2 THE SCOPE OF THE CONVENTION

2.1 The Framework of Articles 1 and 2 of the MLI

Part 1 of the MLI deals with 'Scope and Interpretation of Terms'. This section of the MLI contains the relevant conditions that must be fulfilled for the application of the MLI. The basic idea of the MLI is to implement treaty-related BEPS measures into the tax treaty network. The MLI will not replace existing tax treaties, but rather will be applied alongside those tax treaties.[3] Article 1, which governs the scope of the MLI, states that the MLI modifies all covered tax agreements as defined in Article 2(1)(a). This provision indicates that the scope of the MLI is limited to modifications through the MLI. However, Article 1 of the MLI does not specify for which conventions the MLI is applicable.

Article 2(1)(a) defines the term 'covered tax agreement' as referring to 'an agreement for the avoidance of double taxation with respect to taxes on income (whether or not other taxes are also covered)…'. Thus, an agreement may fall under the scope of the MLI only if this criterion of Article 2(1)(a) of the MLI is fulfilled.[4] From a legal perspective, it is highly interesting to explore in greater detail what exactly constitutes 'an agreement for the avoidance of double taxation'. Section 3 of this chapter will therefore deal with this question and analyse the wording of the provision.

However, agreements that meet the conditions set forth in Article 2(1)(a) of the MLI are not automatically modified by the MLI. Instead, the parties must take action and make a notification in order for the instrument to apply to a specific bilateral or multilateral agreement. Finally, Article 2(a)(i) of the MLI requires that an agreement be in force between two or more parties to the MLI. In this context, the term 'party' refers to a state or jurisdiction that has signed the MLI, and for which the MLI has entered into force.[5] As a result, the scope of the MLI extends only to agreements that meet the formal criteria set forth in Article 2 of the MLI.

Therefore, it appears accurate that the personal scope of the MLI is identical to the personal scope of the specific covered tax agreement. Consequently, defining an agreement's scope is of critical importance. Many tax treaties follow either the OECD or UN Model Tax Convention on Income and Capital (hereinafter 'OECD Model' and 'UN Model'). Under Article 1 of the OECD Model, the 'Convention shall apply to persons who are residents of one or both of the Contracting States'.[6] Article 1 of the UN Model has the same wording as the OECD Model. The only requirement set forth in these provisions for the application of a tax treaty is that a person be a resident of one or both of the contracting states. A person is defined in Article 3(1)(a) of the OECD Model and includes both individuals and companies, as well as any other body of persons.

3. OECD, *Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (2016), para. 13.
4. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 3, para. 25.
5. *See* OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 3, para. 34.
6. *OECD Model Tax Convention on Income and on Capital* Art. 1 (2014).

Assuming that a person falls within the scope of a tax treaty, the legal consequence is that the right of taxation for cross-border transactions is separated between the contracting states.[7]

2.2 Notification Requirement

Article 2(1)(a)(ii) of the MLI requires that 'each such party' have made a notification to the Depositary[8] listing which it wishes to be covered by the MLI. This provision reflects the situation in which there might be circumstances where a party wishes not to cover a specific tax treaty in the scope of the MLI.[9] It is therefore possible not to include all tax treaties in the scope of the MLI because only tax treaties that have been specifically identified in a notification to the depositary are covered by the scope of the MLI. Furthermore, each contracting party to a tax treaty must notify that it wishes to have the treaty be covered by the scope of the MLI. If only one party to a tax treaty wishes to cover a specific treaty, the MLI is not applicable until the second contracting party decides to notify the treaty to the depositary. This approach prevents the unilateral modification of a tax treaty by the MLI. Furthermore, notifications help to identify the agreements along with any other instrument that has been amended by the MLI.[10]

Under Article 2(1)(a)(ii) of the MLI, the parties must notify 'the agreement as well as any amending or accompanying instruments thereto (identified by title, names of the parties, date of signature, and, if applicable at the time of the notification, date of entry into force)'. This approach ensures clarity as to the content of the agreement at the time it is modified by the MLI.[11] Pursuant to the principle of reciprocity, the notifications must correspond to each other. If a mismatch occurs (e.g., the parties notify a different accompanying instrument), the agreement may not fall within the scope of the MLI because the formal criteria for the application of the MLI are not fulfilled. Otherwise, there could be disagreement between the parties about the scope of the MLI. To minimize such disagreements, the depositary (who collects the notifications) requires the parties to report the notifications prior to the ratification of the MLI. The depositary compares those notifications and gives the parties the opportunity to discuss any mismatches and correct them prior to finalization of the lists.[12] Another requirement for the application of the MLI is that – under Article 2(1)(a)(i) of the MLI – the agreement be in force. However, the MLI gives the parties the opportunity to include an agreement in their list of notified agreements under Article 2(1)(a)(ii) of the MLI which has not yet entered into force.[13]

7. R. Prokisch, *DBA Doppelbesteuerungsabkommen*, Art. 1, para. 4 (K. Vogel & M. Lehner eds., 5th edition, Beck 2008).
8. The depositary is managed by the OECD. It collects all reservations and notifications, and makes them available for the public.
9. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 3, para. 14.
10. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 3, para. 26.
11. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 3, para. 33.
12. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 3, para. 18.
13. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 3, para. 32.

2.3 Flexibility with Regard to the Substantive Provisions of the MLI

An agreement falls within the scope of the MLI only if it cumulatively fulfils the criteria set forth in Article 2 of the MLI. However, this does not automatically mean that all substantive provisions of the MLI are applicable to a covered tax agreement, as one of the essential characteristics of the MLI is that it allows the contracting states a certain degree of flexibility.[14] By allowing the contracting states to choose between different sets of alternative provisions, the MLI provides for a considerable amount of flexibility.

The MLI contains opt-out clauses, opt-in clauses and provisions where the contracting jurisdictions may choose between different alternatives.[15] In this context, opt-out clauses mean that a contracting party is bound by the provision of the MLI unless it explicitly expresses at the time of ratification of the MLI that it does not wish to be bound by the provision. The parties must make a reservation in such cases in order to ensure clarity about the content of the MLI. In contrast to opt-out clauses, opt-in clauses are measures where a contracting jurisdiction decides to apply a specific additional and non-compulsory provision of the MLI. However, provisions that contain options are usually applicable only when both contracting states notify that they wish to apply the same option.[16] This approach follows the principle of reciprocity in international law. Thus, a precise analysis is necessary to figure out which substantive provisions of the MLI are applicable in a specific covered tax agreement.

3 AGREEMENT FOR THE AVOIDANCE OF DOUBLE TAXATION AS COVERED TAX AGREEMENT

3.1 General Remarks

Under Article 2(1)(a) of the MLI the term 'covered tax agreement' refers to 'an agreement for the avoidance of double taxation with respect to taxes on income (whether or not other taxes are covered)'. This wording also includes agreements that covers capital taxes and taxes on capital gains beside income taxes. However, agreements that deal solely with shipping, air transport or social security, are not intended to fall under the scope of the MLI.[17] The discussion below considers which types of agreements fulfil the criteria set forth in Article 2 of the MLI and have the potential to fall under the scope of the MLI.

3.2 Taxes on Income

A requirement for the application of the MLI is that the agreement cover taxes on income.[18] The MLI itself does not contain a legal definition of 'taxes on income'.

14. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 3, para. 14.
15. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 3, para. 14.
16. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 3, para. 12.
17. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 3, para. 25.
18. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 3, para. 25.

Therefore, it is not clear which understanding of the term was intended by the drafters of the MLI. Considering that the term 'taxes on income' is used frequently, one could argue that there is a commonly accepted definition of the term.[19] Nevertheless, the MLI does not contain an indication of such a common understanding. However, the MLI provides a rule in Article 2(2) that clarifies how the terms of the MLI are to be interpreted in case of doubts. Under that rule, '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. Under this interpretation rule, it is arguable that the 'income tax' definition of the covered tax agreement applies also for the MLI. However, it must be admitted that an interpretation, following the underlying covered tax agreement, may result in different understandings of the term 'taxes on income', as definitions may vary among covered tax agreements. It is questionable whether this approach reflects the intention of the drafters of the MLI, as this approach may lead to different views regarding the interpretation of an essential term of Article 2(1) of the MLI.

However, the interpretation rule of Article 2(2) of the MLI offers another solution to clarify the meaning of particular words used in the MLI. Considering the wording of the interpretation rule and specifically the phrase 'unless the context otherwise requires', it could be argued that the definition of 'taxes on income' may be derived from the context of the MLI. The MLI was drafted by the ad hoc group in order to implement tax treaty measures that were developed by the OECD.[20] The wording 'taxes on income' which is used in Article 2 of the MLI corresponds to the wording which is used in Article 2 of the OECD Model (2014). As both instruments were drafted in connection with an OECD project and the wording of both instruments is identical, it can be assumed that the term 'taxes on income' is to be afforded the same meaning. Therefore, considering the second part of the interpretation rule, recourse to definitions laid down in the covered tax agreement does not seem necessary.

Although Article 2 of the OECD Model (2014) clarifies which taxes are covered by the treaty, this provision does not provide a precise definition of the term 'tax'.[21] Rather, Article 2 of the OECD Model (2014) merely indicates the meaning of the respective term, as these provisions describe the term in a more general way.[22] Article 2(1) stipulates that 'taxes on income and on capital' are be imposed 'on behalf of a Contracting State or its political subdivision or its political subdivisions or local authorities irrespective of the manner in which they are levied'.[23] The reference to

19. F. Sutter, *Der sachliche Anwendungsbereich des ErbSt-MA*, Erbschaftsteuern und Doppelbesteuerungsabkommen, at 57 (M. Lang ed., 1st edition, Linde 2002).
20. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 3, para. 6.
21. R. Ismer & A. Blank, *Klaus Vogel on Double Taxation Conventions*, Art. 2, at 156 (K. Vogel & A. Rust eds., Vol. 1, 4th edition, Kluwer Law 2015); M. Lang, *'Taxes Covered' – What Is a 'Tax' According to Article 2 of the OECD Model?*, 59 Bull. Intl. Taxn. – Tax Treaty Monitor, at 216 (2005).
22. Lang, *supra* n. 21, at 216.
23. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 2(2)* (2014).

'imposed' allows for no other conclusion than that 'taxes' are restricted to mandatory levies. Generally, taxes are considered to be 'compulsory, unrequited monetary payments to the government'.[24] However, as the scope of the MLI is restricted to taxes on income, the instrument requires a more precise definition of the term.

Article 2(2) of the OECD Model (2014) provides a tautology which describes the term 'taxes on income and on capital'. Under this provision, 'taxes imposed on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation' are regarded as taxes on income and capital. Nevertheless, the term 'income' is not be described in more detail through Article 2(2) of the OECD Model. However, the context of the distribution rules of Articles 6–21 of the OECD Model (2014) must also be taken into consideration, as the aforementioned provisions provide distribution rules for income taxes.[25] Therefore, the distribution rules of Articles 6–21 may be used for the interpretation of the term 'income', and a fall back to domestic definitions under Article 3(2) of the OECD Model (2014) would not be necessary.[26] Thus, 'income' encompasses undoubtedly business profits (Article 7 of the OECD Model), capital gains (Article 13 of the OECD Model), excess profits, as well as salaries and wages (Article 15 of the OECD Model).[27] Moreover, gross receipts from dividends (Article 10 of the OECD Model) and interest (Article 11 of the OECD Model) can also constitute 'income'.[28] This broad definition in Article 2(2) of the OECD Model allows the coverage of a great number of income taxes because the list of taxes is not exhaustive. This seems to be in line with the intention of the drafters of the MLI to modify the maximum number of tax treaties.[29] In contrast, consumption taxes, like value added taxes or expenditure taxes, are not considered as 'income taxes' as they do not fulfil the 'income' criterion.[30]

3.3 Income Tax Treaties

The MLI is designed to modify agreements for the avoidance of double taxation. Double taxation arises because most states levy taxes on all sources of income, i.e., income generated at home and abroad. In order to prevent double taxation, states enter into bilateral agreements for the avoidance of double taxation. Double taxation agreements (hereinafter 'tax treaties') allocate the taxing rights between the jurisdictions that are parties to the tax treaty.[31] Tax treaties may differ significantly from each other, as they reflect varying political positions and special national characteristics. However, the

24. Ismer & Blank, *supra* n. 21, at 156.
25. K. Vogel, *DBA Doppelbesteuerungsabkommen*, *supra* n. 7, Art. 2 tn. 22.
26. Lang, *supra* n. 21, at 216.
27. M. Tumpel, *DBA-Kommentar*, Art. 2 tn. 11 (D. Aigner, G. Kofler & M. Tumpel eds., 1st edition, Linde 2017).
28. Ismer & Blank, *supra* n. 21, at 159.
29. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 3, para. 6.
30. Tumpel, *DBA-Kommentar*, *supra* n. 27, Art. 2 tn. 13.
31. K. Holmes, *International Tax Policy and Double Tax Treaties*, at 57 (2nd edition, IBFD 2014).

OECD[32] and the UN[33] developed model conventions[34] that are of enormous practical relevance today. The aim of these models is to offer guidance to countries wishing to enter into tax treaties. However, these models are not legally binding on the parties.[35] The OECD has summarized the purpose of tax treaties as being 'to promote by eliminating international double taxation, exchanges of goods and services, and the movement of capital and persons. It is also a purpose of tax conventions to prevent the avoidance of evasion'.[36]

Tax treaties are primarily designed to prevent double taxation with respect to taxes on income.[37] As analysed above, income taxes are within the scope of treaties that follow the OECD Model. The same is true for treaties that are based on the UN Model, as both the OECD Model and the UN Models contain the same definition of taxes on income. For this reason, treaties that are based on one of the model conventions fulfil the income tax criterion of Article 2 of the MLI.

Another requirement for the application of the MLI is that the underlying instrument be an 'agreement'. In international law, Article 2(1)(a) of the Vienna Convention on the Law of Treaties stipulates that a treaty is 'an international agreement concluded between States in written form and governed by international law'. The conclusion of a tax treaty falls under this definition of a treaty, as it is usually concluded in a bilateral manner between different states.[38] These treaties are an independent source of law that regulates the legal relationship between countries in international tax law.[39]

Tax treaties undoubtedly fulfil the criteria for the application of the MLI. They deal with the prevention of double taxation with respect to income taxes. This wording covers the criteria for the application of the MLI which are set down in Article 2 of the MLI. This conclusion reflects the intention of the drafters of the MLI because the MLI is specifically designed to implement anti-BEPS measures in the tax treaty network.[40] Furthermore, the application of the MLI is not restricted to treaties that follow the OECD Model, as this is not a requirement of Article 2. In order to clarify which rules are relevant for the application of the MLI, the MLI paraphrases those rules.[41] This systematic approach ensures that provisions which differ in their wording from the

32. *OECD Model Convention on Income and Capital*.
33. *United Nations Model Double Taxation Convention Between Developed and Developing Countries*.
34. K. Vogel & A. Rust, *Klaus Vogel on Double Taxation Conventions*, Introduction, at 20 (K. Vogel & A. Rust eds., Vol. 1, 4th edition, Kluwer Law 2015); Lang, *supra* n. 21, at 216.
35. Holmes, *supra* n. 31, at 65.
36. *OECD Model: Commentary on Article 1* para. 7 (2014).
37. Holmes, *supra* n. 31, at 57.
38. Vogel & Rust, *supra* n. 34, at 24.
39. V. Kluge, *Das Internationale Steuerrecht*, at 646 (4th edition, Beck 2000).
40. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 3, para. 2.
41. These compatibility clauses describe which provisions of a covered tax agreement are affected by the clause. This approach makes sure that the provisions of the underlying tax agreement will be identified if the wording differs from the MLI. Moreover, these clauses describe the legal consequences of a situation where a covered tax agreement does not contain a provision affected by a compatibility clause.

OECD Model nevertheless fall within the substantive scope of the MLI where the MLI refers to the underlying tax treaties.[42] As a result, a tax treaty undoubtedly can become a covered tax agreement under the MLI.

