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The Proposed OECD Multilateral Instrument Amending Tax Treaties

In this article, the authors consider some of the practical issues relating to the introduction of the OECD multilateral instrument amending tax treaties, which has been proposed within the context of the OECD/G20 Base Erosion and Profit Shifting Project.

1. Introduction

The OECD has proposed a multilateral instrument (generally known as the MLI), which will modify as many of the world's tax treaties as states are willing to amend in consequence of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project.[1] The OECD consulted on the MLI but without releasing a draft of it on the basis that it was confidential and on a short timetable of one month.[2] That the 33 responses only ran to 206 pages,[3] which is short by OECD/G20 BEPS standards, probably reflects partly the short period and more significantly that the draft mainly covered the bare bones of some structural issues in drafting the MLI and not much about the details of its content. Many of the responses called on the OECD to publish a draft of the MLI and to consult further on that draft. The indications at the consultation meeting on 7 July 2016 were that the secretariat would take away this proposal and might well publish a draft. The writers of this article contributed to a response, and the article builds on that response without necessarily repeating all its points and adds some further points as a result of further discussions.

To illustrate what we mean when we say that the draft focused on the "bare bones" rather than the precise content of the MLI, it is very hard to comment when we do not know whether it will operate by either:

(1) modifying existing bilateral tax treaties[4] by inserting the substantive provisions that have been developed during the OECD/G20 BEPS process. Having inserted those provisions, the MLI would, in a sense, then fall away, and attention in practice would focus exclusively on the existing bilateral tax treaties, now modified in their wording by the MLI; or

(2) modifying all bilateral tax treaties to which the parties to the MLI are parties (perhaps with a power to have exceptions) without specifying them individually or stating which articles of a particular tax treaty are modified. It would be necessary to turn to the MLI for the wording of the modifying provision and to read the bilateral convention along with, and as modified by, the MLI. Thus, rather than seeking to delete and replace wording in existing bilateral conventions, within the scope of matters covered by the MLI, one would turn from the bilateral convention to the MLI for the relevant wording. This approach would probably require provisions for the interaction of the MLI with particular tax treaties, such as that one could terminate a bilateral tax treaty without the consent of all the parties to the MLI.

This is an important distinction, particularly when one considers issues such as the Commentaries or Explanatory Statements to the new wording contained in the MLI, which we consider in section 2. It is also important as part of any future move towards multilateralization of the international tax rules or additional multilateral instruments. And it has relevance to the languages and implementation process issues, which we consider in section 3.

There are suggestions that approach (1) may be what the OECD has in mind. We favour approach (2) for the following reasons.

First, because approach (1) misses an opportunity to move towards common, internationally agreed wording on provisions relating to double taxation.

Second, approach (1) may create inherent practical difficulties. Realistically, it requires consolidated versions of all existing bilateral tax treaties as modified by the MLI. To achieve these consolidated versions, it will be necessary to identify precisely the wording that is modified by the provisions in the MLI. That task is relatively easy where the bilateral convention is based upon the OECD Model[5]

* **The authors are writing in their personal capacity and not as representatives of any firms or institutions of which they are, or have been, members.**

1. OECD, *Action 15 Final Report – Developing a Multilateral Instrument to Modify Bilateral Tax Treaties* (OECD 2015), International Organizations' Documentation IBFD.
2. OECD, *Public Discussion Draft, BEPS Action 15, Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures, 31 May to 30 June 2016* (OECD 2016).
3. OECD, *Comments received on Public Discussion Draft, BEPS Action 15, Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures, 30 June 2016* (OECD 2016).
4. We are mindful of the fact that there may be some multilateral tax treaties that would be modified by the MLI; for example, the *Convention between the Nordic Countries for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital* (unofficial translation) (23 Sept. 1996) (as amended through 2008), Treaties IBFD.
5. *OECD Model Tax Convention on Income and on Capital* (26 July 2014), Models IBFD.

or UN Model,[6] but a far harder task where the wording departs from either of those Models. In practice, pairs of states may wish to agree in advance which provisions of their tax treaty are modified by the MLI (possibly by an exchange of notes to that effect), which loses some of the advantage of having a multilateral approach to this issue. We can see that there is a practical attraction in having consolidated versions of bilateral treaties, as amended by the MLI, rather than having to read each bilateral treaty side-by-side with the MLI.

Third, as explained in section 3., approach (1) also raises a practical issue over the Commentaries or Explanatory Statements to the wording contained in the provisions inserted by the MLI.

