp-content/uploads/Legal/Agreements/Legal-INTA-DTA-MLI-2023-04-Canada-SA-Synthesised-text-MLI.pdf>.

84. No explicit mention of consultation in the South African version of the synthesized text of the tax treaty with France, available at <https://www.sars.gov.za/wp-content/uploads/Legal/Agreements/Legal-INTA-DTA-MLI-2024-03-France-SA-Model-Synthesised-Text-MLI.pdf>.

85. No explicit reference to consultation of the South African version of the synthesized text of the tax treaty with India, available at <https://www.sars.gov.za/wp-content/uploads/Legal/Agreements/Legal-INTA-DTA-MLI-2023-08-India-SA-Synthesised-text-MLI.pdf>.

86. No explicit mention of consultation in the South African version (see <https://www.sars.gov.za/legal-inta-dta-ml-2025-06-uk-sa-synthesised-text-ml/>).

87. Japan produced an unilateral synthesized text in Japanese and English for the tax treaty with South Africa (see https://www.mof.go.jp/tax_policy/summary/international/tax_convention/SynthesisedTextforJapan_SouthAfrica_EN.pdf). There is no reference in the English synthesized text (published in South Africa) to the Japanese version. The English text was prepared in consultation between the two competent authorities, at least from a South African angle.

88. Although this could be seen as a fairly literal translation of “synthesized text”, it does not seem to be the most accurate from a French linguistic point of view. In French, there is no distinction between the consolidated text and the synthesized text; both are referred to as “*texte consolidé*” or “*version consolidée*”.

89. The changes resulting from the minimum standard of article 6 of the MLI have a number of linguistic differences which do not have a significant impact: the French version mentions “des pratiques d’évasion ou de fraude fiscale (résultant notamment de la mise en place de stratégies de chalandage fiscal destinées à obtenir des allègements prévus dans la présente Convention au bénéfice indirect de résidents d’Etats tiers.” The Dutch version refers to (differences in italics) “des pratiques d’évasion ou de fraude fiscale/évitemment fiscal (résultant notamment de la mise en place de stratégies de chalandage fiscal destinées à obtenir des allègements prévus dans la présente convention au bénéfice indirect de résidents de juridictions tierces).” It is worth noting that “évitemment fiscal” is rarely used in French, where “évasion fiscale” is generally considered the correct translation for “tax evasion”. Also the PPT (art. 7(1) MLI) is not entirely the same in the Dutch and French version. The French version mentions “Nonobstant les autres dispositions de la présente Convention, un avantage au titre de celle-ci ne sera pas accordé au titre d’un élément de revenu s’il est raisonnable de conclure” whereas the Dutch versions mentions “d’un élément de revenu ou de fortune.” However, the difference in the version of the PPT is related to the fact that the France-Netherlands tax treaty only covers income taxes and not wealth taxes (so from the French point of view, there is no need to repeat the provisions of the PPT model as far as the “impôt sur la fortune” is concerned). It is also striking that the arbitration clause added to the CTA by the MLI in the Dutch version contains a comprehensive procedural provision concerning, *inter alia*, the selection and appointment of arbitrators (art. 20 MLI), which is absent in the French version (art. 27 CTA).

90. This is also consistent with the fact that, linguistically speaking, there is no distinction in French between consolidated text and synthesized text (See also, *supra*, n. 88).

91. See https://assets.publishing.service.gov.uk/media/5c49dbee5274a6e49801c40/Synthesised_text_of_the_Multilateral_Instrument_and_

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

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

2.3.3.2.2. Legal value

In any case, it would seem appropriate for the jurisdictions concerned to consult each other in advance and arrive at

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the_2006_Japan_-_UK_Double_Taxation_Convention_-_in_force.pdf.

92. See https://www.mof.go.jp/tax_policy/summary/international/tax_convention/SynthesisedTextforJapan_UnitedKingdom_EN.pdf.

93. See https://assets.publishing.service.gov.uk/media/5ce2bbf240f0b627e4b147c2/Multilateral_Instrument_and_the_2008_France-UK_Double_Taxation_Convention.pdf.

94. See https://www.impots.gouv.fr/sites/default/files/media/10_conventions/royaume-uni/convention_avec_le_ru_modifiee_par_la_cml.pdf.

