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In this article, Chan analyzes how the structure of the multilateral instrument's prevention of treaty abuse article reflects the principles of the 1969 Vienna Convention and how notification rules apply to it.

Action 6 of the base erosion and profit-shifting project identifies treaty abuse, and in particular treaty shopping, as a principal source of concern. In 2016 the OECD/G-20 inclusive framework on BEPS was established. Jurisdictions that have committed to the BEPS project are required to meet the project's four minimum standards, which include prevention of treaty abuse under the 2015 final report on action 6, and also participation in peer reviews and the monitoring of implementation of the minimum standards. This article analyzes how the multilateral instrument's prevention of treaty abuse article is structured to reflect the principles in articles 21(1) and 30(3) of the Vienna Convention on the Law of Treaties (VCLT 1969), and how notification rules apply to the article.

The Action 6 Minimum Standard

As of April 30, 99 jurisdictions have carried out their commitment to the BEPS inclusive framework by signing up to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. Signing the MLI enables a member jurisdiction to swiftly transpose provisions against treaty abuse and other MLI treaty-related measures into their tax treaties.

The action 6 minimum standard on treaty shopping obligates jurisdictions to include two components in their tax agreements:

- an express statement on nontaxation (generally in the preamble); and
- one of the three methods, or alternatives, addressing treaty shopping.

Express Statement

As set out in paragraph 22 of the action 6 final report, jurisdictions are required to include in their tax agreements an express statement that their common intention is to eliminate double taxation without creating opportunities for nontaxation or reduced taxation through evasion or avoidance, including treaty shopping. The following provision now appears in the preamble of the 2017 OECD model tax convention:

> (State A) and (State B),
>
> Desiring to further develop their economic relationship and to enhance their co-operation in tax matters,
>
> Intending to conclude a Convention for the elimination of double taxation with respect to taxes on income and on capital 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 Convention for the indirect benefit of residents of third States).

Three Alternative Methods

Jurisdictions have also committed to implementing their common intention through the inclusion of one of the following three antiabuse methods (three-pronged approaches):

- a principal purpose test (PPT) and either a simplified or a detailed version of the limitation on benefits rule (the PPT-plus);
- the PPT alone; or
- a detailed LOB rule together with a mechanism (such as a treaty rule that might take the form of a PPT rule restricted to conduit arrangements, domestic antiabuse rules, or judicial doctrines that would achieve a similar result) that would deal with conduit arrangements not already dealt with in tax treaties (detailed LOB-plus).

The MLI

Articles 6 and 7 now include the express statement and the first two of the alternative methods in the second component of the action 6 final report. Paragraph 110 of the MLI explanatory statement says that the term "a detailed limitation on benefits provision" in paragraph 15(a) of article 7 refers to a detailed provision of the type appearing in paragraphs 1 through 6 of Article X (entitlement to benefits) of the OECD model tax convention produced in paragraph 25 (page 21) of the action 6 final report. This will be further developed during BEPS follow-up work. The term "a principal purpose test" is a provision of the type described in paragraph 1 of article 7.

Paragraph 25 of the action 6 final report reads: "At the end of May 2015, however, the United States released a new version of the LOB rule included in its model treaty for public comments to be sent by 15 September 2015. When that new version was discussed, it was agreed that it should be further examined once finalized by the United States in the light of the comments that will be received on it."

For this reason, neither the main texts of the MLI nor its explanatory statement provides the detailed LOB rules. However, one will see that the MLI drafters have allowed for a gateway to the detailed LOB in the analysis that follows. The MLI remains a powerful tool for the implementation of the action 6 minimum standard in terms of efficiency, clarity, and transparency. Paragraph 38 of the "Prevention of Tax Treaty Abuse — Fourth Peer Review Report on Treaty Shopping" (the fourth peer review report), approved by the inclusive framework on February 9, reads:

> The MLI has proven to be an effective way — indeed, the preferred way — of implementing the minimum standard. However, a jurisdiction that prefers to implement the minimum standard through a detailed limitation on benefits provision cannot use the MLI to do so. Ninety-six jurisdictions have joined the MLI (including 93 members of the Inclusive Framework [99 members as of April]), 68 have ratified it, and the MLI would, once fully in effect, implement the minimum standard in more than 1,700 bilateral agreements, thus modifying the majority of agreements concluded between members of the Inclusive Framework.