3.4 Multilateral Tax Treaties

In order for an agreement to be covered by the MLI, Article 2(1)(a)(i) thereof requires that the treaty be in force between two or more parties. This raises the question as to what is meant by the expression 'between two or more parties'.[43] Tax treaties are usually intended to eliminate double taxation in a bilateral manner. Therefore, almost all tax treaties in force are ratified between two parties. However, there are multilateral tax treaties with more than two contracting parties. One reason for including the expression 'between two or more parties' could be that the more states involved in an agreement, the lower the chances of concluding an agreement.

Even though there are only a limited number of multilateral tax treaties currently in force, these treaties can undoubtedly have significant importance for the contracting parties of such a treaty.[44] This is why it makes sense for the MLI to modify also these multilateral tax treaties. The MLI enables the modification of such treaties by its use of the wording 'between two or more parties' in Article 2(1)(a)(I).

From a European perspective, the agreement between the Nordic countries for the avoidance of double taxation with respect to taxes on income and capital (hereinafter 'the Nordic Convention') is a significant example of a multilateral tax treaty.[45] The Nordic Convention is ratified between Denmark, Finland, Iceland, Norway, Sweden and the Faroe Islands. Another multilateral treaty has been ratified between the Member States of the South Asia Association for Regional Cooperation (SAARC). SAARC members that are parties to the SAARC Limited Multilateral Agreement on the Avoidance of Double Taxation and Mutual Administrative Assistance in Tax Matters are Bangladesh, India, Maldives, Nepal, Pakistan and Sri Lanka. Additional multilateral tax treaties are in force in South America (Andean Community Income and Capital Tax Convention) and Africa (West African Economic and Monetary Union Tax Treaty).[46]

In addition to the already mentioned multilateral tax treaties, the Arbitration Convention[47] between the EU Member States may also fulfil the criteria for application of the MLI. The Arbitration Convention is an international law convention which is

42. S. Bendlinger, *Multilaterales Instrument zur automatischen Anpassung bestehender Doppelbesteuerungsabkommen*, 27 SWI, 2, 7 (2017).
43. Article 2(1)(a)(i).
44. N. Mattsson, *Multilateral Tax Treaties: A Model for The Future?*, 28 Intertax, at 301 (2000).
45. Mattsson, *supra* n. 44, at 301.
46. K. Vogel & M. Lehner, *DBA*, Vermeidung der Doppelbesteuerung durch multilaterale Abkommen, tn. 40a (K. Vogel & M. Lehner eds., 6th edition, Beck 2015).
47. EU Arbitration Convention (1990): Convention 90/436/EEC of 23 July 1990 on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises, OJ L225/10 (20 August 1990).

independent from EU law.[48] The purpose of the Arbitration Convention is to eliminate double taxation which may occur from a profit adjustment in one Member State without a corresponding adjustment in the other Member State.[49] Therefore, it seems possible that the Arbitration Convention could be classified as an 'agreement for the avoidance of double taxation' in light of the MLI. As income taxes fall within the scope of the Arbitration Convention,[50] it fulfils the criteria for application of the MLI under Article 2 of the MLI.

In order to apply the MLI to these multilateral tax treaties, the same criteria as discussed above must be fulfilled to be treated as a covered tax agreement. Multilateral tax treaties usually differ from the wording of many treaties, as they deal with cases where more than two countries may be involved. An analysis by Mattsson as regards the Nordic Convention shows that there are many similarities between bilateral and multilateral tax treaties.[51] However, if those treaties have the purpose of preventing double taxation with respect to income taxes, they can undoubtedly be notified to the depositary in order to apply the MLI to those treaties.

Nevertheless, there are some specialities and unique aspects to be considered before a multilateral tax treaty is modified by the MLI. There could be situations where not every contracting party to the underlying multilateral tax agreement ratifies the MLI. At this point, one could may ask what would happen if, for example, Norway and Sweden were to ratify the MLI while the other parties to the Nordic Convention do not. Has the MLI modified the relation between Norway and Sweden in such situations? What legal consequences arise for the relations between states which ratify the MLI and those which do not?

Unfortunately, the MLI does not contain an explicit rule regarding treaties between more than two parties. However, it is possible that the wording of the MLI contains a hint on the modification of treaties between more than two states. Under Article 2(1) of the MLI, the MLI modifies agreements that are in force between two or more parties. But one requirement for the application of the MLI is that 'each such party' have made a notification to the depositary. The wording 'each such party' indicates that it is necessary that every party to a treaty notify that multilateral treaty to the depositary. As a consequence, treaties between more than two parties cannot be modified by the MLI when not every party to such a treaty ratifies the MLI and notifies that treaty to the depositary. A unilateral application of the MLI in relation with another party to a tax treaty will be prevented by this approach.

48. P. Plansky, *The EU Arbitration Convention*, Introduction to European Tax Law on Direct Taxation, at 261 (M. Lang, P. Pistone, J. Schuch & C. Staringer eds., 4th edition, Linde 2016); L. Hinnekens, *The Uneasy Case and Fate of Article 293 Second Indent EC*, 37 Intertax, at 602, 604 (2009).
49. Plansky, *supra* n. 48, at 258.
50. Article 2 Arbitration Convention.
51. Mattsson, *supra* n. 44, at 304.

4 FURTHER POTENTIAL AREAS OF APPLICATION

4.1 General Remarks

The MLI is designed to modify covered tax agreements in order to implement the BEPS-related measures into the tax treaty network.[52] Thus, it seems that only tax treaties for income taxes which undoubtedly fulfil the criteria of Article 2 of the MLI, fall under the scope of the MLI. This section analyses whether the MLI may also be applicable to agreements and other instruments that do not primarily aim at preventing double taxation with respect to income taxes.

The MLI modifies substantive provisions of tax treaties that fall under the scope of the MLI. Thus, the MLI focuses on the modification of the distribution rules which are governed by Articles 6–21 of the OECD Model (2014). If agreements other than income tax treaties were to fall under the scope of the MLI, the instruments' effects would be limited, as those agreements might not contain provisions which are modified under the MLI. However, this view does not hold for every provision included in the MLI, as the MLI also contains provisions which could be relevant for the application of other agreements such as the mutual agreement procedure (Article 16) and the preamble. For example, Article 6 of the MLI contains the preamble which clarifies that tax treaties are intended to eliminate double taxation 'without creating opportunities for non-taxation'.[53] This text of the preamble is remarkable because it clarifies for the first time that the purpose of a covered tax agreement is to not create opportunities for non-taxation. Regarding Article 6 of the MLI, the preamble has a significant importance for the interpretation of treaties under Article 31 of the Vienna Convention on the Law of Treaties. Parties to the MLI may therefore have an interest in implementing those provisions in agreements other than tax treaties.

4.2 Tax Agreements on Estates and Inheritance and on Gifts

In practice, tax treaties may significantly deviate from the OECD Model. As a result, their scope is no longer identical to Article 2 of the OECD Model. Furthermore, some treaties may not deal exclusively with taxes on income. Instead, they may also contain provisions that apply to taxes on capital or taxes on inheritance and on gifts.[54] Under Article 2(1)(a) of the MLI, the fact that a specific treaty also applies to other taxes (e.g., taxes on inheritance and on gifts) does not preclude its application to the MLI. In such cases, it appears to be obvious that the agreement may fall under the scope of the MLI because the income tax criterion is fulfilled.

In addition to the OECD Model, the OECD has published a Model Double Taxation Convention on Estates and Inheritances and on Gifts (hereinafter 'the OECD Model on Estates and Inheritances and on Gifts'). The OECD Model on Estates and

52. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 3, para. 6.
53. Article 6(1) MLI.
54. For example, tax treaty between the Federal Republic of Germany and the Kingdom of Sweden, Federal Law Gazette Germany, Part II, 1994/686.

Inheritances and on Gifts is the only model convention that was developed for the prevention of double taxation with regard to inheritance, gifts and estates. The number of inheritance tax agreements is very low compared to the number of income tax treaties.[55] The OECD Model on Estates and Inheritances and on Gifts was published three years after the first OECD Model. Its aim was to close gaps in the scope of the OECD Model.[56]

The Commentary on the OECD Model on Estates and Inheritances and on Gifts stipulates which taxes are covered by that Convention. Under the definition provided therein, taxes on estates and inheritance include 'all taxes which are imposed by reason of death in the form of taxes on the corpus of the estate, taxes on inheritance, transfers duties and donations mortis causa. … Taxes on gifts inter vivos include all taxes which are levied on gifts … or other gratuitous transfer of property'.[57] This definition deviates from the definition of 'taxes on income' under Article 2 of the OECD Model.[58] Thus, the MLI does not apply to treaties that follow the OECD Model on Estates and Inheritances and on Gifts because the income tax requirement of Article 2 of the OECD Model is not fulfilled.

If there were two separate tax treaties – one concerning taxes on income and on capital, and the other concerning taxes on estates and inheritance and on gifts, and no overlap between the respective agreements can be identified – it seems that the MLI would be applicable only to the treaty concerning taxes on income and on capital. However, this result may be different in practice, as the parties to a specific inheritance tax agreement may extend its scope to taxes which also reflect elements of income taxes. In such situations, it is possible that the MLI may be applicable to tax agreements on estates and inheritance and on gifts if both parties notify the agreement to the depositary.

Another noteworthy issue concerns the question as to whether it is possible for there to be an overlap of agreements following the OECD Model on Estates and Inheritances and on Gifts and treaties that are based on the OECD Model. In this context, Sutter, after analysing the scope of both agreements, concluded that no such overlap is possible, as these conventions cover different kinds of taxes.[59] Conversely, Lang highlighted that overlaps between the scope of income tax treaties and inheritance tax agreements can occur as – in practice – the design of taxes may deviate considerably from the definitions set forth in the OECD Model on Estates and Inheritances and on Gifts. By means of an Austrian example, he described that it is arguable that income tax treaties as well as tax agreements on estates and inheritance and on gifts are applicable if a payment is subject to a tax which contains elements of income and inheritance taxes which fall under both treaties. In such situations,

55. F. Sutter, *Erbschaftsteuern und Doppelbesteuerungsabkommen*, Der sachliche Anwendungsbereich des ErbSt-MA, at 43 (M. Lang ed., 1st edition, Linde 2002).
56. Sutter, *Der sachliche Anwendungsbereich des ErbSt-MA*, *supra* n. 19, at 54.
57. *OECD Model Convention on Estates and Inheritance and on Gifts: Commentary on Art. 2* para. 2 (1982); a gift *mortis causa* is one in prospect of death, while a gift *inter vivos* refers to a transfer of goods during the donor's lifetime.
58. Sutter, *Der sachliche Anwendungsbereich des ErbSt-MA*, *supra* n. 19, at 57.
59. Sutter, *Der sachliche Anwendungsbereich des ErbSt-MA*, *supra* n. 19, at 58.

taxpayers must apply both treaties simultaneously. This approach is possible because both tax treaties aim at reducing a person's tax liability and they do not have a contradictory aim.[60] In case of an overlap of the two conventions, one could argue that the MLI is partially applicable to the tax agreements on estates and inheritances and on gifts if the MLI is applicable to the underlying income tax treaty. However, the partial application of the MLI would be limited to the overlapping provisions.

4.3 Agreements for Diplomatic Relations and Immunity

In order to foster diplomatic relations between states, various types of privileges in the host country are granted to diplomatic representatives.[61] For example, diplomatic and consular representatives benefit from tax exemptions in other states under the principle that 'one government should not be taxed by another government'.[62] Regarding tax exemptions for diplomats, several legal sources should be considered.

The Vienna Convention on Diplomatic Relations of 1961[63] was concluded after preparatory work of the UN in Vienna. Article 34 of this Convention provides that '[a] diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal'. This tax exemption does not apply to indirect taxes, taxes on private sources of income; inheritance taxes; registration, court or record fees; mortgage dues; and stamp duty, nor to charges levied for specific services rendered.[64] Furthermore, Article 28 provides for an exemption with regard to '[t]he fees and charges levied by the mission in the course of its official duties'. Furthermore, the Vienna Convention on Consular Relations (1963) was ratified and contains similar tax advantages for consular representatives.[65] It is questionable whether these Conventions fulfil the criteria for the application of the MLI under Article 2.

The phrase 'exempt from all taxes' indicates that 'income taxes' that would be levied in the host country are also included in the exemption. Thus, this finding suggests that those agreements cover taxes on income. Furthermore, another criterion is that the purpose of those agreements must be the prevention of double taxation. The preamble of the Vienna Convention on Diplomatic Relations indicates that its purposes is 'the maintenance of international peace and security, and the promotion of friendly relations among nations'. Moreover, the preamble clarifies that the benefits for diplomats have 'to ensure the efficient performance of the functions of diplomatic missions as representing States'. This approach can be justified by the concept of

60. Lang, *supra* n. 21, at 223.
61. C. Zeileissen, *Die abgabenrechtlichen Privilegien in den diplomatischen und konsularischen Beziehungen*, at 1 (1st edition, Braumüller 1971).
62. P. Fischer & H. Köck, *Völkerrecht*, at 228 (6th edition, Linde 2004).
63. *Vienna Convention on Diplomatic Relations* (1961), available at https://treaties.un.org/doc/Publication/UNTS/Volume%20500/v500.pdf (accessed 5 June 2017).
64. M. Richtsteig, *Wiener Übereinkommen über diplomatische und konsularische Beziehungen*, at 80 (1st edition, Nomos 1994).
65. *Vienna Convention on Consular Relations* (1963), available at https://treaties.un.org/doc/publication/UNTS/Volume%20596/v596.pdf (accessed 3 May 2017); *see* Art. 32 (Exemption from taxation of consular premises), Art. 49 (Exemption from taxation), Art. 60 (Exemption from taxation of consular premises), Art. 66 (Exemption from taxation).

representation, which means that one sovereign does not tax another sovereign. Furthermore, tax exemptions have a functional necessity which should help diplomats in performing their duties independently.[66] In addition, the Convention does not contain any hint that the intention of the drafters was to eliminate double taxation. However, the host country is prevented from taxing diplomats, as they are usually already taxed in their home country. Thus one could argue that diplomatic agreements constitutes agreements for the 'avoidance of double taxation' under Article 1(a) of the MLI.

Nevertheless, it is unrealistic for them to fall under the scope of the MLI. The reason for this is that each contracting party[67] must notify to the depositary that it wishes to apply the MLI to the agreement. Such a political commitment is quite unrealistic because the Vienna Convention on Diplomatic Relations has been ratified by over 150 sates.[68] Moreover, several tax treaties contain provisions covering members of diplomatic and consular missions.[69] Those agreements can, of course, fall under the scope of the MLI when the parties notify the agreement to the depositary.

It is common practice for international organizations to set up treaties that regulate privileges and immunities for the organization. For example, the United Nations set up the Convention on the Privileges and Immunities of the United Nations.[70] Other organizations have more or less copied this convention for their own purposes. Under this Convention, representatives of the UN enjoy the same tax exemptions as diplomats under the Vienna Convention on Diplomatic Relations. Moreover, the United Nations is exempt from all direct taxes on its assets, income and other properties.[71] These tax privileges are necessary for the fulfilment of the purposes of the organization and not for the prevention of double taxation. Furthermore, tax exemptions prevent organizations from annexing part of the common funds for purposes of paying taxes in a specific country, which would undermine the concept of equality of UN members.[72] Moreover, international organizations enter into so-called headquarter agreements with their host countries.[73] Under these agreements, the host countries grant tax exemptions to the respective organizations and their employees.[74]

66. D.S. Smit, *General Report*, in *Tax Rules in Non-Tax Agreements*, at 3 (M. Lang, P. Pistone, J. Schuch, C. Staringer & A. Stork eds.,1st edition, IBFD 2012).
67. Article 2(1)(a)(ii) MLI.
68. Richtsteig, *supra* n. 64, at 80.
69. Zeileissen, *supra* n. 61, at 38.
70. *Convention on the Privileges and Immunities of the United Nations*, available at http://www.un.org/en/ethics/pdf/convention.pdf (accessed 5 June 2017).
71. Smit, *supra* n. 66, at 8.
72. Smit, *supra* n. 66, at 9.
73. For example Austria has several agreements with seventeen organizations that have premises in Austria, such as the *Agreement Between the Republic of Austria and the Organization of the Petroleum Exporting Countries regarding the Headquarters of the Organization of the Petroleum Exporting Countries* (BGBl 382/1974), and the *Agreement Between the Republic of Austria and United Nations regarding the Seat of the United Nations in Vienna*, available at http://ilmc.univie.ac.at/uploads/media/HQ_Agreement_UN_-_Austria.pdf (accessed 3 May 2017).
74. For example, sections 24 and 37 of the *Agreement Between the Republic of Austria and United Nations regarding the Seat of the United Nations in Vienna.*

In light of the MLI, it remains debatable as to whether those treaties may fall under the scope of the MLI, as they deal with tax exemptions that help to prevent double taxation for the employees of international organizations. Therefore, diplomatic agreements of international organizations and headquarter agreements fulfil the criteria for the application of Article 2(1)(a) of the MLI, as they deal with income taxes and help to prevent double taxation, despite the fact that the agreements are not ratified between states, as international organizations do not fulfil the statehood criterion.[75] It is significant that international organizations are not states, as under Article 2(1)(b) of the MLI, a party to the MLI must be a state or a jurisdiction. At first glance, international organizations do not seem to fulfil this criterion, with the result that the MLI is not applicable to agreements of international organizations. However, this conclusion may well be called into question, as international organizations are considered to be states under international customary law.[76] As a result, the MLI is theoretically also applicable to such agreements. The practical impact of this reasoning is limited, as the agreements do not aim at preventing double taxation. Therefore, it seems highly unrealistic that political consensus will be reached such that the MLI would apply to those agreements.