95. See <https://www.ato.gov.au/law/view/document?DocID=MLI/MLI-France-agreement>.

96. See <https://www.ato.gov.au/law/view/document?DocID=MLI/MLI-Japan-agreement&PiT=99991231235958>. This is also the case for the synthesized text of the 1983 Australia-Ireland tax treaty which was the subject of the decision of AU: FCA, 31 Oct. 2024, *Oracle Corporation Australia Pty Ltd v. Commissioner of Taxation (Stay Application)* [2024] FCA 1262 (the taxpayer has appealed this decision to the Federal Court of Australia Full Court). This synthesized text was also attached to the Federal Court’s decision (Annex A).

97. See https://www.mof.go.jp/tax_policy/summary/international/press_release/SynthesisedTextforJapan-AUEN.pdf.

98. See <https://incometaxindia.gov.in/dtaa/synthesised-text-of-ml-and-india-france-dtaa-indian-version.pdf>.

99. See https://www.impots.gouv.fr/sites/default/files/media/10_conventions/inde/version_consolidee_de_la_convention_avec_inde_modifiee_par_la_convention_multilaterale.pdf.

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

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

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100. A similar statement is included in the Australian version: “This document was prepared in consultation with her Majesty’s Revenue and Customs and represents our shared understanding of the modifications made to the MLI.”

101. See also AU: FCA, 31 Oct. 2024, *Oracle Corporation Australia Pty Ltd v. Commissioner of Taxation (Stay Application)* [2024] FCA 1262, regarding the synthesized text of the Australia-Ireland Income Tax Treaty (1983). In para. 6 of its decision, the Federal Court noted that, for ease of understanding, the parties had relied on the “synthesized text”, which sought to incorporate into the text of the tax treaty in question the effect of the MLI on it. The court notes that the synthesized text represents the shared understanding of the competent authorities of Australia and Ireland as to the modifications made to the tax treaty by the MLI. For those reasons, the synthesized text was also annexed to the decision. This decision seems to demonstrate to some extent the reliance of the parties and the court on the synthesized text, in which the fact that there was a shared understanding and prior consultation played a role.

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

These common and identical texts can contribute to a common interpretation and application of the relevant CTA in conjunction with the MLI. This may give them some interpretative value, i.e. subsequent practice within the meaning of article 31(3)(b) of the VCLT (however, see also the alignment with a MAP and the qualification as a subsequent agreement under article 31(3)(a) of the VCLT below in this section).¹⁰⁶ In the case of a shared understanding after consultation this type of text may be given

greater weight by the courts.¹⁰⁷ In such a case, both states have a shared understanding which may contribute to the synthesized text having the status of a MAP or being a MAP within the meaning of article 25(3) of the OECD Model (difficulty in the application of the CTA) in conjunction with article 32(1) of the MLI (reference to the MAP of the CTA if questions may arise as to the interpretation or implementation of the CTA as required by the MLI) even if the text expressly contains the usual disclaimer that the CTA and the MLI are the only legally binding texts. In this case, the status of the synthesized text will depend on the interpretation adopted by the relevant jurisdiction. This status, if alignment with the MAP can be sought, is generally quite low, as is the case with the MAP. Even if it can be concluded that the synthesized text (with a shared understanding and consistency in both texts), like a MAP, can be regarded as a subsequent agreement within the meaning of article 31(3)(a) of the VCLT and as a treaty for the purposes of international law,¹⁰⁸ it has no internal effect because of the consti-

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

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

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

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

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

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

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

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

One difference between the synthesized text and the MAP is that article 25 of the OECD Model contains a power of delegation.¹¹⁰ This element seems to be semantic to some extent, since the status of a MAP is already quite low (*see also below*). The Dutch Supreme Court, for instance, has not explicitly ruled on the qualification of an interpretative MAP as a treaty under international public law, but has nevertheless held that the tax court and the taxpayer are not “bound” by an interpretative MAP.¹¹¹ The Italian Supreme Court¹¹² follows a similar approach, i.e. that these types of MAPs are “agreements of administrative nature”, which should not bind taxpayers and courts but only the authorities that concluded them.¹¹³ In France an interpretative MAP is an administrative agreement which is not “binding” on the tax courts but which, once published, should be “binding” on each competent authority vis-à-vis the others and vis-à-vis the taxpayers concerned.¹¹⁴ A UK tax court could take a MAP into account but would not be obliged to follow it.¹¹⁵ Given the relatively low status

of a MAP, the synthesized text would, by analogy, not go beyond that status. For Switzerland, the consolidated text produced is intended to be a MAP and will have that status (*see also section 2.3.1.*).

