Specialeafhandling:
Interpretation of the BEPS Multilateral Instrument

**Fagområde:** International Taxation

**Problemformulering:**
How will the Multilateral Instrument be interpreted, which sources for this are legally relevant and how will the underlying bilateral double taxation conventions have influence hereon. Will these ensure that the MLI will be interpreted uniformly and will it have a positive effect on treaty interpretation in general?

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**Karakter:**
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Abstract

OECDs Base Erosion and Profit Shifting (BEPS) projekt blev afsluttet med en multilateral traktat (MLI), som har til formål at implementere nye bestemmelser i medlemmernes dobbeltbeskatnings-overenskomster (DBO) hurtigt, ensartet og problemfrit. MLIen er en hidtil uset løsning i international skat, hvilket betyder at MLIen bringer nye udfordringer, som skal løses.

Specialet undersøger hvordan MLIen skal fortolkes, og hvilke kilder der er relevante i processen. Der tages udgangspunkt i en gennemgang af Wienerkonventionen om Traktatrettens fortolkningsregler. På baggrund heraf analyseres regler og kilderne for fortolkningen af DBOer generelt. Særligt undersøges retskildeværdien af OECD modeloverenskomstens (OECD MO) kommentarer, og hvordan den særlige henvisningsregel i art. 3 stk. 2 OECD MO, som tillader brug af national ret til at udfylde begreber i en DBO, skal anvendes. Begge disse emner er kontroversielle i litteraturen og der er ikke enighed om deres svar.

Gennem anvendelse af de forudgående analyser, analyseres MLIen for at afklare hvilke kilder der kan anvendes i fortolkningen af denne, og hvordan MLIens henvisningsregel i art. 2 stk. 2 skal anvendes. MLIen er en selvstændig traktat og dette besværliggør sammenligningen med OECD MO, men da man ikke har taget tydeligt stilling til, hvilke kilder der er retligt relevante, kan der skues til de metoder man har brugt for at gøre OECD MO kommentarerne relevante. Henvisningsreglen giver mulighed for, at begreber i MLIen udfyldes ved at referere til definitioner i den underliggende DBO. Disse begreber har DBO parterne accepteret, og risikoen ved at bruge henvisningsreglen er derfor ikke nær så stor som ved art. 3(2) OECD MO. Der ses tillige på MLIens sproglige aspekter, som føjer franske og engelske dele ind i mange DBOer, og uautoriserede officielle oversættelser, som forventes anvendt til fortolkning, men ingen retskildeværdi har. ”Parternes konference”, hvorigennem parterne kan enes om fortolkning, er ikke i MLIen givet stor betydning, og det forventes derfor at der i større grad opnås bilateral enighed.

Afslutningsvist diskuteres MLIens fortolkningsreglement for at afklare, om der er grund til at frygte, at MLIen vil blive fortolket uensartet af parterne og problematikken anskues fra et bredere perspektiv for at give et bud på, om MLIen vil have en effekt på længere sigt. Det konkluderes her, at uklarheden omkring kilderne til fortolkning vil medføre at MLIen ikke kan forventes konsekvent at blive fortolket ensartet. For MLIen vil dette ikke have en stor effekt, mens det for international skatteret generelt betyder at MLIen ikke vil have en vigtig indflydelse for fortolkning, men kan vise sig vigtig for overgangen til et mere multilateralt system.
1 Introduction

In the aftermath of the 2008 financial crisis, tax avoidance became an increasingly important topic as governments of the world started looking for sources of income to fuel the economies that were slowing down. According to the Organisation for Economic Co-operation and Development (hereafter: OECD) the annual loss of revenue due to the shifting of profits and base erosion accounts to between USD 100 and 240 billion a year.¹ For this reason, governments have demanded that multinational companies should pay tax where profits are made, instead of moving their profits to jurisdictions where these will be left almost untaxed. To further this aim, the Base Erosion and Profit Shifting (hereafter: BEPS) project was initiated by the G20 countries in 2012. The G20 tasked the OECD with designing a BEPS plan, which was endorsed in 2013, and finalized in 2015.

Many of the setups used by multinational entities to avoid taxation employ the double taxation conventions (hereafter: DTC) that countries have entered into, to ensure that companies can conduct business globally without the disadvantage of double taxation. The use of these with the aim of achieving (double) non-taxation is however against the intentions of the states. To hinder these practices, the BEPS project concluded that changes were needed in the global DTC network.

BEPS action 15 had the object of analysing whether a multilateral treaty would be feasible for this purpose. This would save countries from bilaterally updating all their DTCs. It was concluded that such a treaty was a feasible solution, and an ad hoc group was established, with both OECD and non-OECD members, to draft the treaty. The treaty, popularly called the Multilateral Instrument (hereafter: MLI), was adopted in 2016, a signing ceremony in 2017 ensured the first signatories and, due to the required amount of ratifications being reached, it entered into force on July 1, 2018, and will enter into effect on January 1, 2019. Many of the signatories have however not yet ratified the MLI.

The MLI introduces a yet untried method to update DTCs so that they reflect modern challenges in taxation and will add a multilateral aspect in a so far almost exclusively bilateral system. The MLI builds on the current system and has copied parts of this. The process of DTC interpretation is faced with many uncertainties, and by building on top of this, the MLI may risk creating uncertainty and repeating challenges that could have been solved.

This thesis will attempt to give an answer to the issues about interpretation of the MLI, by analysing how and with what the MLI will be interpreted. As the MLI is a product of its history, the thesis will analyse the current interpretation regimes to apply the relevant parts of this to the MLI.

As of December 2018, 85 jurisdictions have signed the MLI, while another 6 have expressed their intention to do. The MLI will thus have a massive impact on international taxation. Understanding how to interpret the new instrument will therefore be an important aid to taxpayers, who will soon have to work with the new convention.

1.1 Research question

How will the Multilateral Instrument be interpreted, which sources are legally relevant for this, and how will the underlying bilateral double taxation conventions have influence hereon. Will these ensure that the MLI will be interpreted uniformly, and will it have a positive effect on treaty interpretation in general?

The research question will be answered through an explanation of the general rules of treaty interpretation based on the Vienna Convention on the law of treaties, an analysis of both the sources available for interpretation of DTCs and the interpretation rule in art. 3(2) of the OECD Model Convention. Applying this, the thesis will analyse how the OECD Multilateral Instrument will be interpreted with focus on the sources available for interpretation and the interpretation rule in art. 2(2). Finally, the thesis will discuss if the MLI itself will be interpreted uniformly and if this influences the interpretation and uniformity of DTCs in general.

1.2 Delamination

The focus of this thesis is the interpretation of the MLI; therefore, the substantive provisions of the MLI will not be covered. The same applies for the substantive rules on international and domestic taxation in general. Case law regarding these will be applied to illustrate the interpretation, but only the interpretational rules and their use will be subject of analysis in these cases.

The MLI is the object of BEPS action 15. The other BEPS actions do not relate to the MLI, except that some of these can be implemented through it. The thesis will thus be limited to BEPS action 15. The research is further limited to DTCs which are mainly based on the OECD Model Convention. (Hereafter: OECD MC), despite there being overlaps with other model conventions.

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2 OECD, Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting as of 4 December 2018 (OECD Publishing 2018)
The thesis does not focus on any specific country, as it will instead answer the research question from an international perspective. Due to many differing views on international taxation, views from differing countries are used to exemplify the issues.

To the extent that judgements from national courts are applied, these are primarily used to show the use of an interpretive rule or justification. A comprehensive case law study has not been undertaken.

1.3 Method
To answer the research question, the legal dogmatic method will be applied. The objective of this is to describe, analyse and to systemise the law as it is (de lege lata).³

To answer the research question, the thesis will analyse and interpret the sources mentioned in art. 38 of the statute of the International Court of Justice. This includes international conventions, customary law, general principles of law and subsidiary judicial decisions and literature from the various nations, to the extent that these are relevant for the question at hand.

The object of this thesis is to analyse the interpretation of an international treaty. The rules for this are primarily found in the Vienna Convention of the Law of Treaties (hereafter: VCLT) which is widely considered to be customary law.⁴ Art. 4 VCLT states that it does not apply retroactively, but as it is customary law, this does not cause issues.

In addition to the above, sources from the OECD, such as the OECD Model Commentary and sources from legislative procedures of various nations will be applied.

Despite sources from different nations being applied, the thesis does not pursue a comparative approach.

The term “double taxation convention” is often used interchangeably with the terms “double taxation agreement”, “double taxation treaty” and “tax treaty”. In the following “double taxation convention” (short: DTC) will be used, following the OECD.⁵

1.4 Structure
To answer the research question, it is necessary to determine and analyse the rules on the interpretation of double taxation conventions. Therefore, chapter two will introduce international taxation in general and the OECD model convention. In chapter three the interpretational rules of the

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³ Peter Blume, Retssystemet Og Juridisk Metode (1st edn, Jurist- og Økonomiforbundets forlag 2011). p. 66
⁴ Alexander Orakhelashvili, The Interpretation of Act and Rules in Public International Law (Oxford University Press 2008). P. 313
⁵ Shelton gives an excellent explanation about the uses of the different terms based on regional and subject differences, Ned Shelton, Interpretation and Application of Tax Treaties (1st edn, LexisNexis 2004). P.7f
Vienna Convention on the Law of Treaties will be set out. These are the starting point of any interpretation of a treaty and the understanding of these is essential when interpreting treaties. In chapter four the lessons from chapter three are applied to the sources that are available when interpreting treaties. An important part hereof is the discussion of the legal relevance of the commentaries to the OECD model convention. In chapter five a short explanation of the mutual agreement procedure (hereafter: MAP) is given.

Art. 3(2) of the OECD MC is described and analysed in chapter six. This provision is the cause of controversy due to its allowance of domestic meanings of terms in an international treaty.

Chapter seven delivers an introduction to the MLI. It will include a short explanation of how the MLI will function, as this is relevant for the interpretation of it. It will also explain other methods of achieving BEPS compliance either with or without the MLI. As the MLI is made to implement the BEPS measures, these alternative methods may have relevance for interpretation.

Chapter eight deals with the interpretation of the MLI and the sources of this. The analysis will rely on the results from chapters three and five. The chapter also deals with art. 2(2) MLI, where the results from chapter six will provide guidance as to how this article may be used in practice.

Chapter nine will provide the discussion of whether it can be expected that the MLI will be interpreted uniformly, and whether this may influence the interpretation of DTCs in general.

Chapter ten is the conclusion.

2 International Taxation

States have the right to levy taxes on their subjects, if there is at least a personal or objective nexus between the state and the taxpayer, which can be a person or a legal person. In such a case a person or a company is subject to full or unlimited tax liability. This connection can be based on a range of factors. One can be citizenship, whereas another can be residence. Due to this a person can become subject to full tax liability in more than one state, thus the person’s full income may be taxed by each of these states.

More commonly, a person is subject to full tax liability in state one, e.g. where residence is, while being limited tax liable in state two, e.g. where the person receives an income. This income would then be taxed twice.

If no action is undertaken, the double taxation of income will have a detrimental effect on trade between countries. To alleviate this burden, states have entered into DTCs. DTCs are international law conventions between countries in which the countries agree to give up some of their taxing rights. A DTC does not add rights, so that income that was not already taxable based on domestic law, cannot become taxable based on the DTC.

2.1 The OECD Model Convention
In principle, every DTC is negotiated individually. The use of model conventions is however very frequent. This makes negotiation easier as parties only need to agree on points, on which they deviate from the applied model.

The first OECD model convention was published in 1963 and the member countries were called upon to follow this model when negotiating double taxation conventions. Revisions were published in 1977 and 1992, after which the OECD started a loose-leaf system with ongoing revisions. The most recent version is from 2017 and includes the BEPS measures.

The United Nations also develops a model convention, which is focused on the needs of developing countries. Some countries produce their own model convention, and use this as a starting point when negotiating DTCs. Both the UN model and the unilateral models of some countries are based on the OECD model.

It is important to keep in mind, that the model convention is a model. The ratified treaties may thus look different, but many DTCs keep to the structure of the model convention.

2.1.1 The obligation to follow the OECD MC
The has recommended that members follow the OECD MC when finalising, revising and interpreting treaties. This means that the MC is taken into consideration by the member states. The OECD could have used a stronger tool to ensure that members follow the MC, but used a recommendation

Countries also enact unilateral measures to limit double taxation, these will not be dealt with here.

In some cases, more than two countries, as with the Nordic Tax Convention. The implications hereof will not be dealt with here.

Henrik Dam and others, Grundlæggende Skatteret 2016 (9th edn, Karnov Group 2016). P. 151

Organization for European Economic Cooperation” (OEEC) until 1961


OECD, Recommendation of the Council concerning the Model Tax Convention on Income and on Capital, C(97)195/FINAL, Adopted on: 23/10/1997. Earlier recommendations have been made. This is the one currently in force.

due to the perceived appropriateness of the flexibility herein.\textsuperscript{14} Despite recommending the use, and the fact that many countries do so, they are not legally bound to do so. For example, the Danish government states that the OECD MC is not binding and that countries are free to deviate from it.\textsuperscript{15} This means that OECD members are under a “soft legal obligation” to follow the OECD MC. Countries should therefore not deviate from the OECD MC, unless they have a good reason hereto.

It is possible to make reservations to the OECD MC, and to make observations to the commentary. Some non-OECD members can also do this. As the OECD MC is a model, reservations to it do not have the effect that reservations normally have in treaties. They are mostly considered only of informative value, but when considering that OECD members are required to follow the OECD MC, a reservation to a provision in it, removes this obligation.

\subsection*{2.2 Treaty and Tax Treaty interpretation}

The interpretational rules that apply to international treaties also govern DTCs. There has been a discussion as to the merits of using the international law interpretational principles on DTCs, and some academics have argued, that the general methods used in international law cannot be used at all on DTCs so that a special set of interpretational rules must be used when interpreting these. This debate sprung from the special status that DTCs have, due to their close connection with domestic taxation. This discussion seems to have been concluded now, and it is widely accepted that the general methods also apply to DTCs.\textsuperscript{16}

A DTC is to be interpreted based on the rules of the VCLT, and the provisions of the DTC. The DTC must generally be interpreted within its own context.\textsuperscript{17}

Despite terms seeming clear, interpretation is always needed. This is because one cannot know if the meaning is clear without applying some process of interpretation to it.\textsuperscript{18} In other words, the interpretation may show that the assumed clear meaning, is not the only or correct one.

\begin{flushright}
\textsuperscript{15} Lovforslag nr. 33, 2018-19 om indgåelse af protokol om ændring af dobbeltbeskatningsoverenskomsten mellem Danmark og Nederlandene. P.11
\textsuperscript{17} Lang, \textit{Introduction to the Law of Double Taxation Conventions} (n 7). P. 44
\textsuperscript{18} Oliver Dörr, ‘Section 3 Interpretation of Treaties’ in Kirsten Schmalenbach and Oliver Dörr (eds), \textit{Vienna Convention on the Law of Treaties, a commentary} (Springer 2012). P. 529
\end{flushright}
2.2.1 The Object and Purpose of a DTC
An important part when interpreting a treaty is finding the objective and purpose of the treaty. This will often be found in the preamble of the treaty or the title. The overall goal of a DTC is the avoidance of double taxation. However, the treaty may not to avoid all double taxation, but only that which is in its scope.

Some DTCs also have the object of deterring tax evasion and may have this stated in their name or preamble.

The objective of the relevant provision itself also needs to be found, as this provision may not primarily have the object of avoiding double taxation.

3 The interpretational rules of the Vienna Convention on the Law of Treaties
The Vienna Convention on the Law of Treaties has since its entry into force been the primary source of rules for the interpretation of international treaties. The convention is mainly a codification of customary law, and many of the articles that were not, have since become customary law. This means that the rules apply to countries who have not ratified the convention.

In the following, the interpretational rules of the VCLT will be examined with focus on the parts that are relevant for DTCs, while less relevant parts will not be dealt with in depth. When discussing the interpretative rules regarding treaties in more than one language, a general examination of this will be given, as DTCs are often authentic in more than one language.

3.1 Art. 31
Article 31 VCLT is the general rule of interpretation. Article 31(1) simply puts that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

This shows that the starting point of interpretation is the ordinary meaning of the terms used. It is important to see, that the parts of art. 31(1) are connected because the context and the object and purpose point to the ordinary meaning. This follows from the fact that there cannot be a single

19 Lang, Introduction to the Law of Double Taxation Conventions (n 7). P. 44
ordinary meaning of a word.\textsuperscript{21} This also shows that art. 31 is one rule, despite the three parts, and explains the singular title: “general rule of interpretation”.

The good faith requirement applies during the entire process of interpretation. Herein lies that the ordinary meaning must be tested for its reasonableness.\textsuperscript{22}

The use of the ordinary meaning shows that the treaty shall be interpreted above all with reference to its text.\textsuperscript{23} For a DTC, the ordinary meaning of a term may be different than an ordinary meaning in a treaty with a different topic. The ordinary layman meaning can however not be left out.\textsuperscript{24} Thus a technical meaning can be “an” ordinary meaning. The VCLT gives no clarification for the temporal aspect of meanings.\textsuperscript{25} The International Court of Justice (hereafter: ICJ) has stated, in its advisory opinion on Namibia,\textsuperscript{26} that certain terms are per definition evolutionary, and these are therefore affected by time. The evolution of a word comes from the intention of the parties, which can be found by analysing the terms used, i.e. if the treaty contains terms that are per definition non-static, it means that the parties intended these to evolve.\textsuperscript{27}

Interpretation shall advance the object and purpose of the treaty, but given the positioning of this part of the provision, examination of the object and purpose comes after the ordinary meaning.\textsuperscript{28} In practice, the “object and purpose” are used as one term, despite it being possible to determine different meanings for the two.\textsuperscript{29} The provision states “object and purpose” in the singular form, but treaties often have more than just one objective and purpose, and the treaty itself may have an object and purpose, as may a single provision. The plural form should therefore be assumed, as the interpreter

\begin{footnotesize}
\begin{enumerate}
\item Dörr (n 19). P. 548
\item Dörr (n 19). P. 542 with reference to the jurisprudence of the ICJ
\item Linderfalk (n 25). P. 73
\item Dörr (n 19). P. 545 and Linderfalk (n 25). P. 203
\item Linderfalk (n 25). P. 209f
\end{enumerate}
\end{footnotesize}
otherwise must find the one object and purpose, which does not agree with how many treaties are
drafted, and because the preparatory material of the VCLT supports this.  

Article 31(1) is followed by 31(2) and (3), which clarify the sources that are the context of the treaty.
These all have equal importance.  

Art. 31(2) states:

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

The preamble is often used to state the objective and purpose of the treaty. Some commentators argue that art. 31(2) does not preclude additional material, stating that “shall comprise” only states that these materials at least are included, and that, had the negotiators wanted to restrict the materials, should have added “only”. Such an option seems to have been taken in art. 32, where “including” is used, which is seen as an opening for additional sources. If the negotiators had preferred allowing additional materials, in art. 31(2), they would have applied the same terms.

Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

Art. 31(2)(a) refers to an agreement between all the parties, e.g. the final act of a diplomatic conference. The VCLT has no form requirements. Some authors dispute this and require a written agreement. For practical reasons this has merit. Thus, anything that clearly displays the agreement between the parties as to their intention that it should be binding, fulfils the requirements.

Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Art. 31(2)(b) requires that all parties accept to be bound by the instrument, as being related to the treaty. The provision requires a legally relevant document.
For both art. 31(2)(a) and (b) the acceptance can be either implicit or explicit. Dörr however points out that the burden of proof will be on the party claiming that others have accepted the agreement or instrument.

For both art. 31(2)(a) and (b) there is uncertainty as to when the instrument or agreement must be made. Conclusion of a treaty is when the treaty is established a definite. Linderfalk however suggests an interpretation regarding only (2)(b) where the conclusion of the treaty means the time interval from when negotiations on the treaty started to when the treaty entered into force for its parties. Dörr suggests that either the adopting, signing or ratification are in connection with the conclusion of the treaty. It seems, that a flexible approach is taken but that the agreement or instrument must be made at least during the negotiating phase of the treaty, and latest until ratification. It is less clear when the other parties need to accept the instrument of (2)(b), which however cannot be after ratification, as it would then be a subsequent instrument.

There shall be taken into account, together with the context:

Art. 31(3) supplements the context. The wording shows that the sources mentioned are not context as (2), as they shall be used together with the context. The sources of (3) are not of lesser value then (2), as they are being used “together”.

Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

In subsequent lies that the agreement must be made after the conclusion of the treaty, which is when the treaty enters into force for all the parties, at the latest. The agreement must regard the interpretation of the treaty or the application of its provisions, and not only relate to the treaty. In practice the difference between the applicable agreements in (2)(a) and (3)(a) is small.

Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

37 Linderfalk (n 25). P. 148
38 Dörr (n 19). P. 552
39 Linderfalk (n 25). P. 137
40 Linderfalk (n 25). P. 149
41 Dörr (n 19). P. 551
42 Dörr (n 19). P. 553
43 Dörr (n 19). P. 554. Dörr exemplifies this by referring to the Territorial Dispute (Libya v Chad) ICJ case, where the ICJ did not bother discussing this, as long as it was clear that there was an agreement
Art. 31(3)(b) is closely related to (3)(a), as it regards a practice that establishes the agreement between the parties as to the interpretation of the treaty. The practice needs to come from the application of the treaty by the parties. When this is met, any action that the parties perform can be considered practice under (3)(b). It is not required that all parties act, if the ones that do not, accept the act(s) of the one(s) that do. Lack of protest may not be enough to establish a practice, and it is required that the other parties have knowledge of the acts. Following the rules of proof, the party claiming that a practice has developed must prove this. There seems to be unclarity on whether one act can constitute practice. Linderfalk accepts one act as practice, if it establishes the agreement between the parties. The contrary would lead to a discussion of how many acts would be required, and if one act is accepted by the parties, a second would strengthen the practice, but it would be strange to argue that this would make it a practice – seeing how the treaty parties had already accepted the “practice”. However, it is difficult for one act to be consistent or common, and thus the knowledge requirement is important where a practice is claimed established by a low amount of acts.

Any relevant rules of international law applicable in the relations between the parties. Art. 31 (3)(c) includes “any” rules, which leads to the inclusion customary law, “the general principles of law recognized by civilised nations”, treaties and any binding rule of an accepted source. Interpretation in good faith is intended to ensure that appropriate consideration is given to developments in international law. The rules must be relevant and thus cover the same subject matter as the treaty.

A special meaning shall be given to a term if it is established that the parties so intended. Art.31(4) has the role of clarifying the burden of proof for a special meaning, which lies on the party, invoking the special meaning. The rule thus follows general rules of burden of proof. There is no need for a formal agreement per se; the special meaning just needs to be established between the parties. The meaning must be different from “an” ordinary meaning, and the provision does not enable the parties to agree on one of more possible ordinary meanings. If the special

44 Herdegen (n 28). Para. 18
46 Linderfalk (n 25). P. 166
47 Linderfalk (n 25). P. 178 and Dörr (n 19). P. 561 and Gardiner (n 22). P. 486
48 Dörr (n 19). P. 569
50 Dörr (n 19). P 569
meaning is written in the preamble of the treaty, it becomes the ordinary meaning in the context of the treaty.\textsuperscript{51} The provision does not bar the use of supplementary material\textsuperscript{52} If a meaning of a word is found in a dictionary or in another accepted source of reference such as an encyclopaedia, the meaning is considered ordinary.\textsuperscript{53}

3.2 Art. 32
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:

Art. 32 functions, as a supplementary rule to art. 31. The use of prescriptive wording in art. 31: “shall” compared to the optional “may” in art. 32 clearly sets up the difference between the two provisions.

Art. 32 can be relied upon only to confirm or to determine the meaning of a term. Confirming the meaning is less controversial than determining the meaning, as it does not entail giving the supplementary materials an important role, and thus keeps it clear that art. 31 is the primary rule.

Determining the meaning is only allowed when the interpretation according to art. 31:

(a) Leaves the meaning ambiguous or obscure; or
(b) Leads to a result which is manifestly absurd or unreasonable.

The threshold for (a) is reachable, whereas it for (b) results in very infrequent use.\textsuperscript{54} What exactly makes a meaning ambiguous or obscure leaves some discretion to the interpreter, who however must conclude that the process in art. 31 was finished unsatisfactory and leaves a real doubt as to the correct meaning.\textsuperscript{55}

When using art. 32 to confirm the meaning, this may result in the found meaning not being confirmed, in which case the interpreter must determine the meaning. A situation where the meaning found in art. 32 materials (clearly) spells out a different meaning than the result of the interpretation using the materials in art. 31, so that this result cannot be confirmed, but where the result from art. 31 is neither ambiguous or obscure, nor manifestly absurd or unreasonable, can be imagined. In this case, the

\textsuperscript{51} Dörr (n 19). P 569
\textsuperscript{52} Dörr (n 19). P. 569
\textsuperscript{54} Dörr (n 19). P. 585
\textsuperscript{55} Dörr (n 19). P. 585 Frank Engelen, Interpretation of Tax Treaties under International Law (IBFD 2004). P. 332
VCLT does not decide what is to be done, so the meaning found through from art. 31 must be adhered to, as this is found by applying the materials that most clearly represent the intention of the parties.\textsuperscript{56} There is not a clear definition of what preparatory work covers, but it arguably should be limited to permanent records,\textsuperscript{57} to ensure that the burden of proof can be lifted. In principle, any, whether textual or non-textual, can be used.\textsuperscript{58} For the use of a source as preparatory material some proof is required that the material reflects an agreed upon opinion. Therefore, the material must have been available to the negotiating parties,\textsuperscript{59} and material produced at the later stages of treaty negotiation will often be more useful. For treaties developed by an international organ, such as the International Law Commission, the material is not preparatory material in the sense of art. 32 but other supplementary material, unless introduced into the negotiations by a party.\textsuperscript{60} When the treaty is open to general accession, preparatory material is still of use, even though not all parties were part of the treaty negotiation.\textsuperscript{61} The contrary would result in a situation where material could be applied until a new party ascended to the treaty.

In addition to preparatory material, the “circumstances of conclusion” can be used as a source. This refers to the economic and political circumstances and in general the “state of affairs” at the time of conclusion of the treaty.\textsuperscript{62}

Given the wording of the provision: “including”, other sources than the ones mentioned can be applied. The sources of supplemental interpretation according to the rules of customary law at the time of interpretation are decisive as to what is included.\textsuperscript{63} This means, that whether materials are accepted, shall depend on the recognition of states and international courts hereof at the time of interpretation. Others state however that any material of relevance can be supplementary under art. 32\textsuperscript{64}, and thus material that could fit into one of the provisions of art. 31, but where one or more requirements are lacking, is included. It may also be material produced by international organisations,

\textsuperscript{56} Engelen (n 57). P. 333
\textsuperscript{57} Gardiner (n 22). P. 488
\textsuperscript{58} Linderfalk (n 25).P. 241
\textsuperscript{59} Dörr (n 19). P. 575
\textsuperscript{60} Dörr (n 19). P. 577
\textsuperscript{61} Linderfalk (n 25). p. 244
\textsuperscript{62} Linderfalk (n 25). p 247 and 249 and Dörr (n 19). P. 579
\textsuperscript{63} Linderfalk (n 25).P 239
\textsuperscript{64} Dörr (n 19). 581
which has relevance for the treaty. Those sources which establish the intention of all parties have a greater significance than more unilateral sources, but in principle all sources have equal value.  

To sum up, art. 32 can contain those sources, which do not fit in art. 31 but are relevant for the treaty. These however must have standing in international law and thus not any material can be used.

### 3.3 Art. 33 and language aspects of DTCs

Art. 33 deals with different language versions of treaties. This is particularly relevant for DTCs, which often are authentic in the language of both countries, and at times have more than two authentic versions.

*When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.*

Art. 33(1), sets out the main rule that generally every language version is equal. Treaties can be designated as authoritative in different languages for the countries to be able to use their own language, and these may designate a third language as an authoritative or even prevailing version. This ensures that the parties are equal.  

*A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.*

Art. 33(2) allows for additions to the authoritative language versions of the treaty. *The terms of the treaty are presumed to have the same meaning in each authentic text.*

Art. 33(3) sets out that despite the differing language, the intention throughout is considered the same. This ensures that the interpreter can use one version of the treaty and interpret it using art. 31 and 32. Courts have not always been consistent in this process, but it keeps with the letter of the provision to not consider all versions initially. Wouters and Vidal suggest that domestic judges are free to only consider their own language version, but that the parties to a dispute are free to rebut the presumption that all versions are the same. This could lead to a situation where the citizen is required

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65 Linderfalk (n 25). P. 348  
67 Gardiner (n 22). P. 491  
68 Elias (n 37). p. 85  
to know the law, whereas the judge is not. This could seem unfair. A balanced view must therefore
be taken; where a judge is reasonably required to consider different language versions, if there is
reason to doubt one authoritative version.\textsuperscript{70}

It could be suggested that the negotiation language has a special status. The International Law
Commission rejected the suggestion of creating a rule in the VCLT to this end, due to not wanting to
limit interpretation.\textsuperscript{71} Being authoritative shows that the treaty shall be used in the interpretive
process. It does however not specify how, and the VCLT thus does not prevent putting emphasis on
the original text of the treaty. The ICJ dealt with this in the LaGrand Case.\textsuperscript{72} In para. 100, the court
points out the differences between the English and the French version of the relevant treaty. It states
that "it might be argued" that the French meaning should prevail, as it was the negotiating language,
but no conclusion was reached. The court instead solved the issue with reference to VCLT art. 33(4).\textsuperscript{73}

In a case from the Swedish Supreme Administrative court,\textsuperscript{74} the court argued that the English text of
the treaty had a special meaning, as the negotiations had been in English.

For countries using the OECD MC as a starting point, this could mean that emphasis on the English
or French versions, wherein it is official, is justified, even when these versions are not authoritative.\textsuperscript{75}

Lang suggests that preference could be given to either the French or English version depending on
which language was used by the working group of the OECD that drafted the article. For the newer
articles, this will often be English.\textsuperscript{76}

Art. 33 does not refer to unauthoritative translations Practically such translations may still be used,
but care must be shown, as the interpreter should use the authoritative version when any unclarity is
seen. The problem may be that one cannot know if such unclarity is there without comparing with the
authentic version. When a country translates the treaty during the treaty negotiations this document
may become preparatory material under art. 32, and differences herein compared to the authoritative

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\textsuperscript{70} Lang, ‘The Interpretation of Tax Treaties and Authentic Languages’ (n 68). P. 17
\textsuperscript{71} Dinah Shelton, ‘Reconcilable Differences - The Interpretation of Multilingual Treaties’ [1997] Hastings International
    and Comparative Law Review. P. 634
\textsuperscript{72} LaGrand (Germany v United States of America), Judgrnent, I C J Reports 2001, p 466. Similar argument was used by
    the PCIJ in the Mavrommatis Concessions Case: Mavrommatis Concessions (Great Britain v Greece) [1925] PCIJ VI. 2.,
    5. Para 19.
\textsuperscript{73} The court’s subsequent discussion on the preparatory work focuses mainly on the French version, because the
treaty was negotiated in French, this is thus not a sign that it follows the suggested argument.
\textsuperscript{74} Regeringsrätten, now: Högsta förvaltningsdomstolen, RÅ 1987 ref 162.
\textsuperscript{75} Lang, ‘The Interpretation of Tax Treaties and Authentic Languages’ (n 68). P. 23
\textsuperscript{76} Lang, ‘The Interpretation of Tax Treaties and Authentic Languages’ (n 68). P. 23
version, may show the understanding of this party. The further away the translator is from the
negotiators, the more likely is it, that errors will be made.
In general, a treaty should be authoritative in the least amount of languages as possible, as this lowers
the risk of errors.\textsuperscript{77} Despite the principle that the treaty has one meaning, this may not be the practical
reality. Other language versions may however also bring clarity, as more sources then are available
in the process of interpretation.

\textit{Except where a particular text prevails in accordance with paragraph 1, when a comparison of the
authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not
remove, the meaning which best reconciles the texts, having regard to the object and purpose of the
treaty, shall be adopted.}

Art. 33(4) clarifies what will happen when, in contrast to what (3) establishes, the different language
versions show a differing meaning, which art. 31 or 32 cannot remedy.
In this case, the interpreter must compare the meanings that result from the different language
versions, as there will be one meaning from each text. The text would suggest that reconciling means
that more meanings are available than the two different ones, and that a meaning that covers both
should be found. This would however let the interpreter chose an entirely new meaning, which goes
against the process of art. 31 and 32. Therefore the meaning of the two that best fits with the object
and purpose of the treaty shall be adopted.\textsuperscript{78}

\section{The sources available for the interpretation of DTCs}
When interpreting a DTC, the VCLT determines which sources are available. In addition, a DTC can
have provisions that allow for additional materials.
In the following, the legal value of interpretational sources will be discussed. Given that many sources
can have a legal value, only the most relevant will be discussed. In particular, the commentary to the
OECD MC will be analysed.
The matter of the legal status of interpretational sources is important from a theoretical angle as well
as in practice. As tax law affects individual taxpayers, it is important for them to know which sources
of law will be relied on during the adjudication of a tax case. It is also important for so that they can
base their advice on the relevant sources.

\footnotesize{\textsuperscript{77} Shelton (n 73). p. 636
\textsuperscript{78} Linderfalk (n 25). P. 365}
The conclusions of the following chapter are relevant to the interpretation of the MLI, because they will show how interpretive sources are given relevance to DTCs in general, the methods of which can be applied to the MLI.

4.1 The OECD model convention
For treaties with provisions that are taken directly from the OECD MC, or translated from it, the OECD MC itself can be an interpretive source. This will mostly only have practical value for translated provisions. As mentioned in 3.3, the English and French versions of the OECD MC could be referred to, even if the DTC is not designated as authoritative in these languages.\textsuperscript{79} For OECD members, it must be considered a rebuttable presumption that a DTC article is a translation only, as they are assumed to follow the OECD MC.

In a case from the German Federal Fiscal Court,\textsuperscript{80} the court did not follow the definition used in the German DTC, but used the meaning of the term that corresponded with how it was generally used in DTCs, i.e. the term as it was used in the English OECD MC.

The principle of good faith requires that the original version is taken into consideration, as by using a translation of an OECD MC article, it can be assumed that the parties intended for the article to have the same meaning as the article in the original version.\textsuperscript{81} In support of this, reference is made to the arguments which will be explained in the following chapter, regarding the commentaries of the OECD MC, as the arguments of accepting these have overlaps.

4.2 The Commentaries to the OECD MC and their legal value
The OECD MC is published with a commentary, which is intended to illustrate and interpret the provisions.\textsuperscript{82} The commentary is produced by the Committee of Financial Affairs of the OECD (hereafter CFA), which is consists of OECD members. It is important to keep in mind that the CFA is thus comprised of experts from OECD member countries, who may have their own countries’ interests at heart.\textsuperscript{83} The commentary is generally relied upon by member states and is frequently cited in court decisions.\textsuperscript{84}

Not all parts of the commentary are relevant for the interpretation of DTCs, as e.g. some parts suggest additional provisions, or suggest that the parties agree on the interpretation themselves.

\textsuperscript{79} Lang, ‘The Interpretation of Tax Treaties and Authentic Languages’ (n 68). P. 25
\textsuperscript{80} BFH of 29 May 1996, I R 167/94, IstR 1996, 336
\textsuperscript{81} Lang, ‘The Interpretation of Tax Treaties and Authentic Languages’ (n 68). P. 28
\textsuperscript{82} OECD, \textit{Model Tax Convention on Income and on Capital: Condensed Version 2017} (n 12). P. 18 para 28
\textsuperscript{83} Kees van Raad, ‘1992 Additions to Articles 3(2) (Interpretation) and 24 (Non-Discrimination) of the 1992 OECD Model and Commentary’ (1992) 1992 Intertax. P. 2
\textsuperscript{84} OECD, \textit{Model Tax Convention on Income and on Capital: Condensed Version 2017} (n 12). P. 19 para 29.3
The legal status of the commentaries is an important unresolved issue in the interpretation of international tax law. The question is whether OECD members are legally bound to take heed of the OECD commentary when drafting and interpreting DTCs. The OECD recommendation, described in 2.1.1, recommends that states conform to the commentary when drafting and negotiating DTCs.\textsuperscript{85} The introduction to the commentary itself states that it is not legally binding.\textsuperscript{86}

It is generally agreed that the commentary at least qualifies as supplementary material in accordance with art. 32 VCLT, either as circumstances of the conclusion of the treaty or as other supplementary material,\textsuperscript{87} but only if the DTC is based on the OECD MC,\textsuperscript{88} and if the commentaries can be said to express the common understanding of the parties.\textsuperscript{89} Due to the optionality of art. 32 VCLT this conclusion is uncontroversial. However, the reason why this conclusion has not stilled the debate is that commentators believe they should be given a more important role, which can be supported at times by case law.

Below, the theory for giving the commentaries a higher legal value is discussed.

### 4.2.1 The commentary as implemented using a provision in the DTC

Countries can include a provision in their DTCs stating the legal relevance of the commentaries. It could also be done by the OECD in the MC. Were such a practice to take hold, it could be argued that leaving the provision out, states their lacking value.\textsuperscript{90} However as only some countries, in some of their DTCs, have done so, e.g. Austria’s DTCs with Denmark,\textsuperscript{91} Chile,\textsuperscript{92} The Netherlands’ DTCs with

\begin{flushright}
\textsuperscript{86} OECD, Model Tax Convention on Income and on Capital: Condensed Version 2017 (n 12). P. 19 para 29.1
\textsuperscript{89} Engelen (n 57). P. 460
\textsuperscript{90} Hugh Thirlway, ‘The Role of the International Law Concepts of Acquiescence and Estoppel’ in Sjoerd Douma and Frank Engelen (eds), The legal status of the OECD commentaries (IBFD 2008). P. 39
\textsuperscript{91} Bekendtgørelse nr. 3 af 30. april 2017 af overenskomst af 25. maj 2007 mellem Kongeriget Danmark og Republikken Østrig vedrørende skatter af indkomst og formue. para 1 in the protocol.
\textsuperscript{92} Abkommen zwischen der Republik Österreich und der Republik Chile zur Vermeidung der Doppelbesteuerung und der Verhinderung der Steuerumgehung auf dem Gebiete der Steuern vom Einkommen und vom Vermögen samt Protokoll - RIS - BGBlA 2015 III 140. Para 11 in the protocol
\end{flushright}
Bahrain\(^{93}\) and Barbados,\(^ {94}\) Denmark’s DTC with Armenia,\(^ {95}\) and Belgium’s DTC with Rwanda,\(^ {96}\) this only accounts for a small amount of DTCs globally, and is thus not enough to declare the practice widespread.