The OECD Model Tax Convention

The two components in paragraph 22 of the action 6 report have been included in the preamble to the convention and article 29 of the 2017 OECD model treaty convention.

The 2017 OECD model tax convention update includes:

> the addition of a new Article 29 (Entitlement to Benefits) and related Commentary, which includes in the OECD Model a limitation-on-benefits (LOB) rule (simplified and detailed versions), an anti-abuse rule for permanent establishments situated in third States, and a principal purposes test (PPT) rule. These provisions were contained in the Report on Action 6. As noted in that Report, the two versions of the LOB rule and the anti-abuse rule for permanent establishments situated in third States as presented in the Report were draft provisions subject to changes, in the light of the versions of those rules that would be included in the 2016 United States Model Income Tax Convention,

Table 1. Legal Text Sources for the Express Statement and Three-Pronged Approaches for Inclusive Framework Members to Meet Action 6 Minimum Standard

	Action 6 Final Report	MLI	2017 OECD Model Tax Convention
Title	Section B — title of the convention (p. 91)[a]	Article 6 — purpose of a covered tax agreement	Title of the convention[a]
Preamble	Section B — preamble to the convention (p. 92)[b]	Article 6(1) and article 6(3)	Preamble to the convention[b]
Treaty Abuse	Section A — cases where a person tries to circumvent limitation provided by the treaty itself	Article 7 — prevention of treaty abuse	Article 29 — entitlement to benefits
PPT	Paragraph 26, section A(1)(a)(ii), containing examples (pp. 54-69)	Article 7(1)	Article 29(9)
Simplified Version of LOB	Paragraph 25, section A(1)(a)(i), containing examples of both simplified LOB and detailed LOB (pp. 21-54)[c]	Article 7(8) to (12), including definition in article 7(13)	Articles 29(1) to (4) and article 29(6)
Detailed LOB Version		N/A	Full text of detailed LOB in commentary on article 29(1) to (7) with examples (pp. 519-584)[d]

[a]"Convention between (State A) and (State B) for the elimination of double taxation with respect to taxes on income and on capital and the prevention of tax evasion and avoidance."

[b]The express statement:

> (State A) and (State B),
> Desiring to further develop their economic relationship and to enhance their cooperation in tax matters,
> Intending to conclude a Convention for the elimination of double taxation with respect to taxes on income and on capital 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 Convention for the indirect benefit of residents of third States).

[c]The detailed LOB article is a draft version only.

[d]The full text of detailed LOB replicates the title to, and article 22 of, the 2016 U.S. model tax convention.

which had not been finalized at the time the Report on Action 6 was approved. Those provisions, as they appear in the 2017 Update, have been finalized accordingly.

The Texts of Articles 7(1) and 7(2)

Article 7(1) provides the PPT rule as the default option and falls under the scope of the action 6 minimum standard that a party to the MLI must apply to its covered tax agreements (CTAs). Article 7(1) is the operative clause and article 7(2) is the MLI's compatibility (conflict) clause. The latter modifies the application of article 7(1) to a CTA's relevant provision, subject to any applicable reservation. The texts of both articles are set out below:

> (1) Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of

the relevant provisions of the Covered Tax Agreement.

(2) Paragraph 1 shall apply in place of or in the absence of provisions of a Covered Tax Agreement that deny all or part of the benefits that would otherwise be provided under the Covered Tax Agreement where the principal purpose or one of the principal purposes of any arrangement or transaction, or of any person concerned with an arrangement or transaction, was to obtain those benefits.

Article 7 contains four opt-out provisions that interact with the compatibility and notification clauses.

The full text of article 7(15) provides that:

A party may reserve the right:

(a) for paragraph 1 not to apply to its Covered Tax Agreements on the basis that it intends to adopt a combination of a detailed limitation on benefits provision and either rules to address conduit financing structures or a principal purpose test, thereby meeting the minimum standard for preventing treaty abuse under the OECD/G20 BEPS package; in such cases, the Contracting Jurisdictions shall endeavour to reach a mutually satisfactory solution which meets the minimum standard.

(b) for paragraph 1 (and paragraph 4, in the case of a Party that has chosen to apply that paragraph) not to apply to its Covered Tax Agreements that already contain provisions that deny all of the benefits that would otherwise be provided under the Covered Tax Agreement where the principal purpose or one of the principal purposes of any arrangement or transaction, or of any person concerned with an arrangement or transaction, was to obtain those benefits.