Fourth, approach (2) makes it easier to have different language priorities from the treaty being amended.

However, approach (2), being novel, might make implementation procedures more difficult. Approach (1) is not, however, free of problems of implementation procedure in relation to languages and to the modification of multiple treaties at the same time.

We shall restrict our comments to three aspects: the status of the "commentaries" to the MLI (*see* section 2.); the languages issue (*see* section 3.); and implementation procedures (*see* section 4.). The second and third are aspects on which the OECD did not formally consult but which may be important. We shall consider these on the basis of both the approaches. We recognize that there are possible variations on the approaches which may move them closer together in practice and that the reasons given for favouring approach (2) over approach (1) can, to some extent, be used to support both approaches, but we think that approach (2) is the better way forward.

2. The Explanatory Statements to the MLI

There are two types of "commentary" to the MLI: the commentary about how the MLI itself is intended to operate; and the commentary to the new language of the treaty provisions amended by the MLI. We shall assume the existence of the former as an Explanatory Report appended to the MLI itself and explaining how it operates to modify existing treaties, hopefully with some clear examples. The following discussion is restricted to the latter.

As is well-known, the Commentaries to the OECD Model[7] are by their terms not legally binding, but are nevertheless extremely important. Courts around the world have struggled with their status and one can find examples of them deciding everything between their being ignored (now very uncommon), through to their being a supplementary means of interpretation, to their being quasi-context.[8] Given the amount of effort the OECD puts into changing the OECD Commentaries, this is unfortunate. The problem arises because international law does not discuss explicitly the legal status of a commentary to a model which is then used as part of the basis for negotiations to inform a bilateral tax treaty. It is different with a commentary to a multilateral treaty, and so here is the golden opportunity for the OECD to give a clear legal basis for the commentaries to the provisions inserted by the MLI. It is an opportunity that should be taken when the MLI is produced and can be approved by all the signatories at the same time as signing it. Such an opportunity fits approach (2) more easily.

If instead approach (1) is adopted, the natural way forward would be for the OECD to wait until the MLI changes are incorporated into the OECD Model and then adopt the changes to the Commentaries on these provisions at the same time. That would be a missed opportunity. It would mean that the old pattern of amendment by Working Party (WP) 1 of the OECD would largely be followed, although probably the WP might be enhanced under the OECD's "Inclusive Framework"[9] by the presence of associate member countries for this purpose. As everyone would be aware that such commentaries related to MLI provisions as well as to the provisions of the OECD Model, it would likely be more difficult for OECD member countries and non-OECD countries to continue to express different views by publishing their observations or positions on the new commentaries.

6. *UN Model Tax Convention on Income and on Capital* (1 Jan. 2011), Models IBFD.
7. *OECD Model Tax Convention on Income and on Capital: Commentaries* (26 July 2014), Models IBFD.
8. There is, for example, a wide variation of approach taken in the courts of the countries represented by the members of the International Tax Group towards the *OECD Model: Commentaries*. In Australia, for example, the courts have generally supported the use of the *OECD Model: Commentaries* and, to the extent that the "ambulatory" issue is explicitly addressed, refer to the version at the time of conclusion of the tax treaty, but reading between the lines, the judges have taken divergent views as to the weight to be afforded the *OECD Model: Commentaries*. In Germany, the *Bundesfinanzhof* (Federal Tax Court, BFH) has regularly stated that the *OECD Model: Commentaries* are not legally binding on German courts; however, *OECD Model: Commentaries* already existing when a tax treaty was concluded may be regarded as expressing an important opinion on how to interpret the *OECD Model* and identical bilateral German tax treaties (*Vienna Convention on the Law of Treaties* art. 32 (23 May 1969), Treaties IBFD). Dutch courts generally take a position quite similar to the German BFH. Similarly, in France, the *Conseil d'Etat* (Supreme Administrative Court, CE) has held that the *OECD Model: Commentaries* are to be used as a means of interpretation for tax treaties concluded between OECD member countries after they were released. Indian courts often rely on the *OECD Model: Commentaries*, provided that the language of the tax treaty is similar to the *OECD Model*. In Italy, some *Corte Suprema di Cassazione* (Supreme Court, CSC) decisions recognize expressly the relevance of the *OECD Model: Commentaries*, though only one isolated decision states it is binding. In Japan, the *OECD Model: Commentaries* are a widely accepted guide to the interpretation and application of provisions of bilateral tax treaties. Swedish courts also normally attribute great weight to the *OECD Model: Commentaries*. *See*, for example, the decision of the *Regeringsrätten* (Supreme Administrative Court, RG) in SE: RG, 2 Oct. 1996, RÅ 1996 ref. 84, Tax Treaty Case Law IBFD. As recently as June 2016, the importance of changed *OECD Model: Commentaries* after the conclusion of a tax treaty impacted on the outcome of a case, so it is clear that the Swedish *Högsta Förvaltningsdomstolen* (Supreme Administrative Court, HF), within the framework given by articles 31 to 33 of the *Vienna Convention* (1969), finds the *OECD Model: Commentaries* important (*see* SE: HF, 20 June 2016, 3960-14). In the United States, there is a line of cases that has referred to the *OECD Model: Commentaries* as a source of guidance. Similarly, in the United Kingdom, the courts have on a number of occasions referred to the *OECD Model: Commentaries* as an aid to interpretation, though the effect of subsequent changes to the *OECD Model: Commentaries* is less clear. The same is generally true in Canada.
9. OECD, *First Meeting of the New Inclusive Framework to Tackle Base Erosion and Profit Shifting Marks a New Era in International Tax Co-operation, 30 June 2016* (OECD 2016).