The provisions are mostly written as a rebuttable presumption, that the commentary expresses the meaning of the provisions. Some use “shall”, which shows a more binding character. As a conclusion, the provision states the status of the commentaries: “\textit{constitutes a means of interpretation in the sense of the Vienna Convention (...)}”. It is not clear, whether the parties intend that art. 31 or art. 32 VCLT is applicable. A provision to make the commentary supplementary is however hardly needed, and thus art. 31 is deemed the relevant article. The provision states that it only applies to provisions substantially similar to the OECD MC. It further clarifies that the commentaries do not overrule an interpretation given in the DTC, the protocol or agreed upon through a MAP. The provisions generally state “\textit{as they may be revised from time to time}” which shows that the parties accept interpretations in updated versions of the commentary.

In the parliamentary comments to the bill enacting the Denmark-Austria DTC the provision is only just mentioned,\(^ {97}\) despite it not being standard practice in Denmark. In the comments to the bill enacting the DTC between Denmark and Armenia, it is stated that the provision simply clarifies the status of the commentaries.\(^ {98}\) This suggests that Denmark already considers the commentary to have an interpretive role which is only formalised by the provision. The notes to the bill enacting the DTC between Denmark and Japan contain the same statement regarding the interpretive value of the commentaries but lacks the actual provision in the DTC. No explanation is given for this difference. The DTC between Denmark and Austria has been applied in a binding answer from the Danish Tax Assessment Council.\(^ {99}\) The answer does not consider the provision, and it refers to the same sources

\(^{93}\) Verdrag tussen de Regering van het Koninkrijk der Nederlanden en de Regering van het Koninkrijk Bahrein tot het vermijden van dubbele belasting en het voorkomen van het ontgaan van belasting met betrekking tot belastingen naar het inkomen; (met Protocol) ’s-Gravenhage, 16 april 2008.

\(^{94}\) Verdrag tussen het Koninkrijk der Nederlanden en Barbados tot het vermijden van dubbele belasting en het voorkomen van het ontgaan van belasting met betrekking tot belastingen naar het inkomen; (met Protocol) Bridgetown, 28 november 2006.

\(^{95}\) Lov nr 1291 af 21. november 2018 om indgåelse af dobbeltbeskatningsoverenskomst og tilhørende protokol mellem Danmark og Armenien. para 1 in the protocol.

\(^{96}\) Convention between the Kingdom of Belgium and the Republic of Rwanda for the Avoidance of Double Taxation and the Prevention of Tax Fraud and Fiscal Evasion with Respect to Taxes on Income and on Capital, Kigali, 16 April 2007.

\(^{97}\) Lovforslag nr. 12 2007-08 om indgåelse af dobbeltbeskatningsoverenskomst mellem Danmark og Østrig.

\(^{98}\) Lovforslag nr. 31, 2018-19 om indgåelse af dobbeltbeskatningsoverenskomst og tilhørende protokol mellem Danmark og Armenien. P. 31

\(^{99}\) TJS 2018, 439, SKM 2018.216SR
as other binding answers. It furthermore explains the legal value of the commentaries by using the exact same phrase as is used in the general explanation regarding the commentaries in the “legal guidance” published by the Danish Tax Administration.\textsuperscript{100} For Austria it is part of its DTC policy to implement the interpretational provision in its DTCs. As with Denmark, the commentary was already considered an interpretive source.\textsuperscript{101} Lang suggests that the provision may have the effect of interpreters erroneously assuming that DTCs without the protocol cannot be aided by the commentary. A similar assumption was made in Austria with other clarifications in DTCs, where the supreme court made an “\textit{a contrario}” argument with a DTC that did not contain the clarification.\textsuperscript{102} Langs argument demonstrates the risk that not including the provision could lead to making the error of assuming that the commentary is not applicable. The argument should however only be applied to DTCs enacted after a practice of enacting the provision has developed.

In conclusion, the lack of, or existence of a provision stating the interpretive value of the commentaries seems not to be conclusive evidence of the legal value of the OECD MC commentaries. It seems to be used by countries to clarify an already accepted position, but nothing seems conclusive when these countries do not enact these provisions.

### 4.2.2 Acquiescence and estoppel as acceptance of the Commentary

As there is no official acceptance of the commentaries, it is sought to make these binding through implying acceptance.

The principles of acquiescence and estoppel stem from the principle of good faith.\textsuperscript{103} Acquiescence means the acceptance of circumstances by a state(1) rather than objecting, despite having reason to do so - some use the term “being required”\textsuperscript{104} - and still refraining from objecting even when it appears to the other state(2) as though the first state(1) accepts these circumstances. This is then interpreted as an acceptance of the circumstances, leading to the inability to object to the circumstances at a later point.\textsuperscript{105}

Estoppel is based on the same principles as acquiescence. The ICJ case Temple of Preah Vihear\textsuperscript{106} is often cited when discussing estoppel. In here, the court set out the requirements for estoppel. Estoppel

\textsuperscript{100} SKAT, Den juridiske vejledning 2018-2, C.F.8.2.1 - Overordnet om modeloverenskomsten.


\textsuperscript{102} Lang, ‘Überlegungen Zur Österreichischen DBA-Politik’ (n 103). P. 19f

\textsuperscript{103} Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, ICJ Reports 1984, p 246. Para 130

\textsuperscript{104} Linderfalk and Hilling (n 89). P. 43

\textsuperscript{105} Thirlway (n 92). P. 29.

\textsuperscript{106} Case concerning the Temple of Preah Vihear (Cambodia v Thailand), Merits, Judgment of 15 June 1962: ICJ Reports 1962, p 6. Para 143f
prevents a state(1) from contesting a situation, that is contrary to a clear and unequivocal representation, explicit or implicit, made previously by it(1) to another state(2), on which the other state(2) was entitled to and did rely, and as a result the other state(2) is prejudiced, or the first state(1) secured some benefit.

Not just any representation can bind a state and silence can difficultly be interpreted as acquiescence or estoppel, as there must be silence when it is clear that a reaction was called for.

Arguments for acceptance of the commentary through acquiescence or estoppel can be based on the recommendations of the OECD regarding the MC and the commentaries. The 1997 recommendation from the OECD to use the OECD MC refers to the OECD MC and the commentaries as a bundle: “(…) conform to the Model Tax Convention, as interpreted by the Commentaries thereon”. This would entail that if a state uses the MC, then the commentary must be applied as well. Such an interpretation suits well to the object of the 1997 recommendation, which among others is “the need to encourage the common application and interpretation of the provisions of tax conventions that are based on those of the Model Tax Convention on Income and on Capital”.

The argument is thus, that if an OECD member has voted in favour of the recommendations, has not made any observations on the relevant part of the commentary, and has now negotiated a DTC based on the OECD MC, some reaction would be called for, if the country does not wish to be bound by the commentaries.

However, the lack of an intention to create legal obligations, when voting for the recommendation and that the recommendation is addressed to the government that negotiates treaties and not courts who interpret the treaty is relevant. This would diminish the obligation to react.

The issues with this kind of reasoning is the reliance on silence and the thoughts of the negotiators, as there is no safe way to determine what could have been in their mind, as the preparatory material

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107 Frank Engelen, ‘How “Acquiescence” and “Estoppel” Can Operate to the Effect That the States Parties to a Tax Treaty Are Legally Bound to Interpret the Treaty in Accordance with the Commentaries on the OECD Model Tax Convention’ in Sjoerd Douma and Frank Engelen (eds), The legal status of the OECD commentaries (IBFD 2008). P. 58
110 Engelen (n 109). P. 59
111 Hans Pijl, ‘Beyond Legal Bindingness’ in Sjoerd Douma and Frank Engelen (eds), The legal status of the OECD commentaries (IBFD 2008). P. 81
may never become available. If the parties have meticulously worked out the provisions of the DTC, it would seem surprising that interpretation was not discussed. If, however they have copied the MC to a large degree, then it would seem less surprising for them to leave out certain points in their discussion, which therefore must have been implied. Often the latter is the case for parts of the final DTC.

Guidance can further be found in the way a government presents a DTC to parliament. The DTC policy of the Dutch government states that if the OECD MC is followed during negotiations, the commentary is a guideline, and that courts also attribute high value to it. In Denmark the Government states that “it will” interpret the provisions in accordance with the commentaries. The Danish Tax Administration considers itself bound by the commentaries, but the status of the courts is less clear. German enacting bills for DTC with OECD members mention when a DTC follows the OECD MC and its commentary, but a more detailed description seems not to be given.

If states did not believe themselves bound by the MC or its commentaries, they would have no need to enter reservations or observations to these. Ward disagrees with the assumption that OECD members always enter an observation when they disagree with an interpretation. He further shows examples where countries have made reservations but accepted the provisions anyway. However, the fact that DTCs are negotiated individually, and a country may have to give up its reservations during negotiations, may explain this.

Another issue with the arguments of acquiescence and estoppel is that the agreement is too general, as the agreement to follow the commentary must be there for each DTC and there must be a specific

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115 Lovforslag nr. 32, 2018-2019, om indgåelse af dobbeltbeskatningoverenskomst og tilhørende protokol mellem Danmark og Japan., where it is written that “Denmark will interpret the provisions in accordance with the commentaries, p. 28. This is just an example, but the same in written is other bills.
116 Den juridiske vejledning - C.F.8.2.1 Overordnet om modeloverenskomsten, which states that the commentaries are binding on the administration, but not on the Tax Court and the ordinary courts.
118 Engelen (n 109).P. 61, de Graaf, Kavelaars and Stevens (n 52). P. 137 also follow this view as to the reasons for following the commentary, but the authors do not conclude whether they agree that each OECD member is bound to follow the commentary.
119 Ward (n 115). P. 89
time where a reaction is called for, and also knowledge by the party that it has to react. Therefore, this would suggest that one cannot conclude that a state is bound for all its DTCs to the commentary, as this calls for a too artificial use of the time when a reaction is called for. However, this depends on how the acquiesced agreement is deemed to emerge. If the act of following the OECD MC in negotiation is the act that must elicit a reaction, this act could happen for every negotiation, during the negotiation, but needs to happen for every DTC that shall follow the commentaries. One could even argue, that the party that does not want to be found by the agreement, has a growing reason to react for every treaty it, or other states enter into, as a practice of applying the commentaries will develop.

In principle, recognition of acquiescence or estoppel as creating a requirement to take heed of the commentary, would result in a non-binding instrument becoming binding with nothing more than silence and lack of protest. This is not ideal, and some commentators have argued that especially in the area of tax law, where DTCs affect (tax) sovereignty there is a requirement for more certainty, and that this sovereignty cannot be given up silently.

In a Dutch lower court of appeals case the court decided that because the DTC was drafted with the intention of following the corresponding OECD MC, the commentary to it was able to provide “some guidance” to the interpretation. The Supreme Court corrected the lower court, as it was correct in its reasoning, but stated that the commentaries have “great significance” for the interpretation of the DTC. The court thereafter used the commentary as its starting point in the interpretation, thereby suggesting that the commentary belongs to the context in accordance with art. 31 VCLT, but it is not entirely clear how the court uses the commentary. The argumentation agrees to some degree with the acquiescence theory, as it accepts that the commentary is relevant due to the reliance on the OECD MC. In a binding answer from the Danish board of Assessment it stated that the DTC article corresponds to the OECD MC, and that thus the commentary is relevant. The commentary was the only source for the interpretation. This also follows the acquiescence argument.

120 Thirlway (n 92). P. 32
121 Engelen (n 109). P. 55
122 In Dutch: “zodat het commentaar op dit Model enig houvast kan bieden”
123 In Dutch: “het commentaar op laatstbedoelde bepaling voor de uitleg van artikel 8, lid 9, van de Overeenkomst van grote betekenis is en niet slechts, zoals het Hof dat uitdrukt, daarbij „enig houvast kan bieden”
125 de Graaf, Kavelaars and Stevens (n 52). P. 138
126 Tfs 199424 LR 199399/93-4651-231.
If the parties have acquiesced or are prevented from contesting due to estoppel, to the commentaries, such acceptance of the commentary, could be based on VCLT art. 31(2)(a). Practically an agreement is thus reached between the DTC parties, according to which they are agreeing to interpret the DTC in accordance with the OECD MC commentaries. This must happen in “connection with the conclusion of the treaty”. This requirement is met if one assumes that the agreement is reached when negotiation is initiated based on the OECD MC. One could also argue that this agreement was already there from the time of the OECD recommendation, or adaptation of each new version of commentaries, but then it is not “in connection with the conclusion of the treaty”. An argument against this is that the commentary is not made by the DTC parties. This issue is however solved, if it is argued that the agreement is to follow the commentary, instead of an agreement to the commentary as such.

Applying the arguments of acquiescence and estoppel, the commentaries can also be said to establish a special meaning in accordance with art. 31(4)127 As mentioned in 3.1, art. 31(4) deals with the burden of proof for a special meaning. If one concludes that the commentaries are binding based on art. 31(4), it means that the party who claims so, has the burden of proof. This is not quite ideal, as the conclusion based on the acquiescence argument should rather be the opposite. An advantage of art. 31(4) is its binding character, as it states that this meaning “shall” be given to a term. This could ensure more uniformity. An argument against 31(4) is that the ordinary meaning may be the same as the one that the commentary sets forth, and a meaning cannot at once be ordinary and special.

4.2.3 The commentary as good faith requirement
The argument that the commentaries are accepted through acquiescence and estoppel can be reproduced based on the good faith requirement, mentioned in chapter 3.1. The argument is that if the DTC follows the OECD MC, the principle of good faith requires that the OECD MC and its commentary are taken into consideration during interpretation, as this must have been the intention of the parties.128 This places the same implicit acceptance upon the parties as the acquiescence and estoppel theory.

127 Ault (n 114). P. 65, Ault argues that simple logic suffices to establish this. The facts that he applies are the same as described under 4.2.2
128 Lang and Brugger (n 90). p. 99
The commentaries can thus be source according to art. 31(1) VCLT, as part of the requirement of interpreting in good faith.\textsuperscript{129} Ward et al also speak in some favour of the good faith approach, stating however that the good faith requirement cannot create a legal obligation, and therefore cannot make the commentaries binding.\textsuperscript{130}

**4.2.4 The commentary as establishing the ordinary meaning**

The commentary can show the ordinary meaning as found in art. 31(1) VCLT. The ordinary meaning does not need to be accepted explicitly by the parties because it is the ordinary meaning and therefore it can be argued that the parties intended this meaning when they negotiated the DTC.

VCLT art. 31(1) does however not state that every term has one ordinary meaning. As discussed in 3.1 both the “layman” and the “technical” meaning can constitute the ordinary meaning. If accepted, the commentary can therefore constitute “an” ordinary meaning. This would mean that other interpretative sources will still have a role.

An argument against the “ordinary meaning” approach is that the commentaries often provide much more than just the meaning of a term.\textsuperscript{131} The ordinary meaning, as establishing the role of the commentaries, may leave the tool of observations to it in a peculiar state, as it would seem difficult to argue that the ordinary meaning of a term changes if just one party makes an observation to it. It would however be unreasonable if the party were forced to accept this meaning despite its observation. In this case the principle of good faith is important. However, the issue demonstrates an error in the argument of the ordinary meaning to justify the use of the commentaries.

In a 1993 case, the Danish Supreme Court referred to the commentary, despite the taxpayer’s argument that the commentary was not relevant.\textsuperscript{132} The commentary was used as one of four points in the interpretation. It is not entirely clear which weight was given to each, but in the decision, it can be read that the comments were not only used to confirm the interpretation, but rather were used as a starting point. The court however refers to use of the commentary as “accepted international practice”. This could be taken as an acceptance that the ordinary meaning is reflected in the commentary.

\textsuperscript{129} Lang and Brugger (n 90), p. 100 however, in at later article Lang only refers to art. 31(4): Michael Lang, ‘Art. 3 Abs. 2 OECD-MA Und Die Auslegung von Doppelbesteuerungsabkommen’ [2011] Internationales Steuer- und Wirtschaftsrecht. p. 286

\textsuperscript{130} David A Ward and others, *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (IBFD 2005). P. 44

\textsuperscript{131} Ward and others (n 132). P. 19

\textsuperscript{132} *TFS 1993,7 HR1992/323/1991.*
4.2.5 Other theories
The commentaries have further been suggested as binding under customary international law, a rule between the parties according to art. 31(3)(c), or as showing subsequent practice. These will not be examined here, as they do not seem to be generally accepted.

4.2.5.1 The relevance of newer versions of the commentary.
The OECD MC and the commentary are updated at certain intervals. In 1992 the OECD adopted a loose-leaf system and updates have become more frequent. This begs the question, whether these updates are relevant for DTCs concluded before their publication, and if so, on what legal grounds. The OECD committee states that the new commentary should be used for provisions that were not changed in the new MC, as the update in such cases only intends to clarify the interpretation.\footnote{OECD, \textit{Model Tax Convention on Income and on Capital: Condensed Version 2017} (n 12). P. 20 para 33}

Art. 31(1) refers to the ordinary meaning of a term. In 3.1 it was explained that in some circumstances, the ordinary meaning of a term may evolve, if the term itself allows this. As DTCs have a somewhat long timespan, while international taxation develops rapidly, terms could become outdated in society, which could require a good faith interpretation to take heed of the new meanings. As the OECD MC commentary is now being updated frequently,\footnote{Lang and Brugger (n 90). comments that the frequent updates undermine the authority of the comments and make it harder to determine which version was used during the negotiation.} this makes it difficult to establish such a development.

The arguments of acquiescence and estoppel could also be applied to the end that the parties agreed to follow the commentary and updates hereto and use the tool of observations to the OECD MC if they do not agree, when they concluded their DTC. This would further mean that the party who would not consider himself bound, should have reacted and known to react to the possible agreement of having to adhere to updated commentaries. This clearly puts even more reliance on mostly silent actions, and it is doubtful if the circumstances warrant this.\footnote{Engelen (n 109). P. 67 but more accepting in Engelen (n 57). P. 468}

The adherence to the commentaries is then either based on art. 31(2)(a) VCLT as being part of the first agreement, or it could be argued that a subsequent agreement according to 31(3)(a) VCLT is acquiesced to. This depends on when the agreement is deemed to be made. As an example, the Dutch DTC policy states that the Netherlands accepts newer versions of the commentary.\footnote{Kamerstukken II 1997/1998, 25087 nr. 4 - Uitgangspunten van het beleid op het terrein van het internationaal fiscaal (verdragen). Part. 2.2}
One could further consider newer commentaries as reflecting subsequent practice according to art. 31(3)(b) VCLT. This practice must be agreed to or accepted by all parties, which may be problematic as interpretation happens at domestic tax administrations and courts. If such practice emerges based on the updated commentary, it may be difficult to ascertain which part(s) of the commentaries at a certain point are considered subsequent practice, and it is thus likely that only parts of the commentary become a reflection of subsequent practice, unless it is argued that the practice itself is “to follow the updated commentary”, but this may also be difficult to determine.