(c) for the Simplified Limitation on Benefits Provision not to apply to its Covered Tax Agreements that already contain the provisions described in article 7(14).

In accordance with article 7(15)(a), a party may reserve its right not to apply article 7(1) to its CTAs on the condition that it will instead adopt the detailed LOB. Under article 7(15)(b), a party can reserve its right not to apply article 7(1) if its CTA already contains a provision identical to article 7(1). Under article 7(15)(c), a party can reserve its right not to apply the simplified version of LOB rules under article 7(6) if its CTAs already contain identical provisions described under the compatibility clause in article 7(14). In addition, article 7(16) provides that a party that chooses to apply the simplified LOB under article 7(6) may reserve its right to not apply the entire article 7 to CTAs in which one or more parties has not chosen to apply the simplified LOB provision in article 7(6).

Both article 7(15)(a) and 7(15)(b) are the opt-out provisions that exclude application of the article 7(2) compatibility clause to the CTA provision corresponding to article 7(1). The two articles differ in the following ways.

Article 7(15)(b) provides a partial reservation by which a party may reserve its right for article 7(1) not to apply to the CTAs that already contain the provisions addressing the same issue. In contrast, article 7(15)(a) is a full reservation. It applies not only to the CTA concluded between the reserving and other party, but also to all CTAs nominated in accordance with paragraph (1)(a) of article 2 (interpretation of terms) or paragraph 5 of article 29 (notification).

MLI article 28(3) (reservations) is modeled on article 21(1) of the VCLT 1969 and provides that:

Unless explicitly provided otherwise in the relevant provisions of this Convention, a reservation . . . shall:

a) modify for the reserving Party in its relations with another Party the provisions of this Convention to which the reservation relates to the extent of the reservation; and

b) modify those provisions to the same extent for the other Party in its relations with the reserving Party.

Second, when an MLI party opts for the 7(15)(a) reservation, both parties must choose to adopt the detailed LOB-plus rules to meet the action 6 minimum standard. Paragraph 109 of the MLI explanatory statement says that "given that

there are multiple measures to meet the minimum standard under Action 6, and that reaching a mutually satisfactory solution solely through the efforts of one Contracting Jurisdiction would not be possible, this paragraph requires not only the reserving Party but also the other Contracting Jurisdiction to the relevant Covered Tax Agreement to endeavor to reach a mutually satisfactory solution that is in line with the minimum standard." If a party reserves its rights in accordance with article 7(15)(b), that party is not obligated to do anything.

Compliant vs. Noncompliant Agreement

Article 7(15)(b) is an application of the later-in-time rule (*lex posterior derogat legi priori*) as laid down in article 30(3) of the VCLT 1969. A preexisting CTA containing a provision denying an item of income or capital all or some tax benefits because obtaining the benefit itself was one of the purposes of an arrangement or transaction is a compliant agreement.

The term "compliant agreement" is adopted in all the peer review reports as a tax agreement that has met the peer review minimum standard under the inclusive framework on BEPS. The legal text of article 30(3) of the VCLT reads[1]:

> When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59 (the Vienna Convention), the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

A preexisting CTA containing the denial-of-benefit provision to which a reservation under article 7(15)(b) does not apply is a noncompliant agreement. A party to the MLI must modify its CTA using article 7(2) if its MLI treaty partner has made the same commitment to the minimum standard and requested the inclusion of BEPS measures via article 7(2).

Article 7(15)(c) is another application of the later-in-time rule that owes its legal base to article 30(3) of the VCLT. It provides a partial opt-out through which a party may reserve the right for the simplified LOB provision not to apply to its CTAs that already contain a simplified LOB provision. These CTAs are excluded from modification by compatibility with article 7(14).

The Legal Principle and the Later-in-Time Rule

The legal principle under VCLT article 30(3) applies to not only article 7 but also other MLI articles. Table 2 illustrates the symmetrical arrangements in the texts of article 6, paragraph 4 (the purpose of a CTA) and article 7, paragraph 15(b) (the prevention of treaty abuse).

