THE INTERPRETATION OF THE MULTILATERAL INSTRUMENT

At University of Copenhagen's annual commemoration on 18 November 2016, Rector Ralf Hemmingsen awarded Professor Michael Lang an Honorary Doctorate of Law based on the promotion by Dean of The Faculty of Law, Professor Jacob Graff Nielsen and the recommendation of Professor Rasmus Kristian Feldthusen and Assistant Professor Karina Kim Egholm Elgaard. The article is based on Professor Michael Lang's honorary doctor lecture at The Faculty of Law in connection with this occasion.

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The OECD/G20 Base Erosion and Profit Shifting (BEPS) Project produced a number of recommendations to be implemented through amendments to bilateral tax treaties. If undertaken on a treaty-by-treaty basis, the sheer number of treaties in effect would make such a process very lengthy. Recognising the need for an efficient and effective mechanism to implement the tax treaty related measures resulting from the BEPS Project, the BEPS Action Plan called for a multilateral instrument. Such a multilateral convention was presented on November 24, 2016. The text of this convention raises a couple of interpretation issues. Michael Lang deals with some of them in this contribution which is based on his lecture delivered at the University of Copenhagen on 17 November 2016 upon being awarded an honorary doctorate.

I. The interpretation of the regulations of the Multilateral Instrument based on the rules of the Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties (VCLT) addresses the interpretation of international treaties. Actually, the VCLT itself is an international treaty. The interpretation provisions contained in the VCLT are also considered international customary law. As a consequence, the regulations of the VCLT on the interpretation of international treaties are also relevant when one of the contracting states did not ratify the VCLT. The multilateral international treaty presented on 24 November 2016 under the name "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting",[1] hereinafter referred to as Multilateral Instrument (MLI), must therefore be interpreted on the basis of the interpretation rules of the VCLT.

According to Article 31 para. 1 VCLT, a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Therefore, the wording of a provision is not the only means of interpretation but must in any case be taken into account. It is the starting point of the interpretation, but it by no means marks the end of it.[2] The term "context" refers to the systematic interpretation of a treaty. By making a reference to the object and purpose, the VCLT leaves room for teleological interpretation. Article 32 VCLT addresses aspects of historical interpretation. At first glance, the development of law is only of subsidiary significance: The aspects mentioned in Article 32 VCLT are to be taken into account if they confirm the meaning which results from the application of Article 31 VCLT, or if the interpretation according to Article 31 VCLT leaves the meaning ambiguous or obscure or leads

to a result that is manifestly absurd or unreasonable. According to Article 31, para. 4 VCLT, however, a special meaning shall be given to a term if it is established that the parties so intended. Hence, the development of law is by no means a priori attributed a subordinate significance. Just as with the weighing of all other relevant arguments in the course of interpretation, in a specific case historical arguments will be weighed on the basis of their persuasive power. On these grounds, the interpretation of an international treaty and hence of the MLI is by no means fundamentally different from the interpretation of other laws, for which systematic, teleological, and historical arguments can also be taken into account in addition to the wording.

This still applies notwithstanding Article 31 para. 3 VCLT, which stipulates that any subsequent agreement between the parties and subsequent practice play a role in the interpretation. This, however, does not say anything about the weight of these aspects in the process of interpretation. They must also "be taken into account". This by no means attributes a priori a greater value to these than to any other arguments. Depending on the subject-matter to be regulated, Article 31 para. 3 VCLT can result in a different room for manoeuvre for the bodies that conclude such agreements or determine the practice. In several legal systems, tax legislation is subject to particularly strict legal requirements. The separation of powers is often of decisive importance. This must also be taken into consideration when it comes to the significance of administrative decisions in international agreements or the relevance of practice. Later agreements or later practice which must be taken into account in the interpretation must also be distinguished from amendments to agreements. Therefore, Article 31 para. 3 VCLT can only exploit those scopes that emerge in the course of interpretation. Agreements or practice of a purely bilateral nature will have no significance whatsoever in a multilateral treaty covered by Article 31 para. 3 VCLT.

II. Art. 2 para. 2 MLI

1. THE SIGNIFICANCE OF ARTICLE 3 PARA. 2 OECD MC FOR THE INTERPRETATION OF ART. 2 PARA. 2 MLI

Moreover, the interpretation of MLI is governed in the MLI itself. Art. 2 para. 2 MLI contains an interpretation provision modelled on Art. 3 para. 2 OECD MC: "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." Art. 2 para. 2 MLI thus follows the example of Art. 3 para. 2 of the EC Arbitration Convention. This provision already presents a similar content: "Any term not defined in this Convention shall, unless the context otherwise requires, have the meaning which it has under the double taxation convention between the States concerned." Art. 2 para. 2 MLI is also modelled on Art. 3 para. 2 OECD MC. This must also be taken into account for interpretation purposes. Therefore, it is appropriate to resort to Art. 3 para. 2 OECD MC and the case law and literature derived from it for the purposes of the interpretation of Art. 2 para. 2 MLI. If the authors of the MLI modelled the provision of Art. 2 para. 2 MLI on that of Art. 3 para. 2 OECD MC, this indicates that they also wanted to establish a link to the content of Art. 3 para. 2 OECD MC.

This, however, is, in equal measure, an advantage and a disadvantage. It does, indeed per se facilitate the interpretation of a provision when the authors of the regulation are guided by already existing provisions. The existing literature and the case law with regard to this regulation can provide indications as to the interpretation of the new regulation. In the particular case of Art. 3 para. 2 OECD MC, however, the interpretation of this provision is fraught with great uncertainties. In many respects, the content of Art. 3 para. 2 OECD MC is unclear. There is a risk that the existing uncertainties surrounding Art. 3 para. 2 OECD MC will also weigh upon the interpretation of Art. 2 para. 2 MLI.