The commentary itself suggests that the parties can agree to the relevance of the updated commentaries using a MAP.\(^{137}\)

In a Dutch Supreme Court case, the court first determined the sources on which interpretation could be based, analysing first the DTC in both languages, thereafter the commentary.\(^{138}\) In the actual interpretation however, domestic law was consulted first, after which the VCLT was applied. The court finally interprets the term using the treaty text and thereafter concludes that this corresponds with the commentary. An updated version of the commentary defined the relevant term, which could explain why the commentary is given a supplementary role. The court further states that the newer commentary reflects “\textit{international consensus}” The advocate general made a clear distinction between corresponding and updated commentary, classifying the former as context, and the latter as supplementary means of interpretation. In a case from 2003 the Danish Eastern High Court ruled that for the interpretation of a DTC, the later OECD MC and commentary, should, in accordance with Danish and international practice, be the starting point.\(^{139}\) It also pointed out that the term “\textit{hiring out labour}”\(^{140}\) was not known when the DTC was concluded. This line of thought could fit into the theory of a dynamic ordinary meaning. The court thereafter interpreted the term “\textit{worker}” with direct use of the later commentaries and concluded that the DTC provision did not preclude this interpretation. The court did not rule on the argument made by the plaintiff that the VCLT forbids relying on the OECD MC commentary, but clearly did not accept it. The Supreme Court’s majority followed the argument of the lower court, and thus the newer commentaries. It however referred to them as a reflection of the international development. This gives the impression that it is not the commentary as such the court relies on, but that the commentary reflects the ordinary (evolved) meaning of terms.


\(^{140}\) In Danish: “\textit{arbejdslæge}”
In a case from the Danish Tax Appeals Agency, it was argued that in the Denmark-Netherlands DTC, an interpretation in the 1992 version of the commentary was relevant, despite being newer than the DTC, as, among other things, the Netherlands had not made an observation to it.\textsuperscript{141} This could give the impression that newer commentaries are binding, and that countries should make use of the observations if they wish it not so. The concrete case seems to be special and controversial as it regards the interpretation the term “worker”, which has given rise to debate regarding hiring out labour.

\textbf{4.2.6 Conclusion}

The use of the commentaries shows that the practice of an international organisation may deviate from the established rules on treaty interpretation,\textsuperscript{142} or that the VCLT is not a perfect fit for all treaties. Courts do not strictly apply, or show how they apply, the rules of the VCLT. It seems however that more than just supplementary value for the commentaries is warranted. The theory of acquiescence and estoppel relies on the same facts as the good faith and the special meaning argument, while the ordinary meaning argument relies less on implicit acceptance. None of these are without issue, but it seems, given the frequent use of the commentaries, that parties can be assumed to have accepted these, if they use them in their negotiation.

For newer commentaries, the argument of acceptance through acquiescence or estoppel could be taken so that also updates to the commentary are relevant. Likewise, an ordinary meaning can evolve and be reflected in the updated commentary. It is however difficult to give these a contextual meaning without any clear hints. Therefore, updated commentary can generally only be applied if they clarify an interpretation and only in accordance with art. 32 VCLT.

\textbf{4.3 The OECD Reports}

The OECD develops reports that discuss issues of taxation, which may be implemented in the OECD MC or its commentaries. The reports are voted on and are thus accepted by the OECD’s members. Despite being agreed to by the OECD members, the reports are not made in conclusion with any DTC and are therefore not context in accordance with art. 31(2).

Solutions from the reports may be implemented in the OECD MC commentaries, which will create a connection between the two. If the commentary is considered to have a higher legal value than

\textsuperscript{141} TFS 2004, 524, SKM2004.237.LSR
\textsuperscript{142} Wouters and Vidal (n 71). P. 11
supplementary, a relevant part of the report may have contextual value, due to its connection with the commentary, and the fact that the report may elaborate on the interpretation in the commentary. Mostly however, the reports should be considered supplementary, due to the lack of acceptance as a source for the individual DTC.

4.4 Negotiation and preparatory material
Courts in e.g. the Netherlands, Germany and Sweden refer to own committee reports and material presented to parliament. These may however not show the agreement between the parties, and in one case the Dutch Supreme Court rejected such material for this very reason. Some states produce a technical explanation, which is however unilateral and not preparatory. In a Danish case, the court referred to minutes from the negotiation of the treaty to determine the intention of the parties. However, such negotiation minutes or other material is mostly not publicly available. The use of the preparatory material is warranted, but it is preferable if this at least shows a shared intention. Preparatory material can be used in accordance with art. 32 VCLT.

4.5 Other DTCs
A DTC between two countries may show how these countries normally interpret a certain term. A third country may use this for interpretation. Vogel applies this in the interpretation of the Germany-Sweden DTC. In a Danish Supreme Court case, discussed in 4.2.6, the court referred to DTCs from other countries (Canada and the United States of America), to examine the view of these on a certain interpretation. In a Dutch case the court considered other Dutch DTCs and other DTCs of the treaty partner in question, when neither the domestic law nor the context offered an interpretation. This was a supplementary use.

DTCs are only binding on the signatories to it. They may be supplementary means of interpretation for others. One must keep in mind that a treaty is autonomous, and that it concerns conflicting interests.

144 HR 11 October 1978 18 759 (BNB 1978/300).
146 Engelen (n 57). P. 438 and Ward (n 115). P. 83
between the two DTC parties and has taken complex long, negotiation. Care should therefore be shown with “a contrario” arguments.

4.6 Decisions from other countries
The use of foreign judgments seems to depend to a large degree on the individual countries, and there are still only a few cases where this is applied. This is caused by limited knowledge, access to databases, language issues and the influence of the commentary. Common law jurisdictions seem to be more open to this. The Danish Supreme Court has referred to “international tax practice” which would include judgments of other countries (see 4.2.6).

Any such use is supplementary.

5 The Mutual Agreement Procedure
Most modern DTCs contain a Mutual Agreement Procedure provision. The role of this is to resolve issues of application or interpretation of the DTC. The current OECD MC includes in art. 25(3) a rule, in accordance which states that the contracting states “shall endeavour to resolve” difficulties or doubts that arise regarding the interpretation of a DTC. This interpretation can be both with regards to individual cases as well as more general questions. The wording shows that the contracting states must try, and thus an outcome is not guaranteed.

The commentaries further set out that the VCLT allows domestic courts to take account of an agreement reached through a MAP. This would follow art. 31(3)(a) VCLT. The commentaries also declare that a MAP agreement is binding on administrators. In newer Dutch DTCs the DTC will qualify the legal value of interpretations that have been made pursuant to the MAP as the Dutch Supreme Court had ruled that such interpretations could only bind the tax administration and not the courts. The Austrian Supreme Court does not consider MAP agreements to be binding on it, and

152 Avery Jones (n 152), P. 77
the German Federal Fiscal Court has stated that it will only follow them under certain circumstances.\textsuperscript{157}

A MAP interpretation will not be the only source of interpretation, and despite the competent authorities agreeing on an interpretation, a court can normally consider all sources of interpretation.

\section*{6 Art. 3(2) of the OECD MC}

Art. 3 of the OECD MC defines terms in the treaty. Certain terms are defined in the specific articles that regard these terms.

Art. 3(2) clarifies the procedure for terms not defined in the treaty. As of 2017, art. 3(2) has the following wording:

\textit{As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires or the competent authorities agree to a different meaning pursuant to the provisions of Article 25, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.}

Art. 3(2) is a special rule of interpretation compared to the general rules of interpretation in the VCLT. The VCLT only applies if art. 3(2) does not offer a satisfactory interpretation.\textsuperscript{158} The rule is however a general rule of interpretation, compared to the special definitions in the treaty.\textsuperscript{159} Art. 3(2) is itself interpreted by the VCLT.

Since the 2003 version of the MC art. 3(2) spells out that a MAP can let the DTC parties agree on a term, which ensures that a domestic term is not needed. Some issues may arise as to the legal value of such an agreement, see chapter five.

The provision allows for recourse to the domestic law of the applying country. Not always however, as this can only be done if the context does not require otherwise. Below, the different parts of the provision will be analysed.

\begin{flushright}
\textsuperscript{157} Lang, ‘Art. 3 Abs. 2 OECD-MA Und Die Auslegung von Doppelbesteuerungsabkommen’ (n 131). p. 283
\textsuperscript{158} de Graaf, Kavelaars and Stevens (n 52). P. 136
\textsuperscript{159} Moris Lehner, ‘Interpretation of Tax Treaties According to German Theory and Practice’ in Klaus Vogel (ed), Interpretation of Tax Law and Treaties and Transfer Pricing in Japan and Germany (Kluwer Law International 1998). P. 89
\end{flushright}
6.1 Application
“Application “is every decision by a court or a tax authority of a tax question for which the treaty is or should be considered. Thus, deciding to tax an income or deciding that the treaty does not apply counts as an application.

Avery Jones et al. suggest that one DTC party first “reads” the DTC to find out if it is precluded from taxing. If not, the state applies its own domestic legislation and not the DTC. This interpretation ensures that the residence state respects the source state. The definition and different meanings given to “applying” and “reading” have not been accepted by other scholars due to its artificial differentiation and ultimately because it finds no support in general theory on interpretation. Parts of the theory set forth by Avery Jones et al. have however developed into the so-called “new approach”, which will be described in 6.4.2.

6.2 Any undefined term
If a term is undefined, art. 3(2) comes into play. Lang limits this to explicitly defined terms, but the commentary keeps it at undefined. Defined terms are not interpreted through art. 3(2), which narrows down the use of the rule.

The domestic term can only be applied if the term has a specific legal meaning which is used in the same context as it is used in the DTC. First, the tax law of a state must be analysed for a term, hereafter other laws may be examined. The term must in any case have a meaning that applies to the taxes of the convention, which makes it unlikely that a fitting term can be found in nontax law. A wide interpretation of the term “term” is to be used, especially considering language issues resulting in the fact that “term” does not exist in the domestic law. Term must thus encapsulate more than “words.” This means that even if an exact corresponding term is not found, one may apply a domestic legal concept if this has the same substance.

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161 Avery Jones and others (n 144). P. 50
162 Lang, ‘Art. 3 Abs. 2 OECD-MA Und Die Auslegung von Doppelbesteuerungsabkommen’ (n 131). P. 288 and Vogel and Rust (n 161). Para 116f
163 Lang, ‘Art. 3 Abs. 2 OECD-MA Und Die Auslegung von Doppelbesteuerungsabkommen’ (n 131). P. 287
167 Avery Jones (n 152). P. 74
The domestic law referred to is that of the applying country. This used to be somewhat unclear but is now clarified in the provision itself.

6.3 At that time
The question of whether art. 3(2) refers to a static or dynamic use of domestic law has mostly been solved as the commentary since 1995 clarifies that a dynamic approach is to be taken. This interpretation follows what was already widely agreed upon as correct even before the clarification. It should therefore also apply to older DTCs. A party may not amend its domestic laws to make a DTC inoperative. A case from the Dutch Supreme Court illustrates this. According to Dutch law, several conditions must be met for pensions to be paid out as pension. If these are not met, the “pension” will be taxed as income from work. OECD MC art. 15 decides that income from work is taxed in the state of employment, whereas art. 18 decides that pensions are taxed by the residence state. This rule was enacted after the DTC in question entered into force. The domestic law would thus move the taxation rights to the Netherlands. The Supreme Court discussed art. 3(2) as well as a dynamic interpretation of the domestic meaning. It argued that it could not apply this, as it would move the taxation right to the Netherlands. The meaning from before the new domestic law, was applied instead, which means that a static approach was taken. In a very similar case, the court only referred to the good faith requirement in art. 31 VCLT, and reached the same conclusion. Thus, the good faith requirement can also bar the use of changed meanings which alter the taxation right.

6.4 When does what context require otherwise?
Domestic law can only be taken into consideration, if the context does not require otherwise. This part of the provision has resulted in the most discussion, as the opinions differ on whether a domestic or contextual interpretation should be preferred. The determine the answer, it is necessary to first clarify what the context contains.

6.4.1 What does the context contain?
According to the commentary, the context is found by analysing the intention of the parties and the meaning given to the term by the other DTC party.

The VCLT also refers to the context in art. 31(2) and defines it as including any preamble, annex and any agreement or instrument agreed to by the parties. Despite the context being defined in the VCLT,
and art. 3(2) being interpreted by the VCLT, this does not entail that the context in art. 3(2) contains the same. This is supported by the fact that the sources mentioned in the commentary, as the meaning given to a term by the other party is not context in the sense of art. 31(2) VCLT. Due to the above, and the fact that the VCLT context is not meant to be applied in isolation, the VCLT context is too narrow for the use in art. 3(2). In general, a wide definition of context seems agreed upon. The context thus includes the intention of the parties, background of the treaty, the treaty, law of both countries including tax law and non-tax law, the OECD MC and its commentaries regardless of whether one considers these context under art. 31 VCLT, OECD reports, and any source that can normally be applied when interpreting treaties.

6.4.2 Conflicts of qualification and the new approach

To qualify the analysis of when the context requires otherwise, it is necessary to examine the so-called new approach as this changes the interpretation of art. 3(2). It has however not concluded the art. 3(2) debate.

If one DTC party applies a domestic law meaning to define a term and the other state does not follow the classification of the first state, double taxation or double non-taxation may occur. The new approach suggests that the residence state must follow the qualification of the source state. If the source state applies the treaty in the light of its domestic law with reference to art. 3(2) this is a correct application in accordance with the DTC. Following this, the residence state must grant relief in accordance with art. 23 A or B because the income is taxed by the source state in accordance with the convention. Thereby both states apply the DTC and double taxation and double non-taxation is prevented. The argument was introduced by the International Tax Group led by Avery Jones. They have shown several court cases where domestic courts for various reasons had followed the qualification of courts of the other DTC party to the effect that 3(2) did not result in double taxation or double non-taxation issues. The OECD Partnership Report of 1999 and the OECD MC

173 Avery Jones and others (n 144). P. 104
175 Avery Jones (n 152). P. 73 and Vogel and Rust (n 161). P. 213. It may seem somewhat strange to include the law of the applying country, as this is also the law that the context may require deviation from.
176 Avery Jones and others (n 144). P. 104
commentary of 2000 adopted this approach. As it was only adopted in 2000, this version of the commentary is only context for DTCs drafted after 2000. The interpretation should therefore be used in older versions as coming from a supplementary source. This will limit the use of the approach. Some have argued that the new approach risks moving the taxation rights against what was agreed upon in the treaty. For many OECD members however, being developed countries, this may be an effect that will go both ways, because both countries may at times be the source state, and at times be the residence state.
A risk with the new approach is, that the residence state must be informed of the qualification in the source state, which often is difficult.
When the conflict of qualification arises due to different views on the facts, or differing interpretation of the DTC itself, the MAP is the correct recourse.

**6.4.3 How is the context applied – which meaning is preferred?**
Having determined what the context includes, the next step is analysing when it requires otherwise. It is not possible to read a systematic preference for the contextual meaning into the provision itself. Such a preference must therefore be found somewhere else. At first sight, it should mean that not all possible interpretations have to be considered before resorting to domestic law. The inclusion of the provision would further make little sense if it is nothing more than a last resort, especially considering that such a last resort can also follow from the VCLT. The word “requires” shows that not just any contextual meaning can be applied instead of a domestic meaning. The found context needs to have “enough” arguments for using it, and this shows that a preference for the domestic meaning seems to follow from the provision.

As art. 3(2) is interpreted by the VCLT, the good faith requirement herein applies. Applying a domestic term can only happen in accordance with this principle.

It has been argued that the object of a DTC requires a contextual interpretation, as preventing double taxation requires the states to apply the treaty similarly. Such argument can further be grounded in

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181 Vogel and Rust (n 161). P. 211
182 Bosman, *Other Income under Tax Treaties* (n 167). P. 57, citing Vogel, also Avery Jones and others (n 144). P. 108
183 Lang, ‘Art. 3 Abs. 2 OECD-MA Und Die Auslegung von Doppelbesteuерungsabkommen’ (n 131). P. 286
good faith requirements, especially taking into consideration that the states cannot be expected to know all meanings of terms in the other country, which could mean that a domestic term cannot be intended by the parties. The MAP allows states to agree to an interpretation, which gives the parties a way of ensuring that the object of the treaty is fulfilled.\textsuperscript{184} Any unwanted use of domestic law, if it occurs, can thus be remedied. This should limit the objective as a reason for a unilateral contextual interpretation. The object of the treaty is in any case not necessarily the object of each individual provision.\textsuperscript{185} The object of art. 3(2) is said to be easing the drafting and application of the treaty, as familiar terms can be used.\textsuperscript{186} This objective would suggest that a domestic term is applied. However, with the increasing uniformity due to, among others, the OECD MC commentary this objective can – to an increasing degree – be attained by applying a meaning from the context.

As a result of the new approach, it can no longer be argued that reference to domestic terms may result in taxation not in correspondence with the treaty. However, care must be shown with the “new approach” as DTCs adopted after 2000 should accept this interpretation, while older DTCs should do so carefully. On the other hand, the new approach is less important if the DTC is interpreted autonomously. This could thus ease up the application of the DTC.

The drafting history of art. 3(2) can also be considered. The first use of “an” art. 3(2) was in the United Kingdom – United States of America DTC. As the parties drafted the provision tacitly, so without clear discussion of its meaning, this shows that it was not intended to have an important role.\textsuperscript{187} The issues that art. 3(2) has given rise to, give a hint that this may be true – that the parties did not consider it carefully – because if they did, they may have ensured that it was clearer. Reference to domestic law is further found in individual articles – where such a reference is sensible. These would be superfluous if art. 3(2) already enabled such reference freely.\textsuperscript{188} In the Danish version of art. 3(2), the provision states: “follows from the context”,\textsuperscript{189} instead of “requires”,\textsuperscript{190} which is less

\begin{footnotesize}
\begin{enumerate}
\item Vogh (n 14). P. 69
\item Lang, ‘Art. 3 Abs. 2 OECD-MA Und Die Auslegung von Doppelbesteuerungsabkommen’ (n 131). P. 282
\item Vogel (n 14).
\item Lang, ‘Art. 3 Abs. 2 OECD-MA Und Die Auslegung von Doppelbesteuerungsabkommen’ (n 131). P. 286
\item Lang, ‘Art. 3 Abs. 2 OECD-MA Und Die Auslegung von Doppelbesteuerungsabkommen’ (n 131). P. 286
\item Own translation, in Danish: “Følger af sammenhængen”
\item The Dutch version uses: “tenzij de context anders vereist”, The German version: „wenn der Zusammenhang nichts anderes erfordert”, The French: “sauf si le contexte exige une interprétation différente”. These all keep to the word “require”, unlike the Danish version. Michelsen states that there should not be interpreted anything of meaning into this difference. Michelsen, International Skatteret (n 180). P. 67
\end{enumerate}
\end{footnotesize}
This prevailing view in Danish literature is that the contextual meaning is preferred. This could be explained by this translation.

