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The Application of the Multilateral Instrument (MLI) "Alongside Existing Tax Treaties"

1 The multilateralisation of double taxation conventions

As a rule, double taxation conventions are bilateral treaties under international public law. Efforts were undertaken to multilateralise this field of law already at an early stage. Following World War I, a draft was presented for a convention between the successor states of the Austro-Hungarian Empire, but only Austria and Italy ratified it.[1] The EU – i.e. its predecessor – also undertook efforts in this direction as early as in the

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[1] For more detail, see *Lang*, The Concept of a Multilateral Tax Treaty in *Lang* (eds), Multilateral Tax Treaties (1997) 187 (187); see also treaty of 6 April 1922, Federal Law Gazette no. 1926/341; originally, this treaty was conceived as a multilateral treaty between the successor states of the Austro-Hungarian Empire (Italy, Yugoslavia, Austria, Poland, Romania, Czechoslovakia, and Hungary). After the conclusion of the treaty, however, the latter only entered into force between Austria and Italy (see Federal Law Gazette no.1926/341, at the end); see also *Warter*, Die rechtsgeschichtliche Entwicklung der Doppelbesteuerungsabkommen, Juridicum Law Review 2014, 111 (124); *Kofler*, Übersicht: Die österreichischen Doppelbesteuerungsabkommen, ÖStZ 2014, 411 (414 FN 89).

1960s.[2] The Arbitration Convention, which exists as an international law treaty between the EU Member States, also constitutes a multilateral convention containing rules on the arm's length principle otherwise found in DTCs.[3] Meanwhile, issues of mutual assistance in tax matters are not just bilateral, but are regulated in a multilateral treaty ratified by a large number of states.[4] Finally, in some regions – such as for instance, in Scandinavia – tax conventions exist which are concluded between more than two contracting parties.[5]

Though the "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting"[6], which is still mostly referred to in literature as "Multilateral Instrument" or abbreviated as "MLI" due to a title used in an earlier draft, also constitutes a multilateral agreement, it does not fall within this category. This is because the MLI does not replace previously existing DTCs but merely alters their content.[7] The bilateral international law treaties remain in place and must still be applied with the content given to them by the MLI. Prima facie, this creates the impression that the impact of the MLI – its multinational character aside – on a DTC covered by the MLI ("Covered Tax Agreement") is not significantly different from that of the usual bi-

[2] 1968 preliminary draft of a European double taxation convention (multilateral agreement of the Member States of the European Communities for the avoidance of double taxation on income and on capital and on mutual assistance in the field of direct taxes), EC Doc. 11.414/XIV/68-D, printed in *Regul* (eds), Steuern und Zölle im Gemeinsamen Markt VIII (1969) V B/2; see also *Kofler* in *Aigner/Kofler/Tumpel* (eds), DBA (2016) Introduction, paragraph 11; *Kofler*, Doppelbesteuerung und Europäisches Gemeinschaftsrecht (2007) 134 et seq.

[3] EU Arbitration Convention (90/436/EEC, OJ L 225).

[4] Convention on Mutual Administrative Assistance in Tax Matters (1988).

[5] In this regard, see also "Nordic Multilateral Double Taxation Convention with respect to Taxes on Income and Capital"; see also *Bravo*, The Multilateral Tax Instrument and Its Relationship with Tax Treaties, World Tax Journal 2016, 279 (279 et seq.); more on this in *Helminen*, The Nordic Multilateral Tax Treaty as a Model for a Multilateral EU Tax Treaty (2014) 1 et seq.

[6] *OECD*, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (2016), available at http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf (accessed on 5 September 2017).

[7] In this regard, see the Preface to the MLI, which stipulates that the "*Parties to this Convention (…) [recognize] the need for an effective mechanism to implement agreed changes in a synchronised and efficient manner across the network of existing agreements for the avoidance of double taxation on income without the need to bilaterally renegotiate each such agreement*."

lateral amending agreements or "protocols"; States who want to amend an existing DTC conclude an additional international law treaty with which they amend the previous DTC. This convention is then approved in the same manner by the responsible bodies under national law as the DTC itself was initially approved. Once the DTC amendments enter into force and the new provisions of the DTC become applicable, the amending agreement then loses its importance in practice: Legal practitioners subsequently base their assessments and decisions only on the amended DTC.[8]