In international law, commentaries – or Explanatory Statements as it would be better to call them to avoid any confusion with the existing Commentaries – included with the MLI are "context" within the scope of article 31(2) of the Vienna Convention (1969):

> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty...[10]

This gives a definite legal status to Explanatory Statements complying with this definition. We presume that both taxpayers and governments would welcome this and want it. It gives proper recognition to the work the OECD and G20 countries who engaged in the OECD/G20 BEPS Project have put into making the Explanatory Statements.

In order for Explanatory Statements to achieve the status of context, it is essential that they are adopted by the parties at the time of the conclusion of the MLI. Since "conclusion" is an expression of unclear meaning, in order to be safe, this means that states need to adopt the Explanatory Statements at the time of signing.[11] While there is a possibility of a subsequent agreement having similar effect,[12] this would be much less satisfactory as agreement would in practice be harder to reach if there was no deadline and states could continue to discuss the detail. Therefore, as a practical matter it would be necessary for the Explanatory Statements to be agreed as part of the negotiation process for the MLI.

Such Statements, being context, have a status not much below that of the MLI itself, and its interpretative statements will be followed by courts, except in the unlikely event that they contradict the ordinary meaning of the terms of the MLI or are contrary to good faith or the object and purpose of the MLI. As Gardiner (2015) says:

> It is difficult, however, to find any practical examples where a clear indication of the parties' agreement on interpretation has been outweighed by other interpretative considerations.[13]

One could achieve the highest status by referring to the Explanatory Statements in the MLI itself,[14] or a slightly lower status as a Protocol of Signature by not cross-referring to them in the MLI,[15] or a lower status still by stating that they were not legally binding.[16] How these different levels of status might be reflected in the implementation by countries of the MLI would depend on their constitutional law and legislative practice. The MLI or the Explanatory Statements as appropriate should spell out clearly what level of status is intended for the Explanatory Statements, and countries would then need to ensure that their implementation of the MLI achieved the intended level of status. Any of these different levels of status would be far preferable to the uncertain status of the Commentaries to the Model. It also fits better with approach (2) because the MLI provisions remain in being rather than ceasing to have effect when the amendments are incorporated into the tax treaties being amended, and so the Explanatory Statements also continue to have effect.

To take an example, we think it is particularly important that an Explanatory Statement on the proposed principal purpose test (PPT) is adopted and maintained by as wide a group of countries as possible. If, as seems likely, a large number of countries adopt the PPT, a single, agreed Explanatory Statement, with clear examples, adopted and applied by as wide a group of countries as possible could be the very best outcome in terms of providing useful guidance and practical tools for taxpayers.

Another advantage of Explanatory Statements along these lines is that, if the draft commentaries contained in the OECD/G20 BEPS Final Reports are adopted as part of the MLI, they will clearly be adopted by a much larger number of countries than the smaller group of OECD member countries that formally adopt the Commentaries to the OECD Model.

Of course, that means that the larger group will have to play a part in making future changes to them, but that is surely something that the OECD is encouraging, having interested a large number of states in joining the MLI. While, in theory, making changes might be more difficult, this should not be a problem if states can make observations if they do not agree (as they can with the Commentaries to the Model).

