

The Autonomous Interpretation of the Multilateral Instrument with Particular Relevance to Article 2(2)

This article assesses the interpretational process regarding the “undefined terms” in the Multilateral Instrument (or MLI). It verifies the relevance of article 2(2) of the MLI – whether it should be the starting point for interpretational purposes – and assesses the importance of the Vienna Convention (1969) and other means of interpretation.

1. Introduction

1.1. In general

The OECD Committee on Fiscal Affairs (CFA), as endorsed by the G20 leaders, released the final package of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project in 2015. The BEPS Project was drafted by a group of countries comprising OECD member countries and non-OECD states, i.e. the member countries of the G20.¹ It consists of 15 Actions.² These Actions deal with different measures that are intended to deal with tax avoidance arrangements, and ensure that profits are taxed where the relating business activities are carried out and the value is created.³ These measures are to be implemented by way of bilateral tax treaties. For this purpose, Action 15⁴ provides for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the MLI or “Multilateral Instrument”)⁵ to modify bilateral tax treaties. The aim of the MLI is to implement the BEPS measures in a fast, consistent and synchronized manner.⁶

The MLI is accompanied by an Explanatory Statement that is intended to reflect the agreed understanding of the negotiators with regard to the Multilateral Instrument. The text of the MLI and the Explanatory Statement have been drafted by an ad hoc group comprising OECD member countries and non-OECD states,⁷ as appointed by the CFA, and as endorsed by the G20 leaders. These documents were released on 24 November 2016.

This article focuses on the interpretation of the MLI and, in particular, on the interpretation of the terms used, but not defined, in the Multilateral Instrument, for example, “principal purposes”, “arrangement” or “benefit”. The meaning of such terms is not expressed in the MLI and must be determined through the interpretational process.

This process, however, is not clear for two main reasons. The first relates to the unclear nature of the MLI. No uniform consent has been registered regarding the MLI in academia. Some authors consider the MLI to be an autonomous treaty to be read alongside the relevant Cover Tax Agreements (CTAs). Others treat the MLI as an amending treaty, i.e. a form of Protocol). These approaches have different effects on the interpretative process of the “undefined terms”.

The second relates to the wording of article 2(2) of the MLI, which aims to determine the meaning of these “undefined terms”. This rule is very vague. In particular, article 2(2) of the MLI does not provide a definition of the term “context” and does not clarify when, and whether, the “context otherwise requires”.

These two aspects are pivotal for the correct and uniform interpretation and application of the “undefined terms” in the MLI. The vagueness of the rule could result in non-uniform interpretations of the terms in question, of the text of the MLI and of the relevant CTAs, in clear contrast to the purpose of the MLI.⁸

1.2. The structure of the article

The analysis of these aspects has been structured in the following two main parts.⁹ In the first step, the analysis is

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1. OECD, *Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, para. 3 (7 June 2017), Treaties & Models IBFD [hereinafter: “*Explanatory Statement*”] and P.J. Hattingh, *The Multilateral Instrument from a Legal Perspective: What May Be the Challenges?*, 71 Bull. Intl. Taxn. 3/4, sec. 3.1. (2017), Journal Articles & Papers IBFD.
2. See OECD, *Action Plan on Base Erosion and Profit Shifting - Report* (OECD 2013), Primary Sources IBFD.
3. OECD, *Explanatory Statement*, supra n. 1, at para. 1.
4. See OECD, *Action 15 Final Report 2015 - Developing a Multilateral Instrument to Modify Bilateral Tax Treaties*, (OECD 2015), Primary Sources IBFD [hereinafter: *Action 15 Final Report* (2015)].
5. *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (7 June 2017), Treaties & Models IBFD [hereinafter: “*Multilateral Instrument*” or MLI].
6. The implementation of the OECD/G20 BEPS Project on a treaty-by-treaty basis would have been very time-consuming, inefficient and ineffective.

7. N. Bravo, *Tax Treaties for the Avoidance of Double Taxation on Income and Capital*, in *A Multilateral Instrument for Updating the Tax Treaty Network* sec. 1.6. (IBFD 2020), Books IBFD.

8. That is, to implement the BEPS measures in the treaty network in a uniform and consistent way.

9. The structure of this article shares some similarities with that in S. Wakounig, *Interpretation of Terms Used in the Multilateral Instrument*, in *The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects* (M. Lang et al., eds., Kluwer Law International 2018). However,

intended to understand whether article 2(2) of the MLI is the starting point for the interpretation of these terms (see section 2.). In this regard, the nature of the MLI is assessed and, therefore, the compatibility of its interpretative provisions with those included in the relevant CTAs.

In the second step, article 2(2) of the MLI is assessed in detail as well as the other applicable interpretation rules and principles, i.e. the Vienna Convention on the Law of Treaties (1969) (the “Vienna Convention”) (see section 3.).¹⁰

Thereafter, the analysis focuses on the legal status of the most relevant means of interpretation that could be used for the interpretation of the “undefined terms” in the MLI (see section 4.). These means include the Explanatory Statement, the findings of OECD/G20 BEPS Project, the OECD Model (2017)¹¹ and the Commentaries on the OECD Model (2017).¹² The article ends with some conclusions in section 5.

2. Why and Whether Article 2(2) of the MLI Is the Starting Point for Interpretational Purposes

2.1. Introductory remarks

Before assessing the functioning and the relevance of article 2(2) of the MLI for interpretational purposes, it should be ascertained whether this provision is the starting point for the interpretation of “undefined terms” in the MLI. This issue is not as straightforward as might seem. It depends on the different views that can be upheld regarding the nature of the MLI. Different outcomes can be reached if the MLI is considered to be: (i) a form of amending protocol that directly modifies and/or implements the provisions of the relevant CTAs (see section 2.2.); or (ii) an autonomous treaty to be read alongside the relevant CTAs (see section 2.3.).¹³

2.2. First approach: The MLI directly amends and/or implements the relevant CTAs

2.2.1. Opening comments

Under the first approach, the MLI is not considered to be an autonomous treaty. It is a form of protocol that applies only once to implement directly BEPS measures arising from the OECD/G20 BEPS Project in relation to the relevant CTAs.¹⁴ When this task is completed and the CTA includes the provisions of the MLI, the scope and purpose of the Multilateral Instrument is realized.¹⁵

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the present article analyses the interpretation of the “undefined terms” in the MLI under different perspectives and with different approaches.

10. *UN Vienna Convention on the Law of Treaties* (23 May 1969), *Treaties & Models* IBFD.

11. *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), *Treaties & Models* IBFD.

12. *OECD Model Tax Convention on Income and on Capital: Commentaries* (21 Nov. 2017), *Treaties & Models* IBFD.

13. Bravo, *The Concept behind the Multilateral Instrument*, in *supra* n. 7, at sec. 2.2.

14. *Id.*

15. Bravo, *supra* n. 13; S. Austry et al., *The Proposed OECD Multilateral Instrument Amending Tax Treaties*, 70 *Bull. Intl. Taxn.* 12, sec. 1. (2016), *Journal Articles & Papers* IBFD and 4 *Brit. Tax Rev.*, p. 455 (2016); and M. Lang, *Die Anwendung des Multilateralen Instruments (MLI) “Alongside Existing Tax Treaties”*, 27 *SWI 12*, pp. 624-631 (2017).

Such an approach is based on the assumption that the MLI is not a real autonomous treaty and/or a “legally complete instrument”.¹⁶ In order to have effects, it requires further actions by the contracting jurisdictions.¹⁷ Furthermore, it is not a “self-sustaining international agreement”,¹⁸ as it is necessarily based on the relevant CTAs. Without these agreements, the MLI has no reason to exist. Under this approach, the CTAs remain the only agreements in force between the relevant contracting jurisdictions.¹⁹

Allegedly, this approach has been supported by the wording of the “compatibility clauses” that have been introduced into the MLI to clarify its interactions with the CTA provisions.²⁰ These clauses “modify” or “apply in place of” the provisions in the CTAs. In this regard, to a certain extent, they seem to suggest a direct effect – a form of integration – of the MLI on the relevant CTAs.^{21,22}

This view is shared by some authors.²³ However, it appears to be inconsistent with both the approach adopted by the drafters of the MLI and the definition of “treaty” in article 2 of the Vienna Convention (1969) (see section 2.3.).

2.2.2. Compatibility issues between article 2(2) of the MLI and article 3(2) of the CTA

Under this scenario, once the substantive provisions of the MLI have been incorporated into the CTA, the MLI is no longer effect. The provisions of the MLI that are not integrated into the CTAs should lose their effect. Article 2(2) of the MLI is one of these provisions. Neither the MLI nor the Explanatory Statement provides for an integration (or compatibility) rule for this article. In the absence of such rules, it could be said that the provision would not have any effect on the CTAs, as they are not imported into those agreements. In a certain way, it could be argued that the provision would lose its effect before entering into force. Accordingly, it would be irrelevant for the interpretation of the “undefined terms” in the MLI.

The only provision which remains available for the interpretation of the “undefined terms” would be article 3(2) of

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16. Hattingh, *supra* n. 1, at sec. 6.1.

17. *Id.*

18. D.W. Blum, *The Relationship between the OECD Multilateral Instrument and Covered Tax Agreements: Multilateralism and the Interpretation of the MLI*, 72 *Bull. Intl. Taxn.* 3, sec. 2.1. (2018), *Journal Articles & Papers* IBFD. However, see Bravo, *supra* n. 13, according to whom the MLI can be considered to be an “amending treaty”, as it is based on the CTAs. Nevertheless, the amending tax treaties must be considered to be autonomous agreements.

19. Bravo, *supra* n. 13.

20. For an overview of the different compatibility clauses, their functioning and effects, see Bravo, *The Relationship between the Multilateral Instrument and the Provisions of the Covered Tax Agreements*, in *supra* n. 7, at sec. 3.5.

21. See Hattingh, *supra* n. 1, at sec. 6.2. The author specifies that, according to the Explanatory Statement, the compatibility clauses aim to change the application of an existing provision without replacing it.

22. OECD, *Explanatory Statement*, *supra* n. 1, at para. 15. The compatibility clauses consist of the four types and are provided for almost each MLI article. According to these clauses, an MLI provision: (i) could apply “in place of” an existing CTA provision; (ii) “applies to” or “modifies” an existing CTA provision; (iii) applies “in the absence of” an existing CTA provision; or (iv) applies “in place or in the absence of” an existing CTA provision.