In a Dutch Supreme Court case, the court searched for a term in Dutch domestic law, but could not find one that was used in the same context in which it is used in the DTC. The judgement seems to suggest that as soon as a term is not defined in the DTC, the Dutch legislation must be analysed for terms that are used in the same context. As in this case there were none, the art. 3(2) context was not examined. In a case from the German Federal Fiscal Court the court first searched for a corresponding term in German law, but after not identifying one it interpreted the treaty in accordance with its context. The same court made the same interpretation in another case and stated that the context did not require a contextual interpretation. In a case from the Fiscal Court of Hamburg, the court concluded that reference to domestic law can only be made if contextual interpretation does not bring consistent results. In a case from the Danish Supreme Court the court referred to internal law, without discussing any context. The domestic term had to be interpreted using the OECD MC commentary.

The above stated arguments and case law do not show a clear conclusion. The views of academics vary from those that would apply a domestic meaning unless this clearly is against the treaty, to those that would apply a contextual interpretation unless such is impossible.

The application of the context or domestic law seems to affect to order in which the two are suggested to be found. Those that favour domestic law, examine this first and vice versa. As “unless the context requires” is written first, this could be a hint to the order in which one should apply the provision. It is illogical, however, to determine if the context requires anything, without knowing what it requires deviation from. The connection with the issue in general seems clear here, as those who favour a contextual approach do not see this as a deviation at all.

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191 Michelsen, *International Skatteret* (n 180). p. 69
194 BFH 14/03/1989, BStBl II 1989, p 599.
197 Vogel and Rust (n 161). P. 212-213 and Bosman, *Other Income under Tax Treaties* (n 167). P. 54
199 Bosman, *Other Income under Tax Treaties* (n 167). P. 55
An approach where both the domestic meaning and a contextual meaning are found should be applied, as any decision whether the context requires anything needs to be taken from a point of knowing both alternatives. This should of course be applied pragmatically; if any of the two cannot be found with reasonable effort, the other alternative is required.

Vogel, Rust and Bosman are proponents of the theory where the domestic term is found first. Other scholars argue that, as domestic law cannot but be a last resort option, the contextual meaning must be found first. It seems however, that the authors do not explain why this is preferred.

Given the above, two different orders can be suggested when a term is not defined in the treaty and art. 3(2) therefore is applied. The former approach sets the following order:

1) The law of the applying state is examined, to determine if it has a meaning for the term in same context
   a) If such a term is not reasonably found, the contextual meaning applies.
2) The context must be examined, to determine if it suggests a different meaning, and if so, if the context requires that this is applied.

While the one favoured by Michelsen, Lang and others gives the following order:

1) The context is examined. If a meaning for the term is found here, this meaning is accepted.
2) If such a meaning cannot be found, or will lead to a very unreasonable result, a meaning in domestic law is applied.

The second order runs into a theoretical problem when in step two no meaning can be found. In this case, art. 3(2) does not apply after all, and one must instead apply the VCLT. Due to the broader context applied in art. 3(2), one can wonder if the same interpretation can be found from only adhering to the VCLT. This would at least result in a strange narrowing of the sources, when the opposite would be more logical. This solution further results in that the initial interpretation results that basically applies the VCLT, but with an interpretation of context that is much wider than what the VCLT ascribes. Such an opening should not be allowed without clear hints that the parties intended this. Furthermore, the second order, in the opinion of the author, does not give

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200 Vogel and Rust (n 161). 212 Alexander Bosman, ‘Causality under Tax Treaties’ (2016) 44 Intertax. P. 393
201 Lehner (n 160). P. 93 with references. This book was however published in 1998, thus before the adoption of the OECD of the new approach. The value of the argumentation in it is therefore lower. Also de Graaf, Kavelaars and Stevens (n 52). P. 137 and Michelsen and others (n 199). p. 1118f
202 Vogel and Rust (n 151). P. 213 and Bosman, Other Income under Tax Treaties (n 167).p. 55
reasonable meaning to the word “requires”, as instead it is applied so that any contextual meaning is required.

6.5 Conclusion
Art. 3(2) allows for reference to domestic terms when a clearly more appropriate term is not found in the context. The objective of easing the work of tax administrations, should be followed, which may mean that well established definitions in the context may be clearly more appropriate than meanings from domestic law.

Objections about the risk of double taxation and double non-taxation have largely disappeared with the “new approach” accepted by the OECD.

For older DTCs, the risk of issues is larger, which may require contextual interpretation more often. This however cannot be done to a degree that the provision loses its use, thus the domestic term should still be the starting point.

In the process of determining the meaning of a term, the first suggested approach should be applied as this conforms the best with the wording of the provision. However, the process must be such that both meanings, if possible, are found so that an informed decision can be made.

It can be argued, that for the appliers of DTCs greater reliance on the context should be preferred, as this will help the further development of an international tax language – based largely on the OECD MC and its commentaries – which eventually can ensure more clarity. As however art. 3(2) is found in the OECD MC, it should be applied as it is intended.
7 The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

BEPS action number 15 analyses the feasibility of creating a multilateral instrument to implement the BEPS treaty measures and is thus more of processual character than the other BEPS actions. Action 15 therefore does not introduce any new measures as such.

The BEPS action plan identified treaty abuse as one of the most severe causes of BEPS, and changes to the DTC network were deemed necessary to prevent BEPS. Thus, several of the BEPS actions require implementation into DTCs. The most straightforward way to implement the BEPS measures in the global DTC network is to implement the changes into the OECD MC. This has been done in the 2017 version of the OECD MC. As DTCs are updated infrequently and it takes a long time for states to negotiate updates to their DTC network, only updating the OECD MC would result in a generation long wait until the BEPS measures would be implemented globally. Due to the need for urgency another solution was required. The option of having OECD members enact protocols to their existing DTCs was discussed, but discarded because it, due to the impossibility of ensuring uniformity, would make the global DTC network more fragmented and the BEPS measures thus less effective. This solution was also too complex and too time-consuming. A self-standing instrument that would supersede bilateral treaties was also discussed. This was abandoned, as it would have required too large a sacrifice of sovereignty.

The OECD concluded that a multilateral convention to modify existing DTCs was the best solution. This would:

- ensure efficiency gains,
- prevent cumbersome bilateral negotiations,
- enable a timely implementation of the BEPS measures,

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206 OECD, BEPS Action 15, Interim Deliverable (n 206). P. 18
207 OECD, BEPS Action 15, Interim Deliverable (n 206). P. 18
• prevent differing implementation of the BEPS measures, and
• aid developing countries.

As a result of the decision, an ad hoc group was given the objective to:

(...) develop a multilateral instrument to modify existing bilateral tax treaties solely in order to swiftly implement the tax treaty measures developed in the course of the OECD-G20 BEPS Project.\textsuperscript{208}

This ad hoc Group consisted of more than 100 states and international organisations, and includes non-OECD members. It is thus not the OECD in its normal fashion that has created the MLI, and the MLI is not an OECD product. The OECD is however depositary of the MLI and will continue to play an important role during implementation.

The MLI’s function of changing original DTCs without simply acting as a protocol to these, is a yet unseen in international taxation and therefore an innovative solution to the issue of outdated DTCs.\textsuperscript{209}

7.1 The functioning of the MLI

The MLI is characterized by flexibility regarding which rules parties want to adopt. This was a necessary sacrifice made by the ad hoc group owing to the sensitivity of giving up tax sovereignty. The flexibility could however also be the weakness of the MLI, as the BEPS measures cannot reach their full potential without wide adoption. Finding the right balance between flexibility and substantive content has been an important objective for the ad hoc group.

Parties to the convention must notify which of their DTCs they want the MLI to apply to. These will become Covered Tax Agreements (hereafter: CTA). Coverage by the MLI requires notification by both parties to the DTC. Some MLI provisions are minimum standards, as these reflect the issues that the ad hoc group considered most important and at the same time the ones which all parties could consent to. The provisions that are not minimum standards, require either an opt-in or a reservation. The MLI functions reciprocally and opt-outs by one state generally entail that the provision will not apply to either state.\textsuperscript{210}

This process has the effect of making the multilateral instrument more bilateral, as the choices made by parties will only affect the bilateral relations with their DTC partners. For certain provisions of the MLI, this becomes even more bilateral when the parties need to reach agreement on how exactly the

\textsuperscript{208} OECD, BEPS Action 15, Final Report (n 205). P. 11
\textsuperscript{210} This rule is not entirely without exceptions, as there are some provisions, where a party can make a reservation that may not affect the other party.
MLI shall change the CTA. Thus, while the multilateral instrument applies to many DTCs at once, the implementation cannot come to fruition without at least some bilateral negotiation. For the simpler parts of this, the OECD hosted a “speed dating” session where representatives from signatories could discuss which choices they were considering.\(^{211}\) For less simple negotiations countries may have to arrange actual bilateral negotiation. If countries do agree before the signing of the MLI, they may choose not to cover the DTC, thereby diminishing the reach of the MLI and thus the chance of its success.

7.2 The effect of different ways of implementation

States are not obliged to implement the BEPS measures through the MLI and are free to implement them in a different way, despite this being against the intentions of the OECD. Thus, not all countries will allow the MLI to apply to all their DTCs, some may want additional negotiation, while others will create a synthesised version of their CTA. Below, these options and their effect on interpretation will be analysed.

7.2.1 Implementing the MLI with a bilateral agreement or the BEPS measures through a protocol

To ensure clarity on the ramifications of implementation of the MLI, countries may want to ensure agreement on how the MLI affects their DTCs with other countries, before notifying each DTC to the OECD. Switzerland has opted for this approach.\(^{212}\) Denmark and the Netherlands did not notify their DTC, as they were negotiating a protocol to it. Accordingly, they chose to implement the BEPS measures during this process.\(^{213}\) The protocol or agreement will apply to the DTC but will have no legal value in relation to the MLI. The protocol, agreement and relating implementing material may have some interpretive value. i.e. when country X and Y have made a bilateral agreement about how they interpret the MLI or have used a protocol to implement the BEPS measures, and another country, Z, seeks guidance on interpretation of the MLI, or specifically how to expect either Y or X will interpret the CTA with Z. As an example, the Danish law enacting the protocol between Denmark and the Netherlands, includes comments on the proposed changes to the DTC. These are unilateral and addressed to the parliament.

\(^{211}\) Interview with Mike Williams, ‘Q&A with OECD Multilateral Instrument Group Chair’

\(^{212}\) ‘Switzerland Signs BEPS Convention’

They do however show how the Danish government interprets some of the BEPS measures. In the section about the Principal Purpose Test (hereafter: PPT) which is a BEPS minimal standard from BEPS action 6, the comments suggest that an “equivalent” rule is found in the Danish “Ligningsloven” § 3(3) and that the PPT will not have any meaning for the Danish interpretation of the DTC. The Danish domestic rule is based on BEPS action 6. The PPT from the MLI and the current Danish rule thus has the same source and are meant to be interpreted alike. The PPT has resulted in much controversy due to the addition of a subjective element. The Danish equalisation of the two rules, and any following sources i.e. Danish sources from application of the domestic rule, could therefore become a source of interpretation for countries, who do not yet have a BEPS action 6 based rule.

Switzerland will enact a protocol to its DTC with the United Kingdom to implement the BEPS minimum standards. This was caused by inability to agree on the effect of the MLI on the Switzerland-United Kingdom DTC. Interestingly, the note on the protocol produced by the Swiss government clarifies that although the provisions from the protocol are the same as the ones from the MLI, there is no connection between the two instruments. This would seemingly bar any suggestions that the protocol could be of interpretive value.

### 7.2.2 BEPS compliant DTCs

Newer DTCs may already contain the BEPS minimum standards, and the MLI is not relevant for these. Any material released in relation to such a DTC or case law based on it relating to the BEPS measures herein can have a supplementary interpretational value. As an example, the Australian enactment of the Australia-Germany DTC in 2016 contains commentary and examples on the use of

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214 “tilsvarende”
216 Wittendorf however points out, that also for Denmark the Principal Purpose Test will be very important, Jens Wittendorf, ‘OECD/G20’s Multilaterale Instrument (MLI) – et Dansk Perspektiv’ SU 2017.197 Skat Udland - Tidsskrift for International Beskatning. P. 7
219 BBI 2018–1350, Botschaft zur Genehmigung eines Protokolls zur Änderung des Doppelbesteuerungsabkommens zwischen der Schweiz und dem Vereinigten Königreich,. P. 4
In this case, the examples are taken directly from the BEPS final reports, and thus add little additional value, but for the DTC the legal relevance of the BEPS reports is raised. It further shows how Australia understands its obligation. Lastly, it may further the development of “international tax practice”.

7.2.3 Synthesised texts of CTAs

Synthesised texts are where the MLI amendments and the CTA are written out as one document, thereby making it easier to understand and apply these. Synthesised texts not legally necessary but drafting synthesised versions of CTAs can be a way of easing the difficulty of applying the MLI alongside CTAs. The ad hoc group foresaw this but did initially not offer any guidance. The OECD secretariat, in its capacity of depository of the MLI, and the ad hoc group, has developed a guide to creating synthesised texts of CTAs, published on 14 November 2018. This was only after the first countries had already published their synthesised texts and only six weeks before the MLI would enter into effect for the first parties that have ratified it. It seems strange, that such a guide was not published alongside the MLI, as the ad hoc group foresaw the synthetisation of CTAs. The guidance states that the OECD intended to make it available to a wider audience in 2018, thereby suggesting that it has already been available to selected groups before the official publication. Comparing the text of the guidance and the text of the synthesised United Kingdom - Slovenia CTA, this seems likely, as the texts are identical, except for certain passages. The guidance has the objective of ensuring that the synthesised texts of CTAs made by parties are as consistent as possible. The guidance differentiates between consolidated versions and synthesised versions. The former is when the MLI provisions are added to the CTA, and the latter functions as if the MLI is a protocol to a DTC. The latter makes the CTA easier to read but removes the importance of the MLI being read and applied alongside the CTA.

221 OECD, Explanatory Statement to the MLI (n 210). Para 13
The synthesised version uses notes to show where something has been removed and boxes indicate where a provision originates from the MLI.

### 7.2.4 Potential issues with alternative implementation and synthesised texts

The protocol solution risks inconsistent implementation of the BEPS measures. This was one of the reasons that the multilateral approach was chosen instead of making all OECD members enact protocols.

Issues may arise when interpreting the DTC and its BEPS protocol. As interpretational rules of the MLI will not apply in the protocol, meanings from the DTC (which will not become a CTA) are directly applicable for the new provisions. This could result in an interpretation that goes against the one that may develop for the MLI. It would however be possible for the parties to the DTC protocol, to set forth herein, how it shall be interpreted.

For synthesised CTAs certain minor issues may come to light. As countries may remove reservations that they have lodged when signing the MLI, the synthesised text needs to be updated to show this, and users need to be aware of such change. As the entire MLI will not be placed within the CTA, one could argue that its microcosm is broken. The problem is smaller compared to the one when using protocols, as the synthesised text is not authoritative. It could however happen that the original MLI parts will be neglected as interpreters will assume that the synthesised text includes all the necessary MLI additions, and thus forget the intention of the MLI as being “read alongside the existing DTC”.

### 8 Interpreting the MLI

As the MLI is an international convention, it shall be interpreted following the rules in international law hereon, which are found in art. 31 to 33 VCLT. This is also explained in the explanatory statement of the MLI, where it states that the provisions should interpreted in accordance with the ordinary principle of treaty interpretation. In addition to this, The MLI also contains its own interpretational rule in art. 2(2).

The issues when interpreting the MLI are relevant due to its complexity, and due to the way that it functions as a multilateral addition to bilateral treaties. The MLI was drafted in a, for multilateral treaties, extraordinary speed of less than two years, and the risk of mistakes rises when processes are sped up. Clarity about interpretation is therefore essential. A concrete example of this can be seen in [OECD, Explanatory Statement to the MLI (n 210). P. 2 Para 12](#).

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the note that the OECD secretariat published on the 14th of November 2018, explaining the interpretation of the entry into force of the MLI.\footnote{OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Entry into Effect under Article 35(1)(a) - Note by the OECD Secretariat (OECD Publishing 2018).} The necessity of providing this note begs the question of why the OECD and ad hoc group did not publish this as part of the explanatory statement or why the provision was not drafted more clearly from the beginning. The same can be said regarding the guidance for the development of synthesised texts.

Interpretation of the MLI may result in either a diverging or a uniform application of it, and this may influence the success of the BEPS project.

Below, the interpretation of the MLI will be analysed, with focus on the sources for this.

### 8.1 The object and purpose of the MLI

The preamble of the MLI states that its purpose is to implement tax treaty related BEPS measures. The need for swift, co-ordinated and consistent implementation of these is also mentioned. The explanatory statement reiterates this.

These points were also stressed by the OECD secretary general during the MLI adoption ceremony, who said that:

> by having drafted this Convention together, you have ensured consistency in the implementation of the BEPS Project, and also on the interpretation of the text itself, which will result in more certainty and predictability.\footnote{OECD, Remarks at Adoption Ceremony of the BEPS Treaty (n 206).}

The preamble of the MLI stresses the BEPS objective of taxing where substantive economic activities are generating profits and preventing treaty abuse.

The purpose of the MLI is thus not only the implementation of the treaty-related BEPS measures, but also ensuring that this happens in an effective way.

### 8.2 The sources available for the interpretation of the MLI

In the following the same approach as in chapter 4 is taken, and only sources that have particular relevance for the MLI are analysed.

The MLI is a new treaty, which makes knowledge about with what it may be interpreted important, as this can ensure clarity.