2.3.3.2.3. Further discrepancies and appreciation

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

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

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

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

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

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

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

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

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

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

115. Compare D. Vines & R. McMahon, *United Kingdom*, in *Dispute Resolution under Tax Treaties and Beyond*, p. 1157 (G. Maisto ed., IBFD 2023), Books IBFD. While there is no case law on MAPs in Australia, the reasoning in AU: HCA, *Minister for Home Affairs of the Commonwealth v.*

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Zentai [2012] HCA 28, (2012) 246 CLR 213 at paras. 35-36, 63-65 suggests that the same result would be reached in Australia on arguments based on subsequent agreements.

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

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

2.3.3.2.4. States having some special features

So far, no synthesized and consolidated versions are available in Sweden¹¹⁷ or Germany.¹¹⁸ However, such versions are likely to be available in the future as a result of the two-stage implementation of the MLI mentioned previously. Nevertheless, Japan has drafted and published a synthesized text of the tax treaty with Sweden and Ger-

many.¹¹⁹ A result of this manner of implementing the MLI is the creation of a consolidated text. Switzerland is also obliged under its domestic law to produce a consolidated text, in which context the other state should mutually agree to a document detailing the amendments made to the CTA by the MLI, similar to a bilateral amending protocol. Italy has not ratified the MLI yet, but it appears its competent authority is working bilaterally with other contracting states to agree synthesized texts. As noted in sections 2.3.3.1. and 2.3.3.2., Canada does not appear to have produced any synthesized texts, although other countries (such as the United Kingdom, the Netherlands and Japan¹²⁰) have produced and published synthesized texts of their respective tax treaties with Canada.

2.3.3.2.5. Some recommendations

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

116. There is no shared understanding but both versions indicate that: "this document was prepared by the Competent Authority of the United Kingdom and represents its understanding of the modifications made to the Convention by the MLI. In preparing this document, the Competent Authority of the United Kingdom consulted with Indian officials."

117. Sweden does not have any synthesized texts. The only texts are those coming out from amending each and every tax treaty, after bilateral agreement, to have them conform with the MLI. Sweden ratified the MLI on 22 June 2018 and it came into force for Sweden on 1 Oct. 2018. It nominated 64 treaties, not including Australia, France, Germany and Switzerland, but deferred the coming into force of the MLI for those treaties by a reservation under art. 35(7) until a later notification specifically covering particular treaties (Germany and Switzerland also make this reservation); see section 2.2.1. No such notifications have been made by Sweden or Germany unlike other countries which have relied on this procedure. Even though not among Sweden's CTAs, Australia announced on 13 Dec. 2023 that it will negotiate an update to its treaty with Sweden, presumably to incorporate MLI type amendments agreed on by both countries, see <https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/media-releases/australia-negotiate-new-tax-treaties-ukraine-and-brazil>.

118. The German Ministry of Finance has published the attached draft bill to implement the MLI for nine countries (24 Dec. 2023). After the bill has been enacted, Germany has to notify the nine countries about the change of the tax treaties. As soon as these countries have sent their notifications, the MLI enters into force. Germany is employing art. 35(7) of the MLI. The nine countries in the German Bill are Croatia, Czech Republic, France, Greece, Hungary, Japan, Malta, Slovak Republic and Spain.

119. See https://www.mof.go.jp/tax_policy/summary/international/press_release/SynthesisedTextforJapan-SwedenEN.pdf and https://www.mof.go.jp/tax_policy/summary/international/tax_convention/SynthesisedTextforJapan_Germany_EN.pdf.