5 CONTRACTING JURISDICTIONS

5.1 General Remarks

Article 2 of the MLI stipulates a number of prerequisites that must be fulfilled by an underlying tax agreement, and it defines the term 'party'. Under Article 2(1)(i) of the MLI, a covered tax agreement must be in force between parties, jurisdictions or territories. Under Article 2(1)(b)(ii), parties are states and jurisdictions for which the MLI has entered into force. This raises the question as to how to interpret these terms, and requires a close examination of the legal requirements that must be fulfilled to become a party to the MLI.

5.2 States as Parties to the MLI

The MLI clarifies that states for which the MLI has entered into force, are parties to the MLI. However, the MLI does not contain a definition of the term 'states'. Under international law, states are considered to be sovereign entities that need not accept any other authority unless they choose to do so. International customary law has come up with a list of criteria that can be used when assessing the legal classification of an entity.[77] These criteria are codified in the Convention on the Rights and Duties of

75. *See* section 5.2.
76. K. Daxkobler & M. Seiler, *Austria*, in *Tax Rules in Non-Tax Agreements*, at 69 (M. Lang, P. Pistone, J. Schuch, C. Staringer & A. Stork eds., 1st edition, IBFD 2012).
77. J. Klabber, *International Law*, at 69 (1st edition, Cambridge 2013).

States,[78] which was signed at a conference of American States in Montevideo. Even though this agreement was ratified only by American states and is therefore applicable only between the contracting parties, this agreement serves as a significant tool for interpreting the statehood criteria. Under that Convention, states must have population, a territory, an effective government and the capacity to enter into relations with other states.[79]

The first requirement set forth in the Convention on the Rights and Duties of States is that a state must have a population. It is irrelevant how the population got there or how large it is.[80] The second criterion is that the state must have a certain territory in which the population claims the power of disposition and organizes its existence. The Convention on the Rights and Duties of States does not require a minimum size of a territory. Furthermore, as long as a state has a core territory, border disputes are not detrimental to an entity's statehood.[81] The first two requirements of this Convention – namely territory and population – are more or less formal, as a state either has them or does not. The remaining criteria are more substantive and therefore are much more noteworthy from a legal perspective.[82]

Another essential requirement in order to qualify for statehood is that the territory have an effective government. In the Island of Palmas case, the arbitrator Huber asserted the opinion that effective government is reflected in the fact that a state is capable of guaranteeing that law and order are upheld.[83] As long as law and order are ensured in a territory, international law is satisfied. In this context, one should bear in mind that this concept applies regardless of the form of government (e.g., democracy, dictatorship).[84]

Regarding the state requirements it is important that the territory be governed completely independently.[85] This means, in effect, that a state may make independent decisions concerning its internal and external relations, and has the capacity to enter into international relations. Therefore, the last of the aforementioned requirements was particularly significant in the days of colonialism, as in the past many territories lacked the sovereignty under international law to enter into international relations. Colonialism gave rise to various types of relations between the colonizers and the colonized. Some colonized territories were entirely dominated by the colonizer, while others were afforded varying degrees of sovereignty.[86] Even today, some territories do not have the capacity to enter into international relations. In general, another state may then be responsible for the entity's international relations. Furthermore, Article 7 of the

78. *Convention on Rights and Duties of States*. As this Convention was signed in Montevideo, it is known as the Montevideo Convention.
79. Klabber, *supra* n. 77, at 70.
80. Klabber, *supra* n. 77, at 70.
81. A. Verdross & B. Simma, *Universelles Völkerrecht*, at 224 (3rd edition, Duncker & Humblot 1984).
82. Klabber, *supra* n. 77, at 71.
83. *Island of Palmas (United States v. Netherlands)*, sole arbiter Max Huber, 2 UN Rep. Intl. Arb. Awards 829.
84. Klabber, *supra* n. 77, at 71.
85. Verdross & Simma, *supra* n. 81, at 225.
86. Klabber, *supra* n. 77, at 71.

parties of the MLI can influence the interpretation or amendments of the MLI. This chapter seeks to answer this core question.

2 THE CONFERENCE OF THE PARTIES OF THE MLI UNDER REVIEW

2.1 The Legal Character of the Conference of the Parties and Other Governing Bodies of the MLI

Throughout recent decades there was a trend, according to which 'multilateral treaties increasingly provide for their continuous governance through an association of the parties', often referred to as the conference of the parties.[2] The main intention of the conference of the parties in various multilateral treaties is simply to ensure proper governance or execution of the treaty itself. Therefore, a conference of the parties generally constitutes or enables an institutionalized (based on procedural rules of the given treaty), intergovernmental cooperation.[3]

However, in comparison to other governing bodies of multilateral treaties or international organizations, the conference of the parties – even though it is institutionally separate from the parties to certain conventions – cannot constitute an own will. Moreover, the conference of the parties does not have its own legal personality. Rather, it must be seen as an institutionalized body acting on behalf of the states that are parties to a convention.[4] With regard to the MLI, the term 'conference of the parties' can be found in the Articles 31, 32 and 33. Article 31(1) of the MLI provides as follows:[5] '*The Parties may convene a Conference of the Parties* for the purposes of taking any decisions or exercising any functions as may be required or appropriate under the provisions of this Convention'.

Given the wording of the underlying paragraph, the conference of the parties is not intended to be permanent in nature, but rather an ad hoc governing body of the MLI. Regarding Article 31(1), the Explanatory Statement to the MLI[6] provides very little information concerning the question as to whether the conference of the parties is a permanent or ad hoc governing body. However, from a systematic perspective, the

2. V. Röben, 'Conference (Meeting) of States Parties', in *The Max Planck Encyclopaedia of Public International Law*, *supra* n. 1, at 1.
3. Röben, *supra* n. 2, at 1.
4. Röben, *supra* n. 2, at 1. According to Röben, any kind of decision-making powers of the conference of the parties must be provided for in the respective treaty. In this regard, the provided decision-making powers are delegated powers (derived directly from the parties), which are limited to the extent of that delegation. Regarding specific aspects of the Aarhus Convention and its conference of the parties, *see* T. Weber, *Umweltschutz durch Rechtsschutz?*, at 14–25. (Verlag Österreich 2015).
5. OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion And Profit Shifting*, Art. 31(1) (2016) (emphasis added).
6. OECD, *Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (2016).

interpretation derived from the wording of Article 31(1) of the MLI is perfectly in line with the description of the formal procedure on the convening of a conference of the parties.[7]

Other than the conference of the parties, there is just one additional governing body, namely the depositary, which only carries out various formal functions (e.g., convening of the conference of the parties under Article 31(2) and (3) of the MLI, notification procedures and maintaining various lists).[8] Under Article 39(1) of the MLI, the Secretary-General of the OECD is to be the depositary of the MLI and of any further protocols to the MLI (e.g., based on Article 38 of the MLI). The fact that the Secretary-General of the OECD is to be the depositary of the MLI strongly indicates the close relation between the MLI and the OECD.[9] Concerning the interrelation between the conference of the parties and the depositary, Article 31(2) of the MLI provides that the conference of the parties should be served by the depositary.[10]

2.2 Parties to the Convention and the Conference of the Parties

When speaking of the parties to the Convention and the conference of the parties, the MLI uses two different phrases which, in fact, have different meanings. Article 2(1)(b) of the MLI states that the term 'party' means:[11]

> i) A *State* for which this Convention is *in force* pursuant to *Article 34* (Entry into Force); or
> ii) A *jurisdiction* which has *signed* this Convention pursuant to *subparagraph b) or c) of paragraph 1 of Article 27* (Signature and Ratification, Acceptance or Approval) and for which this Convention is *in force* pursuant to *Article 34* (Entry into Force).

When comparing the wording of (i) and (ii), which are the two different ways to be treated as a party for purposes of the MLI, Article 27 plays the major role. This is caused by the fact that both paragraphs reference Article 34 of the MLI concerning the entry into force, which means that the difference between the two options can only be described by an analysis of Article 27 of the MLI. Article 27(1) of the MLI provides as follows:[12]

> As of 31 December 2016, this Convention shall be open for signature by:
>
> a) all *States*;
> b) Guernsey …; Isle of Man …; Jersey …; and

7. Article 31(3) MLI. For details on the procedural aspects, *see* section 2.4.
8. Article 39 MLI. *See also* Arts 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 23, 24, 26, 28, 29, 31, 33, 35, 36 and 37 MLI.
9. M. Lang, *Die Auslegung des multilateralen Instruments*, Steuer und Wirtschaft International (SWI), at 11, 20 (2017). The close relation between the OECD and the MLI could eventually also have implications on the interpretation of the MLI, especially regarding contextual issues.
10. *See also* OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 31(2) and (3).
11. Article 2(1)(b) MLI (emphasis added).
12. Article 27(1) MLI (emphasis added).

c) any other *jurisdiction authorised to become a Party* by means of a *decision by consensus of the Parties and Signatories*.

If one analyses the interplay between Article 2(1) and 27(1) of the MLI from an overall perspective, one can conclude that – irrespective of whether the given party is subsumed under Article 2(1)(b)(i) or under Article 2(1)(b)(ii) – states, different territories and other jurisdictions can become parties to the Convention.[13] Accordingly, one can conclude that the MLI generally has a broad understanding of (potential) parties to the Convention.

Based on this understanding, the interrelation between signatories and parties must be evaluated. Under Article 2(1)(d) of the MLI, the term 'signatory' means a state or jurisdiction that has signed the MLI but for which the MLI is not yet in force. Accordingly, the term 'signatory' has a broad understanding as well, thus including the same states and jurisdictions as Article 27(1) of the MLI.[14] However, the sole difference between the status of being a party or a signatory is interlinked with the entry into force of the MLI for the respective jurisdiction.[15] Once a jurisdiction has signed the MLI, it becomes a signatory, and as soon as the MLI enters into force for this jurisdiction under Article 34 of the MLI – which is mostly based on the national ratification, acceptance or approval procedures – the signatory becomes a party.[16] However, it is also possible for a state to sign the MLI (thus being a signatory) but not carry out the ratification procedure under its domestic law; accordingly, the respective state is not a party.[17]

Based on this understanding, one could ask whether signatories have the right to participate in the conference of the parties. Given the clear meaning of the term 'conference of the parties', signatories do not automatically have a right to participate in the conference of the parties, as they are not yet parties. This interpretation is also supported by the Explanatory Statement to the MLI, which states that '[t]he Parties may decide to invite Signatories to participate in a Conference of the Parties'.[18]

13. This interpretation based on the wording of the articles is also supported by the Explanatory Statement to the MLI regarding Art. 27(1) of the MLI ('given that certain non-State jurisdictions have concluded tax agreements under the arrangements with the State responsible for their international relations, the Convention is open for signature by jurisdictions listed in subparagraph b). … Finally, subparagraph c) provides that the Parties and Signatories may decide to authorise other non-State jurisdictions to become Parties to the Convention following its opening for signature on 31 December 2016'.).
14. Even though Art. 2(1)(d) of the MLI – in contrast to Art. 27(1) of the MLI – does not explicitly mention Guernsey, Isle of Man and Jersey, they are implicitly included by the wording, as they are jurisdictions.
15. Article 2(1)(b)(i) and (ii) of the MLI both explicitly use the phrase 'for which this Convention is in force pursuant to Article 34 (Entry into Force)', whereas Art. 2(1)(d) of the MLI states that 'the Convention is not yet in force'.
16. Article 27(2) MLI ('[t]his Convention is subject to ratification, acceptance or approval'.). *See also* OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 27(2) ('The appropriate term will depend on domestic legal requirements. Once the domestic procedures have been completed, an instrument of ratification, acceptance or approval must be deposited with the Depositary and this is the event which triggers the rule for the entry into force of the Convention pursuant to Article 34 of the Convention.').
17. As the MLI does not provide a mechanism under which signatories automatically become parties after a certain period, it is possible that a signatory might never become a party.
18. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 31(1).

Therefore, signatories are generally subject to the discretion of the parties to the Convention when it comes to their participation in the conference of the parties (thus becoming part of the decision-making process within this institutionalized governing body of the MLI).

However – contrary to this interpretation, an analysis of the wording of Article 27(1)(c) of the MLI, where it states that 'by means of a decision by consensus of the Parties and Signatories',[19] could lead one to conclude that signatories automatically play an important role in the decision-making process of the MLI or the conference of the parties.[20] If one further analyses the interrelation between Article 31(1) and Article 27(1)(c) of the MLI, two different lines of argumentation can be brought forward:

- First, Article 27(1)(c) of the MLI does not address which type of decision-making process must be chosen to come to the envisaged consensus decision. Accordingly, one could argue that the way to come to the decision, which is subject to Article 27(1)(c) of the MLI, can be freely chosen by the parties and the signatories, as long as the decision is based on consensus of all parties and signatories. Consequently, the decision-making under Article 27(1)(c) of the MLI need not be carried out during the course of a meeting of the conference of the parties, but rather must be formally distinguished from the decision-making of the conference of the parties (under Article 31 of the MLI).[21] While signatories do not have an important role in the decision-making process of the conference of the parties (i.e., they only might be invited to participate in the conference of the parties), signatories are on par with the parties to the Convention for purposes of decision-making under Article 27(1)(c) of the MLI.
- Second, one could also argue – at least from a the perspective of a first glance – that Article 27(1)(c) of the MLI constitutes an exception from the general rule of Article 31(1) of the MLI (i.e., only parties have the automatic right to participate in the conference of the parties), thus generally expanding the conference of the parties to a conference of the parties and signatories.

19. Decision-making by means of consensus is often incorporated in the rules of procedure of international conferences. In general this mechanism has three main features: (i) it is not the same as unanimity; (ii) it could be joined by a state even if it could not vote in favour of the treaty and (iii) it is not incompatible with indicative voting. In this regard, the mechanism is also often referred to as the 'absence of any formal objection'. For details, *see* A. Aust, *Handbook of International Law*, 2nd edition, at 58 (Cambridge University Press 2010); K. Schmalenbach & C. Schreuer, in *Österreichisches Handbuch des Völkerrechts: Band I – Textteil*, 5th edition, at 243 (A. Reinisch ed., Manzsche Verlags- und Universitätsbuchhandlung 2013); E. Klein & S. Schmahl, in *Völkerrecht*, 7th edition, at 304 (W. Vitzthum & A. Proelß eds., De Gruyter Studium 2016).
20. For details on the tasks of the conference of the parties and its decision-making process, *see* sections 2.3 and 4.
21. Decisions of the conference of the parties must be taken during the course of a meeting of the conference of the parties, whereas decisions under Art. 27(1)(c) of the MLI could also be taken in any other way. At least from a practical perspective, it is very likely that decisions under Art. 27(1)(c) of the MLI will be made at the same time as decisions of the conference of the parties. However, in order to safeguard legally binding decision-making, it must be assured that all parties and signatories participate in the decision-making process under Art. 27(1)(c) of the MLI, even though some of the signatories may not be invited to participate in the conference of the parties.