Interestingly, though, the "Explanatory Statement" – the document in which the ad-hoc group that drafted the MLI explains its rules[9] – emphasizes that the MLI and "amending protocols" differ significantly:[10] "*The Convention operates to modify tax treaties between two or more Parties to the Convention. It will not function in the same way as an amending protocol to a single existing treaty, which would directly amend the text of the Covered Tax Agreement; instead, it will be applied alongside existing tax treaties, modifying their application in order to implement the BEPS measures*." I would like to take these surprising statements in the Explanatory Statement as an opportunity to reflect more extensively on how the MLI affects the DTCs covered by it, and what relevance it retains after the amendment of the content of the DTC rules intended by it becomes effective.[11]

2 The methodology of the MLI

The provisions of the MLI do not designate the number of the article and paragraph of the DTCs they are supposed to amend. Although most DTC rules are borrowed from the model conventions of the OECD and

[8] See, for instance, Article I, II and III of the protocol of the DTC Austria-Switzerland, Federal Law Gazette III 27/2011.

[9] *OECD*, Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, available at http://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf (accessed on 5 September 2017).

[10] See *OECD*, Explanatory Statement, paragraph 13.

[11] As regards the relationship between existing DTCs and the Multilateral Instrument, see, for instance, *Pistone/Govind*, The Relationship between Tax Treaties and the Multilateral Instrument in *Lang/Pistone/Schuch/Staringer* (eds), The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects (2018), 111.

the UN, the numbering of the articles and the paragraphs in the individual DTCs often differs significantly from that of the OECD or UN Model Convention. Which DTCs are ultimately "Covered Tax Agreements" subject to the MLI, will only become evident after the individual contracting parties have notified their conventions accordingly.[12] Therefore, it was not possible at all for the authors of the MLI to address the individual DTC provisions with the respective article or paragraph numbers. Instead, the provisions of the MLI describe the content of the DTC provisions to which they refer.[13] Only in those cases in which the contracting states notify specific rules of their DTC in accordance with the provisions of the MLI do they also have to designate them with the corresponding article and paragraph number of the respective DTC.[14]

The provisions of the MLI use a different terminology when they regulate the impact that the MLI rules have on the Covered Tax Agreements: The phrase "in place of" is often used therein. The Explanatory Statement describes what it means:[15] "*Where a provision of the Convention applies (…) 'in place of' an existing provision, the provision is intended to replace an existing provision if one exists (…).*" The use of the word "replace", which is not only used in the Explanatory Statement but also in the text of the MLI itself,[16] leaves no doubt: In these cases, the provision contained in the MLI replaces the corresponding rule of the respective DTC. In any event, the rule of the MLI becomes part of the DTC.[17] As a result, the text of the bilateral DTC also changes.

Occasionally, the rules of the MLI also contain the phrases "applies to" or "modifies".[18] The Explanatory Statement states the following in this regard:[19] "*Where a provision of the Convention 'applies to' or 'modifies' an*

12 See Article 2(1) MLI.

13 See *OECD*, Explanatory Statement, paragraph 5; *Bravo*, The Multilateral Tax Instrument and Its Relationship with Tax Treaties, World Tax Journal 2016, 279 (281).

14 As regards the specific functioning of notifications, see *Zöhrer*, Notifications According to the Multilateral Instrument and Consolidated Versions of Tax Treaties in *Lang/Pistone/Schuch/Staringer* (eds), The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects (2018), 191.

15 See *OECD*, Explanatory Statement, paragraph 15.

16 See, for instance, Article 4(3)(e) MLI.

17 In this regard, see also *Pistone/Govind* in *Lang/Pistone/Schuch/Staringer*, The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects, 118 et seq.

18 More on this in *Pistone/Govind* in *Lang/Pistone/Schuch/Staringer*, The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects, 118 et seq.

19 See *OECD*, Explanatory Statement, paragraph 15.

existing provision, the provision of the Convention is intended to change the application of an existing provision without replacing it, and therefore can only apply if there is an existing provision." For good reason, it is doubtful whether this necessarily means that the text of the respective DTC will not change at all. Article 6(1) MLI can be used as an example. This provision provides DTCs with a preamble, which serves to set out their objective. The wording of this preamble is as follows:[20] "*Intending 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 reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions).*" The provision of Article 6(1) MLI, which contains the text of this preamble, begins as follows[21]: "*A Covered Tax Agreement shall be modified to include the following preamble text*". This formulation definitely indicates that this text will become part of the DTC. The wording of Article 6(2) MLI confirms this interpretation: "*The text described in paragraph 1 shall be included in a Covered Tax Agreement in place of or in the absence of preamble language of the Covered Tax Agreement referring to an intent to eliminate double taxation, whether or not that language also refers to the intent not to create opportunities for non-taxation or reduced taxation.*" If that text is "included" in the DTC, it is in any event clear that it will become part of the DTC.