In summary, the OECD has the opportunity to either increase the status of the Explanatory Statements to the MLI by making them into context, which is an easier outcome to achieve under approach (2), or to maintain the status quo of Commentaries to the Model, which is the natural outcome of adopting approach (1). For the reasons given, we favour adopting approach (2) and giving the Explanatory Statements the legal status of context in terms of the Vienna Convention (1969).

10. For states adopting the MLI after its conclusion a similar status would be given by article 31(2) (b) of the *Vienna Convention* (1969), as "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty".
11. R.K. Gardiner, *Treaty Interpretation* 2nd edn., pp. 232-239 (Oxford U. Press 2015).
12. Under article 31(3)(a) of the *Vienna Convention* (1969).
13. Gardiner, *supra* n. 11, at p. 226. This statement is immediately after a quotation about subsequent agreements under article 31(3)(a) of the *Vienna Convention* (1969), but, if anything, the position of a contemporaneous agreement is even stronger.
14. As with the Protocol on the Interpretation of Article 69 of the European Patent Convention, which is listed as one of the associated instruments in article 164 of the Convention. *See* Gardiner, *supra* n. 11, at pp. 237-238.
15. Defined in a UN guide as "an instrument subsidiary to a treaty, and drawn up by the same parties. Such a Protocol deals with ancillary matters such as the interpretation of particular clauses of the treaty, those formal clauses not inserted into the treaty, or the regulation of technical matters ...". *See* Gardiner, *supra* n. 11, at pp. 87 and 238. For an example, *see* that relating to the Convention on the Contract for International Carriage of Goods by Road, considered by the UK Court of Appeal (CA), in UK: CA, 12 June 1989, *Chloride Industrial Batteries v. F & W Freight*, [1989] 1 WLR 823.
16. As with the Explanatory Report to the *Convention between the Member States of the Council of Europe and the Member Countries of the OECD on Mutual Administrative Assistance in Tax Matters* (25 Jan. 1988), Treaties IBFD, which states that it "does not constitute an instrument providing an authoritative interpretation of the text of the Convention, although it may facilitate the understanding of the conventions provisions".

3. The Languages Issue

Treaties in general have gone through two phases in relation to treaty languages. First, all tax treaties were unilingual, initially in Latin (at least in Europe), and then in French, reflecting the clear benefits of a single language. The second phase was a move to multilingual treaties, reflecting that there was no obvious single successor to French as a universal treaty language. For example, the United Nations Charter (1945) and the Vienna Convention (1969) are in Chinese, English, French, Russian and Spanish, which are equally authentic. The Treaty on the Functioning of the European Union (TFEU) (2007)[17] is in 23 languages. Sometimes there is a prevailing text, as in the case of the Berne Copyright Convention, which started in French only in 1886 and is now in Arabic, German, Italian, Portuguese and Spanish, with power to designate further languages, but the French text still prevails. English speakers benefitted from this phase because nearly all treaties had an English version. Even so, multilingual texts are clearly disadvantageous compared to the unilingual treaties seen in the first phase. Not only is there scope for mistakes,[18] but some concepts do not translate and different languages have different nuances of meaning.[19]

What may not have been generally appreciated, particularly from the point of view of English-speaking countries, which normally[20] make bilingual treaties with the treaty-partner's language (or languages)[21] having equal authority,[22] is that tax treaties have entered a third phase, which is reverting to the first phase but with English substituted for French as the (if we may be pardoned for saying so) lingua franca of tax treaties. It has been estimated[23] that in total over 80% of tax treaties have a version in English, whether the sole language version, one of the equally authentic versions or the prevailing version. The corresponding total for French is less than 10%. Less than 10% of tax treaties use neither French nor English. The preparation of additional language versions of the MLI may not, therefore, be as significant an issue as the OECD makes it out to be.

Given this starting point, the OECD, who work in English and French, are well placed to propose an MLI in those languages only. But while tax treaties that do not use those languages may account for less than 10% of all tax treaties, they cannot be ignored, and the issue is what should be done for those treaties in relation to the MLI. There are two polar approaches: either to stick to the existing pattern of continuing with the original treaty languages for modifications made by the MLI, which fits better with approach (1), or for the OECD to give a nudge in the direction of either English or French only, which fits better with approach (2). Neither is an ideal solution. The former results in a multitude of official language versions of the amendments made by the MLI, with the corresponding risks of differences in meaning, and the latter results in some modifications being made to a tax treaty in a language different from the rest of the treaty (although this is less obvious if approach (2) is adopted, as the MLI is a free-standing tax treaty).

