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Is the Multilateral Instrument (MLI) Really Multilateral? (Published in the book A Multilateral Convention for Tax: From Theory to Implementation of the Wolter Kluwer Series on International Taxation)

Nathalie Bravo (PwC Austria) · Wednesday, April 27th, 2022

1. Background

In the article *Is the Multilateral Instrument (MLI) Really Multilateral?* published in the book *A Multilateral Convention for Tax – From Theory to Implementation* of the Wolters Kluwer Series on International Taxation, edited by Sergio André Roche and Allison Christians,[1] I analyze the nature of the MLI, a topic that has raised discussions among scholars.

Since the publication of the MLI, authors have argued that this instrument is not a multilateral treaty and, thus, that it does not represent a shift into multilateralism in international tax law because:

- Its application depends on the existence of Covered Tax Agreements (CTAs).
- It does not reflect any value-based normative quality, such as the elimination of global inequalities and the implementation of distributive justice.
- Not all its signatories and parties, particularly developing countries, participated in the negotiation process of the treaty-related BEPS measures implemented through the MLI.
- It does not harmonize tax treaty rules, it only modifies CTAs and provides too much flexibility to its parties.

2. Public international law precedents

However, the review of a number of public international law precedents shows that bilateral treaties and multilateral treaties do not exclude each other; in fact, they often coexist within a single regime. Among others, more advantageous bilateral treaties coexist with the World Trade Organization (WTO) agreements and more advantageous bilateral treaties coexist with the UN Framework Convention on Climate Change and its Kyoto Protocol. Thus, in some cases, the provisions of a bilateral treaty may modify the provisions of a multilateral treaty. In other cases, provisions of a multilateral treaty may modify the provisions of bilateral treaties, as in the case of the European Convention on Extradition, the European Convention on the Repatriation of Minors and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.

Rather than higher politics such as the elimination of global inequalities and the implementation of

distributive justice, many multilateral treaties deal with technical matters, examples of which include the Convention on Road Traffic, the Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, and the International Agreement on Olive Oil and Table Olives.

In the same way, multilateral treaties do not always provide for obligations that are of general or community interest—i.e., *erga omnes* obligations. Multilateral treaties may—and often do — establish mutually reciprocal rights and obligations — i.e., bilateral provisions that concern only pairs of states. In this case, standardization and coordination call for the adoption of multilateral treaties over bilateral treaties.

Flexibility is allowed in most multilateral treaties to promote the participation of states with different interests as well as the depth of their participation. Some multilateral treaties provide for the possibility for the parties to commit at different levels in the text itself, for which opt-ins, alternative provisions, and/or opt-outs are used. Other multilateral treaties leave it to the parties to decide on the scope of their reservations and/or declarations regarding the interpretation and application of the treaty provisions.

Hence, what seems to characterize multilateral treaties is the existence of a conventional community interested in the application, interpretation, and faithful discharge of the treaty provisions.[2] Nonetheless, the conventional community must not include all states of the world. It is up to the negotiating states to determine which states and/or other subjects of international law may participate in the multilateral treaty. Moreover, it is up to each negotiating state to decide whether they agree with the negotiated treaty provisions and would, thus, like to ratify the treaty. Consequently, neither all states are obligated to participate in the negotiations of multilateral treaties nor are all states that participated in the negotiations required to ratify them. From a public international perspective, not all multilateral treaties aspire to reach global consensus and set customary law.

3. Applying the public international law precedents to the MLI

It is true that the MLI builds on the current tax treaty network. The scope of the MLI is established in Article 1: "This Convention modifies all Covered Tax Agreements as defined in subparagraph a) of paragraph 1 of Article 2 (Interpretation of Terms)." The MLI and the CTAs need to be applied and interpreted side-by-side. Thus, the application of the MLI does depend on the existence of CTAs. Nevertheless, this feature of the MLI does not influence its nature. As shown above, bilateral treaties and multilateral treaties do not exclude each other, but often coexist within a single regime.

The modifying nature of the MLI explains why it builds on the current tax treaty network. In addition, the MLI is a partial convention. It exclusively implements measures to eliminate BEPS as agreed in the course of the BEPS Project. More controversial issues in international tax law, such as provisions with major distributive impact on the economies of states—i.e., allocation of income to the state of source or the state of residence—, withholding rates on passive income and the exemption of income subject to exclusive taxation by the state of source are not addressed in the MLI. [3] This characteristic of the MLI has made it possible for developed and less developed countries to conclude the MLI and agree to implement uniform tax treaty-related BEPS rules across the tax treaty network.

It is also true that the MLI does not aim to eliminate global inequalities and implement distributive justice. Thus, the MLI does not reflect a value-based normative quality. However, as mentioned above, a treaty does not need to deal with “higher politics” for qualifying as a multilateral treaty. It is enough that the parties to the multilateral treaty share a common interest that encourages them to agree on standard and/or coordinated rules. The parties to the MLI share a common interest: the elimination of BEPS practices. The MLI creates a multilateral context for implementing uniform international tax rules across the tax treaty network. Moreover, the parties to the MLI are interested in the application, interpretation and faithful discharge of the instrument’s provisions.