> However, the fact that the term 'conference of the parties' is not used in Article 27(1)(c) of the MLI at all, and the fact that Article 27(1)(c) of the MLI provides for an own decision-making quorum (i.e., consensus), contradict this second line of argumentation.[22]

From an overall perspective, the better arguments can be brought forward with regard to the first line of argumentation. The clear meaning of the phrase 'Conference of the *Parties*' and the teleological argument, under which 'Parties may decide to invite Signatories to participate in a Conference of the Parties' for purposes of conference of the parties decisions,[23] do not leave much interpretational room, which would support the second line of argumentation stated above. Accordingly, one can conclude that the MLI does not just provide for a decision-making process using a conference of the parties (i.e., under Article 31 of the MLI), but rather also provides for an additional decision-making process (i.e., under Article 27(1)(c) of the MLI) which is supposed to deal only with the question of authorizing 'any other jurisdiction'[24] to sign and ratify the MLI.[25] Whereas signatories are automatically part of the decision-making process under Article 27(1)(c) of the MLI,[26] they are subject to the discretion of the parties with regard to their potential participation in the conference of the parties (i.e., they only might be invited to participate in the conference of the parties).

The interpretation – according to which the MLI provides two different and separate decision-making processes – is also in line with the general understanding of Article 31(1) of the MLI, as it explicitly states that the parties 'may' convene a

22. Accordingly, Art. 27(1)(c) of the MLI cannot be used in order to derive a right of signatories to automatically participate in the decision-making process of the conference of the parties subject to Art. 31 of the MLI.
23. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 31(1).
24. Article 27(1)(c) of the MLI addresses those jurisdictions that cannot be subsumed under the term 'States' under Art. 27(1)(a) of the MLI or which are not a jurisdiction listed in Art. 27(1)(b) of the MLI.
25. This interpretation is also supported by the Explanatory Statement to the MLI regarding Art. 2(1) ('there are two ways in which the Convention may cover tax agreements concluded by non-State jurisdictions or territories: … jurisdictions may become Parties to the Convention by being listed by name in the text of Article 27(1)(b) at the time of adoption of the text of the Convention or by *being subsequently authorised to sign and ratify the Convention by a decision by consensus of the Parties and Signatories pursuant to Article 27(1)(c)*' (emphasis added).). *See also* OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 27(1) ('subparagraph c) provides that the Parties and Signatories may decide to authorise other non-State jurisdictions to become Parties to the Convention …. This decision must be made by consensus, meaning that any jurisdiction which is not listed in subparagraph b) *can only become a Party to the Convention if no Party or Signatory objects*' (emphasis added).). Accordingly, jurisdictions or territories with an internationally disputed legal status (e.g., Kosovo, Turkish Republic of Northern Cyprus, Palestine, Taiwan) may become parties to the MLI only if no party or signatory to the MLI objects.
26. Given this understanding, parties may – by no means – exclude signatories from the decision-making process under Art. 27(1)(c) of the MLI. A legally binding decision concerning the authorization of 'any other jurisdiction' to sign and ratify the MLI is subject to a consensus decision of all parties and signatories.

conference of the parties for the purposes of taking any decisions. Accordingly, parties are not legally obliged to carry out a decision-making process only by means of a conference of the parties.[27]

In addition to the aspects noted above, the wording of Article 31(1) of the MLI must be further analysed. This article provides that the 'Parties may convene a Conference of the Parties …'.[28] From a logical perspective, the meaning of the term 'convene' a conference of the parties, indicates that there is no legally binding obligation for a party to participate in the conference of the parties.[29] Accordingly, the terms 'parties to the Convention' and 'conference of the parties' are based on the same definition of 'parties', but do not necessarily include the same number of parties.[30]

2.3 The Tasks of the Conference of the Parties and Other Governing Bodies of the MLI

Under Article 31(1) of the MLI, a conference of the parties may be convened for the purposes of '*taking any decisions* or *exercising any functions* as may be *required or appropriate* under the provisions of this Convention'.[31] From the perspective of a first glance, the terms used in Article 31(1) of the MLI indicate broad competences of the conference of the parties, as the conference of the parties may take 'any' decision or exercise 'any' functions that may be required or appropriate under the provision of the MLI. However, the significance of the term 'any' must not be overestimated. This is because 'any decisions' and 'any functions' are logically restricted by the prerequisite of being 'required' or 'appropriate' under the provisions of the MLI. Accordingly, the conference of the parties cannot act arbitrarily, as both a material (required or appropriate) and a formal prerequisite (under the provisions of this convention) must be fulfilled.

Especially the formal requirement is of major importance, as it establishes the limits of the competences of the conference of the parties. In this regard, the wording of Article 31(1) of the MLI gives information about systematic interpretations of the competences of the conference of the parties by making a broad reference to 'the provision of the MLI'. Other than Article 31 of the MLI, only Articles 32 and 33 deal with the conference of the parties – which means that the term 'the provisions of this

27. Accordingly, the decision-making process of the conference of the parties – where only parties have a vote with regard to interpretational questions and amendment issues – must be formally distinguished from the decision-making process laid down in Art. 27(1)(c), under which parties and signatories must come to a consensus concerning envisaged potential signature of 'any other jurisdiction'.
28. Article 31(1) MLI (emphasis added).
29. Even though there is no legally binding obligation that parties to the convention participate in the conference of the parties, it is very likely that parties will participate in the conference of the parties, as the conference of the parties is, in fact, the only governing body that can have a material influence on the MLI (e.g., interpretation and amendments). For the tasks of the conference of the parties, *see* section 2.3.
30. A participant in the conference of the parties automatically must be a party to the Convention. Vice versa, a party to the Convention need not necessarily participate in the conference of the parties.
31. Article 31(1) MLI (emphasis added).

Convention'[32] can be seen as a reference to only these articles. This understanding is also supported by the Explanatory Statement to MLI as regards Article 31(1). There it states that tasks being required or appropriate under the provisions of the MLI could include a 'Conference of the Parties to address questions of interpretation or implementation of the Convention as foreseen in Article 32(2) or to consider a possible amendment to the Convention as foreseen in Article 33(2)'.[33] Accordingly, the conference of the parties generally has two different tasks:

- interpretation and implementation under Article 32 of the MLI; and
- amendments under Article 33 of the MLI.[34]

While the tasks of the conference of the parties have a material character, as they are directly interrelated with the interpretation, implementation or the amendment of the MLI, the depositary has only a formal function. As mentioned, its major tasks are to carry out various notification procedures and to maintain various lists.[35] However, the depositary is also engaged in the convening of the conference of the parties under Article 31(2) and (3) of the MLI.[36]

2.4 Procedural Aspects: The Conference of the Parties between Request and Outcome

From a procedural perspective, Article 31(2) and (3) of the MLI must be explained in detail. Article 31(2) of the MLI provides that the 'Conference of the Parties shall be served by the Depositary' – which indicates the significant role of the depositary in the overall convening procedure. However, from a procedural perspective, Article 31(3) of the MLI is the most significant provision and provides as follows:

> Any Party may request a Conference of the Parties by communicating a request to the Depositary. The Depositary shall inform all Parties of any request. Thereafter, the Depositary shall convene a Conference of the Parties, provided that the request is supported by one-third of the Parties within six calendar months of the communication by the Depositary of the request.[37]

Starting with the first procedural step, a request must be made by any party to the Convention to the depositary. The topic of this request can be related either to interpretational and implementation issues under Article 32 of the MLI or to amendment issues under Article 33 of the MLI. However, other topics cannot be addressed to

32. Article 31(1) MLI.
33. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 31(1).
34. As the tasks of the conference of the parties include 'amendments' of the MLI, the conference of the parties could have further tasks in the future, as the MLI could simply be amended accordingly. However, to this end, the conference of the parties has only two material tasks.
35. *Supra* n. 8.
36. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 31(2) and (3).
37. In addition to the different steps that must be carried out in order to properly convene a conference of the parties, parties to the Convention and participants in the conference of the parties do not necessarily have to be the same, as not all parties to the Convention must participate in the conference of the parties.

the conference of the parties. This request is then forwarded by the depositary to all parties to the Convention so that they are informed about the request.

As soon as the depositary has communicated the request to all parties to the Convention, a six-month response period commences. In this regard, the parties to the Convention may support the request, express their displeasure or simply do nothing. If the request is supported by at least one-third of all parties to the Convention, the depositary 'shall' convene a conference of the parties.[38] While the wording of Article 31(3) of the MLI uses the phrase 'the Depositary shall convene', the Explanatory Statement to the MLI regarding Article 31(3) uses a slightly different wording and states that the 'the Depositary will convene' a conference of the parties. Given the fact that the conference of the parties is materially convened by the parties to the Convention[39] (the task is just formally carried out by the depositary) and based on the understanding that the depositary should only 'serve' the conference of the parties[40] (which logically cannot be interpreted as making the decisions as to whether a conference of the parties should be convened), the term 'shall convene' does not lead to any discretion for the depositary. Accordingly, if the one-third support requirement is fulfilled within a period of six months, the depositary even 'has' to convene a conference of the parties.

In this regard, the conference of the parties need not take place in the form of a physical meeting of delegates of the various parties to the Convention, but may also be organized remotely, for example by 'using videoconference or teleconference, by taking decisions through written procedure or by any other means decided upon by the Parties'.[41]

2.5 General Aspects of Treaty Interpretation in International Law

The goal of treaty interpretation is to determine the meaning of the provisions based on the intention of the contracting states.[42] As the MLI is a written international treaty,[43] the interpretational rules of the Vienna Convention on the Law of Treaties (hereinafter 'the Vienna Convention') are generally applicable.[44] As the interpretational rules set forth in the Vienna Convention reflect pre-existing customary international law, the principles of those interpretational rules are also applicable when one of the parties to the MLI has not signed or ratified the Vienna Convention.[45] Under the Vienna

38. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 31(3).
39. Article 31(1) MLI; OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 31(1).
40. Article 31(2) MLI; OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 31(2).
41. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 31(1).
42. C. Binder & K. Zemanek, in *Österreichisches Handbuch des Völkerrechts: Band I – Textteil, supra* n. 19, at 71–75.
43. Vienna Convention on the Law of Treaties, Arts 1 and 2(1) (23 May 1969), T.S. 18232 (hereinafter 'the Vienna Convention') (the Vienna Convention 'applies to treaties between States'; a treaty 'means an international agreement concluded between States in written form …'.). For details, *see* K. Schmalenbach, in *Vienna Convention on the Law of Treaties: A Commentary*, at 19–25 and 27–48 (O. Dörr & K. Schmalenbach eds., Springer-Verlag 2012).
44. Articles 31–33 Vienna Convention.
45. Lang, *supra* n. 9, at 11. *See also* O. Dörr, in *Vienna Convention on the Law of Treaties: A Commentary*, *supra* n. 43, at 523. Presently, the understanding of international treaty

Convention, Article 31 provides the general rules of interpretation, Article 32 indicates different supplementary means of interpretations and Article 33 deals with interpretational issues of multilingual treaties.[46]

Under Article 31(1) of the Vienna Convention, 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 the light of its *object and purpose*'.[47] In this regard, the wording is not the sole basis for the interpretation of an international treaty, but rather forms its starting point.[48] Furthermore, the 'context' sets forth the relevance of a systematic interpretational approach and the 'object and purpose' promotes other teleological considerations that must be considered during the course of the interpretation.[49]

Moreover, Article 32 of the Vienna Convention provides that also historical aspects must be included.[50] In this regard, the historical interpretation has limited importance just from the perspective of a first glance, as Article 32 of the Vienna Convention states that historical means of interpretation may be used only if the interpretation based on Article 31 of the Vienna Convention, either '[l]eaves the meaning ambiguous or obscure' or '[l]eads to a result which is manifestly absurd or unreasonable'.[51] In fact, this understanding also seems to be consistent if one reads the heading of Article 32, which states 'supplementary means of interpretation'.[52]

However, Article 31(4) of the Vienna Convention provides that a 'special meaning shall be given to a term if it is established that the parties so intended'. From a systematic perspective, the interrelation between Articles 31 and 32 of the Vienna Convention can be understood only in a way such that historical considerations cannot be seen as a sole supplementary mean of interpretation, but rather form an integral part of legal interpretation, which is based on a case-by-case evaluation of different interpretational arguments.[53] Accordingly, one can conclude that international treaty interpretation is in general similar to usual legal interpretation, thus being based on grammatical, teleological, systematic and historic interpretation.[54]

interpretation can be seen as a hybrid between the objective and subjective theories, meaning that one generally must apply a pragmatically modified form of the objective theory when it comes to international treaty interpretation. For details, *see* Binder & Zemanek, *supra* n. 42, at 71–75. *See also* M. Herdegen, *Interpretation in International Law*, in *The Max Planck Encyclopaedia of Public International Law*, *supra* n. 1, at 5–12.

46. Herdegen, *supra* n. 45, at 7–12.
47. Article 31(1) Vienna Convention (emphasis added).
48. Lang, *supra* n. 9, at 11; Dörr, *supra* n. 45, at 541.
49. Lang, *supra* n. 9, at 11. *See also* Herdegen, *supra* n. 45, at 12–16.
50. Lang, *supra* n. 9, at 11. *See also* Herdegen, *supra* n. 45, at 16–20.
51. Article 32 Vienna Convention ('Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to Article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.').
52. For details, *see* Dörr, *supra* n. 45, at 571–585.
53. *See also* Lang, *supra* n. 9, at 11 et seq. For details concerning special meaning instead of ordinary meaning, *see* Dörr, *supra* n. 45, at 568–569. For purposes of determining the meaning under Art. 32 of the Vienna Convention, *see* Dörr, *supra* n. 45, at 583–585.
54. Lang, *supra* n. 9, at 12; Dörr, *supra* n. 45, at 541–552.

Moreover, Article 31(3) of the Vienna Convention provides that (i) any subsequent agreement, (ii) any subsequent practice regarding the interpretation of a treaty and (iii) any relevant rules of international law applicable in the relations between the parties, 'shall be taken into account, together with the context'.[55] Given the wording of this Article 31(3), those subsequent practises or agreements 'shall' be taken into account, which indicates only that they must not be ignored on the merits.[56] However, especially the use of the term 'shall' rather indicates that such agreements can, of course, have a significant role in terms of interpretation, but they do not have a higher relevance compared to other interpretative arguments.[57]

2.6 Specific Interpretational Aspects of the MLI

In addition to the general interpretational rules under the Vienna Convention, the MLI itself also provides specific interpretational provisions. Under Article 2(2) of the MLI, '[a]s 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. The interpretational aspects concerning this provision are discussed in another chapter of this book and are therefore not dealt with here.[58]

However, in addition to Article 2(2) of the MLI, Article 32 of the MLI also addresses issues of interpretation and provides as follows:

> 1. Any question arising as to the interpretation or implementation of provisions of a Covered Tax Agreement as they are modified by this Convention shall be determined in accordance with the provision(s) of the Covered Tax Agreement relating to the resolution by mutual agreement of questions of interpretation or application of the Covered Tax Agreement (as those provisions may be modified by this Convention).
> 2. Any question arising as to the interpretation or implementation of this Convention may be addressed by a Conference of the Parties convened in accordance with paragraph 3 of Article 31 (Conference of the Parties).

Given the structure of Article 32 of the MLI, one can distinguish between two procedures. While Article 32(1) deals with interpretational and implementation issues regarding covered tax agreements[59] and generally proposes a bilateral resolution via a mutual agreement procedure (MAP), Article 32(2) directly focuses on interpretational and implementation issues of the MLI itself and provides for the possibility to address the conference of the parties with these questions. From the perspective of a first glance, one could argue that Article 32 of the MLI paves the way for two different general scenarios:

55. Dörr, *supra* n. 45, at 552–568. *See also* Herdegen, *supra* n. 45, at 18–20.
56. Lang, *supra* n. 9, at 12.
57. Lang, *supra* n. 9, at 12.
58. For details on the interpretational issues with regard to Art. 2(2) of the MLI, *see* Chapter 2 of this book.
59. Article 2(1) MLI (the 'term "Covered Tax Agreement" means an agreement for the avoidance of double taxation with respect to taxes on income …').