There is also the middle way of using the original language (if not English or French) versions for the modifications made by the MLI, but insisting on the English or French version of those amendments prevailing in the event of a conflict. While a prevailing version of part of a tax treaty is probably unique,[24] it would be important to ensure consistency of interpretation and might be accepted in preference to the two extremes.

The choice between the two extremes or the middle way is one for countries to decide, and we explore these without expressing a view in favour of one of them. It is interesting to speculate on what the result would be if the OECD were to ask those countries who have concluded tax treaties in neither English nor French how they would like to proceed? There are some pointers to the likely result being that they would want a reversion to the unilingual (but now with a choice of English or French) first phase of treaties to reflect the reality of the present situation. For example, about 25 of the approximately 100 Dutch tax treaties are in English only, as are a substantial number of Swedish tax treaties. One might feel that non-European

17. *Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* (2008/C115/01), OJ C 115 (2008), EU Law IBFD.
18. *Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion* art. 13(7) (26 Sept. 2008), Treaties IBFD says in English: "The provisions of paragraph 5 shall not affect the right of a Contracting State to levy according to its law a tax chargeable in respect of gains from the alienation of any property *on* a person who is, and has been at any time during the previous six fiscal years, a resident of that Contracting State ...". A literal translation of the Dutch text says "property *of* a person" (emphasis added). The English version, therefore, preserves a greater degree of charging than the Dutch.
19. As in Lord Wilberforce's analysis of whether "*Averie*" was used in its ordinary meaning or as a special meaning in maritime law in decision of the UK House of Lords (HL) in UK: HL, 10 July 1980, *Fothergill v. Monarch Airlines* [1981] AC 251, 274.
20. There are exceptions, such as the English-only tax treaties that have been concluded by the United States with, for example, Bangladesh, Belgium, Denmark, Sweden and Thailand, and the same for other English-speaking countries.
21. For instance, equally authentic versions of the *Convention between the Government of the United States of America and the Government of the Kingdom of Morocco for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (1 Aug. 1977), Treaties IBFD were agreed in French and Arabic as well as English. For constitutional reasons, Canadian tax treaties always include both English and French texts.
22. When effect is given to a treaty in the United Kingdom, only the English version is set out in the Statutory Instrument, but, as this states that the two language versions (which are reported to Parliament in the Treaty Series) have equal authority, there is no difficulty in a judge consulting the other language version. The situation is similar in the United States, where, even when multiple authentic versions are signed, only the English version is forwarded to the Senate as part of the ratification process. In Australia, treaties have, since 2011, been incorporated by reference rather than being set out which makes it even clearer that both language versions are incorporated.
23. R.X. Resch, *The Interpretation of Plurilingual Tax Treaties*, (forthcoming).
24. A possible example is that of *Convention between Morocco and Italy for the Avoidance of Double Taxation with Respect to Taxes on Income as Amended by the Additional Protocol* (unofficial translation) (7 June 1972), Treaties IBFD, which was originally in Italian and French with equal authority. A first Protocol was made with the same language provisions. A second Protocol then added Arabic as a third treaty language, but with the French text prevailing. Nothing was said about the language provision of the first Protocol. It is arguable that since the first Protocol has its own language provision that was not altered by the second protocol without a specific reference to it.

countries would think differently. But Japan, which suffers the disadvantage that none of the world's major, non-tax treaties is in Japanese and is therefore well used to the problem of treaties not being in Japanese, has concluded 23 tax treaties with non-native English-speaking countries in English only,[25] with a further two with a prevailing English version,[26] 20 treaties where English is one of the treaty languages,[27] and one where French was one of the treaty languages. So it seems clear how Japan would vote.

To the extent that there are countries left after eliminating all countries that would accept English and French as the sole language(s) of the MLI and of the treaty amendments that this occasioned, then no doubt a special case could be made for them. For example, we understand that the Germany-Netherlands Income Tax Treaty (2012)[28] was negotiated in English, but that text was not published, and the authentic treaty languages were Dutch and German, which was clearly at Germany's request as all German tax treaties are in German (even though another – third – language may be the prevailing language[29] and they could have agreed to the English text as the prevailing text). Presumably, the Dutch would not mind if that tax treaty were amended in English, whether solely or as a prevailing text, but Germany might well have a problem.[30] We doubt that this is a unique example.