In contrast, paragraph 17(a) of article 7 carries the same language as the first sentence in paragraph 5 of article 6: "Each Party . . . shall notify the Depositary of whether each of its covered tax agreements . . . contains a provision described in paragraph 2, and if so, the article and paragraph number of each such provision."

That means that the CTA provision, to which the provisions that conform with the later-in-time rule under article 30(3) of the VCLT do not apply, is modified by the compatibility provision in article 6(2) or 7(2).

Articles 6 and 7 respectively carry the express statement and the three alternatives addressing situations of treaty abuse in paragraph 22 of the action 6 final report.

Bilateral or Multilateral Route Choice

Article 7(16) of the MLI reads:

> (16) Except where the Simplified Limitation on Benefits Provision applies with respect to the granting of benefits under a Covered Tax Agreement by one or more Parties pursuant to paragraph 7, a Party that chooses pursuant to paragraph 6 to apply the Simplified Limitation on Benefits Provision may reserve the right for the entirety of this Article not to apply with respect to its Covered Tax Agreements for which one or more of the other Contracting Jurisdictions has not chosen to apply the Simplified Limitation on Benefits Provision. In such cases, the

[1]For an in-depth analysis of the rules, see Alfred Chan, "A New Interpretation of the Capital Gains Article in the MLI," *Tax Notes Int'l*, Nov. 29, 2021, p. 1023.

Table 2. Legal Texts of Articles 6 and 7

Article 6 — Purpose of a CTA	Article 6	Article 7
1. A Covered Tax Agreement shall be modified to include the following preamble text: 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),	6(1)	7(1)
2. 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.	6(2)	7(2)
4. A Party may reserve the right for paragraph 1 not to apply to its Covered Tax Agreements *that already contain* preamble language describing the intent of the Contracting Jurisdictions to eliminate double taxation without creating opportunities for non-taxation or reduced taxation, whether that language is limited to cases of tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the Covered Tax Agreement for the indirect benefit of residents of third jurisdictions) or applies more broadly. [Emphasis added.]	6(4)	7(15)(b)
5. *Each Party shall notify the Depositary of whether each of its Covered Tax Agreements*, other than those that are within the scope of a reservation under paragraph 4, *contains preamble language described in paragraph 2, and if so, the text of the relevant preambular paragraph*. Where all Contracting Jurisdictions have made such a notification with respect to that preamble language, such preamble language shall be replaced by the text described in paragraph 1. In other cases, the text described in paragraph 1 shall be included in addition to the existing preamble language. [Emphasis added.]	6(5)	7(17)(a)

> Contracting Jurisdictions shall endeavor to reach a mutually satisfactory solution which meets the minimum standard for preventing treaty abuse under the OECD/G20 BEPS package.

Article 7(16) addresses the situation in which interaction is between a single contracting jurisdiction and contracting jurisdictions of a multilateral agreement with more than two members, in which a member not adopting the simplified LOB option in article 7(6) does not agree to adopt either article 7(7)(a) or (b). If that happens, then either of the parties that adopts the simplified LOB option in article 7(6) may reserve its right for the entire article 7 not to apply to the CTAs for which one or more members of the other party have not agreed to adopt the simplified LOB option in article 7(6).

Meanwhile article 7(16) allows a party to opt out of the entire article 7. The article 7(16) opt-out provision is at odds with the opt-out provision under article 7(15)(a). This anomaly can be reconciled as follows.

Paragraph 23 of the action 6 final report provides that "whilst the minimum standard will be included in the multilateral instrument that will be negotiated pursuant to Action 15 of the BEPS Action Plan, which will provide an effective way to implement it swiftly, this may not be sufficient to ensure its implementation since participation in the multilateral instrument is not mandatory and two countries that are parties to an existing treaty may have different preferences as to how the minimum standard should be met."

A tax agreement will remain noncompliant with the minimum standard if one of the parties opts out of the entire article 7. Article 7(16), like article 7(15)(a), requires the opt-out party and the treaty parties to reach a mutually satisfactory solution. They can proceed with a bilateral agreement either by concluding an amended protocol or negotiating a new agreement that satisfies the action 6 minimum standard. As noted in paragraph 22 of the action 6 final report, the minimum standard requires jurisdictions to do two things in their tax agreements:

- include an express statement on nontaxation (generally in the preamble); and
- adopt one of three methods of addressing treaty shopping.