There is uncertainty over the interpretation of the term "application" in Art. 3 para. 2 OECD MC. According to the opinion held by *Avery Jones et al*, only the state whose taxation rights are limited by the treaty provision will apply the treaty. If, however, a treaty provision only confirms the taxation right of the contracting state, there should be no such "application".[3] The MLI does not, however, directly limit taxation rights, but is used to amend bilateral treaty provisions. If one applies the consideration of *Avery Jones et al* to this constellation, it could mean that an "application" of the treaty can only be assumed if the consequence of the MLI provision is a material derogation from a bilateral treaty provision or the addition of another provision to a bilateral treaty. If, however, it becomes apparent that there is no change in the respective bilateral treaty, because the bilateral provisions correspond a priori to the specific stipulation of the MLI, there can be no "application".

This opinion, however, already failed to prevail with regard to Art. 3 para. 2 OECD MC, and for good rea-

sons:[4] When, on the basis of the treaty, a state comes to the conclusion that the treaty leaves its taxation right unaffected, this is also a result of the application of the treaty. A distinction based on the assumption that, in these cases, the state merely "reads" but not applies the treaty, would be artificial. First and foremost – if one were to attribute material importance to Art. 3 para. 2 OECD MC – a merely "read" treaty provision would then have a different content than an "applied" treaty provision. In consequence, the content of one and the same treaty provision, which is merely "read" by the one contracting state but "applied" by the other would be different. Treaties, however, would not be up to their task of distributing the taxation rights between states so that taxation rights are only allocated to one state – and not to both states or even none of the two.

For similar reasons, even a merely limited interpretation of the term "application" in Art. 2 para. 2 MLI would not be convincing. Admittedly, there is no risk here that the content of the same "Covered Tax Agreement" will be interpreted differently by the two contracting states. If it becomes apparent that a bilateral treaty does not correspond to the requirements of an MLI provision and this MLI provision amends a treaty, this will have consequences for both states that concluded this treaty. The same contracting state, however, which concluded bilateral treaties with different contents with other states, may find itself confronted in one case with a bilateral treaty amended by the MLI and, in another case – if the bilateral treaty provision already corresponded to the MLI requirements – have a bilateral treaty in its legislation that was left unchanged. Art. 2 para. 2 MLI would then be applicable depending on whether the state had to "apply" or merely "read" the treaty, and thus the same MLI provision would have a different content for this state in case of its "application" than in the case of its mere "reading". It is obvious that this does not correspond to the objective and purpose of the MLI, which is to largely harmonize the relevant provisions of all bilateral treaties covered by it.

The most serious uncertainty regarding the interpretation of Art. 3 para. 2 OECD MC is that over the scope of the reference to national law contained in the provision: The phrase "unless the context otherwise requires" which expresses the proviso that this reference is subject to, is understood in completely different ways. According to the opinion shared in particular by tax administrations, almost no importance at all should be attributed to this phrase: If a term not defined in the treaty is used, Art. 3 para. 2 OECD MC prescribes a recourse to national law of the applying state, which can be avoided only in exceptional cases.[5] The opposing view stresses the importance of the said phrase, in particular the significance of the context mentioned therein. It represents not only the systematic interpretation, but also the grammatical, historical, and teleological interpretation. This phrase thus emphasises that DTCs must first be interpreted on their own accord, under consideration of all aspects admissible in the interpretation of international law. Only in those rare cases in which the interpreter fails to establish the meaning of a provision using grammatical, historical, systematic and teleological aspects will there be room for this reference to the national law of the applying state.[6] Since, however, an interpretation using all admissible methods usually leads to results, there is no reason to worry that this would not be the case in DTC law.[7] A conciliatory position by *Vogel*, established between these opinions, puts the emphasis on the term "requires": The treaty context would be of importance only on serious grounds, otherwise, the national law of the applying state would have to be used straight away.[8]

I have already explained in detail elsewhere why I believe that the opinion which does not primarily regard Art. 3 para. 2 OECD MC as a reference to the national law of the applying state but as an additional emphasis on an interpretation within the context of the treaty, is the one with the better arguments.[9] Only this understanding of Art. 3 para. 2 OECD MC will allow for a consistent interpretation of DTCs in both contracting states. When each contracting state interprets terms not defined in the treaty according to its national law, this will – in view of the differences between the national law systems – almost inevitably lead to the states also developing different positions on the distribution of taxation rights. Double taxation and double non-taxation would then be inevitable.

I believe the same applies to Art. 2 para. 2 MLI: If each term not defined in the MLI were understood primarily according to the respective applicable bilateral DTC, the contents of the provisions of the MLI would drift apart. If the content of these requirements can only be derived from the bilateral DTCs themselves, it would not be certain that the requirements of the MLI equally apply for all bilateral conventions covered by it. Therefore, even in the case of Art. 2 para. 2 MLI, the convincing arguments suggest that one should see this provision as an additional emphasis in favour of an interpretation that results from the MLI and is therefore independent of the respective treaty. The principles to be derived by Art. 31 VCLT are thus not replaced by Art. 2 para. 2 MLI but confirmed by it.