120. See https://www.mof.go.jp/tax_policy/summary/international/tax_convention/SynthesisedTextforJapan_Canada_EN.pdf.

121. Australia and New Zealand are currently negotiating a new treaty. It is understood that this is partly to deal with the issues surrounding synthesized texts even though New Zealand and Australia have published a synthesized text based on a joint understanding and updated it twice (see <https://www.ato.gov.au/law/view/document?docid=MLI/MLI-NZ-agreement>). With reference to art. 30 MLI (see also section 2.4.), it is of course possible to enter into a new tax treaty after the MLI has entered into force in both participating states. A striking example is the position between the Netherlands and Belgium. In the first stage, the Belgium-Netherlands Income and Capital Tax Treaty (2001) was not a CTA because the treaty was being renegotiated and this new treaty could, inter alia, include the minimum standards. In the meantime, the Netherlands and Belgium have notified the 2001 treaty as a CTA and the MLI will apply from 1 January 2022. The minimum standards (including the PPT) therefore apply to this CTA; compare also B. Peeters & A. Clocheret, *Deel IX - Gevolgen van het MLI voor de Belgische verdragen*, in *Fiscaal praktijkboek 2023 - 2024: directe belastingen* pp. 391 and 392 (L. Maes & H. De Cnijf eds. Wolters Kluwer); and R. Smet & J. Huyzen-truyt, *DBV België-Nederland: MLI van toepassing, maar vanaf wanneer tegenstelbaar?*, *Fiscoloog Internationaal* 457, pp. 1-5 (2021). On 21 June 2023, a completely new treaty was concluded between the Netherlands and Belgium in which the minimum standards are also included (e.g. art. 6 MLI in the preamble of this treaty and art. 7(1) MLI in art. 21(1) of this treaty). See R. Smet & G. Vanden Abeele, *Deel X - Het nieuwe dubbelbelastingverdrag met Nederland*, in *Fiscaal praktijkboek 2023 - 2024: directe belastingen*, p. 486 (L. Maes & H. De Cnijf eds., Wolters Kluwer).

2.4. Amending CTAs and the BEPS minimum standards

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

so on a bilateral basis with the other contracting states. Given the international consensus on this issue, it is less likely that states will bilaterally roll back implemented BEPS minimum standards.

The authors differ on the legal significance of the minimum standards within this framework. A minority considers that the CTA cannot be amended in such a way that the minimum standards are no longer met or that the MLI as such is undermined. They argue that given the purpose and scope of the MLI (a smooth implementation of the tax treaty-related BEPS measures in tax treaties), there is a legal obligation and not just a political obligation at that stage. This object and purpose is also relevant for the interpretation and application of article 30 of the MLI. Another part of the authors considers the wording of article 30 of the MLI to be sufficiently clear (especially considering the equally authentic French text¹²⁴). This provision allows the CTAs to be amended and, strictly speaking, these amendments can be made in such a way that the minimum standards are no longer included. This would only have political (peer review) rather than legal consequences.¹²⁵

2.5. Compatibility clauses and relationship with CTAs

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

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

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

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

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

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

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

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

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

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

The functioning of the compatibility clauses may depend on the notifications made by the parties to the CTAs,¹³³ since articles that allow a party to choose between alternative provisions require the parties to notify the depositary of their choice. These notifications will enable the relevant states to establish whether a particular compatibility clause regulates the relationship between a provision of the MLI and the CTA. The effects of these notifications

are (usually) dependent on a “match” between the parties and vary depending on the type of compatibility clause that is applied. Four types of compatibility clauses can be distinguished describing the effects of the compatibility clauses on a CTA in accordance with the specific wording included therein.¹³⁴

- (i) the provision of the MLI applies “in place of” an existing provision of a CTA,¹³⁵
- (ii) the provision of the MLI “applies to” or “modifies” an existing provision of a CTA,¹³⁶
- (iii) the provision of the MLI applies “in absence of” an existing provision of a CTA,¹³⁷
- (iv) the provision of the MLI applies “in the place of or in absence of” an existing provision of a CTA.¹³⁸

The impact and meaning of these various types of compatibility clauses were only included in the ES and not in the MLI itself.¹³⁹ This may already be an indication that the ES is of considerable relevance for a correct and consistent application of the MLI on the CTAs (*see further* section 5. of Part Two). Furthermore, the Conference of the Parties’ opinion of 3 May 2021¹⁴⁰ reaffirmed the

126. M.E. Villiger, *Article 30*, in *Commentary on the 1969 Vienna Convention on the Law of Treaties*, sec. 5 (Brill 2008); K. von der Decken, *Article 30*, in *Vienna Convention on the Law of Treaties: A Commentary*, sec. 1 (O. Dörr & K. Schmalenbach eds., Springer 2018); p. 31 et seq. BEPS Action 15 Final Report; and Bravo, *supra* n. 12, at sec. 3.3.1 and 3.3.2.