- if a covered tax agreement of two parties to the MLI is applied in their bilateral relations and a question regarding the 'interpretation or implementation of provisions of a Covered Tax Agreement as they are modified' by the MLI arises, the parties to the convention 'shall' try to resolve the issue on a bilateral basis;[60] and
- in a situation when a 'question … as to the interpretation or implementation of … [the MLI arises]', the parties to the MLI 'may' address the conference of the parties with this question.[61]

Given this understanding, it is questionable as to whether both procedures are interrelated with each another, meaning that both procedures may be applied subsequently in order to address the same interpretational issue. When analysing the wording, one can conclude that both procedures deal with '[a]ny question arising as to the interpretation or implementation …'. However, under Article 31(1) of the MLI, these questions address 'provisions of a Covered Tax Agreement as they are modified by this Convention', whereas under Article 32(2) these questions are concerned with 'this Convention'.

In this regard, one could argue that every interpretational question that arises under Article 32(1) of the MLI, could also arise under Article 32(2), as both of them deal with the same provision.[62] To this end, one could therefore conclude that the MLI establishes a two-step procedure for purposes of resolving interpretational issues, under which the first step 'shall' be carried out and the second step 'may' be taken.[63]

However, in fact one could generally question the overall relevance of Article 32(1) of the MLI, as the issue of dispute resolution by means of a MAP is already addressed by Article 16 of the MLI, thus being implemented to all covered tax agreements accordingly.[64] Concerning the purpose of Article 32(1), the Explanatory Statement to the MLI states: '[p]aragraph 1 clarifies the mechanism for determining questions of the interpretation and implementation of Covered Tax Agreements, as *opposed to questions of* the interpretation and implementation of the *Convention itself*'.[65] Given this sentence in the Explanatory Statement, it is obvious that the drafters concluded that 'question[s] arising as to the interpretation … of provisions of a Covered Tax Agreement'[66] and 'question[s] arising as to the interpretation … of this

60. Article 32(1) MLI.
61. Article 32(2) MLI.
62. Example: A covered tax agreement between State *A* and State *B* was modified by the MLI. During the course of the application of the bilateral covered tax agreement, a question as to the interpretation of a modified provision arose. In a first step, State *A* and State *B* 'shall' try to resolve the interpretational issue based on a MAP. However, irrespective of whether they were able to resolve the issue via a MAP, State *A* and/or State *B* 'may' address the conference of the parties with this question. This is mainly caused by the fact that the provision, which modified the covered tax agreement, is also a provision of the MLI. This means that the interpretational issue between the two States could eventually be relevant for all parties to the MLI.
63. Article 32(1) and (2) MLI.
64. Lang, *supra* n. 9, at 18.
65. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 32(1) (emphasis added).
66. Article 32(1) MLI.

Convention'[67] are not the same. With regard to the scope of application of Article 32(1), the Explanatory Statement to the MLI notes as follows:[68]

> Accordingly, the usual mechanisms foreseen by the Covered Tax Agreement should be used to determine questions of interpretation and implementation of the provisions of the Covered Tax Agreement which have been modified by the Convention. This would include questions as to how the Convention has modified a specific Covered Tax Agreement *pursuant to the compatibility clauses* and *other provisions set out in the Convention*. The competent authorities of the Contracting Jurisdictions can therefore agree on the application of the Convention to their Covered Tax Agreements, as long as the agreement reached is consistent with the provisions of the Convention.

The comments in the Explanatory Statement imply that the scope of application of Article 32(1) and (2) of the MLI should not overlap. However, ultimately, it is questionable why 'questions as to how the Convention has modified a specific Covered Tax Agreement pursuant to the compatibility clauses and other provisions set out in the Convention'[69] should not be subject to the interpretational competence of the conference of the parties.[70] As noted, the question as to whether the provisions of a certain covered tax agreement – as it is modified by the MLI – is in line with the MLI, is also a question concerning the interpretation and implementation of the MLI itself, thus being generally open to a conference of the parties procedure under Article 32(2). However, one could argue that the drafters of the MLI took a cautious position with regard to possible interference in the sovereignty of the parties to the Convention, thus limiting the competence of the conference of the parties accordingly.[71]

From an overall perspective, one can conclude that the two mechanism to address interpretational questions laid down in Article 32 of the MLI are intended not to overlap concerning the scope of application. Accordingly, Article 32(1) is meant to be applicable with regard to interpretational questions of a covered tax agreement, whereas Article 32(2) is applicable when it comes to interpretational questions of the MLI itself.[72] However, as the MAP procedure is already addressed in Article 16 of the MLI, thus being implemented to the covered tax agreements, Article 32(1) has only declarative relevance. This declarative relevance can be seen in the clarification that Article 32(2) should be applicable only in those cases when the questions as to the interpretation or implementation does not just address questions as to the

67. Article 32(2) MLI.
68. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 32(1) (emphasis added).
69. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 32(1).
70. *See also* Lang, *supra* n. 9, at 21.
71. Lang, *supra* n. 9, at 21. Concerning the interference of the sovereignty of a party to the Convention, one could argue that the competence of the conference of the parties could be overwhelming, thus leading to situations where the conference of the parties declares its position on interpretational issues of bilateral situations.
72. Accordingly, interpretational issues of a certain provision of a covered tax agreement – as it is modified by the MLI – are subject to a bilateral MAP (e.g., interpretational issues concerning the interplay between the 'new' article in the covered tax agreement with the remaining articles of the covered tax agreement), whereas interpretational questions of the MLI itself (e.g., broader interpretational questions concerning the general understanding of MLI provisions or concerning procedural rules of the MLI) may be addressed by a conference of the parties.

interpretation and implementation of covered tax agreements.[73] Accordingly, it was not intended by the drafters of the MLI to provide a two-step procedure which could eventually be applied subsequently in order to address 'the same' interpretational questions; the MLI rather provides (clarifies) that there are two different mechanism to deal with interpretational issues.

2.7 General Aspects of Treaty Amendments in International Law

When speaking of amendments to treaties, Article 39 of the Vienna Convention generally provides the legal basis in international law.[74] Similar to the principles of interpretation, most scholars agree that at least parts of Article 39 of the Vienna Convention – especially those parts under which treaties can be amended at all – presently are part of customary international law, thus being applicable also with regard to parties to the MLI that have not signed or ratified the Vienna Convention.[75] Article 39 of the Vienna Convention provides as follows: 'A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide'.

With regard to multilateral treaties, the situation may arise where not all parties want to become parties to an amended international treaty. In this regard, the principles of Article 30 of the Vienna Convention can be applied.[76] Concerning the question as to whether Article 30 of the Vienna Convention reflects rules of international customary law, a perfectly clear answer cannot be given. In fact, there are only very few decisions by international tribunals. However, from an academic perspective most scholars agree that Article 30 of the Vienna Convention codifies well-established principles of customary international law (e.g., lex posterior principle),[77] thus being applicable also in cases when one of the parties to the MLI has not signed or ratified the Vienna Convention.

The lex posterior principle[78] is set forth in Article 30(3) and (4) of the Vienna Convention and is applicable if 'a treaty neither terminates an earlier treaty in its entirety nor defines its relation with other treaties through compatibility clauses'.[79] In fact, this means that – under Article 30(3) of the Vienna Convention – when 'all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended …, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'. However, the lex posterior principle follows another understanding if not all parties to the earlier treaty are parties to the amended (later) treaty. In this regard, Article 30(4)(b) of the Vienna Convention

73. Lang, *supra* n. 9, at 18–22.
74. Binder & Zemanek, *supra* n. 42, at 76–77.
75. K. Odendahl, in *Vienna Convention on the Law of Treaties: A Commentary*, *supra* n. 43, at 701–702.
76. Binder & Zamalek, *supra* n. 42, at 76–77.
77. Odendahl, *supra* n. 75, at 508–509 with further references.
78. Binder & Zemanek, *supra* n. 42, at 91 at seq.
79. N. Bravo, *The Multilateral Tax Instrument and Its Relationship with Tax Treaties*, 8 World Tax J. 3, at 279, 287 (October 2016).

states that: 'As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations'.

Accordingly, the main question regarding amendments of a certain treaty is the question as to whether the parties to the earlier treaty accept the amendments, thus being parties to the later treaty, as well. In other words, it is necessary to evaluate whether a party has consented to be bound by an amendment.[80]

2.8 Specific Issues Regarding Amendments of the MLI

With regard to amendments, Article 33 of the MLI provides as follows:

> 1. Any Party may propose an amendment to this Convention by submitting the proposed amendment to the Depositary.
> 2. A Conference of the Parties may be convened to consider the proposed amendment in accordance with paragraph 3 of Article 31 (Conference of the Parties).

Under Article 33(1) of the MLI, any party may propose an amendment to the Convention by following the procedural process set forth in section 2.4.[81] Given the clear wording of the paragraph, Signatories are excluded from initiating an amendment procedure, as they cannot be subsumed under the term 'party'. However, as already discussed in section 2.2, signatories may be invited to participate at the respective conference of the parties.[82]

Moreover, Article 33(2) of the MLI provides that a conference of the parties may be convened to consider the proposed amendment under Article 33(1) of the MLI. Again – also in this regard – the procedural aspects of Article 31(3) of the MLI must be followed.[83] In comparison to the interpretational competences of the conference of the parties under Article 32 of the MLI, the systematic interrelation between Article 33 and other provisions of the MLI or covered tax agreements is more clear-cut, as there is basically no overlap. Even though an amendment of the MLI could eventually result in an amendment of a covered tax agreement, Article 33 does not explicitly address the issue of two different mechanism[84] in order to carry out an amendment (e.g., bilateral or multilateral).

Moreover, also the phrase '[a] Conference of the Parties may be convened to *consider* the proposed amendment'[85] implies that the conference of the parties need not come to a decision regarding the proposed amendments. Accordingly, the paragraph

80. K. Schmalenbach, in *Vienna Convention on the Law of Treaties: A Commentary*, *supra* n. 43, at 44; Aust, *supra* n. 19, at 59.
81. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 33(1).
82. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 31(1) ('[t]he Parties may decide to invite Signatories to participate in a Conference of the Parties'.).
83. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 33(1).
84. Even though Art. 32 of the MLI addresses two different mechanism in order to overcome interpretational issues, those mechanism do not constitute a two-step procedure, as they do not overlap.
85. Article 33(2) MLI (emphasis added).

merely provides the possibility to discuss the respective issue at an institutionalized governing body, thus easing the decision-making process.

3 THE CONFERENCE OF THE PARTIES AND ITS RELEVANCE FOR THE INTERPRETATION AND AMENDMENTS OF THE MLI

3.1 General Aspects Concerning the Relevance of the Conference of the Parties

Given the distinction between the scope of application of Article 32(1) and (2) of the MLI, the relevance of the conference of the parties for the interpretation of the MLI is mostly based on Article 32(2). Regarding the amendment competence of the conference of the parties, Article 33(2) serves the same purposes. Both competences of the conference of the parties are subject to the procedural aspects under Article 31(3) of the MLI.[86] In this regard, Article 31(3) provides as follows:

> Any Party may request a Conference of the Parties by communicating a request to the Depositary. The Depositary shall inform all Parties of any request. Thereafter, the Depositary shall convene a Conference of the Parties, provided that the request is supported by one-third of the Parties within six calendar months of the communication by the Depositary of the request.

Irrespective of whether a party to the Convention makes a request under Article 32(2) of the MLI or proposes an amendment under Article 33(2), at least one-third of the parties to the Convention must support the interpretations request or proposed amendment within six months upon notification by the depositary.[87] As noted, the depositary may not convene a conference of the parties if the one-third quorum is not reached within six months or if the quorum is reached only after the six-month period.[88] Assuming that a conference of the parties was properly convened, it is questionable how decisions concerning interpretational aspects or concerning proposed amendments are to be taken. In fact, neither the wording of the MLI itself nor the Explanatory Statement give information about procedural aspects of decision-making by the conference of the parties.[89]

From a systematic perspective, the MLI is strongly interrelated with the OECD. This mainly results from the facts that: (i) the MLI is generally based on the OECD's work on BEPS Action 15; and (ii) there is a strong organizational link between the OECD and the MLI, as for example the Secretary-General of the OECD is the depositary

86. Article 32(2) MLI.
87. Article 31(3) MLI. *See also* OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 31(3); Lang, *supra* n. 9, at 19.
88. *See also* section 2.4.
89. Only Art. 27(1)(c) of the MLI provides for a specific decision-making mechanism (i.e., consensus of parties and signatories). However, as discussed in section 2.2, the mechanism under Art. 27 of the MLI rather must be seen as another type of decision-making process within the MLI which is not interrelated with decisions of the conference of the parties.

of the MLI.[90] Accordingly, the Convention on the Organisation for Economic Co-operation and Development[91] (hereinafter the OECD Convention) can generally be considered relevant from a systematic perspective, when it comes to the interpretation of the MLI.[92] Article 6 of the OECD Convention provides as follows:

> 1. Unless the Organisation otherwise agrees unanimously for special cases, decisions shall be taken and recommendations shall be made by mutual agreement of all the Members.
> 2. Each Member shall have one vote. If a Member abstains from voting on a decision or recommendation, such abstention shall not invalidate the decision or recommendation, which shall be applicable to the other Members but not to the abstaining Member.
> 3. No decision shall be binding on any Member until it has complied with the requirements of its own constitutional procedures. The other Members may agree that such a decision shall apply provisionally to them.

Given the wording of Article 6 of the OECD Convention, especially paragraph 1 is of major significance, as it states that mutual agreement of all members is relevant, unless the members unanimously agree on other decision-making requirements.[93] In light of Article 6 of the OECD Convention, one could conclude that decisions of the conference of the parties must be made by mutual agreement.[94] However, two main arguments can be brought forward against this interpretation:

- even though the MLI has a close interrelation with the OECD in general, the OECD Convention is – by no means – directly applicable to the MLI. Moreover, the MLI is also not limited to signing and ratification by OECD member countries;[95] and
- also the decision-making requirements of conferences under international law have generally changed over previous decades, meaning that the former focus on unanimity has shifted to a two-thirds decision-making requirement,[96] at least with regard to the adoption of the text of a specific treaty.[97]

90. OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties – Action 15: 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (2015). *See also* Art. 39 MLI.
91. *Convention on the Organisation for Economic Co-operation and Development* (14 December 1960) (hereinafter 'OECD Convention').
92. Lang, *supra* n. 9, at 20.
93. C. Thiele, *Regeln und Verfahren der Entscheidungsfindung innerhalb von Staaten und Staatenverbindungen – Staats- kommunalrechtliche sowie europa- und völkerrechtliche Untersuchung*, 1st edition, at 273 et seq. (Springer-Verlag 2008). *See also* K. Schmalenbach & C. Schreuer, in *Österreichisches Handbuch des Völkerrechts: Band I – Textteil*, *supra* n. 19, at 240–243. *See also* Lang, *supra* n. 9, at 20 with further references.
94. *See also* Lang, *supra* n. 9, at 20.
95. Lang, *supra* n. 9, at 20.
96. Article 9(2) Vienna Convention. For historical background and negotiating history, *see* F. Hoffmeister, in *Vienna Convention on the Law of Treaties: A Commentary*, *supra* n. 43, at 137–146. *See also* Aust, *supra* n. 19, 91.
97. Hoffmeister, *supra* n. 96, at 142 (in the aftermath of the Conference on the Law of the Sea, on 27 June 1974, 'it became a general practice to strive for consensus … and to allow the adoption of a treaty with a two-thirds majority as a fallback, if no consensus can be achieved'.). *See also* P. Daillier, M. Forteau & A. Pellet, *Droit International Public*, 8th edition, at 188–192 (LGDJ 2009).

3.2 Evaluating the Relevance of the Conference of the Parties for Amendments of the MLI

Article 9(2) of the Vienna Convention provides as follows: 'The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.' The focus of this Article 9(2) is on the 'adoption of the text of a treaty', which is per se interrelated with an amendment of the MLI under Article 33 of the MLI.[98] Accordingly, when it comes to proposed amendments of the MLI, one can conclude that the decision-making – regarding the adoption of the amended text – requires a two-thirds majority of the conference of the parties based on an understanding of Article 9(2) of the Vienna Convention.

However, the adoption of the text of the treaty 'does not constitute in any sense an expression of the State's consent to be bound by it'.[99] In addition, the adoption of the text of the amended treaty by two-thirds of the conference of the parties does not make the amended text unalterable.[100] Ultimately, the pure adoption of the text does not lead to any kind of legally binding force at all.