If one wanted to preserve the approach of authentic texts in each treaty partner's language, there is a well-recognized method in multilateral treaties for the existing treaty language versions of the amendment to be prepared and submitted to the depository of the MLI for confirmation of its accuracy.

The middle way of requiring an English or French prevailing text of the modifications made by the MLI might be attractive, however unusual it would be to have a prevailing version of part of a tax treaty, as the price to ensure consistency of interpretation. But if there is a prevailing text of the changes made by the MLI, does one really need the original treaty language versions as well? It has presumably never happened, but would it be impossible for some provisions of a tax treaty to be in a language different from the rest?[31] And if that happened would that not be an encouragement to the countries to put the rest of the tax treaty into English or French? If the countries then wished to make English or French a prevailing text of the whole tax treaty, they could easily do so taking the OECD Model and making the necessary changes.

If the OECD were to produce the MLI and its Explanatory Statements in English and French versions that are equally authoritative, which might be the natural way to proceed, this would have a disadvantage because it would introduce a French official version of a modification to a tax treaty that was only in English, which would have to be considered in case there was a divergence of meaning (and similarly for a tax treaty only in French). A subtler approach is called for if they decided to nudge tax treaties in favour of either English or French.

A possible way of avoiding the problem caused by introducing an equally authoritative French version into a tax treaty in English only (and vice versa), with the MLI and its Explanatory Statements being in both English and French, might be for it to provide that states could adopt the modifications to existing tax treaties and the Explanatory Statements either in English only, or French only, or both (which Canada would adopt for constitutional reasons) in which case both versions would have equal authority. Regardless of which version a state adopted, the English version would apply to modify a treaty solely in English or with a prevailing English text (and similarly with French). If the tax treaty being modified is between two states that have adopted the English version, that version of the modifications and Explanatory Statements would apply. If the tax treaty being modified is between two states that have adopted different versions, both versions would apply and be equally authoritative (this would automatically apply in Canada). However, states could, when signing the MLI, agree to use a different one of those languages in relation to a particular tax treaty, so that two countries both adopting the English version could modify a treaty in two Romance languages in French.

Adopting approach (2) means that, if the operative parts of the modification to a tax treaty remain as part of the MLI, it is, or at least seems to be, less of a problem if these are in a language different from the rest of the tax treaty. Another

25. Those tax treaties concluded by Japan with Austria, Bangladesh, Belgium, Brunei, Bulgaria, Czechoslovakia, Denmark, Egypt, Finland, Hungary, Indonesia, Israel, Kazakhstan, Luxembourg, Malaysia, the Netherlands, Norway, Pakistan, Romania, South Korea, Sweden, Thailand and Turkey.
26. *Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (9 Nov. 2010) (as amended through 2014), Treaties IBFD; and Convention between the Government of Japan and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (7 Mar. 1989) (as amended through 2006), Treaties IBFD.
27. Those tax treaties concluded by Japan with the following native English speaking countries: Australia, New Zealand, the United Kingdom, the United States and Zambia, and with the following non-native English-speaking countries: Brazil, China (People's Rep.), Germany, Italy, Kuwait, Mexico, Oman, Poland, Portugal, Saudi Arabia, Sri Lanka, Spain, Switzerland, the United Arab Emirates, the Union of Soviet Socialist Republics and Vietnam.
28. *Convention between the Federal Republic of Germany and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (unofficial translation) (12 Apr. 2012), Treaties IBFD.
29. The third (English) language only prevails "[i]n the case there is any divergence of interpretation between the German and the [other Contracting State's language] texts". *See*, for example, *Agreement between Japan and the Federal Republic of Germany for the Elimination of Double Taxation with Respect to Taxes on Income and to Certain Other Taxes and the Prevention of Tax Evasion and Avoidance* (17 Dec. 2015), Treaties IBFD.
30. DE: *Grundgesetz* (German Constitution) does not expressly prescribe that all formal laws need to be in the German language. However, it seems to be common opinion that only laws in the German language are apt to meet the (constitutional) requirement that all citizens can understand the law. Also, the language of parliamentary debate is German. Different from multilateral conventions, bilateral conventions are always concluded at least in the German language (*see* DE: *Standardformulierungen für deutsche Vertragstexte* (Terminological Series issued by the Foreign Office of the Federal Republic of Germany) 4th edn., vol. 4, p. 2 (2004)). It seems unclear whether such a bilateral convention could be amended by a multilateral treaty without a German version (irrespective of the existence of a German translation which is not an authentic text).
31. But *see supra* n. 24 for analogous uses.