127. Art. 30(2) VCLT provides the following: “When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.” Compare also Bravo, *supra* n. 12, at sec. 3.3.1.

128. Compare Bravo, *supra* n. 12, at p. 285; and D.M. Broekhuijsen, *A Multilateral Tax Treaty – Designing an Instrument to Modernise International Tax Law* p. 176, E.M. Meijers Instituut (PhD Leiden University 2017).

129. Annex A, para. 20 et seq. BEPS Action 15 Final Report.

130. Bravo, *supra* n. 12, at p. 296 et seq.

131. Compare the examples included in BEPS Action 15 Final Report, Annex A, para. 24 et seq. such as art. 28(1) of the European Convention on Extradition of 13 Dec. 1957 and art. 103 of the 1994 North American Free Trade Agreement.

132. Para. 15 ES.

133. Compare Bravo, *supra* n. 12, at sec. 3.5.2.1.

134. Bravo, *supra* n. 12, at sec. 3.5.1.3.

135. Compare para. 15 ES. Where a provision of the MLI applies only “in place of” an existing provision, the provision is intended to replace an existing provision if one exists and is not intended to apply if an existing provision does not exist. In such cases, the notification provision states that the provision of the MLI will apply only in cases where all the relevant states involved made a notification with respect to the existing provision of the CTA as described in the MLI (match).

136. *See also* para. 15 ES indicating that where a provision of the MLI “applies to” or “modifies” an existing provision, the provision of the MLI is intended to change the application of an existing provision without replacing it, and therefore it can only apply if there is an existing provision. In these cases, the notification provision states that the provision of the MLI will apply only in cases where all states involved made a notification with respect to the existing provision of the CTA (match).

137. Para. 15 ES. Where a provision of the MLI applies only “in the absence of” an existing provision, the provision of the Convention will apply only in cases where all states involved notify the absence of an existing provision of the CTA.

138. Para. 15 ES. Where a provision of the MLI applies “in place of or in the absence of” an existing provision, the provision of the MLI will apply in all cases. If all states involved notify the existence of an existing provision, that provision will be replaced by the provision of the MLI (to the extent described in the relevant compatibility clause), i.e. a match. Where the relevant states do not notify the existence of a provision, the provision of the MLI will still apply. If there is in fact a relevant existing provision which has not been notified by all states involved (no match), the provision of the MLI will prevail over that existing provision, superseding it to the extent that it is incompatible with the relevant provision of the MLI. If there is no existing provision, the provision of the MLI will, in effect, be added to the CTA. In addition, it can be noted that the wording “in the place of or in the absence of” has not only the broadest scope but it is also the category that is included in almost all substantive provisions of the MLI. Compare art. 3(4) MLI, art. 4(2) MLI, art. 6(2) MLI, art. 7(2) and (14) MLI, art. 8(2) MLI, art. 9(2) MLI, art. 10(4) MLI, art. 11(2) MLI, art. 14(2) MLI, art. 16(4)(a)(i) MLI and art. 17(2) MLI. Compare also Bravo, *supra* n. 12, sec. 3.5.1.2. For a detailed outline of the effect of this compatibility clause in relation to art. 4 MLI (MAP tie-breaker), see J.F. Avery Jones & J. Hattingh, *Tax Treaty Interpretation - Global Tax Treaty Commentaries*, at secs. 5.3.1. and 5.3.2., IBFD Global Topics. These authors have also indicated which reservations are permitted and give examples of countries making use of the various reservations.