It does not specify how these two things should be achieved (for example, through the MLI or agreements other than the MLI). Thus, inclusive framework members or MLI parties that are also inclusive framework members can not only choose among the three methods that can meet the minimum standards, but also choose different routes to get there via bilateral agreement, regional multilateral agreement, or the MLI.

An example of an application of the bilateral route is the Korea-Singapore tax agreement. Singapore and Korea are parties to the MLI but do not include the other party in their list of CTAs. Instead, they have chosen to meet the action 6 minimum standard by including the express statement in the preamble and a PPT provision in article 26 of the treaty.

An example of the application of the regional multilateral route is the Nordic Convention, the members of which include Denmark, the Faroe Islands, Finland, Iceland, Norway, and Sweden. Except for the Faroe Islands, all the members are also parties to the MLI, but each of them does not include the rest of the parties in its list of CTAs. Instead, they have chosen to meet the action 6 minimum standards by including the express statement to the convention and the PPT provision in the preamble and article 26(4) of the "Protocol on changing the agreement between the Nordic countries in order to avoid double taxation with regard to taxes on income and wealth."[2]

Opt-In Provisions Under Article 7

Article 7 of the MLI contains three optional articles designed to supplement the application of the main article. Article 7(4) modifies article 7(1) by providing administrative discretionary relief to taxpayers denied the treaty benefits after failing to satisfy the PPT requirement. Article 7(6) allows a party to adopt the PPT to opt in to the simplified LOB provisions to achieve commitment at a level above the minimum standard. Article 7(7) allows a party, in the situation of a multilateral tax agreement in which some of the parties adopt the PPT but do not choose the simplified LOB option, to reach an agreement to adopt simplified LOB rules in CTAs with the parties that adopt the PPT-plus rules under article 7(6), either symmetrically or asymmetrically.

An MLI member may adopt article 7(4), which is optional, to modify the application of article 7(1) to its CTAs. Article 7(4) provides that:

> (4) Where a benefit under a Covered Tax Agreement is denied to a person under provisions of the Covered Tax Agreement (as it may be modified by this Convention) that deny all or part of the benefits that would otherwise be provided under the Covered Tax Agreement where the principal purpose or one of the principal purposes of any arrangement or transaction, or of any person concerned with an arrangement or transaction, was to obtain those benefits, the competent authority of the Contracting Jurisdiction that would otherwise have granted this benefit shall nevertheless treat that person as being entitled to this benefit, or to different benefits with respect to a specific item of income or capital, if such competent authority, upon request from that person and after consideration of the relevant facts and circumstances, determines that such benefits would have been granted to that person in the absence of the transaction or arrangement. The competent authority of the Contracting Jurisdiction to which a request has been made under this paragraph by a resident of the other Contracting Jurisdiction shall consult with the competent authority of that other Contracting Jurisdiction before rejecting the request.

Articles 7(4) and 16(1) (mutual agreement procedure) each contain a provision allowing the taxpayer to request the competent authority of either contracting jurisdiction of which it is a resident to reconsider the case after the tax benefits have been denied. However, the

[2]Government of Norway, Prop. 114 S (2017-2018).

provisions in articles 7(4) and 16(1) differ in the following areas:

- If the contracting jurisdiction does not choose to adopt article 7(4), the taxpayer does not have a way to make such a request. In contrast, the taxpayer's access to MAP under article 16(1) is not optional and is provided by the MLI article that the contracting jurisdictions must adopt.
- The taxpayer can only present his case to the tax authority of the contracting jurisdiction of which he is a resident under article 7(4) while the taxpayer may present his case to the tax authorities of either contracting jurisdiction under article 16(1).
- An unresolved issue arising from a request for tax benefits under article 16(1), if not settled within a specific time period, could be submitted to arbitration provided that both contracting jurisdictions choose to adopt arbitration under Part VI of the MLI, while article 7(4) does not provide for this.