advantage of this approach is that if the MLI remains in place it will be difficult for the parties to a particular tax treaty to avoid its provisions by making a new tax treaty between them or by amending the existing tax treaty in such a way as to achieve a different result if it is intended to prevent this. And they might also agree to use their best endeavours to achieve the same language position in relation to the MLI provisions in a treaty with a country that has not signed the MLI. This suggestion may sound extreme, but if the choice were put to countries it is possible that they might accept the use of either English or French as they wish (or both for Canada) as the only languages for the MLI changes in recognition that over 90 per cent of tax treaties use those languages. Then native English-speaking or native French-speaking countries would then no longer feel diffident about asking for the English or French to be the sole or the prevailing text; they are rapidly becoming the only countries who do not do this.

4. Implementation Procedures and the MLI

The novel features of the MLI raise several issues on implementation procedure, although fewer if approach (1) is adopted.

The first issue relates to the MLI being in English and French only. Fortunately, many countries already have considerable experience both with multilateral treaties and tax treaties which do not have a version in the national language. As mentioned in section 3., about 25 of the approximately 100 Dutch tax treaties are in English only, and Japan has made 23 tax treaties with non-native English-speaking countries in English only, so their treaty partners must have dealt with the issue of tax treaties not in the national language as well. Normally, an unofficial translation of a tax treaty into their own language is made for the information of the national legislature, while approving the tax treaty in an official language version.[32] This has arisen in relation to both multilateral treaties and tax treaties in Italy,[33] Japan,[34] the Netherlands,[35] Sweden[36] and Switzerland,[37] and, in Germany, for multilateral treaties but not bilateral tax treaties which have been made only in languages that include German (although German need not be the prevailing language).[38] English-speaking or French-speaking countries have not had to deal recently with treaties, whether tax or non-tax, in other languages because modern treaties will have an official English or French version as one of the versions, although, for non-tax treaties, another language version may be the prevailing version.[39] But the same issue used to arise with multilateral treaties.[40]

32. Such an unofficial version has no legal authority unless it is authenticated by the treaty partner, which it will not be. *See* article 33(2) Vienna Convention (1969).
33. Normally the ratification law approves an official version of a tax treaty, often the French version, but most recently the English version, and an Italian unofficial version is made for the parliament, which is attached to the ratification law sometimes without any express reference being made to it. As to tax treaties which are concluded in authentic languages other than Italian the ratification law provides for an Italian unofficial translation, as was the case with the following tax treaties: *Convention between the Republic of Italy and the Arab Republic of Egypt for the Avoidance of Double Taxation with Respect to Taxes on Income and the Prevention of Fiscal Evasion* (7 May 1979), Treaties IBFD; *Convention between the Government of the Hellenic Republic and the Government of the Republic of Italy for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion* (3 Sept. 1987), Treaties IBFD; and *Convention between the Italian Republic and the Socialist Federal Republic of Yugoslavia for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital* (24 Feb. 1982), Treaties IBFD, which is now applicable to Bosnia-Herzegovina, Serbia, and Montenegro. *Convention between Italy and Greece for the Avoidance of Double Taxation with Respect to Succession Duties* (unofficial translation) (13 Feb. 1964), Treaties IBFD does not have any unofficial translation attached.
34. As mentioned in section 3., Japan regularly concludes tax treaties in English only, and a Japanese translation is prepared for the Diet. Also, when a tax treaty is promulgated in the Official Gazette after it is approved by the Diet, the Japanese translation is published together with one of the authentic languages (English, if it is among them) of the tax treaty. However, the Japanese translation does not have a binding effect on the court. It is the authentic language(s) that must be interpreted by the court when there is a difference between the authentic language(s) and the Japanese translation.
35. As mentioned in section 3., about 25% of Dutch tax treaties are in English only with an unofficial Dutch version being prepared for the parliament.
36. Multilateral treaties without a Swedish version are implemented in legislation, Sweden being a dualist country, in one of the official languages with an unofficial Swedish version attached. For example, the *Convention on Mutual Administrative Assistance in Tax Matters* (1988) was implemented into Swedish law in the two official languages, French and English with an unofficial Swedish version attached. If a tax treaty is not in Swedish, for example, the tax treaties concluded by Sweden with Australia, Malta, the United Kingdom and the United States, the English version is implemented with an unofficial Swedish version attached.
37. All tax treaties are produced in French, German and Italian, but one or more of these can be unofficial translations. Tax treaties may be authenticated in one or several languages: German or French is often the authenticated language. With regard to *Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income* (8 Dec. 1977) (as amended through 2012), Treaties IBFD, French was initially used as the authenticated language. However, for the exchange of notes of 3 and 6 May 2012, English was solely used as the authenticated language, compared to the Protocol (2009) for which French was used as an authenticated language. If the MLI were in English and French, French would be used as the official language with unofficial translations prepared in German and Italian.
38. A German version is the basis for parliamentary debates. In addition, it seems to be common opinion in Germany that any law when published needs to be either in German or accompanied by a translation (*see* DE: *Handbuch der Rechtsförmlichkeit* (Federal Ministry of Justice), *Bundesanzeiger* (Federal Gazette) 60 (2008), No. 160a, m.no. 79, 223 and *Anhang* 1.6.). However, the translation does not seem to have any legally binding effect. Bilateral conventions (which always include the German language) are published in all of their languages except for "uncommon symbols". Multilateral conventions without a German version (for example, the *Convention on Mutual Administrative Assistance in Tax Matters* (1988), Federal Law Gazette (BGBl.) II 2015, 966) are published in German in a translation made by the government, which need not be an authentic text, and in English and/or French; further languages are published only in exceptional situations. Although the parliament would accept the MLI in English and French with a German translation prepared by the government which was not an authentic text, it seems questionable whether the same would apply to amendments to bilateral treaties made by the MLI (*see supra* n. 30).
39. In India, English continues to be the language for official purposes under IN: Official Languages Act (1963). Legislation in English is recognized as the authoritative text under IN: Constitution, art. 348 notwithstanding that, under article 343, Hindi is the official language. Normally tax treaties will be in English and Hindi (in addition to the language required by the other state).
40. In the United States, an 1830 treaty with the Ottoman Empire was officially in Turkish. A 1796 treaty with Tripoli was in Arabic and then translated into an English version, which was ratified in the United States. The United Kingdom originally gave effect to the Warsaw Convention on international carriage of goods by air, which was originally in French only with an English translation not even referring to the French in UK: Carriage by