The two-thirds adoption of the amended text rather must be seen as the first step of an amendment procedure that must be followed by the parties' consent to be bound in order to have an amended treaty.[101] However, this does not imply that the amended agreement must include all parties to the earlier treaty.[102] The amending agreement rather binds only those parties that sign and ratify the amending agreement.[103] Ultimately, the parties to the MLI are free to accept or reject the alterations of the MLI that are suggested by the conference of the parties – even by means of a two-thirds adoption of an amended text of the MLI.

In light of recent developments with regard to such amendment clauses in other treaties,[104] one should bear in mind that they strongly differ from each other, but are usually based on some of the following cornerstones:[105]

- the number of parties that must support an amendment before it is subject to decision-making;
- the specific majority that is necessary to make a decision;
- a clause regarding the ratification or acceptance of the amendment;
- the number of parties that must ratify or accept the amendment;

98. Hoffmeister, *supra* n. 96, at 141 at seq.
99. Hoffmeister, *supra* n. 96, at 145 with further references.
100. Hoffmeister, *supra* n. 96, at 145 with further references. The text of a treaty can be changed as long as it is not authenticated under Art. 10 of the Vienna Convention. For details, *see* Hoffmeister, *supra* n. 96, at 147 at seq.
101. In fact, the adoption and authentication of amendments often take place at the same time, thus giving information about the parties' consent to be bound.
102. Odendahl, *supra* n. 75, at 706–707 with further references.
103. Odendahl, *supra* n. 75, at 715–717.
104. For details, *see* Aust, *supra* n. 19, at 92, *citing* H. Blix & J. Emerson, *The Treaty Maker's Handbook*, at 225 et seq. (Oceana Publications 1973).
105. Aust, *supra* n. 19, at 92.

- a clause indicating whether the amendment may be adopted by tacit agreement; and
- a clause that clarifies whether also those parties are bound that have not accepted the amendment.

Given these aspects, the MLI simply provides for the number of parties that must support an amendment before it is subject to decision-making.[106] Other than this, there are none of the above-mentioned specific clauses.

3.3 Evaluating the Relevance of the Conference of the Parties for the Interpretation of the MLI

When speaking of the interpretation under Article 32 of the MLI, there is obviously no such close link to the 'adoption of the text of a treaty' as described in section 4.2. This means that it is questionable from the perspective of a first glance whether the two-thirds decision-making requirement can be applied also for purposes of interpretation of the MLI.

Given the fact that both provisions, namely Articles 32(2) and 33(2) of the MLI, refer to Article 31(3) of the MLI concerning the procedural aspects of convening of the conference of the parties, one can conclude, from a systematic perspective, that also with regard to interpretation and implementation of the MLI, the conference of the parties' decision-making process is subject to a two-thirds majority.[107] Moreover, also based on an argumentum *a maiore ad minus*, one can conclude that the required decision-making quorum of the conference of the parties must not be higher with regard to interpretational issues compared to amendment issues, as interpretation tends to have lower impact on the understanding of the MLI than an amendment. To this end, one can conclude that interpretational decisions of the conference of the parties are based on a two-thirds majority, as well.

However, in fact the MLI includes a specific support requirement, namely the one-third support requirement in order to convene a conference of the parties under Article 31(3) of the MLI. Based on this, one could question whether this one-third support requirement could eventually be interpreted to be a relevant quorum in terms of decision-making. However, the use of this one-third support requirement in terms of decision-making of the conference of the parties (either with regard to amendments or regarding interpretation and implementation) could eventually lead to diverging statements[108] of different blocs within the conference of the parties, which means that none of these statements could claim the authority of being the decision of the conference of the parties. Accordingly, the better arguments can be brought forward with regard to the conclusion that the one-third requirement is relevant only as kind of 'margin of respectability' in order to avoid addressing the conference of the parties with unreasonable questions or proposals.

106. Article 31(3) MLI.
107. Lang, *supra* n. 9, at 20.
108. Concerning diverging statements, *see also* Lang, *supra* n. 9, at 20.

Assuming that a conference of the parties was convened and came to a decision (based on a two-thirds quorum) concerning the interpretation of the MLI, it is questionable whether this interpretative result of the conference of the parties has legal relevance at all. In this regard, Article 32(2) of the MLI provides only that '[a]ny question arising as to the interpretation … of this Convention *may be addressed* by a Conference of the Parties …'.[109] The term 'may be addressed' itself does not constitute a legal relevance of the interpretational results of the conference of the parties, as it establishes only the general possibility to discuss such an issue at a conference of the parties at all.[110] Save for this provision, the MLI itself does not give any further indication as to the potential legal relevance or legal character of such interpretational results of the conference of the parties. In addition, regarding Article 31, the Explanatory Statement to the MLI provides only very little information regarding the legal relevance or legal character.

However, regarding Article 32(2), the Explanatory Statement to the MLI states that the 'word "may" is used … since there could be other means by which to address questions of interpretation … of the Convention, such as the competent authorities *agreeing between themselves* on how the Convention will operate in relation to a particular Covered Tax Agreement'.[111] In this regard, the phrase 'agreeing between themselves' can be interpreted as a reference to the legal character of a 'subsequent agreement of interpretation' under Article 31(3) of the Vienna Convention. Regardless of whether the drafters of the MLI intended to highlight the legal character of the interpretational results of the conference of the parties, those results must be in line with the interpretational rules of the Vienna Convention in any case in order to potentially claim legal relevance in terms of interpretation.[112]

Given the different interpretational rules of the Vienna Convention, one can conclude that interpretational results of the conference of the parties of the MLI cannot have legal relevance on the basis of Article 31(1), (2), (4) and Article 32 of the Vienna Convention, as those provisions refer to documents and context, as well as object and purpose in 'connection with the conclusion of the treaty' or 'the circumstances of its conclusion'.[113] However, this temporal focus is not relevant with regard to Article 31(3) of the Vienna Convention, as the provision explicitly targets 'subsequent agreement[s]', 'subsequent practice[s]' and 'relevant rules of international law applicable in the relations between the parties'.

In this context, one can hardly subsume the interpretative results of a conference of the parties under 'relevant rules of international law applicable in the relation

109. Article 32(2) MLI (emphasis added).
110. Lang, *supra* n. 9, at 21.
111. OECD, *Explanatory Statement to the MLI* (2016), *supra* n. 6, Art. 32(2) (emphasis added).
112. *See also* Lang, *supra* n. 9, at 21; M. Lehner, in *Doppelbesteuerungsabkommen*, 6th edition, at 191–198 (K. Vogel & M. Lehner eds., C.H. Beck 2015).
113. For details, *see* Dörr, *supra* n. 45, at 533–540 & 541–552. *See also* M. Lang, *Wer hat das Sagen im Steuerrecht?*, Österreichische Steuerzeitung (ÖStZ), at 207 (2006); M. Lang, *Die Bedeutung des OECD-Kommentars und der Reservations, Observations und Positions für die DBA-Auslegung*, in *Nationale und internationale Unternehmensbesteuerung in der Rechtsordnung: Festschrift für Dietmar Gosch*, at 238 (J. Lüdicke, R. Mellinghoff & T. Rödder eds., C.H. Beck 2016); Lang, *supra* n. 9, at 21.

between the parties',[114] which means that only the 'subsequent agreement' and 'subsequent practice' are vital possibilities in order to classify the interpretative results as being potentially relevant for purposes of interpreting the MLI. However, when it comes to 'subsequent practices', only a real existing practice could eventually constitute a 'subsequent practice' in the sense of Article 31(3) of the Vienna Convention.[115] In fact, such a practice need not be carried out by all parties to the Convention in order to fall under the scope of Article 31(3)(b) of the Vienna Convention, but must be at least accepted[116] by all parties to the MLI. However, even if the conference of the parties is of the opinion that they simply summarize a 'subsequent practice' when they come to an interpretative result, this is per se not important at all as long as there is no real evidence of an existing 'subsequent practice'. The need for evidence of an existing 'subsequent practice' cannot be replaced by the interpretative result of the conference of the parties.[117]

Accordingly, the most viable option in order to categorize the interpretative results of the conference of the parties with regard to its legal character, is the 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' under Article 31(3)(a) of the Vienna Convention. However, even this option is subject to some pitfalls, as a subsequent agreement on interpretation requires 'an agreement' between all parties to the Convention, whereas the interpretative result of the conference of the parties is subject to a two-thirds majority.[118] In addition, another pitfall of a categorization as a legally relevant 'subsequent agreement on interpretation' could be that the parties to the Convention are not necessarily the same as the participants in the conference of the parties.[119]

Accordingly, the legal relevance of the interpretative result of the conference of the parties as a 'subsequent agreement on interpretation' under Article 31(3)(a) of the Vienna Convention is subject to the following four criteria:[120]

- all parties to the Convention participate in the conference of the parties;
- there is an agreement between the participants of the conference of the parties concerning the interpretational questions;
- the participants of the conference of the parties intended to conclude a 'subsequent agreement on interpretation'; and

114. For details on Art. 31(3)(c) of the Vienna Convention, *see* Dörr, *supra* n. 45, at 561–568. *See also* Herdegen, *supra* n. 45, at 22–25.
115. Lang, *supra* n. 9, at 21; Lehner, *supra* n. 112, at 194. *See also* Dörr, *supra* n. 45, at 554–560.
116. Herdegen, *supra* n. 45, at 18; Dörr, *supra* n. 45, at 557–558.
117. Lang, *supra* n. 9, at 21. According to Dörr, *supra* n. 45, at 555–560, there is no particular form required with regard to a subsequent practise. In this regard, 'official statements or manuals, diplomatic correspondence, press releases, transactions, votes on resolutions in international organizations are just as relevant as national acts of legislation or judicial decisions' could constitute a subsequent practice.
118. Dörr, *supra* n. 45, at 553–554. *See also* section 4.1.
119. *See* section 2.2.
120. Lang, *supra* n. 9, at 21–24.

by multiple countries, modifying the application of each tax treaty that involves the parties to the instrument. Accordingly, the text of the MLI was adopted on 24–25 November 2016 and since the first signing ceremony on 7 June 2017, as of 1 August 2017, seventy jurisdictions have signed the MLI and have already begun the ratification process.

Although the MLI is a multilateral treaty under public international law with its own direct effect, it is unique to the extent that it stands to modify only the application of bilateral treaties between the parties to the MLI. Even though general rules of conflict exist under public international law, the instrument has included specific 'compatibility clauses' in each provision to specify how each tax treaty provision is to be modified. This is largely unchartered territory in public international law – especially so in international taxation. Therefore, it is critical to analyse the public international law aspects of how the MLI will interact with tax treaties.

In this context, this chapter will analyse the relationship between the MLI and tax treaties and whether the proposed option of specific compatibility clauses is the optimum solution.

2 THE MLI AND TAX TREATIES

Apart from the main proposal for the MLI, BEPS Action 15 also contains a toolbox for the MLI which deals with the various public international law concerns as regards the instrument (hereinafter the 'Toolbox'). The Toolbox looks at the interaction between the MLI and tax treaties, and discusses options for how potential conflicts should be dealt with. Although it considers the use of the general interpretive rule of *lex posterior*, the Toolbox recommends the use of compatibility or conflict clauses to ensure that there is no difficulty in applying the MLI in relation to tax treaties. In this context, it is critical to analyse how the MLI can create a situation of conflict with tax treaties.

There are various types of treaty conflicts involving tax treaties, including:[2]

- conflicts between two tax treaties;[3]
- conflicts between tax treaties and other international tax treaties (such as the 1979 Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties);[4]
- conflicts between tax treaties and other treaties that contain specific tax provisions (such as bilateral investment treaties or trade treaties);

2. The first four items of this classification are adopted from *On Conflicts and Other Interactions Between Double Taxation Agreements and Non-Tax Treaties*, Ch. 3, available at: http://www.dfdl.com/wp-content/uploads/2010/09/Conflicts_and_Other_Interactions_Between_DTAs_and_Non-Tax_Treaties_Above_and_Beyond_Treaty_2004.pdf (Treaty Paper).
3. In triangular tax cases, conflicts may arise in terms of two different tax treaties being applicable, resulting in different consequences.
4. Notably, this Convention only allows negotiation of bilateral agreements based on its format and does not discuss conflicts with tax treaties. However, this convention was never in force, as the minimum signatory requirement was not met.

- conflicts between tax treaties and other treaties with no tax focus (such as human rights treaties); and
- conflicts between tax treaties and supranational law (such as European Union law).[5]

Resolution of these conflicts is generally a matter of concern, as there are no prescribed hierarchy rules among treaties, and all treaties are equally ranked according to international law[6] (except if a treaty merely codifies *jus cogens*).[7] However, treaties amending or modifying existing treaties are generally considered subordinate to the basic instrument unless the parties intend them to be autonomous.[8]

The Vienna Convention on Law of Treaties[9] (hereinafter the 'Vienna Convention') is generally referred to in situations involving two or more treaties. Articles 39 and 40 of the Vienna Convention deal with the amendment of treaties by subsequent treaties; Article 59 deals with the case of a subsequent treaty terminating an earlier treaty; and Article 30 is usually used in case of conflicts between two successive treaties.[10] As the MLI will interact and co-exist with existing treaties by modifying their application (and not by amending them), Article 30 of the Vienna Convention needs to be analysed.[11]

Article 30(1) provides that the provision deals with 'successive treaties dealing with the same subject matter'.[12] Per Article 30(2), if a treaty provides that it is subject to a previous treaty, the previous treaty governs on any issue of compatibility. Further, per Article 30(3), if parties to one treaty become parties to a second treaty, the second

5. Under *Costa v. E.N.E.L.*, European Union law has supremacy over both domestic law and other international agreements, thereby creating conflicts between measures of EU law and tax treaties that are not in line with them. IT: ECJ, 15 July 1964, Case 6/64, *Flaminio Costa v. E.N.E.L.*
6. I. Seidl-Hohenveldern, *Hierarchy of Treaties*, in *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag*, at 7–8 (Klabbers & Lefeber eds., M. Nijhoff 1998); N. Matz-Lück, *Treaties, Conflicts Between*, in *Max Planck Encyclopaedia of Public International Law* (Oxford University Press 2015).
7. A treaty in conflict with *jus cogens* is void under Art. 53 of the Vienna Convention on the Law of Treaties.
8. Seidl-Hohenveldern, *supra* n. 6, at 9; P. Reuter, *Introduction to the Law of Treaties*, at 26 (Continuum International Publishing 1989).
9. United Nations Convention on the Law of Treaties, signed at Vienna 23 May 1969, entry into force on 27 January 1980.
10. A. Sadat-Akhavi, *Methods of Resolving Conflicts Between Treaties*, at 47–59 (M. Nijhoff 2003). The Vienna Convention also contains specific modification provisions where parties to a multilateral convention wish to enter into a later *inter se* agreement – but this is not relevant for the present discussion.
11. J. Malherbe, *The Issues of Dispute Resolution and Introduction of a Multilateral Treaty*, 43 Intertax 1, at 94 (2015); N. Bravo, *The Multilateral Tax Instrument and Its Relationship with Tax Treaties*, 8 World Tax J. 3 (2016). Even if the modification is formally considered an 'amendment', nothing in Art. 39 prevents an amendment of bilateral treaties through a subsequent multilateral instrument. *See* C. Innamorato, *Expeditious Amendments to Double Tax Treaties based on the OECD Model*, 36 Intertax 3, at 121 (2008).
12. There is much discussion on how the Vienna Convention is not equipped to deal with conflicts in treaties concerning different subject matters. However, as the MLI and tax treaties deal with the same subject matter, this will not be discussed in detail. But *see generally* A. Ali Ghouri, *Is Characterization of Treaties a Solution to Treaty Conflicts?*, 11 Chinese J. Intl. L. at 247, 249–252 (2012).

treaty governs the relationship between the parties as regards any point where it is incompatible with the first. Finally, per Article 30(4), if any party to the first treaty is not a party to the second treaty, and vice versa, only the treaty that it is party to will apply.