2. THE SIGNIFICANCE OF ARTICLE 3 PARA. 2 OECD MC FOR THE APPLICATION OF ART. 2 PARA. 2 MLI

It is likely that Art. 3 para. 2 OECD MC is not only of significance for the interpretation of Art. 2 para. 2 MLI but also for its application. After all, Art. 2 para. 2 MLI refers – under the proviso explained above – to the respective "Covered Tax Agreements", and these bilateral treaties mostly contain rules similar to those of Art. 3 para. 2 OECD MC. In fact, the proposed commentary passages assume a chain of references: Subject to the terms and the context defined in the MLI itself, Art. 2 para. 2 MLI first refers to the respective bilateral DTCs. There, the treaty provision modelled on Art. 3 para. 2 OECD MC – again, subject to the terms in the DTC itself and the context of the treaty – further points out to the national law of the applying state:[10] "With respect to a term not explicitly defined in the Convention or in the relevant Covered Tax Agreement, Covered Tax Agreements generally provide that any term not defined shall, unless the context otherwise requires, have the meaning it has at the time the Covered Tax Agreement is being applied under the domestic law of the Contracting Jurisdiction applying the Covered Tax Agreement, the meaning given to that term under the tax laws of that Contracting Jurisdiction prevailing over a meaning given to the term under other laws of that Contracting Jurisdiction. Where this rule is present in a Covered Tax Agreement, it would apply for the purposes of determining the meaning of undefined terms in the Convention, unless the context requires an alternative interpretation. For this purpose, the context would include the purpose of the Convention, as described in paragraphs 1 through 14 above, and of the Covered Tax Agreement, as reflected in the preamble as modified by Article 6 (see paragraphs 21 to 23 above, related to the preamble of the Convention, and paragraph 76 below, related to Article 6)."

The wording of the provisions supports this understanding in a constellation where a term is used in the MLI but not defined therein, and its meaning cannot be derived from the context of the MLI either, and the same term is also used in the relevant bilateral DTC, the same being true there. In this case, it does seem legitimate to resort to the national law of the respective applying state. If this term, however, is not used at all in a bilateral DTC, it is not possible at all to resort to national law. After all, the reference in Art. 2 para. 2 MLI means that, in order to determine the meaning of the term used in the MLI, one may only resort to its meaning in the relevant "Covered Tax Agreement". If the term has no meaning there at all because it is not used there, the reference in Art. 2 para. 2 MLI does not apply at all. As a result, the bilateral DTC should not be used for the interpretation of the MLI at all, nor should the provision of the DTC modelled on Art. 3 para. 2 OECD MC. So even if the term used in the MLI has a meaning in the law of the applying state, it is not possible in these cases to consider this meaning for the interpretation of the MLI.

III. Art. 32 para. 1 MLI

1. THE MEANING OF THE MUTUAL AGREEMENT PROCEDURE ACC. TO ART. 25 OECD MC

In the case of uncertainty over the interpretation of a DTC, the mutual agreement procedure often plays an important role in practice. Article 16 MLI is devoted to this procedure. The first three paragraphs of Art. 16 MLI essentially repeat the rules on the mutual agreement procedure already contained in Art. 25 para. 1 to 3 OECD MC. The objective of Art. 16 para. 4 MLI is the harmonization of these rules. Art. 16 para. 5 MLI makes it clear that there is little scope for deviations: The rules on the mutual agreement procedure represent a minimum standard, and though one may, by way of exception, achieve this standard through other means, one must not fall short of it.

In terms of content, the only new element is that mutual agreement procedures can be introduced in each of the two contracting states and not only in the state of residence or – in case of discrimination based on nationality according to Art. 24 OECD MC – in the state of the nationality. In addition, no reference was made to Art. 25 para. 4 OECD MC, since obviously the opinion has prevailed that no explicit provision is required to empower authorities to contact each other directly.[11]

Yet Art. 16 MLI does not alter the fact that Art. 25 OECD MC is merely of procedural importance. This provision empowers and obliges the responsible authorities of the contracting states to deal with cases in which the taxpayer identifies a taxation that infringes upon the treaty, and to undertake efforts to reach a solution. A sometimes controversial view exists that these provisions also give taxpayers a legal claim to the introduction of a mutual agreement procedure.[12] It is by no means possible for the taxpayer, however, to enforce an agreement.[13]

Art. 25 OECD MC does not furnish the competent authorities with a legal basis on which to resolve a case in a different manner than this would have been done outside a mutual agreement procedure – in the regular administrative procedures. They remain

bound to the other provisions of the DTC.[14] The regulations of the mutual agreement procedure can only bring about a change in competence: According to Art. 25 OECD MC, the "competent authority" – i.e. in most cases the Ministry of Finance – must resolve the issue, while in other cases DTC issues are usually solved by the authorities otherwise responsible in tax proceedings, and in many legal systems the highest tax authority is not even involved. Moreover, the provisions on the mutual agreement procedure can override national time limits, which may otherwise stand in the way of a lawful implementation of the DTC. Art. 25 OECD MC, however, does not contain any further authorisations to solve the case in a materially different manner.

Therefore, the meaning of Art. 25 OECD MC is limited to providing the authorities of the contracting states with certainty over whether they are assuming the same facts. The realisation that the authority of the other contracting state assumed the facts in a different manner could prompt them to verify the results of the investigation proceedings that were – and should continue to be – carried out according to national laws. If the facts on which one or even both authorities originally based their assumptions prove wrong and these assumptions need to be corrected, this may also have as a consequence that other DTC provisions are applicable as well. At the level of national laws, too, the two authorities – if they initially applied the DTC provisions in a different manner – could be persuaded by the arguments of the respective other side and eventually review their original legal assessment. None of the two authorities, however, may take a legal assessment as a basis, which the national authority competent outside the mutual agreement procedure could not have otherwise taken. Just as the authority can be also dissuaded from an incorrect assessment at the level of the facts or the laws through the arguments presented by the taxpayer during the hearing of the parties, this can also result from an exchange of arguments with the authority of the other state. The fact that a certain opinion on the content of a DTC provision can also be shared by the competent authority of the other contracting state after implementation of the mutual agreement procedure is not an argument that lends additional support to this opinion. Therefore, with the exception of the procedural particularities described above – such as the obligation to consider the case bilaterally upon the taxpayer's suggestion, or the change of competence of the authority, or the overriding of time limits – Art. 25 OECD MC does not have an independent legal significance.