139. This guidance is now also included in the Opinion of the Conference of the Parties of the MLI, approved on 3 May 2021, para. 5. Compare further S. Govind & P. Pistone, *Compatibility Clauses in the Multilateral Instrument*, in *The OECD Multilateral Instrument for Tax Treaties - Analysis and Effects* p. 118 (M. Lang et al. eds. Wolters Kluwer 2018).

140. Opinion of the Conference of the Parties of the MLI, approved by the Parties on 3 May 2021, available at <https://www.oecd.org/tax/treaties/>

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

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

2.6. Flexibility: Opting-in provisions and reservations

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

The major part of the provisions of the MLI will apply to the relevant CTAs after its ratification¹⁴⁴ unless the states make reservations to these provisions, provided that this is permitted by the MLI (article 28(1) of the MLI).¹⁴⁵

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

- 141. Para. 15 ES.
- 142. Para. 14 ES; and pp. 19 and 22 BEPS Action 15 Final Report.
- 143. The Inclusive Framework and the peer review by the OECD forming part thereof intend to safeguard that the minimum standards are applied by the states involved. This will at least result in some political pressure. Thereby, even if a treaty is not designated as a CTA by one of the two states (no match), then the minimum standards should be applied to this relationship through other means, for instance by renegotiation of the current treaty; compare also paras. 14 and 26 ES. It is expected that states will not run the risk to obtain a negative score because a treaty is disregarded as a CTA and the tax treaty does not otherwise implement the minimum standards. *See also* Hattingh, *supra* n. 12, at sec. 5.
- 144. Compare art. 3(1)-(3) MLI, art. 4(1) MLI, art. 6(1) MLI, art. 7(1) MLI, art. 8(1) MLI, art. 9(1) MLI, art. 10(1)-(3) MLI, art. 11(1) MLI, art. 12(1) and (2) MLI, art. 14(1) MLI, art. 15(1) MLI, art. 16(1)-(3) MLI and art. 17(1) MLI.
- 145. This concerns “authorised reservations”. *See also* art. 19 VCLT, which provides the following:
 A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.
 With respect to the arbitration part of the MLI (part VI of the MLI) reservations are styled differently providing more flexibility to make reservations.

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

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

In addition, for several provisions an explicit opt-in is required¹⁵¹ in which context further choices are possible (including the possibility not to opt in at all).¹⁵² An example of an opt-in provision giving further choices is article 5 of the MLI, i.e. offering various possibilities under which the exemption method should not apply at a CTA level. The various choices made may have an asymmetrical

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

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

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

3.1. General

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

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

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

MLI makes no sense. This leads the authors to conclude that this extended meaning should be implied.¹⁵⁶

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

- (i) considering the relevant term to be interpreted, e.g. "arrangement", which is part of a substantive provision of the MLI, as an inescapable part of the CTA "at the time of application". The "modification" will effectively make the term part of the CTA (as is the case in the example of article 7(1) of the MLI).¹⁵⁸ This approach sees the modification as an integral part of the text of the CTA, allowing the application of article 3(2) of the CTA so as to permit the interpretation of undefined elements of substantive clauses introduced by the MLI with reference to domestic law; and
- (ii) finding a solution in the general legal framework of the VCLT. The existence of domestic tax law meanings for terms that are not defined in the MLI at the time when a contracting state signs the MLI could be a relevant circumstance – certainly in the case of the PPT – that could be used as a supplementary means under article 32 of the VCLT to assist in the interpretation of undefined terms.¹⁵⁹

The context within the meaning of the MLI according to paragraph 38 of the ES comprises of the purpose of the MLI (paragraphs 1-14 of the ES) and the CTA (also reflected in the preamble¹⁶⁰ given by article 6(1) of the MLI)¹⁶¹ as well as the ES (*see further* section 4.). As mentioned above, the authors abstract from the differences – also in terms of usage – between the context (i) within the meaning of article 31(1) of the VCLT (where it is a defined expression) and (ii) within the meaning of article 2(2) of the MLI and article 3(2) of the CTA (where it is undefined).¹⁶² Article 31(1) VCLT considers the object and