23. Bravo, *supra* n. 13.

the CTA (if the CTA has such a measure), but which has a different scope to article 2(2) of the MLI. The interpretation of the “undefined terms” in the MLI according to this rule would be inconsistent with the object and purpose of the Multilateral Instrument. These terms would be interpreted according to the different contexts of the CTAs and/or the relevant domestic laws and, therefore, not in a uniform and consistent way. In addition, such an interpretation would breach the agreements reached by the contracting jurisdictions. These jurisdictions would have to interpret the “undefined terms” in the MLI under the rule provided for by article 2(2) of the MLI. In this scenario, the terms would be interpreted according to a different rule, i.e. that provided for by article 3(2) of the CTA.

Similar results could be realized even if it were hypothesized that article 2(2) of the MLI must be incorporated into the CTAs, even in the absence of a compatibility clause. At first glance, this approach would be more consistent with the object and purpose of the MLI. Both article 3(2) of the CTA and article 2(2) of the MLI would coexist in the same CTA. The former provision would address interpretative issues relating to “undefined terms” in the CTA, while the latter would address the same issue relating to the “undefined terms” in the MLI.

However, this scenario would appear to be difficult to uphold. Neither the drafters of the MLI nor the contracting jurisdictions have agreed to integrate article 2(2) of the MLI into the relevant CTAs. This circumstance appears essential under the present approach.²⁴ The provisions of the MLI that remain effective are only those that the contracting jurisdictions decided to include directly in the relevant CTA through the different compatibility clauses. Nothing in this regard has been agreed in relation to article 2(2) of the MLI. Accordingly, this provision should not apply, as it is not included in the CTA. There is also no room for the application of the *lex posterior* rule *ex* article 30(1) and (3) of the Vienna Convention (1969), as the MLI is not considered to be an autonomous treaty.

If the foregoing is true, i.e. article 2(2) of the MLI has no effect, article 3(2) of the CTA would apply to the “undefined terms” in the Multilateral Instrument. This conclusion would be inconsistent with the object and purpose of the MLI and in breach of the agreement reached by the contracting jurisdictions.

In light of the foregoing, the first approach appears not the most appropriate one to adopt, at least for the purpose of this article. The reasons for this conclusion are to be found in the inconsistency of this approach with that upheld by the drafters of the MLI, as assessed in section 2.3.

24. Under this approach the application of the rule in article 30(3) of the Vienna Convention (1969), i.e. essential for the second approach (*see* sec. 2.3.), cannot be upheld, as it is intended to rule on compatibility among different autonomous treaties.

2.3. Second approach: The MLI must be read together with the relevant CTAs

2.3.1. In general

The second approach is endorsed by the drafters of the MLI and most scholars.²⁵ According to it, the MLI is an autonomous international (tax) treaty, multilateral by nature given the number of contracting jurisdictions, but with substantial bilateral effects.²⁶ It coexists with the relevant CTAs.²⁷ According to the Explanatory Statement,²⁸ the MLI does not have the same function of an amending protocol, i.e. it does not directly modify the text of the relevant CTAs, but, rather, it must be read alongside, and together with, them.²⁹ The CTAs remain valid and effective in the same way as they were agreed bilaterally by the relevant contracting jurisdictions, but subject to the limitation imposed by the MLI.

Under this approach, in order to apply a provision of the MLI, a rule determining the interactions between the MLI and the CTA is needed, at least in those situations in which the MLI provision conflicts/is not compatible with a provision included in the CTA.

In this respect, the Explanatory Statement³⁰ specifies that the interactions between these treaties should be determined by way of the *lex posterior* rule included in article 30(1) and (3) of the Vienna Convention (1969). According to these provisions, the *lex posterior* rule applies subject to the following three conditions: (i) the Vienna Convention (1969) applies to the parties involved and to the (international) treaties in question; (ii) at least two treaties are in force and have been concluded in different period of time by the same persons; and (iii) these treaties have to relate to the same subject matter.

In the case in question, condition (i) is met, as the Vienna Convention (1969) is currently considered to be customary law. Accordingly, it applies to all of the parties involved whether or not they are signatories to the Vienna Convention (1969).³¹ Furthermore, both the CTAs and the MLI qualify as international treaties. The definition of a “treaty” is provided for by article 2 of the Vienna Convention (1969), according to which “treaty” means: “an international agreement concluded between States in written form and governed by international law”. The MLI: (a) is an agreement, as, by means of it, two or more parties define reciprocal rights and obligations; (b) is international, as it is concluded by different contracting jurisdictions; (c) has been drafted in written form; and (d) is not subject to a specific domestic law of a specific contracting jurisdiction.³² As a result, it is an international agreement governed by international law.³³

25. Bravo, *supra* n. 13 and J.F. Avery Jones, *Treaty Interpretation – Global Tax Treaty Commentaries* sec. 5.3.1., Global Topics IBFD.

26. Blum, *supra* n. 18 and Bravo, *supra* n. 13, at secs. 2.4 and 2.5.

27. Bravo, *supra* n. 13.

28. OECD Explanatory Statement, *supra* n. 1, at para. 13.

29. *Id.*

30. *Id.*, at para. 16.

31. Blum, *supra* n. 18.

32. Bravo, *supra* n. 13.

33. *Id.*

Conditions (ii) and (iii) appear to be met as well. The circumstance that the CTAs are not terminated or suspended by reason of the entry into force of the MLI seems to be a matter of fact. There is no provision in the MLI that can cause the termination or suspension of the CTAs.³⁴ Instead, the existence of the last point, i.e. the same subject matter, appear to be not debatable in academia.³⁵ Both the MLI and CTA cover the same taxes, and deal with the allocation of taxing rights between the contracting jurisdictions. In addition, the object and purpose of the MLI is to implement the provisions of the CTA.^{36,37}

According to article 30(3) of the Vienna Convention (1969), when these conditions are met, the earlier treaty applies only in case it is compatible with the later treaty. The Vienna Convention (1969) does not specify what “compatible” means. However, it appears to suggest that the earlier treaty applies, unless it prevents the proper application of the later treaty. Also, the Explanatory Statement is silent on the point, but affirms that an existing provision of a CTA is “incompatible with a provision of the Convention [MLI, n.a.] if there is a conflict between the two provisions”. Consequently, two provisions are compatible if they do not conflict. However, what “conflict” means is not clarified by the MLI or the Explanatory Statement.³⁸ Although the concept of “conflict” between treaties is debatable, academia has generally defined it to be the situation in which an earlier and a later treaty “both deal with the same subject matter in a different manner and if at least one State is party to both treaties”.³⁹ For the purpose of this article, a conflict between the CTAs and the MLI can arise if they are concerned with the same subject matter. If such a conflict arises, in general, the MLI provisions prevail over the CTA under article 30(3) of the Vienna Convention (1969).

However, article 30(3) of the Vienna Convention (1969) appears to rule only in the situation in which a conflict exists. Also, the Explanatory Statement does not give further hints on this issue.⁴⁰ From a literal interpretation of article 30(3) of the Vienna Convention (1969), it seems that the *lex posterior* rule should not apply in these circumstances.⁴¹ However, the lack of a specific provision in this respect could mean that there is no need for such a rule. If the CTA does not conflict with the MLI, both the treaties may apply together. Some authors⁴² see, in the absence of a “conflict” and in the possible simultaneous applica-

tion of both the earlier and later treaty, the result of the application of articles 30(3) and 26 of the Vienna Convention (1969). The latter rule provides for the *pacta sunt servanda* principle, the application of which entails that the earlier treaty bounds the contracting jurisdictions, unless they have provided for otherwise in a later agreement.⁴³ Accordingly, the following two different statements can be derived from the application of article 30(3) of the Vienna Convention (1969): (i) if the earlier treaty conflicts with the later treaty, the latter prevails; and (ii) if there is no such a conflict, the provisions of both treaties apply.⁴⁴

Even if the terms “compatible” and “conflict” are not clearly defined in the MLI and in the Explanatory Statement, as well as in the Vienna Convention (1969), these documents give further guidance regarding the application of the *lex posterior* rule in the MLI context. In particular, as anticipated in section 2.2.1., the documents introduced for almost every MLI article the above-mentioned “compatibility clauses”. These clauses help the interpreter to understand the interaction between the MLI and the relevant CTAs.

2.3.2. Compatibility issues between article 2(2) of the MLI and article 3(2) of the CTA

As stated in section 2.2.2., neither the MLI nor the Explanatory Statement⁴⁵ provide for a specific compatibility clause in respect of article 2(2) of the MLI. The reason for this approach is apparently due to the different conception of the MLI's nature and to the scope and nature of the provision itself. As the MLI is conceived as an autonomous treaty, there is no need to provide compatibility clauses for all of its provisions. The interactions between the CTAs would be managed through article 30(3) of the Vienna Convention (1969), which always applies, unless it is expressly ruled out by the contracting jurisdictions,⁴⁶ which appears not to be the case. This situation means that, in the absence of a conflict between the aforementioned treaties, the relevant provisions will coexist and continue to apply together. The Explanatory Statement⁴⁷ appears to support this conclusion. Even if it does not expressly say that article 30(3) of the Vienna Convention (1969) applies to the provisions under investigation, it seems to intend that article as it applies to the entire MLI and not to specific provisions only.⁴⁸ In this regard, the compatibility clauses should be seen as further explanations of the *lex posterior* principle in specific situations and not as the expression of the *lex posterior* principle itself.

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34. Id.
 35. Bravo, *supra* n. 20, at sec. 3.5.1.4.
 36. Id.
 37. This conclusion appears to be indirectly supported by OECD, *Explanatory Statement*, *supra* n. 1 according to which article 30(3) of the *Vienna Convention* (1969) determines the relationship between the MLI and the CTAs. This suggests that all the conditions provided by article 30(3) of the *Vienna Convention* (1969) are met.
 38. Blum, *supra* n. 18, at sec. 2.2., p. 134.
 39. Bravo, *supra* n. 20, at sec. 3.2., fn. 372.
 40. For instance, if the provision in the MLI introduces for the first time a specific rule in the CTA that does not overlap with the existing provision in the CTA.
 41. Blum, *supra* n. 18, at sec. 2.2. In the author's opinion, if the CTA does not conflict with the MLI, it could be said that the *lex posterior* rule does not apply.
 42. Bravo, *supra* n. 20, at sec. 3.3.2.

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43. Id., at para. 3.4.
 44. Id. That author noted that the provisions of the *MLI* may accumulate or conflict with the provisions of the CTA. These provisions accumulate when they confirm, add or complement a provision of the CTA.
 45. OECD, *Explanatory Statement*, *supra* n. 1, at para. 38 only emphasizes the fact that the article 3(2) of the CTA can be used for the interpretation of the “undefined terms” in the *MLI*. Without this clarification, it may be thought that, according to article 2(2) of the *MLI*, the interpreter must take into consideration the CTA for interpretational purposes only when the meaning of the “undefined term” in the *MLI* under consideration is already defined in the same CTA.
 46. Bravo, *supra* n. 13, at secs. 2.4. and 2.5.
 47. OECD, *Explanatory Statement*, *supra* n. 1, at para. 38.
 48. Id., at paras. 16-17.