\footnote{OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Entry into Effect under Article 35(1)(a) - Note by the OECD Secretariat (OECD Publishing 2018).}
8.2.1 The Explanatory Statement

The MLI came as a package with an explanatory statement (hereafter: EXS). This is a common arrangement for multilateral treaties. The EXS describes its own status in paragraph 11, where it is stated that it “reflects the agreed understanding of the negotiators with respect to the convention”.\(^\text{229}\)

The EXS deals with the explanation of how each provision of the MLI is supposed to affect CTAs. Except for the provisions on mandatory binding arbitration, the EXS is not meant to assist with the interpretation of the underlying BEPS measures.\(^\text{230}\) This delimitation of the EXS limits its value when interpreting the MLI, when not doing so in regard to the provisions on mandatory binding arbitration. VCLT art. 31(2)(b) is the relevant justification for the legal value of the EXS. The statement clearly is an instrument. It is however not as clear if it is made by the parties. The explanatory statement was drafted by the ad hoc group which included members of many of the signing countries. Ad hoc group members are however not required to sign the MLI.\(^\text{231}\) This goes both ways as Chile, for example, has signed the MLI, but was not part of the initial ad hoc group.\(^\text{232}\) Art. 31(2)(b) does not require that all parties have been part of the drafting of the instrument. It just must be accepted by those who did not draft it. The requirement of being made by at least one of the parties seems met, as the countries themselves are part of the ad hoc group. This is different than with the OECD Committee on Fiscal Affairs, where the members are considered experts from their countries, but not necessarily representing this. A product from this committee is therefore considered a work of an international organisation.\(^\text{233}\) The MLI can better be considered a product made by its parties. The EXS was adopted by the ad hoc group along with the MLI on 24 November 2016. Due to the broad interpretation of “in connection with the conclusion of the treaty”, especially regarding the acceptance of an instrument, this requirement is considered met here.\(^\text{234}\) The adoption is however not the action making the convention binding on the countries, as this was merely the acceptance of the MLI as being final and ready for signature. It is however not strictly required that the acceptance is the same


\(^{231}\) OECD, *BEPS Action 15, Final Report* (n 205). P. 5


\(^{233}\) Michael Lang, ‘Later Commentaries of the OECD Committee on Fiscal Affairs, Not to Affect the Interpretation of Previously Concluded Tax Treaties’ (1997) 25 Intertax. P. 8

\(^{234}\) See 3.1
as the acceptance to be bound by the treaty. VLCT art. 31(2)(b) requires acceptance that the instrument relates to the treaty. As the EXS was adopted together with the MLI, this seems met here. The issue is however unclear for parties that were not a part of the ad hoc group and joined later.

The OECD MLI signing ceremony marked the first signatures of the MLI. The MLI itself does not mention the EXS, nor is it in any other way formalised as part of, or belonging to, the MLI. The EXS describes its own role, but an instrument cannot give authority to itself. As mentioned in 3.1, acceptance to be bound by an instrument in accordance with VCLT art. 31(2)(b) can be implicit. The continued mentioning of the MLI as being accompanied by the EXS indicates that such an agreement must have been there for the signing parties, and those that signed or will sign later. However, the other materials that accompany the MLI are also mentioned with it, such as the MLI matching database, and background information, while these are clearly not context. This makes it more unclear if the parties saw the EXS as a part of the context.

In 4.2.2 it was discussed if the OECD MC commentary is binding on DTC parties due to acquiescence or estoppel. The argument is, that the circumstances may require a reaction if the commentaries should not be binding. Arguing acceptance based on an implicit agreement is not entirely comparable to the argumentation regarding the OECD MC commentary. This is due to the EXS being written for the MLI. This connection is not as strong with the OECD MC commentary and a DTC. As the EXS was adopted together with the MLI a reaction would clearly be called for, if a party were against the EXS. This would apply to both original and later signatories. Wittendorf states that the EXS is intended to have the same value as the OECD MC commentary, and thus is part of the context.


237 Wittendorf (n 217). p. 3
Comparing the EXS to the commentary however risks creating unclarity about its relevance as scholars or courts who attribute less value to the commentary may let this opinion affect their assessment of the EXS.

If it is not accepted that later parties implicitly accept the EXS, it cannot apply to earlier parties either as acceptance by all parties is required. This shows that acceptance by all must be assumed. Further, the MLI-package would be amputated against the intentions of the ad hoc group, if the EXS is not given relevance. From the adoption of the MLI together with the EXS it is clear that more than just a supplementary use was intended.

The conclusion must thus be that the EXS is context according to art. 31(2)(b). Were this not the conclusion the statement will be considered a supplementary means of interpretation.

The EXS does not include comprehensive interpretational aid for most of the MLI provisions. Therefore, it may in many cases not be useful for interpreting the MLI’s provisions.

**8.2.2 The Final BEPS Reports**

The BEPS reports contain the substantial provisions that have been made during the BEPS project and which are implemented in DTCs through the MLI. The question is which legal value these have. The EXS informs that the commentary made for the BEPS measures, found in the BEPS reports, has “particular relevance” for the interpretation of the MLI.238 The reports have not been agreed to when concluding the MLI. Members of the OECD, the G20 and others who have joined the Inclusive Framework on BEPS have however agreed to the BEPS measures. The Inclusive Framework on BEPS is a wider forum of OECD, G20, and other states who want to join. The requirement of this is commitment to the BEPS package.239

The MLI preamble, as well as some provisions, mention the BEPS package, which contains the BEPS reports, and makes clear that the MLI implements “agreed changes” – which refers to the changes from the BEPS reports. A connection is therefore clear. The EXS refers to the precise passages of the BEPS reports when describing where provisions originate from, thereby keeping this link. It is further seen that the MLI contains no substantive changes to the provisions as they are drafted in the BEPS reports.240 During the public consultation the ad hoc group secretariat emphasised the importance of

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238 OECD, *Explanatory Statement to the MLI* (n 210). P. 2 Para 12
239 OECD, *Background Brief - Inclusive Framework on BEPS* (n 1). P. 11
using the BEPS commentary to ensure uniform interpretation.\textsuperscript{241} Whereas the statement is not an acceptance of the parties, it could be considered a reflection of an understanding between the parties. It does suggest that the reports have a role on par with the EXS. This can be exemplified by examining the provisions on mandatory binding arbitration which do have substantive explanations in the EXS, but do not have commentary in a BEPS report. This shows that the drafters saw the two instruments as belonging together or being interchangeable.

Using the terminology of the debate regarding the OECD MC commentary one could argue that a good faith requirement exists to interpret the provisions in correspondence to the BEPS reports. In this regard, it is relevant to note that members of the Inclusive Framework on BEPS have committed to the BEPS measures and should therefore act in good faith to adhere to these, and if they decide to implement these through the MLI, this requirement means that they must interpret the MLI in accordance with this objective.\textsuperscript{242}

As discussed in 4.3, OECD reports may generally have relevance for interpreting DTCs. In these cases, the link between the OECD report and the DTC is more indirect, compared to the link between the BEPS reports and the MLI. The argument put forward in 4.3; that a report may have contextual value if the drafters of the DTC clearly knew and accepted the interpretation in the report, or can be assumed to have done so, is even more relevant for the BEPS reports. With these, the ad hoc group has used, and accepted the provisions and therefore also the interpretations from the BEPS reports. The EXS mentions that the MLI makes no substantive changes to the provisions that were made in the BEPS reports.\textsuperscript{243} Where this direct link between the MLI provision and a part of a BEPS report, through the EXS exists, this passage should be considered context on the level of the EXS.\textsuperscript{244} Other parts, where this link does not exist, are supplementary. These parts are however unlikely to offer useful guidance.

It could also be argued that, as the BEPS reports are the origin of the MLI provisions, they may have relevance in determining objective and purpose, or the ordinary meaning of these.


\textsuperscript{242} Membership of the Inclusive framework is not a requirement for signing the MLI, OECD, \textit{Background Brief - Inclusive Framework on BEPS} (n 1). P. 12

\textsuperscript{243} OECD, \textit{Explanatory Statement to the MLI (n 210)}. P. 2 para 12

\textsuperscript{244} Alexander Bosman, ‘Formele Aspecten van Het Multilaterale Instrument’ [2017] 4 Maandblad Belastingbeschouwingen (MBB). P. 5
The reports are therefore in part context, for as far as the parts therein are referred to in the EXS. The parts that are not, are supplementary. They are not considered preparatory material, despite the reports introducing the provisions that are implemented in the MLI without substantive changes hereto, because the reports are preparatory to the provisions – not to the MLI. They should be considered the circumstances of the conclusion of the MLI, as they mark the state of affairs when the MLI was negotiated.

8.2.3 The commentary to the 2017 OECD MC

In 4.2, the relevance of the OECD MC commentary for the interpretation of DTCs was discussed. The OECD MC commentary has a different role regarding the MLI.

The 2017 OECD MC contains the provisions that the MLI will implement into existing DTCs. New DTCs will – if they are modelled on the OECD MC and the parties do not refrain from using the new provisions – contain the BEPS measures. There is therefore a connection between the two instruments, but not as direct as with the BEPS reports. The OECD has stated that the two are not connected, and that this is further shown by the fact that the OECD MC is drafted by the OECD Committee on Fiscal Affairs while the MLI was drafted by the ad hoc group – which is not an OECD organ. In an MLI Q&A webinar the OECD referred to the OECD MC 2017 commentary when answering questions about certain rules in the MLI. The implication of the answer must be that the commentary is also a source for the interpretation of the MLI. Nikolakakis et al. “presume” that, seeing how the EXS gives no elaboration on interpretation (of in this case MLI art. 3(1)), the intention of the drafters is that the commentary is relevant. To a large extent, this will leave out the BEPS reports, as there will be overlaps.

As the OECD MC commentary has been published after the MLI, it has not been signed or agreed to, nor written by any party of the MLI. The MLI is – in principle – not connected to the OECD MC. There thus cannot be any implicit acceptance of it. The arguments for accepting updated OECD MC commentaries for the interpretation of a DTC may have relevance here. This would however require that some kind of acceptance to the older commentaries exists for the MLI. No such acceptance can be interpreted into the relationship between the OECD MC commentary and the MLI. The

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246 OECD, ‘OECD Tax Q&A Webinar | MLI’ (n 245). At 47:00

commentaries cannot therefore be relevant for the MLI based on the newer OECD MC commentaries debate.

The OECD MC and the MLI do contain the same rules. It is therefore logical to use it to some degree. Interestingly, the Dutch minister of Finance suggested that the commentaries “will have influence” insofar that there is correspondence between MLI and the OECD MC.248 The context in which the statement was made suggests more than just a supplementary use – and thus in the way of “context” in accordance with art. 31(2) VCLT. In practice, due to their common use and acceptance, the commentaries may be used more than its status warrants. For terms in the MLI a meaning set out in older OECD MC commentaries could be applied, but in a supplementary way. The arguments for application of the commentaries in regard to DTCs are unconvincing for the MLI and a good faith or similar argument for adherence to these cannot be made.

The commentaries thus have a supplementary role.

8.2.4 Preparatory material to the MLI

VCLT art. 32 allows the use of preparatory material as a supplementary source. Preparatory material to the MLI has not been published. Despite this, the OECD secretariat refers to the negotiations of the ad hoc group, and earlier versions of the article in question, in its note of 14 November 2018 about the interpretation of art. 35 MLI.249

8.2.5 MLI related case law

Case law from domestic courts is not binding on the courts of other countries. It may however have some interpretational value. The MLI contains innovative rules for which there in some countries is not yet any practice. The case law of other countries who have already implemented similar rules can offer solutions. An example is Alta Energy Luxembourg S.A.R.L. v. The Queen because the general anti-avoidance rule in the DTC has similarities with the PPT of the MLI.250 The interpretation of the Canadian court can however only have value based on its merits.251

249 OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Entry into Effect under Article 35(1)(a) - Note by the OECD Secretariat (n 228). Para 7
251 It is outside the scope of this thesis to go into detail about the actual interpretation and its similarities with the principal purpose test
8.3 Art. 2 MLI

In line with other international treaties and with DTCs, the MLI contains in art. 2 definitions of terms. Art. 2(1) contains just four defined terms. These are all related to the functioning of the MLI, and not to substantive rules or definitions of taxation.

Art. 2(1)(a) defines “covered tax agreement” as an agreement for the avoidance of double taxation with respect to income, and possibly other, taxes, that is in force between at least two parties and or jurisdictions that are party to an agreement but where another state is responsible for the international relations of this state, and that by both parties has been notified to the depositary (the OECD) as an agreement that the parties want to cover with the MLI. Agreements not in force yet may be notified, but the date when the agreement enters into force must be given. The agreement becomes a CTA at this date.\(^{252}\)

Art. 2(1)(b) defines party as a state or jurisdiction that has signed the MLI and for which it is in force.

Art. 2(1)(c) defines contracting jurisdictions as parties to a covered tax agreement. This could lead to some confusion as contraction jurisdiction is therefore not the same as party, as the two definitions refer to the different conventions.

Art. 2(1)(d) defines signatory as a state or jurisdiction that has signed the MLI, but for which it has not yet entered into force.

8.3.1 Art. 2(2)

Just like the OECD MC, the MLI has its own interpretational rule in art. 2(2). This rule is closely modelled on the rule in art. 3(2) of the OECD MC, which means that this provision may offer some aid in the interpretation of art. 2(2) MLI.

The rule is a lex specialis interpretational rule and has priority over the rules of the VCLT in case of undefined terms. This does not mean that the VCLT is irrelevant as art. 2(2) itself must be interpreted using the VCLT, and its good faith requirement.

Art. 2(2) states that:

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

Below, the different parts of art. 2(2) will be analysed.

\(^{252}\) OECD, *Explanatory Statement to the MLI* (n 210). P. 10 para 32
8.3.1.1 An undefined term

The application of art. 2(2) requires an undefined term, which is used in the MLI. As this term shall have the meaning that it has under the relevant CTA, it must have a meaning under the relevant CTA. If the term has no meaning under the relevant CTA, art. 2(2) will not apply and no reference to the relevant CTA can be made. Instead the VCLT applies. The provision does not require the term to be explicitly defined in the CTA. The EXS seems to use both “undefined term” and “term not explicitly defined”.

In this case, the wording of MLI must prevail, to the end that “an undefined term” is satisfactory. This also follows the general understanding of art. 3(2) OECD MC.

8.3.1.2 What does the context contain?

In 6.7.1 the context referred to in art. 3(2) OECD MC was analysed. The context referred to in art. 2(2) is not the same, although overlaps are possible and the principles for determining the context are the same. For art. 3(2) a broad context is favoured. For the same reasons as for art. 3(2), this also applies to the MLI. The MLI EXS does not explicitly set out what the context for art. 2(2) MLI is, as it instead spells out what is included, or added to, the context of art. 3(2) of the relevant CTA after the MLI is implemented.

According to this, the context includes the purposes of the convention, and that of the CTA with the added preamble. This preamble, a part of BEPS action 6, states that the CTA should not create opportunity for tax evasion or avoidance. Despite the above, the material that counts as context for this provision, should also constitute the context for art. 2(2). For art. 2(2) therefore, the context includes the purpose of the MLI and the purpose of the relevant CTA with its amended preamble. The purpose of the MLI, as stated in its preamble, includes “the need to ensure (...) co-ordinated and consistent implementation of the treaty related BEPS measures (...)”. Owing to the broad concept of context, the BEPS final reports and the OECD MC and its commentaries are included in it. Especially the 2017 version of these is included in the context as it includes the treaty related BEPS measures. Whereas the domestic law definition of the other DTC party is context for art. 3(2) OECD MC, the same reasons for including this as context for art. 2(2) MLI do not exist as art. 2(2) refers to the CTA, and not to any domestic law. This is therefore not context for art. 2(2) MLI. Where the OECD MC commentary for art. 3(2) adds the intention of the parties to the context, it is relevant to ask if this

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253 OECD, Explanatory Statement to the MLI (n 210). P. 11 Para 38
254 OECD, Explanatory Statement to the MLI (n 210). P. 11 Para 38
255 OECD, Explanatory Statement to the MLI (n 210). P. 11 Para 38
should also apply for art. 2(2) MLI. Using the same reasons as for including the domestic legislation of the DTC party, the interpretation of the MLI by the other party is also context. The question is here, if this means all other MLI parties are included, or just the one with which the relevant CTA is shared. For both questions, considering the bilateral effect of the MLI, it is the opinion of the author that only the interpretation and intention of the relevant CTA partner should count as context. A differing view would be practically impossible and would result in a surrender of sovereignty that goes beyond what parties agreed to when signing the MLI, as it could result in having to accept interpretations from other MLI parties’ CTAs.

The context is thus broad and with clear overlaps with the context as found in provisions modelled on art. 3(2) OECD MC.

8.3.2 The interplay between art. 3(2) of the relevant CTA and art. 2(2) MLI
Art. 2(2) MLI and art. 3(2) of the relevant CTA seemingly create a system together when following the below steps:

1. A term is contained, but not defined in the MLI
2. The relevant CTA contains a meaning for the term
3. The context referred to in art. 2(2) MLI does not require otherwise than to use this term
4. The meaning used in the CTA is used in the MLI provision

Given the conclusion in chapter 6, the relevant CTA should first be analysed to determine if the term is used here. If it is not the rule is not applicable. When a meaning is found, it becomes relevant to determine the context and whether this requires a differing interpretation.

For terms contained in the MLI and the relevant CTA, but defined neither in the MLI nor in the relevant CTA, the steps will look like this:

1. A term is contained in the MLI and the CTA, but not defined in either
2. An examination of the context referred to in art. 2(2) MLI is not applicable, as the term has no definition in the CTA
3. Domestic law contains a relevant meaning for the term in the same context
4. The context referred to in art. 3(2) CTA does not require otherwise than to use this term
5. The context referred to in art. 2(2) MLI does not require otherwise than to use this term
6. The domestic law meaning is adopted for use in the MLI

The step mentioned under no. 2 is in the author’s opinion necessarily the only solution, as it is illogical to analyse if the context requires otherwise, if no alternative is presented. The question would in this

257 Florian Haase, *Multilaterales Instrument - Heidelberger Kommentar* (1st edn, CF Müller 2018). Para. 366 is unclear about how this would play out
case be: “does the context require otherwise than X”, to which no conclusion can be given. As explained under 6.4.3 this will likely not keep interpreters from applying a contextual interpretation already at this point. The steps will result in an examination of the context twice in steps no. 4 and 5. In practice, partly also due to the modified “context” in art. 3(2) OECD MC, this step will presumably be undertaken as one. Step 5 could be argued to be expendable as art. 2(2) refers to the CTA, and not the domestic meaning. It is, however, the domestic meaning that becomes the CTA meaning. Likewise, step 4 can seem artificial, as it is irrelevant to determine if the context of the CTA requires otherwise, if the term will be employed in the MLI, but the step is needed to determine if it may at all be applied in the CTA. This makes sense due to the connectedness of CTA and MLI.

8.3.3 The issues with a non-contextual interpretation
The interpretation as explained above shows that the MLI is not a “real” multilateral treaty, but instead something in between a bilateral protocol and a multilateral treaty. The MLI mostly has bilateral effect. The interpretation by one MLI party, will therefore only affect the relationship of the relevant CTA partner. Indirect issues could occur, when a country that has applied its own definition of an MLI term comes into conflict with a country that has done the same.

The challenges that arise when applying the equivalent in DTCs of art. 3(2) OECD MC are not nearly as prominent in art. 2(2) MLI. The main reason for this is that the underlying source of law and terms is the same for the two countries, to which the substantive provisions of the MLI apply. Referring to the shared CTA will thus be much less of an issue, as the meanings in the CTA are agreed on and shared between the CTA parties.

The ability to conclude a DTC without getting bogged down in discussions about meanings of terms, is one of the reasons for including art. 3(2) in the OECD MC. This also applies here. Drafting a multilateral treaty requires more compromise than a bilateral one. This may be the reason why the ad hoc group has chosen to define so few terms in the MLI.