Another formulation used in the MLI is "in the absence of":[22] Some provisions are to also apply bilaterally, when the DTC does not contain a previous provision that these can replace or modify. Therefore, when a DTC, for instance, previously had neither a principal purpose test nor an LoB (limitation of benefits) provision,[23] there is no article in this DTC which could be replaced with the corresponding rule of the MLI. Nonetheless, the provision required by the MLI should be applicable in the bilateral relation. Evidently, the MLI cannot name a specific article of the respective DTC in which this provision will be inserted. This does not automatically imply, however, that the provision has not become part of the DTC: The fact that no provision can be inserted at a precisely defined position in the *text of the DTC* does not in any way mean that

[20] See Article 6(1) MLI.

[21] Article 6(1) MLI.

[22] See, for instance, Article 3(4), Article 4(1), Article 8(2), or Article 9(2) MLI.

[23] See Article 7 MLI; see also *OECD*, Explanatory Statement, paragraph 88 et seq.

the *content of the DTC* was not amended. Therefore, the mere fact that the compatibility clauses of given provisions of the MLI do not explicitly refer to the number of the article and paragraph of the DTCs that ought to be amended, does not, however, prevent the rules of the MLI from becoming part of the DTC once the MLI enters into force with regard to the respective treaty. The text of a rule must never be regarded as identical with the ***meaning*** of a rule: In the course of interpretation, the text of a provision is merely the starting point for determining its ***meaning***.[24] On the other hand, it is also important to bear in mind that the ***application*** of a rule must not be confused with the need to ***consider the text*** of that rule: While only the bilateral DTC has to be applied, it can be necessary to look at the text of the MLI rule, in order to determine the meaning of the rule, which, although did not become part of the text, became part of the content of the DTC. This is not unusual: In order to determine the content of a rule, quite often a lot of material has to be taken into account. The MLI provision which changed the content of the DTC is definitely part of the context of that DTC and therefore relevant for interpretation purposes.

3 The relevance of Article 30 MLI

In this context, the provision of Article 30 MLI is of major importance. It has the following heading: "Subsequent Modifications of Covered Tax Agreements". It reads as follows: "*The provisions in this Convention are without prejudice to subsequent modifications to a Covered Tax Agreement which may be agreed between the Contracting Jurisdictions of the Covered Tax Agreement.*"

This rule confirms that the Parties to a DTC who amended their DTC as a result of the MLI still have it within their power to shape their bilateral treaty relations independently of the MLI. Therefore, they can amend their DTC at their discretion even after their accession to the MLI. Moreover, in their bilateral relations, they can rescind any amendments to the content of their DTC they previously introduced as a result of the MLI. In doing so, they can even fall short of the minimum stand-

[24] See *Lang*, Introduction[2] paragraph 64.

ards of the MLI.[25] They would not be violating any international law obligation as a result. They would, however, fail to meet the political targets set by the G20 and the OECD as part of the BEPS project.[26]

Above all, however, the provision of Article 30 MLI makes it clear that all amendments to a DTC brought about by the MLI are first introduced in the bilateral convention itself.[27] It makes no difference whether or not the text of the bilateral DTC also changed as a result, because when the Parties to a DTC modify their bilateral convention, they will only be able to amend those rules that are part of the DTC. This contradicts the assumption that provisions only contained in the MLI are applicable in a bilateral relation without having been introduced into the DTC: Article 30 MLI does authorize the Parties to modify *the DTC*, but not to amend *the MLI* in their bilateral relation.