In view of the small legal content of the first three paragraphs of Art. 25 OECD MC and the fact that the overwhelming number of DTCs concluded worldwide already contain these rules, it is all the more surprising that these rules are expressly referred to as a minimum standard in the MLI. This must be attributable to the fact that it was not possible to agree on the arbitration procedure as a minimum standard. The regulations on the mutual agreement procedure are the only ones stipulating a minimum standard that is not only in the interest of the administration, but also takes into account the interests of the taxpayers affected by the implementation of the DTC. It is therefore disappointing that, especially in the field of legal protection, only those regulations are declared part of the endeavoured minimum standard which today are already contained in almost all DTCs.

The rules on the arbitration procedure contained in Art. 25 para. 5 OECD MC are complemented and replaced by more detailed regulations, which not only don't belong to the minimum standard: The contracting states of the MLI must even separately opt to declare these regulations applicable. As a result, the number of arbitration procedure regulations in DTCs worldwide is not likely to increase very fast. If these regulations had been at least subject to an opting-out or had even become part of the minimum standard, they would probably have gained acceptance must quicker.

Arbitration procedures essentially differ from the conventional mutual agreement procedures which they are designed to complement: In an arbitration procedure, the representatives of the competent authority either do not participate at all, or they can be overruled. Therefore, there is no longer any assurance that the results of an arbitration procedure can have the same content as decisions of the national authorities. In contrast, the representatives of national authorities who participate in a mutual agreement procedure must interpret the treaty provisions using the same methods which are also relevant in determining the content of these provisions in the national stages of appeal. In states governed by the rule of law, their objective is to prevent decisions in mutual agreement procedures from being reached otherwise – e.g. under consideration of extralegal values or as the result of horse-trading. No mutual agreement can be reached without their approval. In contrast, in arbitration procedures the competence is transferred to authorities that otherwise have no competence in a purely national administrative procedure. In several legal systems, a constitutional justification will be required for this.[15] Since numerous states have already accepted arbitration procedure regulations

outside tax law and similar issues emerge in these legal areas, one can often resort to the same considerations presented in these cases for constitutional justification.

2. THE MEANING OF THE MUTUAL AGREEMENT PROCEDURE ACC. TO ART. 32 PARA. 1 MLI

In addition to Art. 16 MLI, Art. 32 para. 1 once again expressly addresses the mutual agreement procedure: "Any question arising as to the interpretation or implementation of provisions of a Covered Tax Agreement as they are modified by this Convention shall be determined in accordance with the provision(s) of the Covered Tax Agreement relating to the resolution by mutual agreement of questions of interpretation or application of the Covered Tax Agreement (as those provisions may be modified by this Convention)."

The question arises, however, as to the normative significance of this regulation. Since this paragraph explicitly mentions the mutual agreement procedure, this could justify the assumption that the provision also has a content that cannot already be derived from Art. 16 MLI. The expression "shall be determined" also suggests that, as a result of this provision, the competent authorities can take decisions by way of the mutual agreement procedure which they would otherwise not be authorized to take under national procedural law.

Such an assumption, however, would not only raise the question as to how to draw the limits of these powers – that go beyond the otherwise given possibilities – by way of interpretation. After all, in a mutual agreement procedure the competent authorities act as national authorities and not in another capacity. This assumption is out of the question simply because the said regulation refers to the mutual agreement procedure according to the bilateral treaties, since the expression "determined" is followed by the phrase "in accordance with the provision(s) of the Covered Tax Agreement relating to the resolution by mutual agreement".

A look at the Explanatory Statement on Art. 32 para. 1 MLI explains the background of Art. 32 para. 1 MLI:[6] "Paragraph 1 clarifies the mechanism for determining questions of the interpretation and implementation of Covered Tax Agreements, as opposed to questions of the interpretation and implementation of the Convention itself. Paragraph 1 provides that any questions as to the interpretation or implementation of the provisions of a Covered Tax Agreement as modified by the Convention shall be determined in accordance with the relevant provision(s) of that Covered Tax Agreement itself (as those provisions may be modified by the Convention). Accordingly, the usual mechanisms foreseen by the Covered Tax Agreement should be used to determine questions of interpretation and implementation of the provisions of the Covered Tax Agreement which have been modified by the Convention. This would include questions as to how the Convention has modified a specific Covered Tax Agreement pursuant to the compatibility clauses and other provisions set out in the Convention."

The primary objective of the authors of the materials is the distinction from Art. 32 para. 2 MLI – yet to be discussed. The first sentence once again generally demonstrates that mutual agreement procedures should determine questions concerning the interpretation and implementation of the respective bilateral tax agreement, while the procedure under Art. 32 para. 2 MLI deals with the interpretation and implementation of the MLI itself ("Convention"). The last sentence of the quoted paragraph of the Explanatory Statement goes on to describe another constellation that should also be covered by Art. 32 para. 1 MLI, but is not, at least prima facie, merely a question of interpretation and implementation of the bilateral DTC. As a result, Art. 32 para. 1 MLI must be understood above all with regard to para. 2 of this provision: The authors of the MLI wanted to ensure that the scope of Art. 32 para. 2 MLI – and thus of the "competence" of the "Conference of the Parties" – does not get out of hand, and clarify that the conventional mutual agreement procedure should continue to be of considerable importance in the interpretation of bilateral DTCs. Against this background, one can attribute a declarative significance to Art. 32 para. 1 MLI. The relevance of this provision is to clarify that Art. 32 para. 2 MLI should be applicable only in those cases that go beyond the interpretation and implementation of the bilateral DTC.