The MLI, by not including an extensive list of definitions, ensures the least possible interference with the intention of the original DTC. This flexibility can, however, go both ways, as the reference to the “bilaterally shared” CTA means that the term may be given a differing interpretation across MLI parties. DTCs normally do not contain a specific clause or preamble that sets out the object of consistent application, although such an object could be interpreted into the general objective of ensuring the elimination of double taxation. The MLI, however, contains such an objective in its preamble, as it states the need for consistent implementation in a synchronised and efficient manner. When art. 2(2) MLI is applied with the result that a domestic meaning is given to a term in an MLI provision, this is a more controversial result. It is however not much more controversial than when
this happens with a ordinary DTC. This is due to the bilateral character of the provisions of the MLI that amend the DTC.

The above would suggest that the context of the MLI should require less contextual interpretations than what a first guess – keeping in mind that the provision is copied of art. 3(2) - would look like. A contextual interpretation is still required when the CTA or domestic term result in the BEPS measures not having their intended effect, as the context contains the objective of the MLI. This addition to the context may result in fewer references to the relevant CTA or to domestic law. Lang goes as step further and argues that reference to the CTA or domestic law should be allowed only in exceptional circumstances, as it may result in differentiated interpretation of the MLI.258 This argument should be seen in context of Lang’s opinion regarding art. 3(2) OECD MC, which he similarly suggests should be a last resort.259 Due to the use of “required”, the contextual meaning that is found as an alternative to the CTA meaning, shall not only be preferable, but clearly preferred.

8.3.4 Conclusion
Summing up the above, it has been shown that the MLI allows for reference to the underlying CTA and the domestic law of the applying state. Given that the MLI adds new rules to DTCs and contains few definitions, art. 2(2) is relevant.

Despite being modelled on art. 3(2) OECD MC, the context in art. 2(2) is different as the results of its application are less controversial. In the author’s view, a one to one application of theory and case law relating to art. 3(2) would be wrong as the use of the provision does not risk an interpretation that the bilateral parties would not agree on. For this reason, it is the opinion of the author that fewer interpretations will require something else than a reference to the CTA. As with art. 3(2), if possible both the CTA meaning, and the context should however be considered, to determine what the context requires.

8.4 MAP and The Conference of the Parties
The MLI has certain – new and old – ways of solving issues that relate to interpretation. One of these is the conference of the parties.

Art. 32 MLI sets out a rule of how the MLI and the CTAs it modifies, are to be interpreted.

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

259 See 6.4.3
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).

This setup ensures that the interpretation of CTAs remains the sole competency of the parties to it. It, however, also gives the impression that the MAP is the only solution for questions regarding interpretation or implementation of the CTA. This does not sit well together with normal rules of tax treaty interpretation. The EXS declares that “the usual mechanism foreseen by the Covered Tax Agreement should be used to determine questions of interpretation and implementation of the provisions of the Covered Tax Agreement”. This clarifies that art. 32(1) confirms the normal rules of interpretation. The EXS remarks that art. 32(1) also covers questions as to how the MLI changes a CTA.

Issues regarding the interpretation of the MLI itself are within the domain of all parties to it, and for that the parties may convene a “Conference of the Parties”. The use of “may”, shows that the conference of the parties is just one option. The EXS expands on this and adds that competent authorities may agree between themselves on how the MLI will apply to their CTA. It is surprising that this allowance is written in the EXS and not the MLI itself, as it is an important addition. The clarification diminishes the Conference of the Parties as the relevant forum for questions on interpretation of the MLI.

There may be some questions as to when art. 32(1) or 32(2) applies. The more multilateral parts must belong to (2), which covers the procedural parts e.g. questions as to how amendments to the MLI will work. For other parts, it seems that most questions can be dealt with under art. 31(1).

The EXS clarifies that any conclusion to a MAP must be consistent with the MLI. This may seem obvious but given the flexibility of the parties when applying the MLI, it also seems surprising that the two CTA parties cannot reach an agreement to amend the effect of the MLI - even more so,

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260 OECD, *Explanatory Statement to the MLI* (n 210). P. 75 Para 315
261 Lang, ‘Die Auslegung Des Multilateralen Instruments’ (n 258). P. 18
262 OECD, *Explanatory Statement to the MLI* (n 210). P. 75 Para 316
263 OECD, *Explanatory Statement to the MLI* (n 210). P. 75 Para 315
considering that art. 30 MLI allows the parties to amend CTAs despite the MLI. The need for consistency is relevant, as MAPs could otherwise result in the MLI losing all its effect. The fact that countries have been given ample other ways of applying the MLI flexibly, would suggest that the parties, when not applying these ways, must faithfully commit to the MLI as it is written. However, the BEPS measures are not committed to through the MLI, but through the BEPS project itself. This could be taken to say that the parties should be able to amend the effect of the MLI, despite this making the BEPS measures less effective. In practice it may be difficult to determine when a MAP conclusion is not consistent with the MLI. As a MAP is reached between the authorities of the CTA partners the agreement between these ensures that action against the MAP conclusion is unlikely. The MLI only has the Conference of the Parties which could convene to determine the correct interpretation. The EXS does not state that an agreement made by the Conference of the Parties must be in accordance with this MLI. This makes sense as all the parties will have a chance to influence this, and as the Conference of the Parties can vote on amendments in accordance with art. 33 MLI.

Art. 31 MLI introduces the conference of the parties.

1. 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.
2. The Conference of the Parties shall be served by the Depositary.
3. 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.

The EXS explains that the Conference of the Parties does not necessarily have to meet in person but could do so using video conference or by exchanging written procedure. This could ensure that the Conference of the Parties does become a useful instrument, as it significantly lowers the burdens of setting up the conference. The EXS is, however, quiet on how exactly the Conference would work and how agreement would be reached. As the term “the parties” is used, it seems clear that only those states or jurisdictions for which the MLI has entered into force can convene a Conference of the Parties. The EXS, however, states that signatories may be invited. It is unclear if signatories would

264 OECD, *Explanatory Statement to the MLI* (n 210). P. 75 Para 316
265 OECD, *Explanatory Statement to the MLI* (n 210). P. 75 Para 312
266 OECD, *Explanatory Statement to the MLI* (n 210). P. 75 Para 321
also be able to vote if invited. Art. 27 MLI states that the parties and signatories must reach consensus on the acceptance of other non-state jurisdictions as signatories. This would suggest that signatories can vote if invited for other purposes, as their opinion is asked for in this case. This is also logical as the signatories will become bound by the treaty eventually and will at this point become bound by agreements reached by the conference of the parties. If the parties thus decide to invite signatories, it could be argued that these should be given the option of voting. It could, however, also be said that, as the MLI does not yet affect the signatories, these should not be able to influence it. Art. 18 VCLT requires that parties may not defeat the object and purpose of a treaty which they have signed but have not yet ratified. This should ensure that, even when allowed to vote, the signatories may not have a negative effect on the MLI.

The MLI is silent on this on voting. The VCLT at. 9(2) states that a two-thirds majority is needed at international conferences to accept the text of a treaty. The MLI conference of the parties does however also vote on interpretations, therefore suggesting that the rule of the VCLT not necessarily fits on the MLI. The OECD and Council of Europe Convention on Mutual Administrative Assistance in Tax Matters (hereafter MAC), coordinating body requires mutual agreement or, lacking this, a two-third majority. Since the MLI Conference of the Parties will be served by the OECD, it seems likely that the same will be applied to the MLI Lang points out that any agreement that the conference reaches will be difficult to fit into the VCLT. The only viable option would be to qualify the agreement as a subsequent agreement between the parties, according to VCLT art. 31(3)(a). This, however, requires agreement between all parties.

Alternatively, one could accept that the outcome of the Conference of the Parties will not have legal value, but instead will function as soft law, i.e. will function as a guideline. Given the observance of the OECD MC commentary, it is not unlikely that such a guideline could have an effect despite lacking hard legal value. Without agreement from all parties, the MLI could risk differing interpretations. This can arguably be worse than other differences in the use of the MLI that may arise, as these issues may go to the interpretation of “core” MLI provisions. The same can, however, be said about interpretations that are agreed upon using a bilateral MAP.

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268 Lang, ‘Die Auslegung Des Multilateralen Instruments’ (n 258). P.21
The relevance of the Conference of the Parties may be further diminished, as Lang points out that even if agreement can be reached, this agreement will, following VCLT art. 31(3)(a), only need to be taken into account. It therefore is not of higher value than other sources in art. 31. This means that it will not make other sources of interpretation less important, and an agreement may be dismissed by a court.

In sum, the rules in art. 31 and 32 show that the interpretation of the MLI is in large parts within the competency of the parties to a CTA. The scope for questions that only the Conference of the Parties can deal with is thus limit and this may limit is significance. Any agreement by it may further lack legal value, but this may also make it easier to utilise the Conference of the Parties.

8.5 The languages of the MLI
The MLI is authentic in English and in French. The is the same as the OECD MC. The OECD MC is however translated into many languages, which is often not an issue as it is not authoritative in any language – only official. The interim report on the MLI states that there are many examples of multilateral treaties being translated for domestic purposes with only a few authentic versions, which has “created no major difficulties”. The OECD reports that 90 % of DTCs have an authoritative version in either French or English. Thus assuming this would not lead to many issues.

The ad hoc group itself has translated the MLI into the necessary other languages. This is commendable, as the closer the translators are to the treaty drafters, the better the translation.

For Germany, and possibly other countries, the language aspect is challenging, as it is a constitutional requirement that German versions of treaties and MLI-changed treaties are provided for the parliament. This could be the reason that Germany has only notified a limited number of its treaties, but the German government has not confirmed this. Germany has notified approximately one-third of its 96 DTCs.

269 Lang, ‘Die Auslegung Des Multilateralen Instruments’ (n 258). P. 22
270 OECD, BEPS Action 15, Interim Deliverable (n 206). P. 61
271 OECD, ‘OECD Tax Q&A Webinar | MLI’ (n 245). At 44:30
272 OECD, BEPS Action 15, Interim Deliverable (n 206). P. 61
The MLI interacts very closely with the DTCs by modifying their provisions. This may result in a situation where the CTA will have English articles in between non-English ones and even with English parts in non-English provisions. At first sight this could result in issues of interpretation due to lack of understanding of the terms used in a different language. The issue may however be minor as most DTCs are based on the OECD MC. The EXS simply states that it may be necessary to refer back to the authentic versions of the MLI, when interpretational issues arise. "Referring back" must be done at every instance of any unclarity, which, without using the authentic version, may not be discovered. This would suggest a careful use of the unauthentic translated versions. Art. 33 VCLT allows for a good faith use of one authentic language version – thus either English or French, which should be the starting point. It has been suggested that states could create translated synthesised, or consolidated versions and use a MAP to authenticate this version between the two parties. The MLI or the EXS does not suggest this option, and it seems no country has done so. Doing so would take away the functioning of the MLI as being amending DTCs and the result would largely become comparable with when a protocol was used. States should therefore only use translated versions for informative purposes.

In practice, the translated will likely be used, as can already be seen as e.g. the German MLI commentary uses the German translation. This shows the difference between theory and practice. Due to translations being made by the ad hoc group, these are likely to be of high quality and the risk from using these is therefore low. The OECD director for Tax Policy and Administration has stated that the OECD will help with translated versions, “which will be harmonized so we don’t have discrepancies there.” This gives the impression that the unauthentic translations are a middle thing between official and authentic, which makes using them less of a problem, but may also lead to more interpreters assuming that they are actually authenticated.

As both French and English are authentic, they can both be used for interpretive purposes, i.e. if the meaning in the English version is unclear, the French may offer help.


275 Lang, 'Die Auslegung Des Multilateralen Instruments' (n 258). P. 22
276 OECD, Explanatory Statement to the MLI (n 210). P. 75 Para. 317
278 Haase (n 257).
Many comments have been made about the language aspect of the MLI, but few have found actual issues. Issues are most likely to occur due to translations of the MLI into non-authentic languages. It is hard to imagine however, that the language issues will result in any major issues. In the author’s view, the OECD has taken almost the best option by choosing two languages; preferable it would have been just one, as fewer languages keep interpretation simpler, and could have done more to further the increase of one language for DTCs.

9 The MLI - what convergence does it create?
Above, the theory of treaty interpretation and its sources have been analysed, followed by an analysis of the MLI, its interpretational sources and its interpretational rule. Accordingly, the next step will be to discuss what the MLI may mean for international taxation.

The following will initiate with a view of the MLI itself and will be followed by a discussion of some of its parts that relate to interpretation.

9.1 The MLI – to implement the BEPS measures
The added complexity of the MLI seems clear. The steps to determine the applicable law have become more, with more layers of information that must be analysed. OECD Director Saint-Amans reported that the MLI “may not be any less readable than the existing difficult environment”\(^{280}\) which shows that the MLI never had as a main object to create an easier system.

The MLI was supposed to be the easiest way ensuring BEPS compliance. The suggestion that multilateral negotiation should be easier than bilateral, is not necessarily widely agreed on. The argument that it is cheaper is more easily acceptable. Any surrender of sovereignty is often met with resistance by national governments, which explains why a truly multilateral treaty was not an alternative. The BEPS project instead resulted in a complex instrument of which the standard implementational mechanism can result in situations, where countries at the time of ratification are not necessarily able to know how the ratified instrument changes the status quo. This may explain why Denmark, initially, has used every reservation possible.\(^{281}\) Using an innovative instrument like the MLI has other advantages. It allowed the OECD to hold a reception and talk about its groundbreaking way to solve the issue of BEPS, and it ensured that the BEPS project finished with an

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\(^{280}\) Bell (n 276).

\(^{281}\) Wittendorf (n 217). P. 3. On 30 November 2018, Denmark released its draft bill to implement the MLI, where it is stated that all parts of the MLI will apply to the notified Danish DTCs. Forslag til Lov om anvendelse af multilateral konvention til gennemførelse af tiltag i dobbeltbeskatningsoverenskomster til forhindring af skatteudhuling og overskudsflytning, J. nr. 2017 - 6695, SAU Alm.del - Bilag 66. p. 168
instrument which is concrete and binding. For the parties it allowed them to proudly be a part of the fight against BEPS, which on paper at least is difficult to not want to join. The protocol option was dismissed due to technical challenges, risks of fragmentation and lack of speed. It would seem as if this option was never really considered. The argument of being too technical seems, given the current MLI, debatable. A protocol option has the distinct advantage of being a known solution. The OECD report talks of a “bundle of amending protocols”, without specifying how this could have looked or why it would be too technical. Schwarz comments on the issue with a one size fits all approach; DTCs are thoroughly negotiated and differ depending on the countries. The MLI betrays this way in which DTCs are negotiated, which may result in more reservations. A protocol solution could have taken heed of individual differences and may thus have resulted in a better uptake of the BEPS measures. Schwarz further wonders about whether states have been fast to sign, but slow to implement the MLI due to the above. Referring again to the Denmark example from above, this issue with ratification can be because countries want to play it safe and await how other countries implement the MLI. Schwarz further wonders whether an update in the OECD MC could have been a faster and easier solution. Above it was discussed that countries may still have to bilaterally negotiate MLI positions. The MLI thus does not entail smooth sailing all the way and whether the MLI was the best choice remains to be seen.

Below, it will be disused whether the choice of a multilateral convention brings advantages for uniformity.

9.2 Will the MLI create greater convergence?
This is relevant for the MLI itself, and for international tax in general. The argument of having a single text is put forward multiple times in the OECD report; one text drafted by the best treaty drafters would use the most appropriate language and a common international understanding would develop. The multilateral instrument would so to say set out the definitive way and meaning for the new terms, thereby ensuring all countries apply these alike and thus creating more certainty, and in the end a better implementation of the BEPS measures.

OECD, BEPS Action 15, Interim Deliverable (n 206). P. 18


Schwarz, ‘Multilateral Negotiation of Bilateral Treaties’ (n 281).
OECD, BEPS Action 15, Interim Deliverable (n 206). P. 16
This object loses some of its chance of success, when it is seen how few definitions and explanations the MLI contains, and how the sources for aid have been treated. As seen in 8.3, the MLI contains in art. 2(1) some definitions, but these only relate to the practical way in which the MLI works.

9.2.1 The clarity of the interpretational sources

The “toolbox”, developed as part of the 2014 interim report on how to draft the MLI, suggested that the MLI could be accompanied by a commentary or explanatory statement.\(^{287}\) The MLI interim report suggests that the relationship between the convention and its explanatory statement could be defined in the convention.\(^{288}\) This shows that an explanatory statement with a clear role was, at least at one point, suggested to assist the MLI. The text does not refer to the OECD MC commentaries, which is surprising given the importance of these.

The “toolbox” referred to the OECD and Council of Europe Convention on Mutual Administrative Assistance in Tax Matters\(^{289}\) which is accompanied by an explanatory report. The MAC explanatory report clearly states its non-binding character,\(^{290}\) and states that the convention generally shall be interpreted in accordance with the OECD MC commentaries.\(^{291}\) This approach, where reference is made to the OECD MC commentaries, while the report is itself non-binding, could have given brought clarity if used by the MLI.

The final MLI does not mention its own explanatory statement. This is first surprising as the opposite had clearly been discussed. It is further surprising given the long-standing issues of the OECD MC commentaries. It should be kept in mind that the MLI is a self-standing convention, thus calling for its own set of guidelines. Referring to the OECD MC commentaries would diminish the self-standing character of the MLI.\(^{292}\) Commentators have pointed out the need for examples for the Principal Purpose Test (PPT), which has brought much uncertainty.\(^{293}\) Clearly, it therefore cannot be seen as a mistake that the MLI says nothing about its relationship with the explanatory statement or any other

\(^{287}\) OECD, BEPS Action 15, Interim Deliverable (n 206). P. 44

\(^{288}\) OECD, BEPS Action 15, Interim Deliverable (n 206). P. 18


\(^{291}\) OECD and Council of Europe (n 287). P. 1


\(^{293}\) OECD, BEPS ACTION 15 Development of a Multilateral Instrument to Implement the Tax Treaty Related BEPS Measures - Comments Received on the Public Discussion Draft (OECD Publishing 2016). P. 11, P. 15, P. 178 and P. 199
materials from the BEPS project or the OECD commentaries. This is at first sight disappointing, as the ad hoc group had a chance of bringing clarity for interpretation and as it could have been easy to enter such a provision.