Article 2(2) of the MLI is a procedural rule. As anticipated in section 1., it has a specific scope that relates only to the interpretation of the MLI terms. It is different from the “substantive” provisions of the MLI,⁴⁹ which generally overlap and/or modify existing provisions of the CTA or have to interact with them.⁵⁰ It does not overlap with any provision of the CTA. In particular, it does not overlap with article 3(2) of the CTA. These provisions follow a similar interpretative path, but have different contexts and scopes, and refer to different interpretation sources. Accordingly, they do not appear in conflict and can coexist. When “undefined terms” used in MLI provisions are concerned, article 3(2) of the CTA does not apply, as these terms are clearly outside its scope. The same consideration, *mutatis mutandis*, should be extended to article 2(2) of the MLI where an “undefined term” used in the CTA is concerned.⁵¹

As there is no conflict between these two articles, there is no need for a specific compatibility clause to rule on their interaction. This task should be left to article 30(3) of the Vienna Convention (1969).

To a certain extent these considerations should not change even in the absence of a provision similar to article 2(2) of the MLI. This provision has no relevance in the determination of the compatibility between the interpretative rules of the MLI and of the CTA.⁵² This issue is assessed by way of article 30(3) of the Vienna Convention (1969). Furthermore, the absence of such a rule does not mean that the interpretation of the terms in question would fall to article 3(2) of the CTA, as it would fall outside the scope of this rule. On the contrary, it would most likely be performed through the general rules of interpretation set out in the Vienna Convention (1969). These rules apply to all the international treaties, unless the contracting jurisdictions have provided otherwise.

The relevance of article 2(2) of the MLI as well as the Vienna Convention (1969) for the interpretation of the “undefined terms” in the MLI now needs to be assessed. This issue is considered in section 3.

49. Arts. 3-26 MLI.

50. Instead, article 2(2) of the MLI only has the scope to clarify how the specific terms used, but not defined, in the MLI should be interpreted. It refers only to such terms and any reference to terms used in the CTA is outside its scope and purpose.

51. As discussed in relation to the first approach (*see* section 2.2.), if article 2(2) of the MLI is integrated into the CTA, for example, “in place of” or also “in the absence of” article 3(2) of the CTA, unintended interpretative results would be achieved. Even the “undefined terms” in the CTA would be interpreted in accordance with the context of the MLI, in breach of the agreement reached by the contracting jurisdictions to the CTA.

52. Similar considerations can be extended to the situation in which OECD, *Explanatory Statement*, *supra* n. 1 is not regarded as a binding document for the contracting jurisdictions (*see* sec. 4.2.2.). This document only confirms the application of article 30(3) of the *Vienna Convention* (1969), and better clarifies the application of the “compatibility clauses”, which have been demonstrated to be irrelevant for the purpose of this article (*see* sec. 2.).

3. The Rule Provided by Article 2(2) of the MLI

3.1. In general

Art. 2(2) of the MLI reads as follows:

2. 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.

According to this rule, in order to establish the meaning of the “undefined terms”, the interpreter should look at the meaning that they have in the relevant CTAs, unless the “context”, of the MLI, requires a different interpretation, for example, an autonomous interpretation of the MLI.^{53,54} If the MLI context does not require so, the interpreter can determine the meaning of the terms in question under the relevant CTA. In this regard, the interpreter should assess first if they are defined in the CTA.⁵⁵ If they are not, the interpreter should apply a provision similar to article 3(2) of the OECD Model (if any).⁵⁶ The “undefined terms” would be interpreted according to the relevant domestic law, unless the “context” of the CTA requires otherwise. If the term in the MLI is not used in the CTA, neither the reference to the domestic law nor the application of article 2(2) of the MLI would be possible.⁵⁷ In addition, in the absence of a provision similar to article 3(2) of the OECD Model, the terms under investigation would most likely be interpreted directly according to the general principles of interpretation set out in the Vienna Convention (1969).⁵⁸

However, article 2(2) of the MLI neither clarifies the meaning of the term “context” nor when and/or whether it “otherwise requires”. In this respect, the Explanatory Statement clarifies only that:

the context would include⁵⁹ the purpose of the Convention, as described in paragraphs 1 through 14 above,⁶⁰ and of the Covered Tax Agreement, as reflected in the preamble as modified by Article 6.⁶¹

53. This rule applies only to the CTAs included by a given country or territory within the framework of the MLI.

54. Interpretation rules qualify as “special rules”, when they are applicable only in respect to certain treaties and/or have limited purposes. Article 2(2) of the MLI is a special rule, as it concerns only the interpretation of the “undefined terms” in the MLI. Special rules are counterposed to general interpretation rules. For the purpose of this article, general rules are represented by the *Vienna Convention* (1969).

55. For instance, in a provision similar to article 3(1) of the *OECD Model* (2017).

56. A confirmation in this respect seems to be provided for by OECD, *Explanatory Statement*, *supra* n. 1, at para. 37.

57. M. Lang, *Die Auslegung Des Multilateralen Instruments* 1 SWIWI, p. 15 (2017).

58. A. Bosman, *General Aspects of the Multilateral Instrument*, 45 *Intertax* 10, p. 646 (2017).

59. OECD *Explanatory Statement*, *supra* n. 1, at para. 38. The verb “include” used in OECD *Explanatory Statement*, *supra* n. 1, at para. 38 suggests that the elements noted do not represent an exhaustive list of what is comprised in the MLI context.

60. For instance, according to: (i) OECD *Explanatory Statement*, *supra* n. 1, at para. 6, the purpose of the MLI is to implement “swiftly” the BEPS measures in the treaty network; and (ii) OECD *Explanatory Statement*, *supra* n. 1, at paras. 12 and 14 “the object and purpose of the Convention is to implement the tax treaty-related BEPS measures”.

61. That is, as stated in OECD *Multilateral Instrument*, *supra* n. 5, Art. 6(1) MLI, its purpose is “to eliminate double taxation with respect to the taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining

In addition, it states that the interpretation of the MLI must be undertaken in good faith, according to the ordinary meaning of the term under investigation in its context and in light of its object and purpose.⁶² These are principles that – even if not expressly stated – appear to be those provided for by article 31(1) of the Vienna Convention (1969). In this regard, according to the same document, the OECD Model Commentary (2017), in which the BEPS measures were implemented, is of particular relevance for interpretational purposes.⁶³

Other than the foregoing, both the MLI and the Explanatory Statement do not give further guidance regarding the interpretation of “undefined terms” in the MLI.

3.2. The relevance of article 2(2) of the MLI for interpretational purposes

The lack of further explanations in this respect entails that, before interpreting “undefined terms” in the MLI, the meaning of article 2(2) of the Multilateral Instrument must be determined in turn.⁶⁴ Article 2(2) of the MLI is not only vague and general, but also it does not give any guidance or limit to the interpreter. The interpreter is substantially free to adopt the approach, and the means of interpretations, the interpreter likes the most to define the meaning of “undefined terms” in the MLI. For instance, an interpreter could support a broader concept of the MLI’s “context”, in being able to encompass all of the possible means of interpretation, for example, the Explanatory Statement, the OECD/G20 BEPS Project or the OECD Model and the Commentaries on the OECD Model.⁶⁵ A broad concept could prevent too frequent reference to the CTAs for interpretational purposes, thereby encouraging an autonomous interpretation of the MLI and safeguarding a more uniform interpretation and application of the Multilateral Instrument. On the other hand, the opposite view could be held, and a narrower concept of the MLI’s “context” could be supported.⁶⁶ This position would arise, as, according to a textual (grammatical) interpretation of the article, the reference to the CTAs should be preferred. Under this view, only the text, annexes and preamble of

the MLI would be part of the “context”, and no external means of interpretation would be permitted for interpretational purposes.⁶⁷

Analogously, very different interpretations could be held with regard to the meaning of the sentence “unless the context otherwise requires”. A textual approach could be adopted.⁶⁸ According to this approach, the use of “unless” from a grammatical perspective reveals the less weight that the “context” has in the interpretational process. It should be used by the interpreter only in exceptional circumstances. Alternatively, a teleological approach could be adopted.⁶⁹ In this case, the “context” should guide the interpretation to apply the treaty in a more uniform and consistent way in both the contracting jurisdictions.

Accordingly, the wording of article 2(2) of the MLI can be interpreted in very different ways, without material limitations. At least in theory, any of the aforementioned approaches could be held and applied by the interpreters.

In this respect, it can be argued that these limits could be given by the general (domestic) interpretational principles of the relevant legal systems.⁷⁰ This approach could potentially work in a purely domestic situation and/or in the absence of international interpretation rules, when the parties belong to the same jurisdiction and there is no necessity to try to uniform different legal systems. In general, national tax law is applied in accordance with the relevant state’s own interpretation rules and principles. In this context, the process does not give rise to any negative consequences for the purpose of the best interpretation of the laws and/or agreements under review. On the contrary, it does not appear to fit into an international environment and, in particular, in the presence of codified international interpretation principles, i.e. those of the Vienna Convention (1969). It would inevitably lead to a different understanding of the obligations of the parties and, therefore, to a different application of the relevant treaties in the relevant jurisdictions of the parties.⁷¹ For the purpose of this article, it would entail many different interpretations of article 2(2) of the MLI and, consequently, of the “undefined terms” under investigation.

The Vienna Convention (1969) has a binding character for all countries.⁷² Inter alia, its scope is to establish common interpretational rules and principles, i.e. a form of “minimum standards” of interpretation, to be followed

reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions”.

62. OECD *Explanatory Statement*, *supra* n. 1, at para. 12.

63. For instance, para. 11-13 *OECD Model: Commentary on Article 3* (2017).

64. The consideration in this paragraph are built on the literature that has been published in the past with regard to article 3(2) of the *OECD Model* (2017) that the author believes could apply, *mutatis mutandis*, to article 2(2) of the MLI. Both articles: (i) have a similar wording; (ii) were drafted in the OECD environment; (iii) have a similar interpretation path; (iv) in order to reach their purpose must be applied in a uniform way; and (v) are included in international treaties subject to the *Vienna Convention* (1969).

65. Bosman, *supra* n. 58, at p. 647; Bravo, *supra* n. 13, at para. 2.5.; J. Becker, E. Reimer & A. Rust, *Article 3. General Definitions*, in *Klaus Vogel on Double Taxation Conventions* p. 212 (E. Reimer & A. Rust eds., Kluwer L. Intl. 2015); Avery Jones, *supra* n. 25, at sec. 5.1.1.; and E. van der Bruggen, *Unless the Vienna Convention Otherwise Requires: Notes on the Relationship between Article 3(2) of the OECD Model Tax Convention and Articles 31 and 32 of the Vienna Convention on the Law of Treaties*, 43 *Eur. Taxn.* 5, secs. 10.3. and 11. (2003), *Journal Articles & Papers IBFD*.