IV. Art. 32 para. 2 MLI

1. THE "CONFERENCE OF THE PARTIES" ACCORDING TO ART. 31 PARA. 3 MLI

After the already mentioned provision of Art. 32 para. 2 MLI, the "Conference of the Parties" can be addressed for questions arising as to the interpretation and implementation of the MLI. Explicit reference to Art. 31 para. 3 MLI is made therein. Indeed, the entire Art. 31 MLI deals with the "Conference of the Parties":

1. The Parties may convene a Conference of the Parties for the purposes of taking any decisions or exercising any functions as may be required or appropriate under the provisions of this Convention.

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

Art. 32 para. 2 MLI is not the only provision referring to Art. 31 para. 3 MLI. Art. 33 MLI, which deals with possible amendments of the MLI, also contains such a reference:

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

Therefore, the "decisions" and "functions" addressed in Art. 31 para. 1 MLI are those referred to in Art. 32 para. 3 and Art. 33 para. 2 MLI. In case of an amendment, the proposals of the Conference of the Parties must be presented for resolution. In his capacity as Depositary, the Secretary General of the OECD must notify the Parties thereof in accordance with Art. 39 para. 2 lit e. A Conference of the Parties can also convene in case of a request in accordance with Art. 32 para. 2 MLI. In both cases, the condition is that the request is supported by one third of the Parties within six months after the Depositary has notified the Parties thereof. If fewer than one third of the Parties support the request, or this quorum is established after the expiry of the time limit of 6 months, that condition is not met. In this case, the Secretary General of the OECD may not convene a Conference of the Parties.

It is interesting that the Explanatory Statement on Art. 31 MLI assumes that the Conference of the Parties does not necessarily require the physical presence of the representatives of the Parties in one place:[17] "The Conference of the Parties could meet in person, but could also fulfil its functions by meeting remotely, for example by using videoconference or teleconference, by taking decisions through written procedure or by any other means decided upon by the Parties."

This bears the question as to how decisions of the Conference of the Parties will be taken, especially when the Conference of the Parties wishes to exercise the right granted to it under Art. 32 para. 2 MLI to address questions of the interpretation and implementation of the MLI ("may be addressed by the Conference of the Parties"). No explicit regulations can be found in the MLI in this regard. Art. 6 para. 1 of the Convention on the Organisation for Economic Co-operation and Development (OECD) provides that, "unless the Organisation otherwise agrees unanimously for special cases, decisions shall be taken by mutual agreement of all the Members".[18] In fact, the MLI was negotiated within the framework of the OECD. The role of the Secretary General of the OECD as Depositary, explicitly integrated in the MLI, also emphasises the proximity of this Convention to the OECD. This could also lead to the demand that decisions by the Conference of the Parties are taken unanimously. The OECD Convention, however, is definitely not directly applicable to the MLI. Moreover, the MLI is by no means open for signature only to Member States of the OECD. It should also be taken into account that, at least with regard to voting on international law texts, international practice has changed in the course of time: Whereas the unanimity rule generally applied in the past, international law has already derived a standard from recent state practice, according to which a two-thirds majority of the participating states will suffice for the adoption of treaties at international conferences.[19] Accordingly, Art. 9 para. 2 VCLT received the following wording: "The adoption of a text of a treaty at an international conference takes place by the use of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule." Though the interpretation and implementation of the MLI does not correspond to the voting on a text of a treaty, under Art. 33 para. 3 MLI, the Conference of the Parties is responsible for deciding on a "proposed amendment" of the MLI – and thus on the amendment of a text of a treaty. Art. 9 para. 2 VCLT may definitely be of importance for such decisions. In view of the parallel regulation of questions on the "interpretation or implementation" and an "amendment" in Art. 31 para. 3 MLI, it would seem obvious to assume the same majority requirement in both cases. Therefore, much suggests that, when the Conference of the Parties addresses questions of the interpretation and implementation of the MLI, a two-thirds majority should be required. In contrast, the only quorum defined by the MLI itself is the support by one third of the Parties under Art. 31 para. 3 MLI. This condition must be met when the request of a Party is to be treated by the Conference of the Parties. If this quorum were

also to be applied to decisions of the "Conference of the Parties" on the interpretation or implementation of the MLI, this would eventually render diverging opinions within the Conference of the Parties possible. In the commentary of the OECD to its Model Convention and in some OECD reports, for instance, one will occasionally find majority and minority opinions as well. These, however, do not require that an opinion is supported by at least one third of the member states to be included in the commentary or the report. Therefore, applying this quorum to decisions of the Conference of the Parties is by no means self-evident.

The requirement for the support by one third of the Parties, however, ensures in any case that one or a few Contracting States cannot easily force the Conference of the Parties to be convened. The request by a Party to convene the Conference of the Parties to address a specific topic of the interpretation or implementation requires the support of at least a qualified minority. Against this background, however, it is also logical that, once convened, a Conference of the Parties cannot discuss just any question. Instead, the approval of one third of the Parties is required for each topic proposed for treatment by a Party. This is all the more relevant as – according to the Explanatory Statement on Art. 31 MLI – the Conference of the Parties can also be convened through a written procedure.