Therefore, Article 30(2) deals only with conflict clauses where priority of the previous treaty is retained. In all other cases with identical parties for both treaties, the residual clause in Article 30(3), i.e., the *lex posterior* rule, will apply.[13] Article 30(2) and (3) each use the term 'compatibility'. This term is not defined in the Vienna Convention and scholars have maintained differing views as regards the scope of the term. The traditional definition laid down by Jenks restricts the term only to cases where parties cannot simultaneously comply with obligations under both treaties.[14] This definition was followed and defended by some other scholars, as well.[15] However, later scholars, including Vranes, Pauwelyn and Borgen have adopted a much broader definition that includes conflicts arising from conflicting permissive and prescriptive norms.[16]

If the Vienna Convention is to be applied to conflicts between the MLI and tax treaties, a broader definition may be necessary, as the MLI may, in cases of abuse, allow something that is not permissible under a tax treaty. For instance would Jenks consider it 'incompatible' that a particular permanent establishment non-discrimination provision is affected by the third jurisdiction permanent establishment situation as envisaged in Article 10 of the MLI? As there is ambiguity in this position, relying on the Vienna Convention alone may create a bit of uncertainty.

Further, prior to the Vienna Convention, there were several cases where the *lex prior* doctrine was considered more appropriate in a treaty conflict situation than the *lex posterior* doctrine.[17] In this regard, a noteworthy view is asserted by

13. C.J. Borgen, *Resolving Treaty Conflicts*, 37 Geo. Wash. Int'l. L.Rev., at 573, 577 (2005).
14. C.W. Jenks, *Conflict of Law-Making Treaties*, 30 Brit. Y.B Int'l. L., at 426 (1953).
15. For scholars who have followed this position, *see* E. Vranes, *The Definition of 'Norm Conflict' in International Law and Legal Theory*, 17 Eur. J. Int'l. L. 2, at 395, 402 (2006), *citing* W. Karl, *Conflicts Between Treaties*, in *Encyclopaedia of Public International Law*, vii, at 467, 468 (R. Bernhardt ed., North Holland 1984); W. Czapliński & G. Danilenko, *Conflicts of Norms in International Law*, 21 Neth. Y.B Int'l. L. 3, at 12–13 (1990); R. Wolfrum & N. Matz, *Conflicts in International Environmental Law*, at 4 (Springer Verlag 2003). *See also* J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge University Press 2003), (citing Klein, Wilting and Kelsen (in his earlier works) as having followed this definition). Vranes also mentions that this earlier view of Kelsen is in contradiction to his later view in H. Kelsen, *Allgemeine Theorie der Normen*, at 79 (Manz Verlag Wien 1979).
16. E. Vranes, *supra* n. 15; J. Pauwelyn, *supra* n. 15; C.J. Borgen, *supra* n. 13.
17. Central American Court of Justice, 30 September 1915, *Costa Rica v. Nicaragua*, AJIL 11 (1917), 181–229; Central American Court of Justice, 9 March 1917, *El Salvador v. Nicaragua*, AJIL 11 (1917): 674–730; Permanent Court of Intl. Justice, 5 September 1931, *Customs Regime Between Germany and Austria*, Advisory Opinion, PCIJ Series A/B 41, at 42; Permanent Court of Intl. Justice, 12 December 1934, Oscar Chinn case (*United Kingdom v. Belgium*), PCIJ Series A/B 63; Eur. Ct. Human Rights, 21 November 2001, *Al-Adsani v. The United Kingdom* [GC] – 35763/97, para. 61, Separate Opinion of Judge Eysinga, 131 and Separate Opinion of Judge Schücking, 148. All of these are referred to in *Principles of Conflict Resolution within the Interpretative Process of Article 31(3)(c)*, in P. Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill 2015). *See also* UN Int'l. Law Commission, Report of the Study Group of the Int'l. Law Commission, *Fragmentation of International Law*, U.N. GAOR, 54th Sess., at 2 (13 April 2006), U.N. Doc. A/CN.4/L.628 (2002) (noting that both *lex prior* and *lex posterior* are used as interpretive tools for treaty conflicts based on circumstances).

Schulz[18] and relied on by Borgen[19] under which it is doubted whether *lex posterior* as laid out in Article 30(3) is a customary international law principle as in the case of much of the Vienna Convention.[20] If this rule is not considered customary international law, Article 30(3) would be binding only on signatories to the Vienna Convention. Some important signatories to the MLI have not ratified the Vienna Convention (e.g., India). This could create an issue if Courts in these jurisdictions prefer a politically favoured interpretation that leads to cherry-picking between the original tax treaty and the MLI provisions. Moreover, as suggested by Seidl-Hohenveldern and Reuter,[21] treaties amending or modifying existing treaties (such as the MLI) may be considered subordinate to the basic instrument unless the parties intend them to be autonomous i.e., the *lex prior* rule, which may affect uniformity in interpretation.

In the absence of the *lex posterior* rule being mandatory, an interpretation using Articles 31 and 32 based on 'object and purpose' may have to be followed.[22] Furthermore, the *lex specialis* rule may be applied in certain cases where the MLI rule is considered more specific than the tax treaty provision. However, this exercise may lead to subjective determinations by various Courts and ultimately, disharmony. Further, even if the *lex posterior* rule is relied on, since the MLI itself provides a lot of flexibility to States and the operation of some provisions are subject to the choice or exercise of options, the *lex posterior* rule may not be precise enough to meet the objects of the MLI. So, specific clauses within the MLI dealing with a conflict between the MLI and tax treaties would be the most ideal solution.[23]

3 CONFLICT AND COMPATIBILITY CLAUSES

According to the International Law Commission (ILC), a conflict clause is 'a clause in a treaty intended to regulate the relation between the provisions of the treaty and those of another treaty or of any other treaty relating to the matters with which the treaty

18. Borgen, *supra* n. 13, at 588, *citing* A. Schulz, *The Relationship Between the Judgments Project and other International Instruments*, at 14 (Hague Conference on Private International Law, Prel. Doc. 24, 2003).
19. Borgen, *supra* n. 13, at 587, 602.
20. As mentioned in Merkouris, *supra* n. 17, at 175, the *lex posterior* doctrine has been considered a general principle, a principle of interpretation or conflict resolution, a maxim, a doctrine, a subordinate interpretive criteria, guidelines, presumptions, system rules, principles of legal logic and tools of conflict resolution by various authors and courts, thereby creating confusion as to the general nature. However, Merkouris concludes that *lex posterior* and *lex specialis* are considered accepted as 'customary international law' or as general principles.
21. *Supra* nn. 6 and 8.
22. Treaty Paper, *supra* n. 2.
23. Bravo, *supra* n. 11, arrived at the same conclusion to accommodate cases where original tax treaty provisions meeting BEPS standards are intended to be retained. Merkouris, *supra* n. 17, noted that the major weakness of a conflict clause is dealing with situations where all parties to the subsequent treaty are not the same as in the earlier treaty. As this is not a matter of concern either in the MLI, the case for conflict clauses is strengthened.

deals.'[24] Further, according to the ILC report on the fragmentation of international law,[25] there are seven types of conflict clauses:

- clauses that prohibit the conclusion of incompatible subsequent treaties (such as the North Atlantic Treaty Organization (NATO) treaty);[26]
- clauses that expressly permit subsequent 'compatible' treaties (e.g., the UN Convention on the Law of the Sea);[27]
- clauses in the subsequent treaty providing that it 'shall not affect' the earlier treaty (e.g., the Geneva Convention on High Seas);[28]
- clauses in the subsequent treaty that provide that among the parties, it overrides the earlier treaty (e.g., the extradition treaty between the EU and the United States);[29]
- clauses in the subsequent treaty that expressly abrogate the earlier treaty (e.g., the UN Convention on the Law of the Sea);
- clauses in the subsequent treaty that expressly maintain earlier compatible treaties (e.g., the UN Convention on the Law of the Sea); and
- clauses that promise that future agreements will abrogate earlier treaties (e.g., Article 307 of the Treaty of the European Union).

Borgen[30] also refers to The Treaty Maker's Handbook,[31] which lays down the following varieties of conflict clauses:[32]

- clauses where the present treaty prevails over all other treaties;
- clauses where the present treaty prevails over all earlier treaties;

24. Treaty Paper, *supra* n. 2, at 63, *citing* Reports of the Intl. Law Commission, Yearbook Intl. Law Commission, vol. II, at 214 (1966).
25. Intl. Law Commission, *supra* n. 17, at 138.
26. Article 8 reads as follows: 'Each Party declares that none of the international engagements now in force between it and any other of the Parties or any third State is in conflict with the provisions of this Treaty, *and undertakes not to enter into any international engagement in conflict with this Treaty*' (emphasis added).
27. Article 311(3) reads as follows: 'Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.'
28. Article 30 reads as follows: 'The provisions of this Convention shall not affect conventions or other international agreements already in force, as between States parties to them.'
29. Article 18 reads as follows: 'This Agreement shall not preclude the conclusion, after its entry into force, of bilateral Agreements between a Member State and the United States of America consistent with this Agreement.'
30. *Supra* n. 13.
31. *The Treaty Maker's Handbook*, at 210–212 (H. Blix & J.H. Emerson eds., Oceana Publications 1973).
32. Merkouris, *supra* n. 17, refers to Sadat-Akhavi, *supra* n. 10, while proposing two categories with three sub-categories each focusing on the priority element; Pauwelyn, *supra* n. 15, proposes three categories, referring to prior treaties, future treaties and intra-treaty conflicts; Czapliński and Danilenko, *supra* n. 15, refer to four categories.

- clauses where the present treaty prevails over earlier treaties for parties to the present treaty;
- clauses where the parties to the present treaty undertake an obligation not to enter into later treaties inconsistent with the present one;
- clauses where supplementary agreements are permitted only if they are compatible with the present treaty; and
- clauses where the parties to the present treaty undertake an obligation to modify existing treaties that they may have with third parties.

Common conflict clauses in the tax context include[33] Article 28 of the OECD Model Convention,[34] Article 27(2) of the OECD-Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters,[35] Article 2103(2) of the North American Free Trade Agreement[36] and Article 1(2) of United Kingdom-United States tax treaty (2001).[37]

However, in the case of the MLI, the clause would seek to modify the application of existing bilateral agreements between parties and in most cases, resolve inconsistencies in favour of the MLI while both instruments remain active. A typical 'conflict' clause would generally lead to the overriding of one treaty in favour of another. In a situation such as the MLI where both treaties remain in force, the term 'compatibility clause' or 'interaction clause' as suggested in environmental law research would be more appropriate.[38]

The exact wording used in the compatibility clause is critical. Some clauses are worded in particularly vague terms and rather than help in interpreting a conflict, create more confusion.[39] In such cases, the intention of the parties has been sought through the *travaux préparatoires*, leading to more confusion.[40] To avoid this, these

33. Examples derived from Treaty Paper, *supra* n. 2.
34. Article 28 provides that nothing in the Convention shall affect the fiscal privileges of members of diplomatic missions or consular posts under customary international law or special agreements on that subject matter.
35. This provision gives priority to the EU, EEC treaties for member countries as against the convention.
36. This provision gives priority to tax treaty rules as against the North American Free Trade Agreement on conflict.
37. This provision states that the treaty does not affect benefits under any other treaty between the parties.
38. H. van Asselt, F. Sindico & M.A. Mehling, *Global Climate Change and The Fragmentation of International Law*, 30 L. & Policy 3, at 423, 431 (2008).
39. Bravo refers to the conflict clause in the Cartagena Protocol on Biosafety to the Convention on Biological Diversity as being particularly loosely worded in Bravo, *supra* n. 11. The International Law Commission also refers to Art. 22 of the 1992 Biodiversity Convention as containing a loosely worded, vague conflict clause. *See* Intl. Law Commission, *supra* n. 17, at 137. While the above examples are referred to in Merkouris, *supra* n. 17, at 188, the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal are also mentioned.
40. Merkouris, *supra* n. 17, citing Sadat-Akhavi, *supra* n. 10, at 206–207. Sadat-Akhavi mentions three cases where this was done: the 1961 Single Convention on Narcotic Drugs, the 1951 Universal Copyright Convention and the 1974 Convention of the Unification of Certain Rules relating to the Carriage by Sea of Passengers and their Luggage.

compatibility clauses must be drafted precisely and clearly without leaving room for ambiguity. There are several compatibility clauses in multilateral conventions which seek to modify bilateral conventions and which are drafted precisely with a reference to the clauses that are sought to be modified.[41]

Moreover, the MLI would require one compatibility clause per provision, as the interaction of each provision with existing tax treaties and the proposed modification would be different.[42] However, as mentioned in the Toolbox, reference to the exact provision, the application of which is being modified, in each bilateral treaty would be impossible in the MLI, as (i) several clauses dealing with the same subject matter are worded differently in tax treaties and (ii) the numbering of clauses is not uniform across the vast worldwide tax treaty network.

Therefore, while modifying the application of existing provisions, precise language relating to the subject matter of each provision should be used such that the application of the corresponding provision in each covered tax treaty is modified.

4 COMPATIBILITY CLAUSES IN THE MLI

4.1 The Format of Compatibility Clauses in the MLI

The MLI follows the format recommended above by using one compatibility clause for each provision. However, the arbitration part contains a single compatibility provision,[43] as the provisions in Part VI are to be applied cumulatively, unlike the rest of the MLI. As provided in the Explanatory Statement,[44] the following language schemes have been used for the compatibility clauses in the MLI, depending on the context:

41. The best example of a well-drafted compatibility clause in a similar situation is Art. 16(3) of the UN Convention against Transnational Organized Crime (15 November 2000) which provides that 'Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them' (thus modifying all bilateral extradition treaties between two signatories). Bravo, *supra* n. 11, refers to the following clauses in multilateral conventions that modify bilateral treaties, similar to the MLI, and are worded precisely: International Convention for the Suppression of the Financing of Terrorism, Art. 11 (9 December 1999); Convention for the Suppression of the Illicit Traffic of Dangerous Drugs, Art. 9 (26 June 1936), Convention for the Suppression of Unlawful Seizure of Aircraft, Art. 8 (16 December 1970); International Convention against the Taking of Hostages, Art. 10 (17 December 1979); International Convention against the Recruitment, Use, Financing and Training of Mercenaries, Art. 15 (4 December 1989); International Convention for the Suppression of Terrorist Bombings, Art. 9 (12 January 1998); Agreement on Extradition between the European Union and the United States of America, Art. 3 (25 June 2003); Agreement on Mutual Legal Assistance between the European Union and the United States of America, Art. 3 (25 June 2003); International Convention for the Suppression of Acts of Nuclear Terrorism, Art. 13 (14 September 2005); and International Convention for the Protection of all Persons from Enforced Disappearance, Art. 13 (20 December 2006).
42. C. Silberztein & J. Baptiste Tristram, *OECD: Multilateral Instrument to Implement BEPS*, 23 Int'l. Transfer Pricing J. 5 (2016).
43. Article 26 MLI.
44. Explanatory Statement to the MLI, para. 15, pages 5, 6.

MLI provision applies 'in place of' existing provision

Where such language is used, the corresponding tax treaty provision would be replaced by the MLI provision. Here, it is not envisaged that the MLI provision be added to tax treaties that do not contain a corresponding provision.

MLI provision 'applies to' or 'modifies' an existing provision

Where such language is used, the corresponding tax treaty provision would be modified by the MLI provision without replacing it. In this case, as well, it is not envisaged that the MLI provision be added to tax treaties that do not contain a corresponding provision.

MLI provision applies 'in the absence of' existing provision

Where such language is used, if the concerned tax treaties do not contain the corresponding provision, the MLI provision will be added to the tax treaty.

MLI provision applies 'in place of or in the absence of' existing provision

Where such language is used, the MLI provision will replace an existing corresponding tax treaty provision; if the tax treaty does not contain the provision, the MLI provision will be added to the tax treaty. This is the broadest possible scenario where the MLI provision should be applicable in all cases, except where an authorized reservation is exercised.