66. F.A. Engelen, *Interpretation of Tax Treaties under International Law* sec. 10.10.3. (IBFD 2004), *Books IBFD* and F. van Brunschot, *The Judiciary and the OECD Model Tax Convention and its Commentaries*, 59 *Bull. Intl. Fiscal Docn.* 1, sec. 2.7. (2005), *Journal Articles & Papers IBFD*.

67. Lang, *supra* n. 57, at p. 14. According to that author, the same two main approaches described with respect to article 3(2) of the *OECD Model* (2017) can be held in relation to article 2(2) of the MLI.

68. Becker, Reimer & Rust, *supra* n. 65, at pp. 211-213 and K. Vogel & R. Prokisch, *General Report*, in *Interpretation of double taxation conventions*, International Fiscal Association (IFA) 1993 *Cahiers de droit fiscal international* vol. 78a, sec. 3.e. (Kluwer 1993), *Books IBFD*.

69. Van der Bruggen, *supra* n. 65, at sec. 6.; Engelen, *supra* n. 66, at sec. 10.10.1.; and M. Lang, *2008 OECD Model: Conflicts of Qualification and Double Non-Taxation*, 63 *Bull. Intl. Taxn.* 5, sec. 3. (2009), *Journal Articles & Papers IBFD*.

70. B.J. Arnold, *The Interpretation of Tax Treaties: Myth and Reality*, 64 *Bull. Intl. Taxn.* 1, sec. 4.9. (2010), *Journal Articles & Papers IBFD* and Van der Bruggen *supra* n. 65, at secs. 10.1 and 10.2.

71. Van der Bruggen, *supra* n. 65, at sec. 10.1.

72. Including the countries that did not sign the Vienna Convention (1969), as it is considered customary law.

to interpret international law in a more consistent and uniform way.⁷³ Accordingly, its purpose is to encourage common interpretations of international law and to avoid different practices among countries.⁷⁴

In this regard, an interpretation of article 2(2) of the MLI in accordance with the different domestic general principles would be inconsistent with the purpose of the MLI and also with the Vienna Convention (1969).⁷⁵ The Vienna Convention (1969) rules aim to prevent the foregoing, i.e.: (i) the deliberate use of the “domestic” principles of interpretation to interpret international treaties; and, as a consequence; (ii) their non-uniform application.⁷⁶ It could be said that their purpose is to bind the interpreters to carry out a combined interpretational process, which has to take into account different elements.⁷⁷ The interpreters would have to justify the understanding of, and the relevance to give to, each, and not to only some as could be prescribed by the relevant “domestic” interpretation rules. This approach encourages a uniform interpretation of international treaties. It strives to harmonize the different outcomes that could stem from the application of the different relevant domestic laws and interpretation principles.

As a result, given the foregoing, it would appear that the wording of article 2(2) of the MLI requires the interpreters to rely on the Vienna Convention (1969) to interpret article 2(2) of the MLI and, therefore, the “undefined terms” in the MLI. Notwithstanding this situation, the MLI provides for a special interpretation rule in respect of the terms in question, which in general should prevail on the general principles of the Vienna Convention (1969),⁷⁸ it appears to be impossible to rule out the principles of the Vienna Convention (1969), considering the fact that article 2(2) of the MLI is unclear and self-explanatory, unless it is expressly agreed to by the parties.⁷⁹ A different approach would result in many different interpretative outcomes in the different contracting jurisdictions, and would be contrary to the object and purpose of the MLI.

If it is imagined the absence of article 2(2) in the MLI, the foregoing considerations would not change.⁸⁰ The interpretation of the “undefined terms” in the MLI would be

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73. For instance, the *Vienna Convention* (1969) wanted to avoid the situation that one state considers only the intention of the parties, and that another considers only the wording of the terms under investigation, for interpretational purposes. See *Official Commentary on a Preliminary Draft of The Vienna Convention*, in *Materials on International, TP and EU Tax Law* p. 2268 (K. van Raad ed., Intl. Tax Ctr., Leiden 2018-2019).
74. E. Reimer, *Interpretation of Tax Treaties*, 39 *Eur. Taxn.* 12, secs. I. and II. (1999), *Journal Articles & Papers IBFD*. According to that author, the interpretation of international law has the scope to reconcile the different traditional concepts of domestic law.
75. Blum, *supra* n. 18, at sec. 2.2.
76. *Official Commentary on a Preliminary Draft of The Vienna Convention*, *supra* n. 73, at pp. 2268-2269.
77. For instance, the wording of the term under investigation but also the intention of the parties.
78. Engelen, *supra* n. 66, at sec. 10.10.2. However, most scholars believe that the *Vienna Convention* (1969) applies to tax treaties in any case, and that its rules and principles should be used by the interpreters to interpret article 2(2) of the MLI and its “undefined terms”.
79. Engelen, *supra* n. 66, at sec. 10.10.2. and J.A. Becerra, *A Practical Approach to Determine the Influence of the OECD Multilateral Instrument on North American Tax Treaty Networks*, 71 *Bull. Intl. Taxn.* 11, sec. 5. (2017), *Journal Articles & Papers IBFD*.
80. Van der Bruggen, *supra* n. 65, at sec. 11.

carried out directly under the principles and rules of the Vienna Convention (1969). As stated in the previous paragraph, this duty would not be assigned to article 3(2) of the CTA, which has a different object and purpose. Accordingly, also in this scenario, the different contracting jurisdictions would interpret the undefined terms” in the MLI using the same set of rules, i.e. those of the Vienna Convention (1969). This approach would be consistent with the purpose of the MLI.

A different conclusion would be reached if the Vienna Convention (1969) does not apply. As stated in this section, in this case, the interpreter would be free to adopt the interpreter’s preferred (interpretation) approach. It would be limited only by the “domestic” principle of interpretation provided for by the interpreter’s country. However, if these principles do not demand that the interpreter to take into consideration all the elements set out in the Vienna Convention (1969), or the interpreter is required to consider only few of them, the uniform interpretation of the “undefined terms” in the MLI would be compromised. Such terms would be interpreted differently in the different contracting jurisdictions.⁸¹

It can be submitted that article 2(2) of the MLI has the necessary function to link the Multilateral Instrument with the relevant CTAs for interpretational purposes.⁸² However, it would appear that the provision is of limited relevance in this respect as well.⁸³ The relevant CTAs could be deemed to be part of the interpretational process also through the principles of the Vienna Convention (1969).⁸⁴

Lastly, it is possible to challenge the concept that the Vienna Convention (1969) includes only very generic principles, which are taken into consideration, in any case, in each jurisdiction, independently of the existence of the Vienna Convention (1969).⁸⁵ In addition, it could be said that the principles of the Vienna Convention (1969) – as well as the “domestic” general interpretation principles – ultimately are subject to the different views of the interpreters, and, therefore, could potentially lead to different, and inconsistent, interpretations.

With regard to the first point, it has been already highlighted in this section that the “domestic” general principles of interpretation can vary depending on the different legal systems or practices of countries.⁸⁶ The application of these principles is precisely what the Vienna Conven-

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81. Contra, see D.A Ward, *The Role of the Commentaries on the OECD Model in the Tax Treaty Interpretation Process*, 60 *Bull. Intl. Taxn.* 3, sec. 3. (2006), *Journal Articles & Papers IBFD*. According to that author, the *Vienna Convention* (1969) has a limited role in the interpretational process. As stated in the *Official Commentary on a Preliminary Draft of The Vienna Convention*, the provisions of the *Vienna Convention* (1969) concern only generic principles that the interpreters are not bound to apply.
82. Engelen, *supra* n. 66, at sec. 10.10.2.
83. Id.
84. For instance, the “ordinary meaning” of a term, *ex* article 31 of the *Vienna Convention* (1969), could be that provided by the relevant CTA. See Engelen, *supra* n. 66, at sec. 10.10.2.
85. Arnold, *supra* n. 70, at sec. 3.2. According to that author, the provisions of the *Vienna Convention* (1969) are meaningless, too vague, general and self-evident, and cannot provide any real guidance for the interpretational process.
86. Reimer, *supra* n. 74, at sec. I. and Vogel & Prokisch, *supra* n. 68, at sec. 3.

tion (1969) tries to avoid, thereby implementing a form of “minimum standards” of interpretation to be followed by interpreters.

In relation to the second point, it can be said that apparently the freedom given to the interpreters by article 2(2) of the MLI is not exactly the same as that given by the Vienna Convention (1969). According to the former article neither restrictions nor “minimum standards” of interpretation appear to be given to the interpreters. Instead the Vienna Convention (1969) explains what are the minimum principles and/or elements that interpreters should follow and assess during the interpretational process, it clarifies the meaning of these elements by way of the text of the Vienna Convention (1969) and its commentary, it defines the meaning of “context”, and it enables the interpreter to determine what could be the usable “binding” or supplementary, non-binding means of interpretation.

Ultimately, the interpretational process is subjective by nature, and hardly limited by objective and pre-agreed criteria and/or conditions.^{87,88} However, if uniformity is the objective of the, international, interpretational process,⁸⁹ in the author’s opinion, such a goal most likely would be achieved if the interpreters have to take into account the same elements for interpretational purposes, rather than consider the different interpretation principles provided for by the respective legal systems. In this regard, the Vienna Convention (1969) is a common binding set of interpretational rules and probably the best, available, way to interpret tax treaties in a more uniform and consistent manner. This position, of course, can be true only if these rules are followed and applied by all of the relevant interpreters in the different contracting jurisdictions.