Such a constellation may also raise the question as to which impact a DTC amendment agreed between the two states *after* entry into force of the MLI for both states will subsequently have on the MLI. A differentiation will be necessary in this context. When, for instance, a DTC did not previously contain an express rule on the income of "entertainers" accrued in the hands of other entities and the two states now decide in an amendment agreement to add a second paragraph to the provision modelled on Article 17(1) OECD MC, this will have no impact whatsoever on provisions not related hereto. For instance, any amend-

[25] For greater depth on the minimum standard, see also *Langer*, The Relevance of the Minimum Standard in the OECD/BEPS Project in *Lang/Pistone/Schuch/Staringer* (eds), The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects (2018), 89; Similarly, see *Blum*, Bull. Intl. Taxn. (2018), 135. However, see also *Bravo*, Future Changes of "Covered Tax Agreements" and of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS in *Lang/Pistone/Schuch/Staringer* (eds), The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects (2018), 237 (241 et seq.) where it is argued that although restrictions to subsequent modifications may not be explicitly mentioned in the wording of Article 30 MLI, such limitations can be derived from both the context and the object and purpose of the MLI. Under such an interpretation, which is not shared here, modifications to the MLI would only be permitted in so far as they do not interfere with the MLI's primary and overarching objective of curtailing BEPS practices.

[26] Similarly, see *Bosman*, General Aspects of the Multilateral Instrument, 45 Intertax 10 (2017) 642 (657 et seq.).

[27] This view is also shared by *Blum*, claiming that "*Article 30 of the MLI is necessarily based on the assumption that the MLI has a direct effect on the content of bilateral CTC.*"; in this regard see *Blum*, Bull. Intl. Taxn. (2018), 133.

ments made by the MLI to a DTC provision modelled on Article 10(2)(a) OECD MC must therefore be assessed separately: If during accession to the MLI the one Contracting State – as opposed to the other – issues a reservation under Article 8(3)(a) MLI, the entry into force of the MLI for the two Parties will initially not mean that a retention period will be added to the provision modelled on Article 10(2)(a) OECD MC. A later withdrawal of the reservation under Article 28(9) MLI will cause the 365-day retention period to become relevant for the DTC provision corresponding to Article 10(2)(a) OECD MC. This will not be prevented by the fact that the two Contracting States bilaterally amended the rule on the taxation of entertainers prior to the withdrawal of the reservation.[28]

The assessment becomes more difficult when an amendment agreement concluded after entry into force of the MLI also affects the convention provision modelled on Article 10(2)(a) OECD MC. The following example will illustrate this: Initially – as in the aforementioned case – the 365-day retention period was not inserted into the convention provision modelled on Article 10(2)(a) OECD MC upon the signing of the MLI by the two states because one of the Parties issued a reservation according to Article 8(3)(a) MLI. If a 183-day retention period is subsequently inserted into this convention provision by way of a bilateral amendment agreement, it is not a priori clear what the consequences will be if the corresponding Party now withdraws the previously issued reservation sometime after the entry into force of the amendment agreement according to Article 28(9) MLI. Will the result be that, in this previously bilaterally amended DTC too, the 365-day retention period will now replace the 183-day period, or will the 183-day period remain despite withdrawal of the reservation?

Lex posterior and lex specialis considerations are not of much help here: Although the withdrawal of the reservation may be regarded as the most recently issued international law act and thus have a "lex posterior" character, the previously introduced bilateral amendment is the more specific act. This is because the Contracting State that now withdraws the reservation is thus introducing a measure that has an effect on all its

[28] Regarding reservations and their impact, see *Walker*, Reservations to the Multilateral Instrument in *Lang/Pistone/Schuch/Staringer* (eds), The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects (2018), 165; *Garcia Antón*, Untangling the Role of Reservations in the OECD Multilateral Instrument: The OECD Legal Hybrids, Bulletin for International Taxation 2017, 544 (545 et seq.).

DTCs covered by the MLI and not just on a single one. Lex posterior and lex specialis rules, however, are never more than just refutable assumptions.[29] Finally, the relation between two mutually contradicting rules can never be solved through seemingly mechanistic considerations, but only through interpretation.[30] Therefore, one must also in this case consider the objective and purpose, the context, and the intention of the Contracting Parties: If the two Parties concluding the amending agreement intended to permanently solve the issue of the retention period in their bilateral relation for the future – i.e. until another possible bilateral amendment – so as to establish legal certainty for investors and thus do not make it dependent on whether the other Party changes its convention policy again, the 183-day retention period will remain in place even in case of a later withdrawal of the reservation by one of the Contracting States. The withdrawal of the reservation will then not have an impact on this DTC. However, if the amending agreement was a compromise achieved on a bilateral level between the two states, one of which – i.e. the one that had originally issued the reservation – did not intend to introduce a retention period in the dividend rule at all while the other would have preferred to integrate a 365-day retention period in this convention as well, and if the withdrawal of the reservation indicates that both states are now pursuing the objective of introducing 365-day retention periods in their convention provisions modelled on Article 10(2)(a) OECD MC, much suggests that the withdrawal of the reservation will lead to a renewed amendment of the DTC just recently modified on a bilateral level. In this case, the 183-day retention period will be converted to a 365-day retention period also for the purposes of the meanwhile bilaterally amended DTC.