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

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

155. *Id.*

156. *Id.*

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

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

159. Avery Jones & Hattingh, *id.*

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

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

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

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

The risk may arise that the interpretation spectrum is blurred to a certain extent. The MLI and the CTAs serve different purposes, and they have different contexts.¹⁶⁴ Because of the effect of article 3(2) of the CTA on the MLI, qualification and interpretation conflicts may continue to exist and have an impact on the MLI. Additional issues may arise when a CTA is not styled on the OECD Model but, for instance, on the UN Model although, the CTA provisions affected by the MLI are quite comparable under the UN Model and the OECD Model. The impact, however, of, e.g. article 7(1) may be different because “a benefit under the Covered Tax Agreement” may differ because of other allocation provisions included in tax treaties styled on the UN Model when compared to the OECD Model, e.g. article 12A of the UN Model and article 21 of the UN Model; compare the India-Netherlands Income and Capital Tax Treaty (1988) being a CTA that is also based upon the UN Model¹⁶⁵ already having effect and more in particular article 7(1) of the MLI in combination with article 12 having a provision for technical fees and the absence of an other income provision. Of course, the CTA, the model on which it is styled and the benefit as enshrined in a specific tax treaty provision also are factors taken into account in evaluating the second prong of article 7(1) of the MLI (the normative or teleological element), i.e. whether granting the benefits would be in accordance with the object and purpose of the provisions of the relevant CTA.¹⁶⁶ In this connection the object

and purpose of a specific allocation provision of the CTA should be taken into account but that is not always clear and easy to establish.¹⁶⁷ In addition, the pre-2021 version of the UN Model did not contain a provision similar to article 23A(4) of the OECD Model and the Commentary on Article 23 of the UN Model in its pre-2021 version did not provide the OECD Commentary’s solution for qualification conflicts offering another interrelationship with article 5 of the MLI.

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

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

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

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

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

166. See also W. Schön, *The Role of “Commercial Reasons” and “Economic Reality” in the Principal Purpose Test under Article 29(9) of the 2017*

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 OECD Model, in *Building Global International Tax Law, Essays in Honour of Guglielmo Maisto*, pp. 249 and 250 (P. Pistone ed., IBFD 2022).

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

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

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

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

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

but not “trust”¹⁷² or comparable interest,¹⁷³ provided that the term is not used elsewhere in the CTA.¹⁷⁴

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

3.2. Article 31 et seq. of the VCLT

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

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

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

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

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

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

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

176. Art. 4(1) OECD Model.

177. Art. 10(3) OECD Model.

178. Art. 5 OECD Model.

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

180. Compare para. 12 ES:

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

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

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

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

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

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

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

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

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

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

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

185. In fact, of the jurisdictions represented by the authors, only the Dutch Supreme Court seems to follow this approach. See also the following decisions of the Hoge Raad as regards the inapplicability of art. 3(2)

The authors are of the opinion that this view and the application of the canon *lex specialis* versus *lex generalis* should not govern the relationship between article 2(2) of the MLI and article 3(2) of the CTA on the one hand and article 31 et seq. of the VCLT on the other¹⁸⁶ at least not in such a way that the *lex specialis* would take precedence over the *lex generalis* and would exclude its application:

- (i) it could be argued that the *lex specialis* as a priority rule only comes into play in the event of a conflict with the *lex generalis*, which does not seem to be the case with regard to article 2(2) of the MLI/article 3(2) of the CTA in relation to articles 31 et seq. of the VCLT.¹⁸⁷ Even if the relationship between the *lex specialis* principle and the rules of interpretation of article 31 of the VCLT were to be regarded as unsettled (as indicated above in this section) within this framework, it would seem sensible to adopt a reading that reconciles the two and allows them to be applied concurrently (*see also* (iii) below);¹⁸⁸
- (ii) this is unknown in common law countries (which do not consider that interpretation is ever a matter of applying formulaic rules)¹⁸⁹ and also in some civil law countries; and
- (iii) thirdly, this approach seems to turn the relationship between article 2(2) of the MLI/article 3(2) of the CTA on its head. Article 3(2) is part of the text of the CTA and article 2(2) is part of the text of the MLI. They are therefore also part of the “context” within the meaning of article 31(2) of the VCLT. Consequently, article 3(2) of the CTA/article 2(2) of the MLI do not supersede or exclude the application of article 31 of the VCLT but rather complement it. Article 3(2) of the CTA/article 2(2) of the MLI modify to some extent the ordinary meaning to be given to the terms of the CTA/MLI in their context, in the light of its object and purpose and in good faith.¹⁹⁰ In the view of the authors, article 3(2) of the CTA/article 2(2) of the MLI, therefore, must be understood as rules that are embedded in the general framework of article 31 et seq. of the VCLT and supplement it in order to meet the specific needs addressed by the MLI/CTA. As a