Given the foregoing, it appears that the object and purpose of the MLI requires an autonomous interpretation of the “undefined terms” in the MLI in accordance with the rules and principles laid down in the Vienna Convention (1969). Article 2(2) of the MLI, which must be interpreted in its turn using the same principles, taken on a standalone basis, therefore, appears of limited relevance for this purpose.^{90,91}

4. Applicable Principles and Means of Interpretation

4.1. Principles of interpretation

If the considerations of section 3. are valid, the different approaches that could be held regarding article 2(2) of the

MLI,⁹² assessed on a standalone basis, are of little weight. In order to ascertain the meaning of the terms used in this provision – as well as those used but not defined in the MLI – the interpreter should undertake an autonomous interpretation under the Vienna Convention (1969). This situation means that they should be interpreted in good faith, under the ordinary meaning they have in their context and in light of the treaty’s object and purpose,⁹³ assessing whether the parties have given to the same terms a special meaning.⁹⁴

For the purpose of this analysis, the interpreter can use different means of interpretation. Their qualification as binding tools for interpretational purposes is conditional on their inclusion in one of the elements set out in article 31 of the Vienna Convention (1969).⁹⁵ This assessment should be carried out on a case-by-case basis, as they could not qualify as binding source of interpretation in all circumstances.⁹⁶

The “ordinary meaning” of a given term is not necessarily the same for every treaty. Article 31(1) of the Vienna Convention (1969) refers to the “ordinary meaning” that is given to the term under investigation in a particular context. The concept of “ordinary meaning” refers to the common understanding and usage of that term, its daily life meaning. In the context of the MLI, the ordinary meaning of a term used could stem, for example, from a dictionary meaning, the domestic laws of the contracting jurisdictions, the OECD Model, the Commentaries on the OECD Model, the Explanatory Statement, the MLI and the OECD/G20 BEPS Project.⁹⁷

A given term could also have more than one “ordinary meaning”.⁹⁸ This circumstance is why it should be assessed under the other elements provided for in article 31 of the Vienna Convention (1969).⁹⁹ In particular, among the possible meanings, the interpreter should choose the ordinary meaning that is more reasonable in the treaty context.^{100,101}

In this respect, the term “context” has been qualified as the “environment” of the terms under investigation.¹⁰² In the MLI, this environment could be represented by the text, annexes and preamble of the MLI. It could also comprise the Explanatory Statement, the OECD/G20 BEPS Project or the OECD Model (2017) and the Commentaries on the OECD Model (2017) (see section 4.2.). As anticipated in

87. Arnold, *supra* n. 70, at sec. 4.9.

88. *Id.*

89. That is, to find the internationally agreed meanings for the terms under consideration.

90. Y. Brauner, *McBEPS: The MLI – The First Multilateral Tax Treaty That Has Never Been*, 46 *Intertax* 1, p. 15 (2018). The author shares the views of that author, as that author believes that “one is required in any event to apply the normal *Vienna Convention* (1969) rules of interpretations”.

91. To a certain extent, this conclusion also appears to be supported by the OECD, *Explanatory Statement*, *supra* n. 1, at para. 12. This paragraph refers to the principles and rules of the *Vienna Convention* (1969) for the purposes of interpreting the MLI.

92. That is, for the interpretation of the term “context” and for the understanding of when and/or whether it “otherwise requires”.

93. Art. 31(1) *Vienna Convention* (1969).

94. *Id.*, at art. 31(4).

95. For instance, “ordinary meaning” under article 31(1) of the *Vienna Convention* (1969) or “context” pursuant to article 31(2) of the *Vienna Convention* (1969) or “special meaning” under article 31(4) of the *Vienna Convention* (1969).

96. See sec. 4.2. for the analysis of the most relevant means of interpretation through the *Vienna Convention* (1969).

97. C. Elliffe, *The Meaning of the Principal Purpose Test: One Ring to Bind Them All?*, 11 *World Tax J.* 1, sec. 4. (2019), *Journal Articles & Papers IBFD*.

98. Reimer, *supra* n. 74, at sec. I.B.

99. *Id.*

100. Avery Jones, *supra* n. 25, at sec. 3.4.4.

101. Under article 31(2) of the *Vienna Convention* (1969).

102. Reimer, *supra* n. 74, at sec. I.B.

section 3.1., according to the Explanatory Statement,¹⁰³ the “context” of the MLI also includes: (i) the purpose of the MLI; and (ii) the purpose of the CTA, as amended by article 6 of the MLI.

Instead, the “object and purpose” of the MLI is determined by its Preamble and the Explanatory Statement.¹⁰⁴ These concern the uniform and coordinated implementation of the OECD/G20 BEPS measures into treaty networks.

Any possible special meaning of a given term should be also taken into consideration, *ex* article 31(4) of the Vienna Convention (1969). In the context of the MLI, a special meaning could be the one given by the text of the MLI, the OECD/G20 BEPS Project and the Explanatory Statement or by the OECD Model (2017) and Commentaries on the OECD Model (2017), for example, the terms defined in article 2(1) of the MLI.

Lastly, in the circumstances described in article 32 of the Vienna Convention (1969), for limited purposes the interpreter could also use other means of interpretation. These terms are not included in article 31 of the Vienna Convention (1969).¹⁰⁵

4.2. The most relevant means of interpretation

4.2.1. Opening comments

Some scholars¹⁰⁶ have tested the relevance of the Explanatory Statement, the OECD/G20 BEPS Project and the Commentaries on the OECD Model (2017) for interpretational purposes. In general, this test has been applied using the Vienna Convention (1969) rather than under article 2(2) of the MLI. Such a circumstance could support the thesis of the limited relevance of article 2(2) of the MLI for interpretational purposes and of the pre-eminence of the Vienna Convention (1969) in this respect. The analysis of the main MLI-related means of interpretation is undertaken in sections 4.2.2., 4.2.3. and 4.2.4.

4.2.2. The Explanatory Statement to the MLI

As anticipated in section 1., this document was drafted by an ad hoc group that was open to all of the interested parties participating on an equal footing.¹⁰⁷ The countries that drafted the Explanatory Statement were the same that drafted the text of the MLI.¹⁰⁸ Both of the documents were adopted by the relevant member countries on 24 November 2016.¹⁰⁹

The Explanatory Statement aims:

103. OECD, *Explanatory Statement*, *supra* n. 1, at para. 38.

104. MLI, Preamble, paras. 1-14.

105. For instance, the OECD, *Explanatory Statement*, *supra* n. 1, the OECD/G20 BEPS materials or the OECD Model (2017) and the OECD Model: Commentaries (2017), where, in the specific case under investigation, they cannot fall under article 31 of the Vienna Convention (1969).

106. That is, those have already shared their view on the legal status of the OECD, *Explanatory Statement*, *supra* n. 1, the OECD/G20 BEPS Project and the OECD Model (2017) and the OECD Model: Commentaries (2017) – see secs. 4.2.2., 4.2.3. and 4.2.4.

107. OECD, *Explanatory Statement*, *supra* n. 1, at para. 7.

108. *Id.*, at para. 11.

109. *Id.*

to provide clarification of the approach taken in the Convention and how each provision is intended to affect tax agreements covered by the Convention. It therefore reflects the agreed understanding of the negotiators with respect to the Convention.¹¹⁰

However, it affirms to address the interpretation of only articles 18 through to 26 of the MLI. The interpretation of articles 3 through 17 of the MLI apparently falls outside of the scope of the Explanatory Statement,¹¹¹ and must be carried out under the principles of the Vienna Convention (1969).¹¹²

The legal status of the Explanatory Statement is controversial. It does not form part of the MLI,¹¹³ and the latter does not expressly refer to it for interpretational purposes. Furthermore, the Explanatory Statement seems somehow to be incoherent, thereby appearing to be an interpretational tool only for certain articles.

According to the most popular view,¹¹⁴ the Explanatory Statement is a binding interpretation tool for the members of the ad hoc group, *ex* article 31(2)(a) of the Vienna Convention (1969). It qualifies as an “agreement relating to the treaty, which was made between all the parties in connexion with the conclusion of the treaty”¹¹⁵ This interpretation appears to be supported by the Explanatory Statement, which – as previously noted in this section – reflects the “agreed understanding of the negotiators with respect to the Convention”.¹¹⁶ Accordingly, it can qualify as an agreement, as, through the Explanatory Statement, the members of the ad hoc group have agreed on the meaning of the MLI.

For the countries that decide to sign the MLI, but were not part of the ad hoc group, the Explanatory Statement can be regarded as a binding instrument for interpretational purposes under article 31(2)(b) of the Vienna Convention (1969), but only to the extent that it can be proven that it was accepted, at least implicitly, by the parties as an instrument relating to the MLI. Bosman (2017)¹¹⁷ shares this view. According to that author, the Explanatory Statement would be accepted implicitly as a document connected to

110. *Id.*

111. *Id.*, at para. 12.

112. *Id.* For the sake of clarity, the OECD, *Explanatory Statement*, *supra* n. 1 does not expressly refer to the Vienna Convention (1969), but all the principles provide in article 31(1), so that it appears that a clear reference to the Vienna Convention (1969) is implicit.

113. Wakounig, *supra* n. 9, at p. 24.

114. Avery Jones, *supra* n. 25, at sec. 5.3.3.; Austrey et al., *supra* n. 15, at sec. 2.: it is “context”, under article 31(2) of the Vienna Convention (1969) to the extent it is adopted at the time of the conclusion of the MLI (*rectius* at the time of signing); and Hattingh, *supra* n. 1, at sec. 6.3.: it can be considered to be part of the context as per article 31(2)(a) of the Vienna Convention (1969) for the member countries of the ad hoc group, even if it is unclear as to who are the member countries of this group (it is not clear if the group includes all of the participants or only the negotiators), and even, if literally, it is not an agreement reached by parties to the MLI, but is an agreement reached by the future parties to the MLI. However, in this respect, the simultaneous adoption of the OECD, *Explanatory Statement*, *supra* n. 1 and the MLI by the ad hoc group appears to be a sufficient hint of the intentions of the parties to include it in the “context” under article 31(2) of the Vienna Convention (1969). In any case, it can be viewed as a supplementary mean of interpretation according to article 32 of the Vienna Convention (1969).

115. Art. 31 Vienna Convention (1969).

116. OECD, *Explanatory Statement*, *supra* n. 1, at para. 11.

117. Bosman, *supra* n. 58, at p. 647.

the MLI. Otherwise, the ranking of this document would be no greater than article 32 of the Vienna Convention (1969). In this respect, it appears to be clear that the ad hoc group intended to give much greater importance to the Explanatory Statement.

Other scholars do not share the same conclusions. Their view is that the Explanatory Statement can be included at most in article 31(4) of the Vienna Convention (1969)¹¹⁸ or in article 32 of the Vienna Convention (1969), as a mere supplementary means of interpretation.¹¹⁹ This position arises primarily, as the Explanatory Statement is not part of the signed treaty, i.e. the MLI, and cannot bind a country that did not approve it explicitly.¹²⁰

Nevertheless, in the author's view, the Explanatory Statement can be regarded as a binding tool for interpretational purposes under article 31(2)(a) or (b) of the Vienna Convention (1969). The author's reasoning is set out in the following paragraphs.

The MLI and the Explanatory Statement have been drafted by the ad hoc group to reflect the OECD/G20 BEPS measures. The ad hoc group was open to all of the interested countries,¹²¹ whether or not participating in the draft of the Explanatory Statement was a choice for the relevant states or jurisdictions.