4 The meaning of Article 37 MLI

The provision of Article 37 MLI headlined "Withdrawal" is also revealing.[31] It reads as follows:

[29] For more on the derogation rules, see *Bydlinski*, Juristische Methodenlehre und Rechtsbegriff (1982) 572 et seq.

[30] In this regard, see *Bydlinski*, Juristische Methodenlehre 573.

[31] For more detail, see *Hörtenhuber*, Consequences of a Withdrawal from or a Termination of the Multilateral Instrument in *Lang/Pistone/Schuch/Staringer* (eds), The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects (2018), 211.

> *"1. Any Party may, at any time, withdraw from this Convention by means of a notification addressed to the Depositary.*
>
> *2. Withdrawal pursuant to paragraph 1 shall become effective on the date of receipt of the notification by the Depositary. In cases where this Convention has entered into force with respect to all Contracting Jurisdictions to a Covered Tax Agreement before the date on which a Party's withdrawal becomes effective, that Covered Tax Agreement shall remain as modified by this Convention."*

When a state withdraws from the MLI in accordance with Article 37 MLI, the DTC amendments introduced as a result of the MLI remain in force. Therefore, the legal effects of the MLI cease to apply for this Contracting State, but the withdrawal from the MLI does not nullify the DTC amendments made up to that moment. This is understandable from a legal policy point of view, since every State Party to the MLI would otherwise have the power to change the content of its DTCs again with effect for its other respective Parties, and return to the status quo ante through a unilateral act not requiring their approval – e.g. a withdrawal in accordance with Article 37(1) MLI.[32] The other states that still remain Parties to the MLI cannot be reasonably expected to accept this. Had the state now withdrawing from the MLI not acceded the MLI in the first place, the other states would probably have endeavoured to enforce some or all of the changes foreseen in the MLI in a different manner – for instance, through bilateral treaty negotiations, if necessary also under threat of terminating the DTC.

Therefore, the legal effects of the MLI no longer apply to the withdrawing state in the future. At the same time, the DTCs continue to be part of its legislation with the content they received as a result of the MLI. This means that even those amendments of the DTCs brought about by the MLI which did not modify the text of a specific article and paragraph of a DTC must have become part of the DTC. In any event, after the withdrawal has come into effect, there is no longer any possibility of applying the MLI "*alongside existing tax treaties*".[33] This is because the MLI can no longer be applied by the state that withdrew from the MLI. The wording of Article 37 MLI does not suggest that, as a result of this provision, rules that could be found only in the MLI until the withdrawal will only

[32] Similarly, *OECD*, Explanatory Statement, paragraph 353; more on this in *Hörtenhuber* in *Lang/Pistone/Schuch/Staringer*, The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects, 211.

[33] See, again, *OECD*, Explanatory Statement, paragraph 13.

"migrate" into the DTCs of this state after the entry into effect of the withdrawal.[34] Therefore, one must assume that the changes of the DTC brought about by the MLI were included in this DTC itself from the very beginning – i.e. upon the entry into force of the MLI with regard to the respective DTC. If DTC amendments can in any event form part of a DTC after the withdrawal of an MLI State Party even in a "free-floating" manner – that is, without being "domiciled" in a specific article and paragraph of the DTC – it is not understandable why they should not have become part of the DTC in this manner already before the withdrawal. The MLI has thus upon its entry into force resulted in the modification of the content of the respective DTC and, in this respect, lost its significance for the respective DTC. From this perspective, one cannot possibly claim that the MLI ought to be applied "*alongside tax treaties*" – as suggested by the Explanatory Statement.[35] These effects of the MLI are by all means comparable with those of an amending protocol.[36]

The effects of the MLI on a specific convention, however, do not end with its entry into force. Instead, the "Contracting Jurisdictions" of the MLI, for instance, have the possibility to withdraw initially issued reservations after the entry into force of the MLI.[37] As a result, the content of a DTC can change again later through a unilateral legal act based on the

[34] Even the Explanatory Statement on Article 37 MLI give no cause to doubt this interpretation; in this regard, see *OECD*, Explanatory Statement, paragraph 351 et seq.