2. THE MEANING OF THE CONFERENCE OF THE PARTIES ACCORDING TO ART. 32 PARA. 2 MLI

According to Art. 32 para. 2 MLI, a Conference of the Parties operating on the basis of Art. 31 para. 3 MLI is authorized to address "any question as arising to the interpretation or implementation of this Convention". Here, the structure of Art. 32 para. 2 MLI corresponds to that of Art. 32 para. 1 MLI, though Art. 32 para. 1 MLI refers to the "provisions of a Covered Tax Agreement" instead of the "Convention". This suggests that the scope of application of both provisions should not have any overlaps. As already implied, however, it is anything but clear just why the responsibility of the Conference of the Parties should not include "questions as to how the Convention has modified a specific Covered Tax Agreement pursuant to the compatibility clauses and other provisions set out in the Convention". The question whether a provision of the bilateral DTC meets the requirements of the MLI is also a question of interpretation and implementation of the MLI. Only in those cases, in which just the content of the bilateral DCT provision is unclear, would this constitute a matter eligible for a mutual agreement procedure – and not for the Conference of the Parties. The authors of the MLI are obviously worried about a potentially negative impact on the political sovereignty of the individual Parties if the Conference of the Parties were to make statements as to whether the understanding of a DTC provision developed by a Party meets the multilateral requirements.

It is questionable, however, whether an opinion by the Conference of the Parties on questions of the interpretation and implementation of the MLI is legally relevant at all. In any event, Art. 32 para. 2 MLI does not attribute any legal significance to these opinions. Besides, all that Art. 32 para. 2 MLI stipulates is that the Conference of the Parties may address such questions without making any statements as to which legal consequences such an opinion may have. Therefore, it can have legal relevance only on the basis of other international law provisions – such as those contained in the VCLT.

These are definitely not statements that must be taken into account according to Art. 31 para. 1, 2, or 4 VCLT, since only documents can be used here which were already available at the time of the conclusion of the treaty, or were created at the same time as the conclusion of the treaty.[20] The same applies to materials under Art. 32 VCLT.[21] According to Art. 31 para. 3 VCLT, it is clear that such a statement of the Conference of the Parties will neither automatically become a "rule of international law" nor is it a "subsequent practice" of the Parties.[22] Even if the Conference of the Parties were to assume that its statement only summarizes a "subsequent practice", it is not the statement that counts but only the "subsequent practice", which will first require proof and is not considered already proven merely by its mention in an opinion of the Conference of the Parties.

Most likely, one should construe the opinions of the Conference of the Parties as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions". This, however, would in any case require that all Parties have approved such an opinion. Even then, the question arises as to whether the Conference of the Parties can be readily identified with the Parties. This is questionable simply because, according to the Explanatory Statement on Art. 31 MLI, even mere signatories – i.e. states that have not yet become Parties themselves – can be invited to participate in a Conference of the Parties.[23] An opinion of the Conference of the Parties can only have legal relevance if the representatives of the Parties deliver this opinion not only

as a mere expert report but also with the intention of concluding a "subsequent agreement" according to Art. 31 para. 3 VCLT.

Even then, the legal significance of such a subsequent agreement would be very limited: On the one hand, Art. 31 para. VCLT provides that the aspects addressed therein are taken into consideration, but they do not therefore enjoy a priority over other arguments to be taken into account in the interpretation. They must be considered together with the wording, the context, and the objective and purpose, without automatically being given a priority. In addition, such subsequent agreements can only be of significance for the interpretation, since Art. 33 MLI provides for a separate procedure for amendments. Therefore, when the content of such an opinion goes beyond the framework yielded by the interpretation, it must not even be taken into account.

V. The authentic languages of the Convention

1. THE IMPORTANCE OF THE ENGLISH AND FRENCH VERSION OF THE MLI FOR THE INTERPRETATION OF BILATERAL DTCS

The already mentioned explanatory statement to Art. 32 MLI also addresses the question of the language. The Conference of the Parties can also be confronted with this topic:[24] "The final clause of the Convention provides the authentic languages of the Convention are English and French. Accordingly, where questions of interpretation arise in relation to Covered Tax Agreements concluded in other languages or in relation to translations of the Convention into other languages, it may be necessary to refer back to the English or French authentic texts of the Convention."

It is true that the text of a bilateral DTC can degenerate into a Babylonian confusion of languages as a result of the MLI. In those cases in which a paragraph of a DTC provision is replaced by a regulation of the MLI, the English and French versions of this text automatically become authentic, even if the DTC as such declared a different language version to be authentic. In this respect, the MLI – with its independent regulations on authentic languages – partially derogates from the corresponding regulations of the bilateral DTC on the authentic languages. So it may often be the case that, upon implementation of the MLI, the text of a paragraph of a DTC must be based on the original authentic language, while the English and French versions of the text are relevant for the interpretation of the following paragraph.

Things can get even more complex. I will try to explain this using an example: In the DTCs that have a regulation similar to that of Art. 13 para. 4 OECD MC, Art. 9 para. 2 MLI replaces the "period" in which the condition for the corresponding "value threshold" must be met, with the "period" defined in Art. 9 para. 1 lit a MLI. The latter defines an observation period of 365 days. In these cases, even individual phrases of a provision inserted as a result of the MLI can have the English and French text versions as authentic, while the language version otherwise considered authentic for the respective DTC applies to the remaining paragraph.

One should not, however, overstate the importance of this topic. After all, the language question is by nature only relevant for the *text* of a provision. The text, however, is merely the point of departure for the interpretation and by no means the end.[25] Apart from the wording, it is also imperative to use context, objective and purpose, and the development of law in interpreting the content of the provision. In this respect, it is irrelevant which language is considered authentic.