For the countries that joined the ad hoc group, the Explanatory Statement can fall within article 31(2)(a) of the Vienna Convention (1969), as the Explanatory Statement expressly states its nature of an "agreement" connected to the MLI among the ad hoc group.¹²² The Explanatory Statement was drafted alongside the text of the MLI to explain the provisions of the MLI. Both the documents were released and adopted together by the member countries of the ad hoc group.¹²³ In light of the foregoing, it appears that all of the conditions required by article 31(2)(a) of the Vienna Convention (1969) are fulfilled by these countries.¹²⁴

With regard to the countries that did not join the ad hoc group, different considerations are required. These countries were not involved in the drafting of the Explanatory Statement, as well the text of the MLI. However, this situation was, apparently, their free choice.¹²⁵ Considering the foregoing and their subsequent access to the MLI, it may be concluded that these countries freely decided to accept the provisions of the MLI, as drafted and understood by the ad hoc group. As the understanding of the MLI pro-

visions is included in the Explanatory Statement, it can be held these countries indirectly accepted to be bounded by the document as well, for example, by way of *ex article* 31(2)(b) of the Vienna Convention (1969).

This conclusion is supported by the fact that the provisions of the MLI cannot be customized by the contracting jurisdictions. When these jurisdictions accept, i.e. opt-in, to the provisions of the MLI, they accept the provisions as drafted by the ad hoc group, together with the meaning that they have under the Explanatory Statement.

In this respect, the context of the MLI is very different from a normal treaty context. In the latter situation, in general, the contracting jurisdictions use the provisions of the OECD Model and/or the UN Model¹²⁶ as the basis for the negotiation. Thereafter, the jurisdictions adjust and/or amend these provisions to better determine their mutual interests. This circumstance often leads to a debate on the relevance of the Commentaries on the OECD/UN Models for the purposes of treaty interpretation. In the context of the tax treaty, the contracting jurisdictions do not always use the same wording as set out in the OECD Model and/or UN Model and, even if they do, it cannot be ensured that these jurisdictions will attribute to the words used the same meaning as provided for in the OECD Commentaries. This situation arises as, during the negotiations, the parties have the right and the power to customize the tax treaty. For this reason, it is always hard to establish if the OECD Commentaries are a binding tool for the purposes of treaty interpretation, as it cannot be ensured that this is what the parties intended when they concluded the tax treaty.

In the context of the MLI, it can be said these elaboration and negotiation phases were not carried out by the contracting jurisdictions but only by the drafters of the Multilateral Instrument. The contracting jurisdictions, other than the drafters of the MLI, have no powers over the text of the Multilateral Instrument. The consideration arises from this circumstance that, if a contracting jurisdiction has accepted a provision of the MLI, it, therefore, has accepted also the meaning given to it by the drafters of the Multilateral Instrument.

A further circumstance could support the relevance of the Explanatory Statement for interpretational purposes. As noted in this section, the Explanatory Statement¹²⁷ affirms that it is not intended to address the interpretation of the BEPS measures included in articles 3 to 17 of the MLI. However, in the same paragraph, it states that it does so in relation to articles 18 to 26 of the MLI.¹²⁸ According to the Explanatory Statement,¹²⁹ these differences in treatment stem from a specific circumstance. For the latter group of articles, the Explanatory Statement provides not only further explanations on their application, but also the substance of these provisions, as, in this regard, Action 14 of

118. That is, if the agreement of the parties in this respect can be proven. See Wakounig, *supra* n. 9, at p. 25.

119. M.L. Gomes, *International Taxation and the Challenges for Multilateralism in the Context of the OECD Multilateral Instrument*, 72 Bull. Intl. Taxn. 2, sec. 3.3. (2018), Journal Articles & Papers IBFD and Brauner, *supra* n. 90, at p. 16.

120. Wakounig, *supra* n. 9, at p. 25.

121. OECD, *Explanatory Statement*, *supra* n. 1, at para. 7.

122. *Id.*, at para. 11, where it is stated that "it reflects the agreed understanding of the negotiators with respect to the Convention".

123. *Id.*

124. *Official Commentary on a Preliminary Draft of The Vienna Convention*, *supra* n. 73, at para. 14, p. 2271, according to which article 31(2)(a) of the Vienna Convention (1969) can be included in all the agreement relating to the interpretation of a treaty.

125. OECD, *Explanatory Statement*, *supra* n. 1, at para. 7.

126. Most recently, *UN Model Double Taxation Convention between Developed and Developing Countries* (1 Jan. 2017), Treaties & Models IBFD.

127. OECD, *Explanatory Statement*, *supra* n. 1, at para. 12.

128. *Id.*

129. *Id.*, at paras. 19-20.

the OECD/G20 BEPS Project did not provide any draft articles.

However, if the Explanatory Statement has the scope to interpret these articles and to provide for their substance, the question is how, in this respect, it should not be legally binding for all the contracting jurisdictions, i.e. at least for the provisions relating to articles 18 to 26 of the MLI. For the members of the ad hoc group, the foregoing reinforces the most popular view of the Explanatory Statement as an agreement, *ex* article 31(2)(a) of the Vienna Convention (1969).

For the contracting jurisdictions that were not in the ad hoc group, these circumstances entail that the Explanatory Statement is an indispensable tool, at least, for the application and interpretation of these articles. Without the Explanatory Statement, articles 18 to 26 of the MLI would lack substance and interpretational guidance. In other words, these articles would be “empty” provisions, subject to the arbitrary interpretations of the different contracting jurisdictions. Such a result would be inconsistent with the object and purpose of the MLI. Accordingly, with regard to these articles, it can be said that there is a strong implicit link between the Explanatory Statement and the text of the MLI. This is a dependency that could result in the qualification of the Explanatory Statement as a necessary binding tool for the application and interpretation of the MLI.

If this were true for articles 18 to 26 of the MLI, how it could not be also true for articles 3 to 17? Could the Explanatory Statement have a different legal status for different articles? The answer should be negative, taking into account the fact that the main criticism involving the possible acceptance of the Explanatory Statement as a legally binding tool for interpretational purposes relates to the lack of any direct link with the MLI, i.e. with the signed and binding treaty. This direct link is missing for both articles 3 to 17 and articles 18 to 26. If this circumstance can be accepted for articles 18 to 26 of the MLI, there are no apparent reasons to justify a different treatment for the other articles of the Multilateral Instrument, i.e. for articles 3 to 17.

4.2.3. The OECD/G20 BEPS Project

4.2.3.1. Initial remarks

The BEPS Project was developed by the OECD CFA, including all the OECD and G20 member countries, working on an equal footing.¹³⁰ In order to be effective, the final outcomes of this project had to be implemented into the existing tax treaties and the relevant domestic legislation.¹³¹

The relevance of the OECD/G20 BEPS Project for interpretational purposes is controversial. The proposals arising from the BEPS Project are not binding tools *per se*, but, at the same time, they represent the substance of the MLI. Their importance is demonstrated by the Explan-

130. *Id.*, at para. 3.

131. That is, *ante* 2017.

atory Statement, which comments on each provision in the MLI, express referring to the relevant paragraphs and pages of the relevant BEPS Actions.¹³²

According to Bosman,¹³³ the BEPS materials arising from the OECD/G20 BEPS Project form the substance of the MLI provisions. These materials could derive their binding effects, *ex* article 31(2) of the Vienna Convention (1969), by way of the Explanatory Statement, considering the references made to them in the latter to clarify the application of the provisions of the MLI. According to that author, this can be true only if the Explanatory Statement is considered a binding tool for interpretational purposes and for the results of the BEPS Project to which the former document refers. The remaining parts of the BEPS Project would not be “context” under article 31(2) of the Vienna Convention (1969), as it was not adopted in connection with the conclusion of the MLI, and does not rank in article 31 of the Vienna Convention (1969) through the Explanatory Statement.¹³⁴

Avery Jones (2019)¹³⁵ shares a similar view, believing that the OECD/G20 BEPS Project could be a binding tool for interpretational purposes under article 31 of the Vienna Convention (1969). However, that author arrives at this conclusion by way of a different path. In principle, the BEPS Project would have the same status as the Commentaries on the OECD Model. However, the Explanatory Statement, implicitly, states that the substantive provisions of the MLI should be interpreted under the Vienna Convention (1969),¹³⁶ and that the “object and purpose” of the Multilateral Instrument is to implement the BEPS measures. Based on this circumstance, these measures should be regarded as the “object and purpose” of the MLI under article 31(1) of the Vienna Convention (1969), rather than “context” under article 31(2).

Other authors extend the same considerations to the measures arising from the OECD/G20 BEPS Project that have been made with regard to Commentaries on the OECD Model.¹³⁷ In this context, these authors include the BEPS

132. For instance, *see* OECD, *Explanatory Statement*, *supra* n. 1, at paras. 39-40, relating to Art. 3 MLI: “The Action 2 Report, “Neutralising the Effect of Hybrid Mismatch Arrangement”, produced new Article 1(2) of the OECD Model Tax Convention. ... Article 3(1) of the Convention replicates this text.”

133. Bosman, *supra* n. 58, at p. 647. A similar view is shared by Brauner, *supra* n. 90, at p. 16. According to that author, the OECD/G20 BEPS Project can hardly be viewed as supplementary means of interpretation, as its outcomes are not binding on the signatory parties, in particular, for those that did not participate in the discussion surrounding the BEPS Project. However, there is the chance that the BEPS reports could apply in the interpretational process under article 31 of the *Vienna Convention* (1969) by way of OECD, *Explanatory Statement*, *supra* n. 1, which constantly refers to the BEPS Project.

134. These remaining parts could qualify as supplementary means of interpretation, and, therefore, be included in article 32 of the *Vienna Convention* (1969). The same status could be attributed to the measures arising from the OECD/G20 BEPS Project for those countries that did not join the ad hoc group and, in respect of which the OECD, *Explanatory Statement*, *supra* n. 1 is not considered to be a binding tool for interpretational purposes.

135. Avery Jones, *supra* n. 25, at sec. 5.3.3.

136. The OECD, *Explanatory Statement*, *supra* n. 1, at para. 12 includes the exact wording of article 31(1) of the *Vienna Convention* (1969).

137. *See* Bravo, *supra* n. 13, at sec. 2.5., fn. 337.

measures, at most, in article 31(4) or 32 of the Vienna Convention (1969).¹³⁸

In the author's opinion, the analysis on the legal status of the OECD/G20 BEPS Project for interpretational purposes should be carried out by comparing their hypothetical implementation in a bilateral way with their actual multilateral implementation.