[35] While this view is shared by both *Blum*, it has also been argued in literature that the MLI and the Covered Tax Agreements continue to exist together. Regarding the former view, see, *Blum*, Bull. Intl. Taxn. (2018), 132 et seq. Regarding the latter view, see *Avery Jones*, Treaty Interpretation in Global Tax Treaty Commentaries (R. Vann eds., IBFD 2014), section 5.3.1., *Bosman*, Intertax (2017), 643; *Corwin/Eggert/Zuble*, Practical Questions for Multinationals in an MLI World, Tax Executive (2017); *Jirousek*, SWI 2017, 333; and *Herrington/Lowell*, The Evolving World of Global Tax Planning: Part II, Intl. Transfer Pricing J. 2 (2017) 87 (92).

[36] This is also acknowledged by the Explanatory Statement on Article 37 MLI, which explicitly states that "*[t]his approach replicates the approach taken in amending protocols to bilateral tax treaties…*"; in this regard see *OECD*, Explanatory Statement, paragraph 353.

[37] In addition, it is possible to modify the MLI itself through amending protocols. Article 38 MLI governs the connection between such amending protocols and the MLI, and stipulates that "*[t]his Convention may be supplemented by one or more protocols*"; see also *OECD*, Explanatory Statement, paragraph 356, which states the following: "*Article 38 provides that the Convention may be supplemented with one or more protocols, that to become a party to a protocol, a State or jurisdiction must be a Party to the Convention, and that a Party to the Convention would not be bound by any protocol unless it becomes a party to the protocol in accordance with its provisions*."

MLI. To remain with the above example: If a state initially issued a reservation with respect to the retention period of the dividend rule modelled on Article 10(2)(a) OECD MC and later withdrew this reservation, the withdrawal of this reservation may lead to the retention period becoming relevant in the bilateral relation to those States Parties of the MLI who did not issue such a reservation or later withdrew it. As a result of this renewed amendment of the bilateral convention, however, the MLI has again lost its significance for this DTC provision. It is the respective DTC itself which must be applied before and after.

Upon entry into force of a withdrawal in accordance with Article 37 MLI, however, these effects also become obsolete for subsequent periods: Therefore, when a state belonging to the Contracting Jurisdictions of the MLI withdraws its reservation after the withdrawal of the other state from the MLI, this can no longer amend the DTC between the two states. Therefore, if the state issuing the withdrawal in accordance with Article 37 MLI never issued a reservation with regard to the retention period foreseen in the convention provision modelled on Article 10(2)(a) OECD MC, and the other state still remaining party to the MLI withdraws its reservation after the withdrawal of the first-mentioned state, the retention period can no longer be included in the DTC through the mere withdrawal of the reservation. This DTC then still does not foresee a retention period for the dividend provision modelled on Article 10(2)(a) OECD MC. If the two states are not willing to accept this, they must amend the DTC bilaterally. Vice versa, afterwards the withdrawing state no longer has the possibility of withdrawing a reservation once it was issued. If the state withdrawing from the MLI is the one that initially issued the reservation in respect of the retention period in the dividend rule, and if this state now changes its convention policy in that it now welcomes a retention period, it must amend all of its DTCs by way of bilateral negotiations.[38]

5 Concluding summary

The above considerations demonstrate that the effects of the MLI on DTCs covered by it are not dramatically different than those of an amending protocol. There are, of course, differences pertaining to the multilateral nature of the MLI or to the fact that, for instance, reser-

[38] Similarly, see *Bosman*, Intertax (2017), 658.

vations can still be withdrawn after an amendment has been made to a DTC by the MLI and the content of the DTC can change once again as a result. Therefore, the effects of the MLI do not completely cease after it has entered into force with respect to a specific DTC and has thus amended the content of this DTC. It is too far a stretch, however, when the Explanatory Statement claims that the MLI is applied "*alongside existing tax treaties*",[39] thus emphasizing a contradiction to amending protocols. It is, indeed, unusual that provisions can become part of a DTC without being attached to the text of a specific paragraph of an article of this DTC. The fact that DTC provisions can exist which have become part of the content of the DTC in a "free-floating" manner needs getting used to, and it makes it more difficult to quote such provisions. Nevertheless, these rules have also been included in the DTC.

[39] See, again, *OECD*, Explanatory Statement, paragraph 13.