Articles 7(6), 7(7), and 7(14) provide that:

> 6. A Party may also choose to apply the provisions contained in paragraphs 8 through 13 (hereinafter referred to as the "Simplified Limitation on Benefits Provision") to its Covered Tax Agreements by making the notification described in subparagraph c) of paragraph 17. The Simplified Limitation on Benefits Provision shall apply with respect to a Covered Tax Agreement only where all Contracting Jurisdictions have chosen to apply it.
>
> 7. In cases where some but not all the Contracting Jurisdictions to a Covered Tax Agreement choose to apply the Simplified Limitation on Benefits Provision pursuant to paragraph 6, then, notwithstanding the provisions of that paragraph, the Simplified Limitation on Benefits Provision shall apply with respect to the granting of benefits under the Covered Tax Agreement:
>
> a) by all Contracting Jurisdictions, if all of the Contracting Jurisdictions that do not choose pursuant to paragraph 6 to apply the Simplified Limitation on Benefits Provision agree to such application by choosing to apply this subparagraph and notifying the Depositary accordingly; or
>
> b) only by the Contracting Jurisdictions that choose to apply the Simplified Limitation on Benefits Provision, if all of the Contracting Jurisdictions that do not choose pursuant to paragraph 6 to apply the Simplified Limitation on Benefits Provision agree to such application by choosing to apply this subparagraph and notifying the Depositary accordingly.
>
> 14. The Simplified Limitation on Benefits Provision shall apply in place of or in the absence of provisions of a Covered Tax Agreement that would limit the benefits of the Covered Tax Agreement (or that would limit benefits other than a benefit under the provisions of the Covered Tax Agreement relating to residence, associated enterprises or non-discrimination or a benefit that is not restricted solely to residents of a Contracting Jurisdiction) only to a resident that qualifies for such benefits by meeting one or more categorical tests.

Asymmetry in Option Choice

Article 7(7) addresses the situation in which some, but not all, of the parties adopt the simplified LOB option. Parties not adopting the simplified LOB option for granting benefits under the CTA may reach an agreement to adopt either article 7(7)(a), under which the simplified LOB option would apply to all parties symmetrically, or article 7(7)(b), under which the simplified LOB option would apply asymmetrically for the party that chooses the PPT-plus simplified LOB option.

Asymmetry in adopting the simplified LOB provision among treaty parties is at odds with the reciprocity principle in public international law. Some of the contracting jurisdictions may choose the PPT-alone option because that would suffice to meet the action 6 minimum standard. Others may choose a combination of PPT and the simplified LOB option (the PPT-plus). The asymmetry in the choice of the simplified LOB, if

article 7(7)(b) is chosen, may leave it applicable to some, but not all, contracting jurisdictions.

Notification

The full text of the article 7(17)(a) to (17)(e) notification provisions is reproduced below:

> (a) Each Party that has not made the reservation described in subparagraph a) of paragraph 15 shall notify the Depositary of whether each of its Covered Tax Agreements that is not subject to a reservation described in subparagraph b) of paragraph 15 contains a provision described in paragraph 2, and if so, the article and paragraph number of each such provision. Where all Contracting Jurisdictions have made such a notification with respect to a provision of a Covered Tax Agreement, that provision shall be replaced by the provisions of paragraph 1 (and where applicable, paragraph 4). In other cases, paragraph 1 (and where applicable, paragraph 4) shall supersede the provisions of the Covered Tax Agreement only to the extent that those provisions are incompatible with paragraph 1 (and where applicable, paragraph 4). A Party making a notification under this subparagraph may also include a statement that while such Party accepts the application of paragraph 1 alone as an interim measure, it intends where possible to adopt a limitation on benefits provision, in addition to or in replacement of paragraph 1, through bilateral negotiation.
>
> (b) Each Party that chooses to apply paragraph 4 shall notify the Depositary of its choice. Paragraph 4 shall apply to a Covered Tax Agreement only where all Contracting Jurisdictions have made such a notification.
>
> (c) Each Party that chooses to apply the Simplified Limitation on Benefits Provision pursuant to paragraph 6 shall notify the Depositary of its choice. Unless such Party has made the reservation described in subparagraph c) of paragraph 15, such notification shall also include the list of its Covered Tax Agreements which contain a provision described in paragraph 14, as well as the article and paragraph number of each such provision.
>
> (d) Each Party that does not choose to apply the Simplified Limitation on Benefits Provision pursuant to paragraph 6, but chooses to apply either subparagraph a) or b) of paragraph 7 shall notify the Depositary of its choice of subparagraph. Unless such Party has made the reservation described in subparagraph c) of paragraph 15, such notification shall also include the list of its Covered Tax Agreements which contain a provision described in paragraph 14, as well as the article and paragraph number of each such provision.
>
> (e) Where all Contracting Jurisdictions have made a notification under subparagraph c) or d) with respect to a provision of a Covered Tax Agreement, that provision shall be replaced by the Simplified Limitation on Benefits Provision. In other cases, the Simplified Limitation on Benefits Provision shall supersede the provisions of the Covered Tax Agreement only to the extent that those provisions are incompatible with the Simplified Limitation on Benefits Provision.