The MAC explanatory report states its relation to the OECD MC commentaries, while such a statement is lacking in the MLI. A problem with the existing OECD MC commentaries as a source for interpretation is, that the MLI is not an OECD product and includes parties, who are not OECD members. It could be imaged that these would not appreciate a source of interpretation which is out of their control. A counter argument is the soft-legal status of the commentaries, but this is not how the commentary is used. The provisions that are in the MLI, are also found in the newest version of the OECD MC 2017. If a legally binding, in the form of context according to VCLT art. 31, commentary was supplied with the MLI this must necessarily be identical to the OECD commentaries. If not, the divergence that this MLI commentary is trying to prevent will be aided instead. As future DTCs will be based on the OECD MC 2017 version, these will be supplemented by the OECD MC commentaries, all the while the MLI-modified CTAs would be interpreted by an identical binding set of commentary. This is would be a somewhat peculiar solution, when different views of the legal value of the OECD MC commentaries still exists. Two other issues of this approach are mentioned below. Firstly, countries can make observations to the OECD MC commentary. This opportunity is also given to some non-members of the OECD. If a country has made an observation to the interpretation set out in the commentary, this may be of importance to the MLI also, as it will affect how this country interpreted the provision before the MLI, and thus possibly also after the MLI has been implemented. An MLI commentary could not meaningfully show this, and this could result in a lack of understanding of interpretive issues and thus uncertainty. Secondly, is the question what will happen when the OECD releases new commentaries to provisions, that are also in the MLI. Having a set commentary specific to the MLI could risk that the OECD MC commentary receives updates, while the MLI commentary does not. This issue could however have been solved by reconvening the ad hoc group at set intervals. As mentioned above, this issue may not be larger than the issue of having different sets of OECD MC commentary for different DTCs. This situation will already show itself as a result from applying the MLI, as the older DTC is supported by older OECD MC commentary, while the newer MLI provisions require explanations from newer sources.
One commentator suggested forcing countries to agree to accepted interpretation and to deny them the right to sign the MLI if they would refuse following the accepted norms. This approach in the opinion of the author, would require too much of the individual countries in terms of surrendering sovereignty as they would be giving up accepted understandings of terms, and could therefore have posed a risk of countries not signing the MLI.

As mentioned in 8.2.4, the preparatory material to the MLI has not been released. This material is not publicly available and therefore questionable as a source of interpretation. It is disappointing that this material was not made public. For DTCs this is normal in many countries. For multilateral treaties, this is less normal. The ad hoc group stated that it was forced to make a compromise between opening all documents and a closed process, due to conflicting wishes by countries. Considering the general closedness of bilateral DTC negotiations, one could argue that any openness is a good start.

Practically the issues above may turn out to be rather limited and may not be worse than the situations that courts have to deal with now, with determining the relevance of updates to the commentaries made after the DTC was enacted or using different versions of the commentaries for different DTCs. The ad hoc group discussed meaningful diversity versus meaningless diversity regarding the interpretation of the MLI, and how the latter should be prevented. The question is one of how to treat the newcomers to the party, that has been led by the OECD members. It would seem, that the ad hoc group and the OECD could have done more to ensure certainty, instead of sticking with the old methods. Even just a hint to the relevance of the BEPS reports, or the OECD MC commentaries could have made it more permissible for judges to apply these in their interpretation and could have brought more clarity. This could also have clarified the connection of the MLI to the work of the OECD in general. One could further argue that requiring parties to adhere to a commentary is another surrender of sovereignty, which could result in the risk that countries are not willing to join the MLI. A clearer source of interpretation however only provides clarity and international law in most cases requires an autonomous interpretation. Surrender of sovereignty is therefore not a strong argument. Alternatively, a set-up like that of the MAC explanatory report could have been a solution that would not risk this.

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294 OECD, *MLI Discussion Draft - Comments Received* (n 290). P. 42
295 OECD, ‘OECD WebTV - Public Consultation of the Ad Hoc Group on the Multilateral Instrument’ (n 241). At 05:00. The public consultation was based on a short discussion draft and a draft for the MLI was not supplied for comments.
296 OECD, ‘OECD WebTV - Public Consultation of the Ad Hoc Group on the Multilateral Instrument’ (n 241). At 00:19:00
9.2.2 To what degree does art. 2(2) pose a risk for the use of the MLI?

The reference in art. 2(2) MLI to definitions in the CTA, and through it to domestic law shows that the substance of the multilateral instrument is not multilateral. The form of the MLI is clearly multilateral, but only parts of it are multilateral in substance. This is relevant for the way the MLI should be applied.

As art. 2(2) is modelled on art. 3(2) OECD MC, arguments can be made about how art. 2(2) MLI should be used only a last resort, as some suggest for art. 3(2) OECD MC. In the opinion of the author, this is incorrect. It will and can be used more often. This may differ depending on the country, thereby creating more diversity. Due to the unclarity about interpretation sources, one could argue that non-OECD countries would use this provision even more as they may be less willing to rely on the OECD sources or may be less used to do so. The provision makes clear, that the MLI-parties have not committed to an autonomous MLI interpretation, as the sources for this are not clearly available.

The requirement of interpretation in good faith does not require that the parties generally refrain from applying the provision, as it is a part of the convention. In certain cases, this may be different. Art.2(2) allows the divergent practices that countries have developed over time so be applied and adhered to. This makes the application of the MLI easier and respects these peculiarities. This argument makes even more sense, if it is taken into consideration that the MLI provisions can become “part” of a CTA provision and will have parts of the CTA both after and before it. As the provisions of the MLI will be used bilaterally, the issues from this approach will be limited. An obvious example of an issue is however when two countries, X and Y, in their DTC have accepted a certain interpretation. This interpretation may be used in the MLI. What will then happen in the relation between Y and Z?

Taking it one step further the issue becomes more troublesome when Z also adheres to a non-standard use of a term. What shall Y do in this situation? If Y accepts both non-standard interpretations, Y will effectively interpret the same term differently depending on the CTA partner. This may be considered less than ideal for courts and practitioners in country Y, but in practice this will be no different than without the MLI and is therefore something that countries will have had to deal with already. This shows that the bilateral MLI provisions without risking the MLI, in many circumstances, could be given a CTA interpretation.

It is my opinion that the objective of the MLI will ensure that much interpretation will happen without reference to domestic law, which will ensure increasing convergence. There is however a lack of reason to require contextual interpretation of the bilaterally functioning provisions, when the alternative is a bilaterally accepted interpretation, as it only has bilateral effect. For the MLI to serve its purpose, an autonomous interpretation is therefore often not necessary. For the uniformity of
interpretation, this conclusion is not ideal. It is however not the objective of the MLI to streamline international taxation, had this been so, the ad hoc group should have taken a clear position on interpretational material to aid the interpreter.

**9.2.3 The Conference of the Parties offers little help**

The Conference of the Parties does not bring an obvious tool to help the parties create a uniform instrument. The conference of the parties adds multilateralism into the treaty as it lets all parties convene and agree on questions about the MLI. It is however not mandatory, the incentive for states to use it is lacking. As it will be easier to negotiate bilaterally with a single CTA party, this may be preferred. However, following the same principle as the MLI itself, if a country has a need for a certain interpretation and needs agreement for this from many parties, the Conference of the Parties may be relevant. But due to the need of collecting acceptance from one-third of the MLI-parties, it may be easier to agree with all these bilaterally.

As the MLI comes with little in the form of follow-up mechanisms, review or a body to which parties must answer, there is little to keep countries from taking the easier route and solving issues bilaterally instead of multilaterally. The Conference of the Parties lacks any rules on how, when, voting, and how its finances are managed. This results in an instrument that sounds good on paper but is hampered by its unclarity. During the public consultation on the MLI commentators voiced the view that a mechanism to ensure continued talk on interpretation amendments and implementation should be formalised. It is disappointing to see that the best the ad hoc group could come up with is the Conference of the Parties as found in art. 31 MLI. If this mechanism will not be utilised, the OECD may take up the mantle in its role of the depositary. While the OECD has the expertise to take care of finishing the MLI and ensuring correct implementation, this may happen to the detriment of non-OECD members. These will, despite being a part of the MLI, and the Inclusive Framework in BEPS, still not be anywhere near full OECD members.

The OECD and Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters provides a different way of solving interpretational issues. Art. 24(3) MAC implements a coordinating body, made up of representatives of the competent authorities of parties to the convention. This body oversees the implementation of the convention and has the right to suggest amendments to the convention. Art. 24(4) gives parties the option to ask the body to furnish opinions on the interpretation of the provisions of the convention. In Art. 24(5) it is however spelled out that disagreements between competent authorities – also regarding interpretation – shall be endeavoured to be resolved between these. The provision however also states that the agreements shall be communicated to the body. Finally, art. 24(6) ensures that interpretations made by the body and
agreements made between the competent authorities become available to all parties, as the OECD shall inform them of these. The explanatory report also states that the body only has an advisory role only, and that the sharing of opinions and agreements does not make these binding on other parties. The OECD has published rules of procedure for the coordinating body, setting out how often it meets, and how decisions are made.

The differences between the MAC and the MLI in this regard are quite clear. The MAC clearly states in the convention itself, that a body shall be created, and that it shall have certain functions. The MLI is much vaguer and states only that interpretation may be addressed by the Conference of the Parties. The MAC also only states that interpretational issues “may” be furnished to the body but is clearer on the sharing of opinions once they are made. A clear advantage of the MAC is also that its explanatory report is clear about the legal value of interpretation produced by the body and competent authorities.

The MAC explanatory report states that such a body is necessary due to the multilateral character of the convention, to ensure uniform interpretation. The fact the such a body was not made for the MLI could be taken to show its bilaterality.

In sum, it is the author’s opinion that the Conference of the Parties could have benefited from more details on its functioning, more permanence as well as rules to share findings on interpretation. The approach taken in the MAC has clear advantages to the one in the MLI. Especially on sharing (non-confidential) information, which is an easy point to ensure uniformity.

9.2.4 The outlook from a wider perspective
For international tax from a more general point of view, the problem with the MLI is that its intended objective is to implement the BEPS measures. It does not try to be much more than that, and while it may ensure that this happens in a coordinated way, the treaty shows little ambition of having other effects on interpretation in international tax. This may be a missed chance, but it should be kept in mind that the MLI was made for a specific task. The ad hoc group chair, during the consultation on the MLI, stated that there may be situations where countries agree to the same text but have different ideas of what it means or how it will be interpreted but said that this is no different than the current situation.

297 OECD and Council of Europe (n 287). Para 243 and 248
298 OECD and Council of Europe (n 287). Para. 229
299 OECD, ‘OECD WebTV - Public Consultation of the Ad Hoc Group on the Multilateral Instrument’ (n 241). At 55:00
The MLI contains few terms that can contribute to the harmonisation of the international tax language and its mechanism of ensuring clarity are less than could have been hoped for. For the purpose of convergence, it is the author’s opinion that it will have a limited effect – more like a small step in an overall process towards harmonisation than a jump towards a system with fewer interpretational problems.

This does not mean that it will have no effect at all. Its effect may however be more pronounced in the way that it is an experiment to see how the current bilateral DTC network can be aided and updated with multilateral means.

9.3 What may be the future of the MLI?

The idea of a multilateral DTC is not new. The League of Nations explored the idea of a multilateral DTC in the early days of international taxation and, while a comprehensive multilateral DTC was not pursued, some multilateral treaties have been successful. This success has been with conventions of a limited scope; either functionally as the OECD and Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters, or geographically as the Nordic Multilateral Tax Treaty. The MLI is also limited in its scope, but with a different limitation as the MLI has a limited objective of implementing a range of new provisions into existing DTCs.

This gives the impression that after achieving this, the story of the MLI ends. The 2014 interim report states that while the method could be used in the future, the MLI should focus on the BEPS project. The MLI contains in art. 33 a rule on how the it could be amended. The rule simply states that a party may propose an amendment by submitting a proposal to the depositary. Art. 33(2) states that a Conference of the Parties may be called to discuss the proposal. The EXS offers no further clarification. The use of “may” shows that the Conference of the Parties is not the sole way of dealing with amendments.

Given the objective of the MLI, it seems most obvious that the ad hoc group saw the possibility of amendments as a furtherance of the BEPS project or to solve issues of the MLI, but the provision states nothing that should bar amendments of a more progressive character. Given the work put into creating the MLI, it would be a waste to limit it to a one-time solution. If the MLI is a success, the OECD or G20 members could initiate a second round of BEPS talks which could lead to new treaty amendments to be quickly phased into the DTC network through an amended MLI.

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300 OECD, BEPS Action 15, Interim Deliverable (n 206). P. 28
Taking an optimistic view, the MLI, or a successor to it, could become an instrument that is amended at regular intervals. Whereas the OECD MC and its commentary are now updated at regular intervals, a continually amended MLI could stand in its place, resulting in quick responses to challenges in international taxation. This functioning would have worked better were the MLI more of a multilateral treaty that “kept” its articles within the treaty – by moving certain topics out of the bilateral into the multilateral sphere – instead of the MLI as it is, with its modifying effect. This option could however create additional complexity, where the original MLI is followed by an amended MLI, to which not all MLI parties necessarily are parties. As advantage of updating the MLI this way, is that much of the controversy about the use of updated OECD MC commentary could be solved, as parties would accept the updated MLI.

The instrument of an “MLI” has been helped along by the BEPS issues, which created the necessary momentum. It is therefore optimistic to believe that amendments to it could be accepted without another large-scale project that will justify the surrender of sovereignty by states. In 2020, the BEPS Inclusive Framework will issue a report with results of the implementation of the BEPS measures. This could be a step toward new MLI articles.

Moving additional issues into a multilateral instrument can aid the furtherance of convergence within international taxation, and interpretation will develop multilaterally due to contextual interpretation. Care must be shown towards any try to make the MLI the forerunner of a “real” multilateral tax treaty. The author believes that the way towards it may be shaped by the MLI, but there is still a long way to go. Any such work should be initiated by a more inclusive organisation, that not only includes developed countries but also developing countries. Especially given that these may have differing views on how international taxation should develop. Developing countries have expressed the desire of strengthening the UN Committee of Experts on International Cooperation in Tax Matters to make it an intergovernmental body to ensure a more inclusive debate on the development.301

Certain points could already after the MLI enters into effect be addressed to improve its working. Sharing of information regarding the implementation and interpretation of the MLI would be something that the OECD could initiate in its role of depositary. Sharing of information could easily be implemented and would not risk tax sovereignty. Clarity should be given to the legal importance

of whatever will be shared. Establishment of rules of procedure for the Conference of the Parties would also be beneficial. The importance of this is particular for non-OECD MLI parties. Without the Conference of the Parties becoming an effective instrument, more must be done by the OECD, to the detriment of the MLI parties who have lesser influence in this forum.

10 Conclusion
The object of this thesis is the interpretation of the OECD Multilateral Instrument to implement the BEPS measures. The MLI is an important product of the BEPS project and brings multilateralism into the bilateral DTC network.

Being an international treaty, the MLI shall be interpreted applying the rules of the Vienna Convention on the Law of Treaties. This means that the MLI shall primarily be interpreted in good faith using the ordinary meaning of the terms in their context, in the light of their object and purpose. To determine what this may mean, the sources for the interpretation of DTCs in general and the OECD MC commentaries in particular have been analysed. It is concluded that this issue is still debated and that courts in OECD member states often use the commentaries, but without clarity on how exactly. Academics have suggested different ways of placing the commentary within the rules of the VCLT, but these are all somewhat strained, as the VCLT has no way of dealing with an instrument like the commentaries. It is concluded that whether based on good faith or on acquiescence or estoppel the OECD members must take heed of the corresponding OECD commentaries for DTC provisions that have no intended deviation from the OECD model, when no observation or other indication can be found that they disagree with it. This does not mean, that the commentary must always be followed, but it shall be consulted during interpretation. Care must be had with later commentaries. In cases of very old DTCs, courts may favour use of these later commentaries as an update and may base this on “international practice”, which could be the ordinary meaning. Normally, newer commentary should be considered a supplementary means of interpretation. Art. 3(2) has become clearer in recent updates to the OECD MC, but the main question of when reference to the domestic meaning of terms can be applied is still undecided. It is concluded that a wide definition of context should be applied for the provision. This ensures that the decision of applying a contextual interpretation can be made on an informed basis. Due to the “new approach” however, it is also concluded that the issues with referring to domestic law regarding newer DTCs, are no longer pressing. For this reason and due to the object of the provision, it is concluded that reference to domestic law should be the starting point and that a contextual interpretation should be applied only when the domestic meaning clearly gives an unfavourable result. In addition, it is
concluded that for the provision to fulfil its meaning, if possible, both the domestic and the contextual meaning should be found.

While the BEPS project concluded that the MLI is the best way of implementing the BEPS measures, countries are not forced to use the MLI for this aim. Some countries have opted for bilaterally negotiated protocols. This may result in a differing application of the BEPS measures.

The MLI is accompanied by an explanatory statement and interpretational aid may further be found in the final BEPS reports and the newest version of the OECD MC 2017. The explanatory statement is intended to be context. While not clearly stated, this is the intention of the parties which can be seen by how the MLI and the explanatory statement are presented as a package. The BEPS reports include commentary and explanations for the provisions implemented through the MLI. This would suggest that they should have a role in the interpretation, but no clear statement hereto is given. As the explanatory statement refers to passages in the BEPS reports when describing the MLI provisions, the connection between the two is clear, and for these passages the BEPS report should be considered context to the MLI. The OECD MC commentary as updated in 2017 has a weaker link to the MLI. It does however implement the BEPS measures in mostly the same way as the MLI. No further connection can be found, and it is therefore not context, but at best supplementary. Practice may see heavier reliance on it, due to familiarity with the instrument.

The interpretation rule in art. 2(2) MLI is modelled on art. 3(2) OECD MC but allows for reference to the Covered Tax Agreement instead of domestic law. For this reason, the theory of art. 3(2) OECD MC cannot be applied to art. 2(2) MLI directly. Referencing to the CTA allows the bilaterally applied provisions of the MLI to be interpreted in a way that respects the bilateral relationship between the CTA parties. The provision may therefore prove valuable for allowing bilateral peculiarities to apply while still adhering to the BEPS measures. It is therefore concluded that the risk of non-effective interpretation is lesser for the MLI compared to that of DTCs. In cases where the CTA meaning would clearly risk the effectiveness of the BEPS measure, the context requires that a contextual interpretation is applied.

It is shown that the Conference of the Parties may be used as a tool to agree on interpretation. The states may however also bilaterally agree on this, and the division of these two competences seems to favour the bilateral approach. The MLI is authentic in French and English. This means that these languages may modify provisions in a different language. This may result in challenges, but as the OECD materials are always produced in these languages, the challenges will be manageable.
Translations have been produced, but it is important to keep in mind that while these are produced by the ad hoc group, they lack authoritativeness.

In the discussion regarding the effect of the MLI for interpretation and convergence in international taxation it is argued that the MLI brings unclarity about its own sources to the detriment of uniform interpretation. It is however concluded that the complexity in international taxation make it difficult to deliver a clear solution, and that the MLI at least benefits from building on a known system. It is further seen that the interpretation rule can risk some of the multilaterality, but that due to the substantial bilateral character of the MLI, this will not be a major issue. De lege ferenda it could be suggested that an autonomous MLI interpretation should be favoured, but this would require surrendering more sovereignty and should have come with more clarity about what to base interpretation on. It is further noted that the Conference of the Parties could have been a stronger instrument and, as it is not, may risk not being used and a chance for further talks in a bigger group than just the OECD can have been lost.

For the future, the MLI should not be seen as much more than a tool to implement the BEPS measures. As the road towards multilateralism has been widened by the MLI, it is to be hoped that the system of modifying DTCs with a multilateral instrument will be utilised again. This will depend on the success of the MLI, and importantly, if states can be rallied to a cause that is important enough.
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11.7 Webpages

- Interview with Mike Williams, ‘Q&A with OECD Multilateral Instrument Group Chair’

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