In a bilateral situation, it is probable the implementation of the measures arising from the OECD/G20 BEPS Project would have the same destiny as the Commentaries on the OECD Model. Following an assessment of the BEPS measures, the contracting jurisdictions would implement them in a given tax treaty in a customized manner. Such an implementation would be based on the understanding of the parties to the BEPS measures, leading to a non-uniform implementation in a particular treaty network. In this case,¹³⁹ the BEPS Project should not be considered to be a binding interpretational tool, as there is no certain match between the understanding of the BEPS proposals by their drafters and the "customized" BEPS measures as implemented in the given tax treaty. Consequently, as generally is the case with regard to the Commentaries on the OECD Model, the BEPS measures would be a binding tool for interpretational purposes, at most, only in those cases in which they were implemented without customization by the contracting jurisdictions.

In a multilateral situation, it would appear that there is almost no room for the contracting jurisdictions to customize the measures arising from the OECD/G20 BEPS Project. The contracting jurisdictions would have to adopt the provisions in the MLI that were considered to be "minimum standards", with some exceptions and possible adjustments. With regard to the other provisions, i.e. the vast majority, the contracting jurisdictions could decide to adopt them or not through the opt-in and/or opt-out mechanism. In order to opt-out, the contracting jurisdictions have to make "reservations", which, however, are limited to those provided for in the MLI and cannot be customized.¹⁴⁰ In other words, neither the provisions of the MLI nor the reservations drafted by the ad hoc group in accordance with the BEPS Project can be customized by the contracting jurisdictions. Accordingly, when a contracting jurisdiction opts-in for an MLI provision, it accepts that the implementation of the BEPS measures into the relevant CTAs without any adjustment, i.e. as thought out by its drafters and as implemented in the text of the MLI and the Explanatory Statement. If this is

true, the BEPS proposals can be considered to be binding tools for interpretational purposes by way of the MLI and the Explanatory Statement. This view appears to be supported by Hattingh (2020),¹⁴¹ according to whom, as these measures are to be implemented through the domestic ratification of a treaty, i.e. the MLI, they derive constitutional relevance from this circumstance.

In light of the foregoing, the author's view is that the outcomes to the OECD/G20 BEPS Project could be included in article 31(1) of the Vienna Convention (1969) as the "ordinary meaning" of a given term if that term had its typical usage in the BEPS measures. It could also fall within article 31(2)(a) or (b) of the Vienna Convention (1969). The BEPS Project would qualify as an express or implicit¹⁴² agreement or instrument accepted by the contracting jurisdiction in connection with the conclusion of the MLI. Alternatively, the BEPS Project could be included within article 31(4) of the Vienna Convention (1969) as a "special meaning", as given by the contracting jurisdictions for terms that do not have a common usage.

These conclusions recall the ideas of Engelen (2008),¹⁴³ according to whom the meaning of a given term included in the Commentaries on the OECD Model could be binding for the contracting jurisdictions by acquiescence or estoppel if the jurisdictions did not make any reservation to the OECD Commentaries in which that term is included. In relation to this situation, the counterargument suggested by Avery Jones¹⁴⁴ was that the OECD Commentaries are not binding and that the OECD member countries are not required to communicate if they agree or do not agree with the considerations set out in the OECD Commentaries. In the absence of such an obligation, it is difficult to uphold the argument that these jurisdictions have passively accepted the content of the OECD Commentaries. In relation to the MLI, it appears that Engelen's arguments could be stronger. The Explanatory Statement is commentary to a treaty, and not to a Model as it is for the OECD Commentaries, and it is intended to clarify the intentions of the drafters regarding the application and interpretation of the Multilateral Instrument. All of the interested countries had the possibility to join the ad hoc group and, therefore, to influence the draft text of the MLI and the Explanatory Statement. In this respect, it can be argued that the countries that decided not to join the ad hoc group and not to become involved in the drafting of the MLI accepted by acquiescence the agreements reached by the ad hoc group in relation to the text of the Multilateral Instrument and its meaning.

138. Hattingh, *supra* n. 1, at sec. 6.3. According to that author, the measures arising from the OECD/G20 BEPS Project are not part of the "context", as they were agreed by a group smaller than the ad hoc group. See also Brauner, *supra* n. 90, at p. 16. According to that author, the OECD, *Explanatory Statement*, *supra* n. 1 gives interpretational effect to the BEPS measures by way of the backdoor. However, this would create confusion and could be regarded as offensive for the countries which did not participate in the BEPS Project. See again Elliffe, *supra* n. 97, at sec. 4.1., according to whom states that are not G20 or OECD member countries would not be bound politically by the BEPS Project.

139. That is, assuming that parties other than those that drafted the measures arising from the OECD/G20 BEPS Project, the MLI and the OECD, *Explanatory Statement*, *supra* n. 1.

140. Bosman, *supra* n. 58, at pp. 649-650.

141. P.J. Hattingh, *The Relevance of BEPS Materials for Tax Treaty Interpretation*, 74 Bull. Intl. Taxn. 4/5, sec. 3.1.2. (2020), Journal Articles & Papers IBFD.

142. The OECD/G20 BEPS Project can be considered to be an "express" agreement for the member countries of the ad hoc group and an "implicit" one for the other countries in arriving at the considerations in this paragraph.

143. Avery Jones, *supra* n. 25, at sec. 3.11.2.7.1. and F.A. 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 *The Legal Status of the OECD Commentaries* para. 5. (S. Douma et al. eds., IBFD 2008), Books IBFD.

144. Avery Jones, *supra* n. 25, at sec. 3.11.2.7.1.

4.2.3.2. Example

Article 7(1) of the MLI could be assessed to try to put into practice some of the considerations noted in section 4.2.3.1. This provision deals with the principal purpose test (PPT), and it has been drafted in very broad terms. In particular, this article uses terms such as “benefit”, “principal purpose”, “arrangement” and “transaction”, which are not expressly defined in the MLI. Except for the term “Cover Tax Agreement”, all the terms referred to in this article are not defined in the MLI. This absence of any definitions and guidance means that the meanings of these terms must be determined by way of the interpretational process described in sections 2., 3. and 4.

In particular, the starting point for the interpretation of these terms would be article 2(2) of the MLI, as they are terms included in a provision of the Multilateral Instrument. However, the purpose of the MLI and the vagueness of article 2(2) entail that its wording – as well as the terms under investigation – must be interpreted using the principles of the Vienna Convention (1969). An interpretation under article 2(2) of the MLI only could not satisfy the “minimum standard” of interpretation discussed in section 3.2., and would result in many different approaches and outcomes, for example, a textual versus teleological approach.

With regard to article 7(1) of the MLI, key terms, such as “arrangement”, “transaction”, “principal purpose” and “reasonable”, are not used at all in the OECD Model ante 2017.¹⁴⁵ Instead, the term “benefit” is used just once in article 27(8)(d) of the OECD Model.

In relation to the terms not used at all in the relevant CTAs, no reference to these CTAs and/or the relevant domestic legislation, i.e. by way of a provision similar to article 3(2) of the OECD Model, if any, would be possible to investigate their meaning, even if the latter would provide for specific definitions of the terms in question.¹⁴⁶ In this respect, article 2(2) of the MLI should not apply, and the meaning of the foregoing terms would be determined directly through the Vienna Convention (1969). Analogously, article 3(2) of the CTA, if any, would not apply, as it has a different purpose, i.e. to interpret the “undefined terms” of CTAs and not those in the MLI.

Instead, the starting point for interpretational purposes would be article 2(2) of the MLI for the terms used in the CTA. The terms used in article 2(2) of the MLI must be interpreted first. Afterwards, the meaning of the terms used in article 7(1) of the MLI can be determined. This position means that the rules and principles in the Vienna Convention (1969) should determine the context of the MLI and when and/or why it would prevent reference to the relevant CTAs and/or domestic legislation for interpretational purposes.

145. The term “purpose” alone is widely used in the *OECD Model ante 2017*. This, however, does not appear to be relevant for the purpose of the analysis in this article.

146. Lang, *supra* n. 57 and W.C. Haslehner, *A Multilateral Interpretation of the Multilateral Instrument (and Covered Tax Agreements)?*, 74 *Bull. Intl. Taxn.* 4/5, sec. 3.1. (2020), *Journal Articles & Papers IBFD*.

In both cases, when the Vienna Convention (1969) comes into play, a combined interpretative operation should be carried out.¹⁴⁷ This operation should consider the ordinary meaning of the terms under investigation, their context and the object and purpose of the treaty, *rectius* the MLI.

The ordinary meaning of the terms is generally the first step in the analysis. With regard to article 7(1) of the MLI, an imposing illustration in this respect has been carried out by Elliffe (2019).¹⁴⁸ That author has demonstrated that reference to Action 6 of the OECD/G20 BEPS Project can be made at this stage, and that the ordinary meaning does not necessarily coincide with the dictionary meaning. These terms should be interpreted in light of the object and purpose of the MLI, i.e. the uniform and consistent implementation of the findings of the BEPS Project into the bilateral tax treaties. Subsequently, the context of these terms should be assessed. Here, this action is of paramount importance and entails, in particular, the definition of the usable means of interpretation.

If both the Explanatory Statement and the materials of the OECD/G20 BEPS Project are included in article 31(2) of the Vienna Convention (1969), the definition given to the terms in question in the OECD/G20 BEPS Project would be binding for interpretational purposes. The Explanatory Statement¹⁴⁹ affirms that article 7(1) of the MLI was drafted on the basis of article X(7) (Entitlement to benefits) of the OECD Model (2017), as reproduced in the Final Report on Action 6¹⁵⁰ of the BEPS Project. The sole changes made in the MLI to the BEPS discipline was to conform the text to the terminology of the Multilateral Instrument, i.e. the term “Convention” used in the BEPS material is replaced with the concept of “Cover Tax Agreement”.

Neither the MLI nor the Explanatory Statement make further material considerations regarding the interpretation or application of the PPT. Accordingly, it can be said these documents rely on the OECD/G20 BEPS Project with regard to what concerns the discipline of the provision. The Final Report on Action 6 further clarifies background,¹⁵¹ purpose,¹⁵² interpretation¹⁵³ and application¹⁵⁴ of the PPT.

For interpretational purposes, in particular, the Final Report on Action 6 clarifies: (i) the meaning of the term “benefit”;¹⁵⁵ (ii) the meaning of the phrase “that resulted directly or indirectly in that benefit”, adding an example for clarity;¹⁵⁶ (iii) the meaning of the terms “arrangement”

147. *Official Commentary on a Preliminary Draft of The Vienna Convention*, *supra* n. 73, at p. 2269.

148. Elliffe, *supra* n. 97, at sec. 4.

149. OECD, *Explanatory Statement*, *supra* n. 1, at paras. 91-92.

150. OECD, *Action 6 Final Report 2015 – Preventing the Granting of Treaty Benefits in Inappropriate Circumstances* para. 26, p. 55 (OECD 2015), *Primary Sources IBFD* [hereinafter: *Action 6 Final Report* (2015)].