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 of the Dutch tax treaties styled on the OECD Model; NL: HR, 29 Sept. 1999, no. 33 267, *BNB* 2000/16; NL: HR, 29 Sept. 1999, no. 34 482, *BNB* 2000/17; NL: HR, 21 Feb. 2003, no. 37 011, *BNB* 2003/177; NL: HR, 21 Feb. 2003, no. 37 024, *BNB* 2003/178; NL: HR, 1 Dec. 2006, no. 38 850, *BNB* 2007/75; NL: HR, 1 Dec. 2006, no. 38 950, *BNB* 2007/76; NL: HR, 1 Dec. 2006, no. 39 535, *BNB* 2007/77; NL: HR, 1 Dec. 2006, no. 39 710, *BNB* 2007/79; NL: HR, 1 Dec. 2006, no. 40 088, *BNB* 2007/79; and NL: HR, 19 Jan. 2018, no. 16/03321, *BNB* 2018/68.

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

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

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

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

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

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

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

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

191. This view seems to be followed by the Hoge Raad in the aforementioned decisions. *See* in particular NL: HR, 19 Jan. 2018, *BNB* 2018/68 as set out above, *supra* n. 185.

192. Avery Jones & Hattingh, *supra* n. 138, at sec. 4.1., Resch, *supra* n. 183, at pp. 216 and 217; E. van der Bruggen, *Unless the Vienna Convention Otherwise Requires: Notes on the Relationship Between Article 3(2) of the OECD Model Tax Convention and Articles 31 and 32 of the Vienna Convention on the Law of Treaties*, 43 *Eur. Taxn.* 5, pp. 154, 155 (2003), *Journal Articles & Opinion Pieces IBFD*; and J.F. Avery Jones et al., *The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model – II*, 19 *British Tax Review* 2, p. 104 (1984).

193. Para. 12 ES.

194. Bosman, *supra* n. 153.

195. Compare the 2020 Dutch Tax Treaty Policy Memorandum, para. 3.2.1. *See also* the Dutch Explanatory Memorandum (*Memorie van Toelichting*), Second Chamber 2017/18, 34 853, no. 3, p. 17; and para. 68 ES. *See* further F.P.G. Pötgens & E.M.L. Kool, *Nederland en het Multilaterale Instrument: een stand van zaken*, *Weekblad voor fiscaal recht* 2018/206, p. 1427; L. De Broe, *Role of the Preamble for the Interpretation of Old and New Tax Treaties and the Policy of the Prevention of Treaty Abuse*, 74 *Bull. Intl. Taxn.* 4/5, p. 164 (2020), *Journal Articles & Opinion Pieces IBFD*; and J. Schwarz, *The Impact of the New Preamble on the Interpretation of Old and New Treaties and on the Policy of Abuse Prevention*, 74 *Bull. Intl. Taxn.* 4/5, p. 176 (2020), *Journal Articles & Opinion Pieces IBFD*. According to Duff and Gutmann, *supra* n. 164, at pp. 24, 49 and 50, various national reports indicate that preambles to tax treaties play a limited role in the interpretation thereof. In line with this consideration De Broe, *id.*, at p.171 and Schwartz, *id.*, at pp. 177 and 178 adopt a comparable approach as regards the preamble to the MLI (art. 6) or to the OECD Model.

4. Conclusions

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

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

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

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

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

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

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

After giving an overview of the functioning of compatibility clauses, reservations (including their withdrawal), notifications and opting-in provisions, the authors analyse the interpretation of the MLI. This analysis begins with article 2(2) of the MLI. The authors argue that this provision does not contain a direct reference to the domestic law of the relevant states for undefined terms in the MLI,

but rather to article 3(2) of the CTA, which is modelled on the OECD Model, because it is unclear whose domestic law should be applied under a multilateral treaty such as the MLI.

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

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