2. THE IMPORTANCE OF THE ENGLISH AND FRENCH VERSION OF THE OECD MC FOR THE INTERPRETATION OF BILATERAL DTCS

There is an additional reason why one should not overstate the language question: In many instances, bilateral DTCs are to a significant part based on a specific version of the OECD MC. This implies that, in interpreting these bilateral convention provisions, one can already resort today to the OECD MC and the version of the OECD Commentary available at the time of the signing of the convention.[26] Since the OECD Model Convention is written in English and French, these two versions of the Model Convention and of the corresponding Commentary must be used. Therefore, the English and French texts of the OECD MC are relevant for many provisions of bilateral DTCs.[27]

A similar rule applies to the UN MC. The UN MC is published in the six official UN languages. The individual language versions are on an equal footing: Therefore, when regulations of a bilateral treaty are modelled on the model regulations developed by the UN, the considerations developed for the OECD MC must also be applied analogously to the regulations of the UN MC. Hence, regardless of which languages are declared authentic in a specific treaty, it must be taken into account for interpretation purposes that, by adopting the wording of a regulation of the UN MC, the Parties also wanted to include its content in their bilateral DTC. The content of this UN model regulation is best

revealed if one understands the text of the regulation in consideration of the six official UN languages.[28]

One must take into account here, however, that the UN MC is for the most part modelled on the OECD MC. Several provisions also have the same wording as the parallel regulations in the OECD MC. In those cases in which such regulations were included in the UN MC and the authors of the UN MC did not clearly express that they attributed a different meaning to these regulations, it must be assumed for interpretation purposes that the authors of the UN MC themselves intended to establish a link to the OECD MC. If these regulations subsequently entered a bilateral treaty – even through the "detour" of the UN MC –, the particular meaning of the text in the English and French version of the OECD model regulations at the time must be taken into account for interpretation purposes.[29] Only a lesser importance must then be attributed – if at all – to the versions of the UN model regulation in the other four UN languages.[30]

All this shall apply even if the respective bilateral DTC has declared completely different languages other than English or French as authentic. One reason for this is that the process of interpretation cannot be formalized. When the authors of the treaty established a link to a provision of the OECD MC, this cannot be ignored for interpretation purposes. Another reason is that this is in accordance with Art. 33 VCLT. Art. 33 para. 2 VCLT explicitly allows other language versions to be used as authentic than those defined as authentic. This can be the case when the Parties agree on this. The inclusion of a regulation from a model convention in a bilateral DTC can be construed as such an implicit agreement.[31]

IV. Concluding summary

When interpreting a multilateral international treaty such as the MLI, the same interpretation rules as those for bilateral international treaties and hence those for DTCs shall apply. These are codified in Articles 31 et seq VCLT. Apart from the wording, one must also consider the objective and purpose, the systematics, and even historical aspects. Similar to bilateral DTCs, however, the MLI also contains separate regulations on its interpretation. It is regrettable that an interpretation provision similar to Art. 3 para. 2 OECD MC has also been included in Art.2 para.2 MLI: As a result, the existing uncertainties around Art.3 para.2 OECD MC have also been imported into the MLI, thus casting uncertainty upon its interpretation. In addition, it was demonstrated that the theory advocated in the Explanatory Statements, according to which the relevance of national law is stipulated in Art. 2 para. 2 through reference to Art. 3 para. 2 OECD MC, at least in those cases in which an expression used in the MLI can only be found in national law but not in the bilateral DTC, has no legal basis.

On closer analysis, the express mention of the mutual agreement procedure in Art. 32 para. 1 MLI proves unnecessary. Opinions issued by the Conference of the Parties, specifically mentioned in connection with the interpretation, will in any case not have any – or hardly any – significance in the interpretation of the MLI, simply because the MLI grants the Conference of the Parties the right to address questions. When the government representatives gathered in the Conference of the Parties adopt common opinions along the lines of a well-founded expert report, their formal importance may not be greater than that attributed to the opinions of expert authors. When the high level of expertise of this body is reflected in the scientific quality of these opinions, however, they have a great chance of being taken into account by courts due to their persuasive power.

As a result of the fact that English and French are the two authentic languages of the MLI, texts written in these languages will become part of bilateral DTCs even if only one or none of the two languages is expressly declared authentic by the specific DTC to be implemented. Prima facie, this renders the interpretation of bilateral DTCs considerably more complex, since other languages than usual may be considered authentic for individual paragraphs or even phrases. The fact that, in the past, most DTCs have been based on model conventions of the OECD or the UN relativizes this problem: Already in the past, the English and French text versions of these DTC provisions had to be taken into account for interpretation purposes, even if these two languages were not expressly declared authentic by the respective DTC.

NOTER

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1 http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf

2 Lang, Auslegung von Doppelbesteuerungsabkommen und authentische Vertragssprachen, Internationales Steuerrecht (hereinafter IStR) 2011, p. 403 (p. 408).

3 Avery Jones, Qualification Conflicts: The Meaning of Application in Article 3(2) of the OECD Model, in Beisse/Lutter/Närger (eds.) FS Beusch (1993), p. 43 (p. 47).

4 Vogel, DBA-Kommentar3 (1996), Art 3 MN 65; Lang, Die Bedeutung des innerstaatlichen Rechts für die DBA-Auslegung, in Burmester/Endres (eds.), Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht in Spannungsverhältnis, FS Debatin (1997), p. 283 (p. 286).