The compatibility clauses for the substantive provisions in the MLI are ordered into the above four categories as follows:

'In Place Of'	*'Applies to/Modifies'*	*'In the Absence Of'*
Article 5(7) providing Option *C* in the methods for elimination of double taxation provision where exemption provisions will be replaced by modified credit provisions, but only in treaties that contain exemption provisions	Article 5(3) and (4) providing Options *A* and *B* dealing with the switch from exemption to credit in case of no or low taxation at source or deduction claimed at source along with dividend exemption in the residence state	Article 16(4)(b) and (c) regarding provisions added to the mutual agreement procedure only if they are not present in existing tax treaties
Article 12(3) dealing with commissionaire arrangements that apply only to tax treaties with dependent agent permanent establishment clauses		

Therefore, it can be concluded from the above that in most cases, as long as (i) two jurisdictions have ratified the MLI and have notified an existing tax treaty between them as covered by the MLI and (ii) either of these jurisdictions has not placed a reservation on the application of the provision as a whole as provided under the MLI, provisions containing the compatibility clause 'in place of or in the absence of' are meant to apply in precedence over the provisions in the tax treaty, irrespective of notification of an existing provision dealing with the same subject. A detailed illustration depicting the functioning of compatibility clauses and the notification provisions in the MLI *in toto* is provided as an Annexe to this chapter.

The drafting of compatibility clauses in the MLI has largely been an extremely precise exercise and ticks most of the boxes in terms of adequately defining compatibility between the MLI and tax treaties. In most cases, the wording adopted by the MLI seems to achieve the intended results, as well. However, there are certain issues that also need to be considered.

4.2 Issues with Regard to Compatibility Clauses in the MLI

The following issues may arise and need to be dealt with in the text of compatibility clauses in the MLI.

4.2.1 Issues with Regard to the Minimum Standards

As indicated in section 1 of this chapter, the BEPS Project was undertaken with the aim of enhancing international tax coordination in a way that could effectively counter unintended cross-border tax advantages in the form of international tax avoidance and aggressive tax planning.[48] However, in order to achieve political agreement, certain measures were considered more important than others, and the final BEPS reports set forth measures on the basis of 'minimum standards' and 'best practices'. While the minimum standards are considered mandatory for the states that participated in the project, best practices would be merely recommendations for further action. The minimum level of action envisaged under the minimum standards was required in order for the overall project to remain coordinated in terms of approach.[49] The OECD's BEPS monitoring process would continue to assess whether states are complying with the minimum standards, which may result in political consequences for those that do

48. The concept of tax avoidance is broader than aggressive tax planning, as the latter is confined to a cross-border situation where differences between tax systems are exploited by a taxpayer to create a tax advantage, whereas any circumvention of tax rules may create tax avoidance. *See* P. Pistone, *The Meaning of Tax Avoidance and Aggressive Tax Planning in European Union Tax Law: Some Thoughts in Connection with the Reaction to Such Practices by the European Union*, in *Tax Avoidance Revisited in the EU BEPS Context* (A.P. Dourado ed.), IBFD, October 2017.
49. P. Pistone, R. Julien & F. Cannas, *Can the Derivative Benefits Provision and the Competent Authority Discretionary Relief Provision Render the OECD-Proposed Limitation on Benefits Clause Compatible with EU Fundamental Freedoms*, in *Base Erosion and Profit Shifting (BEPS)*, at 212 (M. Lang, P. Pistone, A. Rust, J. Schuch & C. Staringer eds., Linde 2016).

not comply in the future. However, the BEPS final reports continue to remain soft law and – in the absence of sanctions – would be hardly enforceable from a legal perspective.

However, as discussed, the MLI, under Action 15, has been created so as to multilaterally implement the tax treaty-related changes envisaged in the BEPS Project into various bilateral tax treaties. Through the reservation process in the MLI, legal sanction has been given to the tax treaty-related minimum standards, as states are free to place a reservation against applying such provisions only if the minimum standards are otherwise complied with. Notably, as the term 'minimum standard' has been referred to in the MLI as an obligation,[50] one could even question whether the soft law nature of the term has been transformed into hard law.[51]

Under the BEPS Action 6 final report, the minimum standard that countries need to adhere to is to include either a principal purpose test (combined with a simplified limitation-on-benefits clause or not) or a detailed limitation-on-benefits clause coupled with domestic anti-conduit rules.[52] However, Article 7(2) of the MLI – the compatibility clause for the principal purpose test – only allows replacement of an existing principal purpose test clause with the MLI principal purpose test clause or the addition of the MLI principal purpose test clause to a treaty where such test is absent.

As the minimum standard only requires two states to have either a principal purpose test alone or coupled with a limitation-on-benefits test, some pairs of states may wish to replace their existing, loosely or too narrowly worded limitation-on-benefits provisions with the broad principal purpose test clause in the MLI.[53] Although the MLI could have allowed such flexibility by expanding the compatibility clause provided in Article 7(2), allowing the MLI principal purpose test clause to replace existing treaty-level general or specific anti-avoidance rules, the present provision does not allow this.[54]

50. Article 7 of the MLI especially contains the term 'minimum standard' and allows reservations against applying the principal purpose test contained therein if the 'minimum standard' is otherwise met through a detailed limitation-on-benefits clause.
51. For the legal relevance of minimum standards and an analysis of this point, *see* A. Langer in Chapter 5 of this book, where it has been concluded that this is not the case
52. There is scope to argue that mandatory minimum standards that provide alternatives should be equivalent in terms of scope and effect. However, it is clear that the limitation-on-benefits and principal purpose test are not equivalent as minimum standards, and this would create bias and two blocks of countries. *See* Pistone, Julien & Cannas, *supra* n. 49, at 212.
53. This is especially so for EU countries, as limitation-on-benefits clauses are being questioned by the European Commission as restrictive of the fundamental freedoms. Separately, some countries may even wish to have uniform treaty practice by establishing identical clauses for all of its tax treaties and thus, to shift from the limitation-on-benefits approach to a principal purpose test approach.
54. Article 7(6) and 7(17) provide that the simplified limitation-on-benefits clause would be applicable only to states that have made a choice by notification for the same. However, Art. 7(17)(e) also provides that the MLI simplified limitation-on-benefits clause would be given precedence in case of inconsistencies even if not notified. Although this wording may allow modification of existing limitation on benefits provisions even where no choice is made for the same, it is clear that there is still no option provided to replace an existing limitation-on-benefits clause with a principal purpose test clause.

As the purpose of creating such a framework within the MLI was to give legal sanction to the tax treaty-related minimum standards, the provisions of the MLI should ideally be equivalent in scope to such minimum standards. In light of this, the compatibility clause attached to the principal purpose test, i.e., Article 7(2), should have allowed the replacement of all existing treaty-wide anti-avoidance provisions (which should be sufficient as long as it meets the minimum standard).

4.2.2 Issues in the Positioning of Provisions

Issues could arise in the compatibility clauses depending on how the scope of the MLI is interpreted as well. The OECD, in its legal note on the functioning of the MLI,[55] has clarified that the MLI modifies only the application of the tax treaty using the *lex posterior* principle, and does not modify the language of the tax treaty itself, as in the case of an amendment. However, as the MLI uses language such as 'in place of' and 'replaced' in the compatibility clauses, which in turn are specific provisions meant to avoid a subjective *lex posterior* approach, and the notification provisions, the legal effect of the MLI may be unclear in the hands of tax authorities or courts. It remains plausible that a court would consider that the MLI provision actually modifies the provisions of a bilateral tax treaty and not just their application. This would particularly be so if States choose to create consolidated versions where MLI provisions are inserted within the tax treaty. If this approach were to be followed, there are several issues in relation to how a particular provision would be positioned in the tax treaty.

First, Article 13(2) or (3) of the MLI, which seek to modify the list of activities in a tax treaty that will not constitute a permanent establishment, are to apply in place of 'relevant parts' of existing provisions under the compatibility clause contained in Article 13(5)(a) of the MLI.[56] However, if the latter approach as regards the scope of MLI is adopted, as Articles 13(2) and 13(3) refer directly to the existing list provided in the tax treaty and propose modifications, without providing text that would replace such provisions, applying these provisions may become difficult. This may have the legal consequence that there is no substantive text provided in the MLI that can be added in place of the 'relevant parts' of such provisions, even if this expression is defined by two states.[57]

55. OECD Directorate of Legal Affairs, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Functioning under Public International Law, available at: https://www.oecd.org/tax/treaties/legal-note-on-the-functioning-of-the-MLI-under-public-international-law.pdf, paras 14–18.
56. A noteworthy question that can also be considered here concerns whether this provision would be compatible with all sorts of existing permanent establishment provisions, as permanent establishment provisions are diverse in nature and contain distinct differences (such as the 'service permanent establishment' provision, 'supervisory services' in the building site/assembly project permanent establishment provision, inclusion of warehouses as a permanent establishment as in the UN Model, etc.).
57. Two states may also define 'relevant parts' differently, leading to disagreement on the mechanics of a concept that they agree on. This may lead them to not choose the MLI option, but to bilaterally agree on text to modify their tax treaty.

For example if the existing tax treaty contains Article 5(4) as contained in the OECD Model and the states wish to modify the provision under the recommendations in BEPS Action 7, the compatibility clause contained in Article 13(5)(a) allows only a direct replacement of 'relevant parts' of the present article with Article 13(2) or 13(3).[58] However, Article 13(2)(a) and 13(3)(a), the first sub-part of both provisions, is worded to include 'the activities specifically listed in the Covered Tax Agreement (prior to modification by this Convention) as activities deemed not to constitute a permanent establishment…'. This would lead to the consequence that, if this approach is followed as regards the scope of the MLI, subsequent to modification, the text of the tax treaty may now contain a reference to the old text of the tax treaty as regards the primary list of activities that do not constitute a permanent establishment (if the latter approach as regards the scope of the MLI is adopted).

It is clear that the OECD has devised this mechanism considering the OECD vision as regards the scope of the MLI and because the provisions corresponding to Article 5(4) may be differently worded in several tax treaties, especially because the OECD and UN Models use different language for this provision. It is also evident that interpretation of the new provision using Article 31 of the Vienna Convention,[59] would lead to the implication that the text prior to modification is retained in the tax treaty, as intended by the OECD. However, as the MLI has direct legal effect, the text that may be construed by authorities to 'replace' existing text should ideally not have contained further references to previous text in the interest of clarity, and should have contained a concrete and well-defined list.

Therefore, the compatibility clause in this provision could have used the 'applies to or modifies' language so that – irrespective of how the scope of the MLI is interpreted – it could modify the existing list without replacing it entirely.

Second, similar to the above concern, several provisions in the MLI that could be seen as replacing existing tax treaty provisions contain references to 'covered tax agreements' and paragraphs within the MLI. For example Article 12(1) of the MLI dealing with revisions to the dependant agent permanent establishment provision, refers to 'covered tax agreements' and the following paragraph 2 of the MLI provision. If the language is directly imported, the term 'covered tax agreement' would not be defined in the tax treaty and paragraph 2 of the MLI provision may not correspond to paragraph 2 of the tax treaty provision, giving rise to concerns.

As in the above case, this issue may not arise except in exceptional cases and may be resolved by interpretation under Article 31, reading the MLI in the context of the tax

58. As indicated, the Explanatory Statement details that the language 'in place of' in a compatibility clause refers to a direct replacement of the previous provision with a new provision. Furthermore, although notification by states is mandatory for this provision to become applicable and there is no 'replacement' rule in the notification provision attached to this provision, the language of the compatibility clause should still take precedence.
59. Referring primarily to the ordinary meaning in good faith with regard to the context and object and purpose of the provision. Furthermore, the authors believe that the Explanatory Statement would have great interpretive relevance as an agreement or instrument executed along with the treaty, providing 'context' as defined in Art. 31(1)(b) of the Vienna Convention.

treaty provision. However, a revision of the principal provision that is to be added to a tax treaty to refer to itself and its own paragraphs, might have been better for legal certainty.

Third, by this interpretation, problems in positioning may also arise where provisions are to be added 'in the absence of' existing provisions, as no clarity has been provided as to where these provisions would be added in the tax treaty.

For example the provision on 'corresponding adjustments' in Article 17 of the MLI could be added in the absence of such provisions in a tax treaty – but states may disagree as to whether this provision should be a continuation to Article 9(1) of the tax treaty; a new paragraph; and some countries could even assert that this could be an explanation clarifying the scope of Article 9(1). Furthermore, the location of a provision in a new article, paragraph or a sub-paragraph may mean different things for interpretation. For example the addition of the 'savings clause' as a new provision in a tax treaty would mean something completely different to adding a 'savings clause' within an existing anti-avoidance provision in the tax treaty.[60]

Where such language is used, considering possible interpretation difficulties in the future where various States may interpret the scope of the MLI differently, it would have been more ideal to specify whether the newly added provision would be a new paragraph or add to an existing sub-paragraph in the tax treaty so as to prevent these issues in interpretation. However, the authors believe that this should not be a concern if there is a broad acceptance as regards the scope of the MLI, i.e., that it only stands to modify the application of a tax treaty and not to modify the language of the tax treaty itself.

4.2.3 *Issues in Articles with Options*

In general, where articles allow the contracting jurisdiction the discretion to choose between various provisions in relation to one subject matter, the corresponding compatibility clauses need to be tightly worded in order to ensure that it applies only in cases where the relevant option has been selected by the jurisdiction.

For example Article 5(3), (4) and (7) of the MLI are worded in such a way that they seem applicable irrespective of the choice made under Article 5(1). Although Article 5(1) allows the jurisdiction a choice between these compatibility clauses, as well, and the exercise of the options is dictated by the notification provision in Article 5(10), as the compatibility clauses are separate provisions contained in the tax treaty, from a legal standpoint, such option may not render the other options inactive

60. In such cases, one would again have to use interpretation techniques under Art. 31 of the Vienna Convention. Even though the wording of the MLI and the Explanatory Statement along with the background of each revision in the BEPS reports may provide enough context to point one towards the consequences intended by the OECD, a language revision would definitely have been preferable in the interest of legal certainty, to ensure that different states do not interpret these provisions differently.

automatically unless there is forceful wording to that extent in Article 5(1) or in each of these compatibility clauses (making them subject to the choice of the respective substantive provision).

This confusion is even more apparent in Article 7 of the MLI dealing with the methods to combat treaty abuse as laid out in the BEPS Action 6 final report. While Article 7(1)–(5) deal with the principal purpose test and provide for their compatibility – allowing their application in place of, or in absence of existing principal purpose test clauses, Article 7(6) allows for the option of a simplified limitation-on-benefits clause in addition to this. Article 7(14) is the prescribed compatibility clause for the simplified limitation-on-benefits clause that makes it applicable in place of, or in absence of other limitation-on-benefits clauses. However, without a qualifier in Article 7(6) that Article 7(14) is part of the option of the jurisdiction, there could be a legal interpretation that all existing limitation-on-benefits provisions are to be replaced by the provision in Article 7(14).

Although the notification provisions[61] read with the Explanatory Statement[62] would provide a definite solution here and resolve this uncertainty in favour of the intention of the drafters while interpreting the provision under Article 31 of the Vienna Convention, it would have definitely been easier and more in line with clarity in drafting for a specific reference to be added to Article 7(14) that it is applicable subject to choice under Article 7(6). This drafting style has already been used in Article 26, i.e., the compatibility clause for Part VI (the arbitration provisions).[63]

4.2.4 *Conflict in Conflict Clauses*

Research in the field of treaty conflicts also looks at the interaction of conflict clauses with each other. As tax treaties are customized to a large extent, it may be impossible to rule out tax treaties containing language retaining supremacy in dealing with a subject. In case of a 'conflict in conflict clauses', general rules of interpretation may need to be referred to again.[64]

In order to avoid this, it might have been better to specify that the provision of the MLI would supersede the tax treaty provision in terms of compatibility or conflict clauses in the tax treaty that exclude future agreements on a subject matter. However, it could be argued that the notification mismatch related provisions in the MLI provisions that contain the compatibility clause 'in place of or in the absence of' which provide that the MLI provision would supersede the tax treaty provisions in case of incompatibility, may be considered to provide clarity in such situations.

61. Each party that is to use the simplified limitation-on-benefits provisions is to notify the depository of such choice and disclose agreements containing similar provisions, as well.
62. The Explanatory Statement on the compatibility clause, however, provides that it is intended to apply in place of all existing limitation-on-benefits clauses.
63. The compatibility clause is subject to Art. 18, which provides for the choice to accept the arbitration option.
64. Merkouris, *supra* n. 17, at 191, refers to the conflict in conflict clauses in Art. 311 of the UN Convention on the Law of Sea and Art. 22 of the Convention on Biodiversity; *Vienna Convention on the Law of Treaties: A Commentary*, at 513 (Dörr & Schmalenbach eds., Springer 2012).