The second issue relates to the MLI being in English and French but making modifications only in those languages to tax treaties in other languages, including the national language if that is not English or French. As before, national legislatures are likely to require a national language version of the modifications, which will be part of the MLI, and which need not be an authentic text, although Germany would presumably insist on an authentic text of all German tax treaties being amended.[41] Under approach (1) there would be a need to agree the treaty language versions of each tax treaty being modified, which could be a matter for the contracting states or could be handled by the depository of the MLI who would confirm their accuracy.

If approach (2) were adopted, with the MLI in English and French and making modifications in those languages only (or with English or French as the prevailing text) to tax treaties in other languages, one is in unknown territory when dealing with a bilateral treaty. However, handling a multilateral treaty not in the national language is not unusual and, hence, handling the MLI in that fashion should not be a problem. Making modification to treaties in languages other than the treaty language(s) is unusual but is mainly a language problem, which we considered in section 3., rather than a problem of implementation procedures (but Germany might well have a problem if a German tax treaty were modified in a language other than German, even though there seems to be no constitutional objection to this).[42]

The fact that the MLI would amend a number of tax treaties at the same time does not appear to be a problem in any of the countries considered.

Another potential problem for legislatures is how to deal with countries joining the MLI in the future. Presumably the answer is that the national legislature would approve the MLI as it stood at a given time amending the tax treaties that it applied to then. If later another country joined the MLI, this could be represented to the legislature for approval of the further amendments. This issue may not arise as the OECD is arranging a signing session in the first half of 2017[43] and, with the eyes of the world's press upon them, it may be likely that countries will not want to be seen to be missing.

Air Act (1932). Only later when, as a result of a protocol, the Convention was also in English and Spanish, with the French prevailing, this resulted in the 1961 Act with the treaty scheduled in English and (the prevailing) French, which was the one in issue in the important treaty interpretation case of *Fothergill v. Monarch Airlines* (1980).

41. *See supra* n. 30 and the text immediately before.

42. *See supra* n. 30 and the text immediately before.

43. OECD, *Secretary-General, Report to G20 Finance Ministers, Chengdu, People's Republic of China 23-24 July 2016* p. 9, last paragraph (OECD 2016), available at www.oecd.org/tax/oecd-secretary-general-tax-report-g20-finance-ministers-july-2016.pdf.