Additionally, it is true that all the provisions of the MLI, including the ones that establish minimum standards, allow parties to make reservations to exclude part of or an entire article. It is also true that reservations limit the harmonization and/or coordination that may be achieved with the MLI. Reservations change the scope of application of the treaty provisions for the reserving state and the party that accepts the reservation—the accepting state—and for the reserving state and the party that opposes the reservation—the objecting state. Nonetheless, as mentioned above, reservations are a common feature of multilateral treaties. Only few multilateral treaties prohibit their parties the possibility to make reservations.

Although parties to the MLI can commit to differing extents by making reservations, they can only make the reservations that were acceptable to the treaty makers from an international tax policy perspective in the fight against BEPS. If parties avail themselves of the flexibility provided by the treaty makers and reserve the application of some of the rules of the MLI, then uniform rules will still be implemented across the tax treaty network, even though not all of the parties will adopt all of the rules of the instrument. This already results in uniformity.

Moreover, despite the different levels of commitment that parties may adhere to through the MLI, coordination in applying the treaty-related BEPS measures can be attained. The clearest example of the coordinating effect that may be achieved with the MLI is found in the provisions that set out the minimum standards, as parties can reserve their application only when their CTAs already meet these standards or if they commit to meeting them in an alternative manner. By April 2022, all the 99 signatories and parties to the MLI have accepted the application of the PPT rule in order to fulfill the minimum standard on treaty abuse. Therefore, even though flexibility is provided in the text of the MLI, in practice its parties have accepted the application of the PPT rule creating a high degree of uniformity across the tax treaty network.

Common and uniform interpretation of the MLI provisions can be achieved in practice because the MLI establishes the possibility of convening a conference of the parties. Likewise, the conference of the parties may amend the provisions of the MLI to further modify their tax treaty relations. Finally, the Explanatory Statement to the MLI can also be seen as a tool for attaining uniform interpretation and application of the provisions of the instrument. The Explanatory Statement was prepared by the ad hoc Group and was adopted together with the final text of the MLI. The Explanatory Statement clarifies the approach taken in the MLI. Although not intended to address the interpretation of the treaty-related BEPS measures, it nevertheless promotes a uniform interpretation of the functioning of the MLI and the mandatory binding arbitration procedure.

The MLI has been the object of study within the investment law community. Just as the tax treaty network, the investment treaty network comprises more than 3,000 treaties. Many of them require modification. However, the conclusion of a multilateral investment treaty that would replace all of them has also shown to be unfeasible. Thus, experts in international investment law have found a

model for the modification of bilateral investment treaties in the MLI. Interestingly, these experts have not only recognized the multilateral nature of the MLI, but also praise its design. Wolfgang Alschner, for example, has indicated:

The MLI takes the form of a multilateral opt-in convention, which modifies DTTs under its scope. The MLI thereby leaves the bilateral governance structure of the tax regime intact, but adds a lightweight multilateral superstructure.

(…)

This ability to deliver global standards where needed while preserving national preferences where possible is an attractive model for investment law because its multilateral reform will need to strike a similar balance to be successful.[4]

The discussion above demonstrates that based on the concepts accepted under public international law, the MLI is a multilateral treaty. All the parties to the MLI have interest in the implementation of uniform international tax rules across the tax treaty network. Moreover, the parties to the MLI are interested in the application, interpretation, and faithful discharge of the instrument's provisions.

I invite you to read the full version of the article!

* The author holds a Ph.D. in International Business Taxation (WU) and an LL.M. in International Tax Law (WU). She is the author of the book *A Multilateral Instrument for Updating the Tax Treaty Network* (IBFD, Doctoral Series, Vol. 52).

[1] N. Bravo, *Is the Multilateral Instrument Really Multilateral?*, at 89-113 in *A Multilateral Convention for Tax – From Theory to Implementation* (S.A. Roche and A. Christians ed., Wolters Kluwer, Series on International Taxation, 2021).

[2] See S. Rosenne, *Bilateralism and Community Interest in the Codified Law of Treaties*, at 222, in *Transnational Law in a Changing Society—Essays in Honor of Philip C. Jessup* (W. Friedmann et al. ed., Columbia University Press, 1972).

[3] D. Broekhuijsen has previously argued that multilateral initiatives may be widespread accepted if provisions dealing with distributional effects are avoided. See D. Broekhuijsen, *A Multilateral Tax Treaty*, *Designing an Instrument to Modernise International Tax Law*, at 82-83 (Proefschrift, Universiteit Leiden 2017); and, D. Broekhuijsen & H. Vording, *The Multilateral Tax Instrument: How to Avoid a Stalemate On Distributional Issues?*, at 39-61, BTR 1 (2016).

[4] W. Alschner, The OECD Multilateral Tax Instrument: A Model for Reforming The International Investment Regime?, at 474, 5 Broo. J. Int'l L. 1 (2019).

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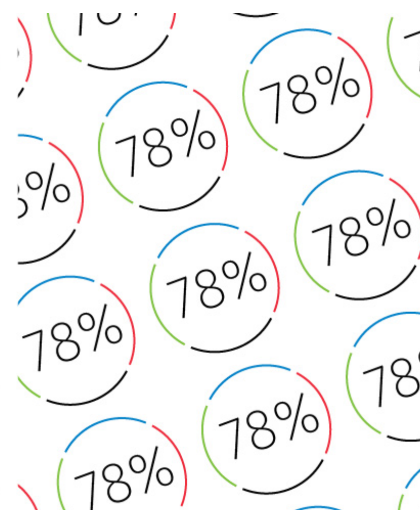

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