5 Loukota, Grundsätze für die steuerliche Behandlung international tätiger Gastprofessoren, SWI 1998, p. 456 (pp. 456 et seq.); Loukota, Vermeidung von Irrwegen bei der DBA-Auslegung, SWI 1998, p. 559 (p. 563); see also VwGH 13.12.2006, 2005/15/0158.

6 Lang, Die Maßgeblichkeit des innerstaatlichen Rechts für die DBA-Auslegung in der jüngsten Rechtsprechung des VwGH, SWI 2007, p. 199 (p. 205 et seq.); The VwGH denied the reference to the national law oft he applying state in the decision from 21.5.1997, 96/14/0084.

7 Lang, Die Auslegung von Doppelbesteuerungsabkommen als Problem der Planungssicherheit bei grenzüberschreitenden Sachverhalten, in Grotherr (eds.), Handbuch der internationalen Steuerplanung3 (2011), p. 1865 (p. 1867); Lang, Introduction to the Law of Double Taxation Conventions (2010), MN 76.

8 Vogel, DBA3 (1996),Introduction MN 56; Vogel, DBA3 (1996), Art 3 MN 70.

9 Lang, Die Bedeutung des originär innerstaatlichen Rechts bei Auslegung und Anwendung von Doppelbesteuerungsabkommen, SWI 1999, p. 61; Lang, SWI 2007, p. 206; Lang, Art. 3 Abs. 2 OECD-MA und die Auslegung von Doppelbesteuerungsabkommen, Internationale Wirtschaftsbriefe (hereinafter IWB) 2011, p. 281 (p. 291).

10 Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, Article 2 para. 38.

11 Lang, Doppelbesteuerungsabkommen und innerstaatliches Recht (1992) p. 156; Lehner, in Vogel/Lehner (eds.), DBA6 (2015), Art 25 MN 181 et seq.

12 Lang, Der Rechtsanspruch auf Einleitung des "Verständigungsverfahrens", Juristische Blätter (hereinafter JBl) 1989, p. 365 (p. 371); compare also Bachmayr, Rechtsanspruch auf Schutz gegen internationale Doppelbesteuerung, Steuer und Wirtschaft (hereinafter StuW) 1964, p. 885 (pp. 885 et seq.); Tipke, Verständigungsverfahren: Rechtsanspruch auf Beseitigung der Folgen einer Doppelbesteuerung oder bloßer Rechtsreflex, Außenwirtschaftsdienst des Betriebs-Beraters (hereinafter AWD) 1972, p. 589 (pp. 589 et. seq.).

13 Lang, JBl 1989, p. 372; Lang, Introduction to the Law of Double Taxation Convention, p. 148.

14 Lang, Einführung in das Recht der Doppelbesteuerungsabkommen2 (2002), MN 155 et. seq.

15 As regards the debate in Austria, see Lang, EG-Übereinkommen über das Schlichtungsverfahren, in: Gassner/Lechner (eds.) Österreichisches Steuerrecht und europäische Integration (1992) p. 229 (pp. 241 et. seq.).

16 Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, Article 32, para. 315.

17 Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting Statement Article 31, point 312.

18 Also see Thiele, Regeln und Verfahren der Entscheidungsfindung innerhalb von Staaten und Staatenverbindungen (2008), p. 273; Heintschel von Heinegg, in Ipsen, Völkerrecht6 (2014), p. 400.

19 Neuhold, Die Wiener Vertragsrechtskonvention 1969 (1971) p. 17 et seq.

20 Lang, Wer hat das Sagen im Steuerrecht?, Österreichische Steuerzeitung (hereinafter ÖStZ) 2006, p.203 (p. 207); Lang, Die Bedeutung des OECD-Kommentars und der Reservations, Observations und Positions für die DBA-Auslegung, in Liber amicorum Gosch (2016), p. 238.

21 Lang, ÖStZ 2006, p. 207.

22 Lang in Liber amicorum Gosch , p. 238.

23 Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting Article 31 point 312.

24 Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, Article 32, point 317.

25 Lang, IStR, p. 408; Sinclair, The Vienna Convention on the Law of Treaties (1984) p. 115.

26 Lang, IStR 2011, p. 404; Lang, in Liber amicorum Gosch p. 235; Gosch, Seminar D "Judges Seminar": Abkommensrecht vor Gericht: Stichworte zu den zehn gängigen Streitpunkten, IStR 2014, p. 699.

27 Lang, The Interpretation of Tax Treaties and Authentic Languages, in Maisto/Nikolakakis/Ulmer (eds.), Essays on Tax Treaties: A Tribute to David A. Ward (2013), p. 15 (p. 17).

28 Arabic, Chinese, English, French, Russian, and Spanish; The UN MC and its updates are published by

the UN Committee of Experts on International Cooperation in Tax Matters (emerged from the former Ad Hoc Group of Experts) which was founded by the Economic and Social Council of the United Nations. The working language of the Committee is English. The UN MC and its updates are not subject to the decision-making of the Economic and Social Council, and therefore they only represent opinions of a group of experts.

29 Lang, IStR 2011, p.409; Lang, in Maisto/Nikolakakis/Ulmer (eds.) Essays on Tax Treaties: A Tribute to David A. Ward, p.30.

30 Lang, IStR 2011, p. 409; Lang, in Maisto/Nikolakakis/Ulmer (eds.) Essays on Tax Treaties: A Tribute to David A. Ward, p.3.

31 For more detail, see Lang, IStR 2011, p. 406 et seq. ; Lang, in Maisto/Nikolakakis/Ulmer (eds.), Essays on Tax Treaties: A Tribute to David A. Ward, p. 26 et seq.