151. *Id.*, at para. 1, p. 55.

152. *Id.*, at paras. 2-7, pp. 55-56.

153. *Id.*, at paras. 7-13, pp. 56-58.

154. *Id.*, at para. 14, pp. 59-64

155. *Id.*, at para. 7, p. 56.

156. *Id.*, at para. 8, p. 57.

and “transaction”;¹⁵⁷ (iv) when “it is reasonable to conclude” that the principal purpose of an arrangement or transaction is to obtain benefits under a tax treaty;¹⁵⁸ and (v) the meaning of “one of the principal purposes” and when a purpose is not the principal purpose of the taxpayer, giving also few illustrative examples.^{159,160} Lastly, the application of the PPT is illustrated by way of ten examples.¹⁶¹ These examples could have some impact also for interpretational purposes.

In the author’s opinion, these clarifications are necessary to apply article 7(1) of the MLI properly. They are directly provided for by the drafters of the proposals derived from the OECD/G20 BEPS Project, i.e. by those who drafted the Final Report on Action 6 and, in particular, the provision that has been copied and pasted into article 7(1) of the MLI. Only these clarifications should matter in respect of the purpose of the application and interpretation of the article in question. In this regard, article 7(1) of the MLI has been shaped into its present form because of the considerations made in the Final Report on Action 6, and in this “context” only. This position would not work in another environment and on the basis of different considerations. Accordingly, Final Report on Action 6, as well as the Explanatory Statement, should be a binding interpretative tool for all of the countries that are signatories to the MLI, regardless whether or not they were part of the ad hoc group.

Taking into account the object and purpose of the MLI, this appears to be the only approach that could be adopted to interpret the terms in question in a uniform and consistent way. The exclusion of the Explanatory Statement or of the materials arising from the OECD/G20 BEPS Project from the interpretative process would inevitably result in many different interpretations of the terms not defined in article 7(1) of the MLI and to a non-uniform application of these provision. As this would run counter to the purpose of the MLI, it would appear that this would be the incorrect approach to adopt.

4.2.4. *The Commentaries on the OECD Model (2017)*

The potential inclusion of the Commentaries on the OECD Model (2017) among the binding means of interpretation *ex* article 31 of the Vienna Convention (1969) is also controversial. Those authors who have expressed their views in the past on the legal status of the OECD Commentaries on the OECD Models tend to extend the

same considerations to the MLI-related implementations in the OECD Commentaries (2017).^{162,163}

In the author’s view, further considerations should be made in relation to aspects of the Commentaries on the OECD Model (2017). These relate to those aspects, which: (i) reproduce exactly the content of the OECD/G20 BEPS Project; or (ii) stem from the BEPS initiative, but were thought of the first time in the context of the OECD Commentaries (2017).

With regard to the first kind of amendments, the author is of the opinion that the considerations made in sections 4.2.2. and 4.2.3. should be extended, *mutatis mutandis*, to the Commentaries on the OECD Model (2017).¹⁶⁴ As stated in section 4.2.2., those contracting jurisdictions that accept to opt-in with regard to certain provisions MLI agreed to their inclusion in their treaty networks in the form and with the meaning drafted and understood by the ad hoc group, without any possible customization, except for those expressly allowed by the MLI. The provisions accepted in the MLI by a contracting jurisdiction have the meaning as stated in the Explanatory Statement, which has been copied and pasted from the material derived from the OECD/G20 BEPS Project and partially reproduced in the OECD Commentaries (2017). If the BEPS Project has any binding character through the Explanatory Statement, the same binding character should be attributed to the OECD Commentaries (2017), which reproduces the (binding) BEPS materials. In other words, the inclusion of these parts of the OECD Commentaries (2017) in an understanding based on article 31(2)(b) of the Vienna Convention (1969) should stem from the implicit acceptance of the Explanatory Statement and of the BEPS materials as binding documents for interpretational purposes. The Explanatory Statement appears to support this view, even if in a very moderate way. According to the Explanatory Statement,¹⁶⁵ “the commentary that was developed during the course of the BEPS project and reflected in the final BEPS Package has particular relevance in this regard”,¹⁶⁶ i.e. for the interpretation of the substantive provisions of the MLI.

Different considerations should be made for the explanations and/or principles and/or examples¹⁶⁷ contained in the Commentaries on the OECD Model (2017) that were not expressly included in the materials arising from the OECD/G20 BEPS Project, and that were thought of

157. *Id.*, at para. 9, p. 57.

158. *Id.*, at paras. 10-11, pp. 57-58.

159. *Id.*, at paras. 12-13, p. 58.

160. The material arising from the OECD/G20 BEPS Project would not resolve all of the interpretative issues that might arise in relation to this rule, but these materials provide more than simple hints for the interpreters for its application. The variables that can arise from its application are too many to be predicted and assessed in a single document.

161. OECD, *Action 6 Final Report* (2015), *supra* n. 150, at para. 14.

162. See, for example, Engelen, *supra* n. 66, at sec. 10.9.1. and Avery Jones, *supra* n. 25, at sec. 3.11. See also Hattingh, *supra* n. 141, at sec. 3.1.2., fn. 19.

163. See, for example, Bosman *supra* n. 58, at p. 648 and Wakounig, *supra* n. 9, at pp. 25-29.

164. Hattingh, *supra* n. 141, at sec. 3.1.2., Table 2. The Table provides a list of the provisions included in the *OECD Model* (2017), which relate to the OECD/G20 BEPS Project.

165. OECD, *Explanatory Statement*, *supra* n. 1, at para. 12.

166. Hattingh, *supra* n. 141, at sec. 4.2.1. According to that author, the OECD, *Explanatory Statement*, *supra* n. 1 does not expressly refer to the *OECD Model: Commentary* (2017). Accordingly, the reference could also be made to other documents, for example, *UN Model Double Taxation Convention between Developed and Developing Countries: Commentaries* (1 Jan. 2017), Treaties & Models IBFD.

167. See, for example, paragraph 182, examples K, L and M of the *OECD Model: Commentary on Article 29* (2017).

and added in the OECD Commentaries (2017) for the first time.¹⁶⁸ These amendments and/or additions do not appear to have the same connection with the text of the MLI and the Explanatory Statement that the relevant materials derived from the BEPS Project, and relating to the OECD Commentaries (2017), have. These materials were not provided for in the BEPS Project that are represented in the substance of the text of the MLI as expressly agreed by the contracting jurisdictions. Consequently, it would be hard to hold that the contracting jurisdictions even implicitly agreed to them. As a result, these materials should have less effect in the interpretational process or, at least, they should be subject to the old considerations made in the context of the relevant tax treaty. In other words, if these parts of the OECD Commentaries (2017) cannot be considered to be binding tools for interpretational purposes by way of the BEPS Project and the Explanatory Statement the outcome on their legal status would vary depending on the different approaches adopted.¹⁶⁹ For instance, these parts of the OECD Commentaries (2017) could be included in article 31 of the Vienna Convention (1969) to the extent that the provisions of the MLI as implemented in the CTAs are identical to those provided for in the OECD Model (2017). Alternatively, these provisions could be ranked among the supplementary means of interpretation under article 32 of the Vienna Convention (1969), where their binding nature is not confirmed.

5. Conclusions

In light of what has been stated in this article, it can be said that when a term used, but not defined in the MLI must be assessed, the interpreter should start the analysis from article 2(2) of the MLI. According to the drafters of the MLI, and most authors,¹⁷⁰ the MLI should be regarded as an autonomous and independent agreement that must be read alongside the relevant CTAs. In this context, the “undefined terms” in the MLI should be interpreted under article 2(2) of the Multilateral Instrument, as this provision is not directly integrated into the CTAs, and does not conflict with article 3(2) of the CTA, which has a different object and scope.

However, article 2(2) of the MLI is only the starting point for the interpretational purposes. The analysis carried out in this article has demonstrated its inadequacy for the interpretation of the terms in question. The terms used in article 2(2) of the MLI are vague and general, and can result in too many different interpretations and approaches. Neither guidance for their interpretation nor any limitation to different possible outcomes is provided for by the text of the MLI or the accompanying Explanatory Statement.

168. Hattingh, *supra* n. 141, at sec. 4.4.2.

169. Engelen, *supra* n. 66, at sec. 10.9.1 and Avery Jones, *supra* n. 25, at sec. 3.11. See also Hattingh, *supra* n. 141, at sec. 3.1.2., fn. 19.

170. See Bravo, *supra* n. 25.

In the absence of general rules of interpretation agreed on an international level, such guidance or limitations would be provided by the “domestic” general rules and/or principles of interpretation, as set out in the different legal systems of the relevant contracting jurisdictions. These, international, rules exist, and are those codified in the Vienna Convention (1969). They have been agreed on to avoid the foregoing situation, i.e. the interpretation of the international laws under the rules and principles set out in different domestic systems. The rules of the Vienna Convention (1969) apply to the purposes of this article. The subjective scope of the Vienna Convention (1969) is met. Every country is subject to these rules, as the Vienna Convention (1969) is considered to be international customary law. Also, the objective scope is met. The MLI, as well as the relevant CTAs, fall within the definition of “treaty” as provided for by articles 1 and 2 of the Vienna Convention (1969).

Under article 31 of the Vienna Convention (1969), the interpretation of the “undefined terms” in the MLI must be carried out in good faith, in accordance with the ordinary meaning these terms have in the context of the MLI and its object and purpose. The value of these rules is that they establish a “minimum standard” of interpretation, thereby forcing the interpreters, for example, judges and the tax authorities, to undertake such an interpretation according to all of the elements provided for in article 31 of the Vienna Convention (1969), and to “justify” the weight given to each. In the context of the Vienna Convention (1969), the interpreters cannot limit their analysis to the intentions of the parties or the literal and/or grammatical interpretation of the terms under investigation. Ultimately, this process is conditioned to the subjective interpretation of the interpreter, for example, to the personal understanding of the facts of the case and the relevant applicable laws, political, economic and social opinions, education and culture. Such an interpretation is subjective in nature, and objective criteria to carry out this process can be hardly established. Nevertheless, this approach appears to be the most consistent with the MLI. In particular, this article has demonstrated that, with regard to the interpretation of the “undefined terms” in the MLI, the only way for the interpreter to comply with the object and purpose of the MLI is to carry out an autonomous interpretation of these terms, as well as of article 2(2) of the MLI, in accordance with the principles and rules set out in the Vienna Convention (1969).

In this process, the interpreter should rely on the Explanatory Statement, the material arising from the OECD/G20 BEPS Project and – to a more limited extent – on the Commentaries on the OECD Model (2017). For the reasons described in the preceding paragraphs in this section, in general, these means of interpretation are to be found in article 31 of the Vienna Convention (1969).