Application of the Notification Provisions

Notifications are given to:

- make the later-in-time reservation in accordance with article 28(8); and
- trigger application of optional provisions in accordance with article 29(1).

The notification language in articles 28 and 29 is worded differently for different purposes.

Article 28(8) of the MLI provides that:

> For reservations made pursuant to each of the following provisions, a list of agreements notified pursuant to clause ii) of subparagraph a) of paragraph 1 of Article 2 (Interpretation of Terms) that are within the scope of the reservation as defined in the relevant provision (and, in the case of a reservation under any of the following provisions other than those

listed in subparagraphs c), d) and n), the article and paragraph number of each relevant provision) must be provided when such reservations are made:

. . .

d) Paragraph 4 of Article 6 (Purpose of a Covered Tax Agreement);

e) subparagraphs b) and c) of paragraph 15 of Article 7 (Prevention of Treaty Abuse) . . .

For the CTA denial-of-benefits provision (or the simplified LOB provision), article 7(17)(a) provides that a party is required to notify the depositary of whether each CTA to which the later-in-time rule does not apply under article 7(15)(b) (or under article 7(15)(c)) contains a provision described in article 7(2) (or 7(14)), and if so, the article and paragraph number for each.

Table 3. Notification When the Later-in-Time Rule Article 7(15)(b) and (c) Does Not Apply

	Noncompliant Provision	Notification 28(8)	When to Give Notice
(i)	PPT provision in article 7(1) to be modified by article 7(2)	Article 7(17)(a) if not subject to 7(15)(b) (first sentence)	On the date of deposit of instrument of ratification as per article 2(1)(a)(ii), and for addition of new agreements to the list notified under article 2(1)(a)(ii), article 29(5) applies
(ii)	Simplified LOB provision in article 7(6) to be modified by article 7(14)	Article 7(17)(c) if not subject to 7(15)(c) (second sentence)	
(iii)	Simplified LOB provision in article 7(7), agreed to be modified by article 7(14)	Article 7(17)(d) if not subject to 7(15)(c) (second sentence)	

Notification to Take Legal Effect

If a party to the MLI chooses the discretionary relief option under article 7(4), the simplified LOB option under article 7(6) or 7(7), that party is required to give notification to the OECD Depositary in accordance with MLI article 29(1). The purpose of serving a notification is for the opt-in articles to take legal effect, triggering the application of the opt-in article by each of the parties. The required notification is given in the standard language as provided in paragraph 7(17)(b) for the discretionary relief optional provision in paragraph 4, and in paragraphs 7(17)(c) and 7(6) for the simplified LOB option in paragraph 6, as illustrated in Table 4.

The MLI distinguishes between cases in which all parties have adopted a given option or provision and those in which the later-in-time rule does not apply to an opt-in provision. For article 7(4) or article 7(6) to apply, all the parties must give matching notifications in accordance with the second sentence of article 7(17)(b) or article 7(6). In contrast, if the later-in-time rule does not apply, a party is required to give notification to the Depositary in accordance with the second sentence of article 7(17)(c) (or article 7(17)(d)) for adopting article 7(6) (or article 7(7)). That notification must include a list of CTAs that contain a provision described in article 7(14) as well as the article and paragraph number of each, in the same way that article 7(2) does.

Applying the Notification Rule

The design of the MLI provides for two scenarios under which a party can conclude agreements with its treaty partners: multilaterally or bilaterally. If party A signs and lists a CTA with one of the members of a multilateral agreement (the Nordic Convention, for example), the second and third sentence in article 7(17)(a) (or the first and second sentence of article 7(17)(e)) will apply in the bilateral relationship between party A and the multilateral agreement as party B only if both party A and all members of party B have given matching notifications. Otherwise, the operating provision in article 7(1) (or the simplified LOB provision under articles 7(8) to 7(13)) supersedes the CTA provisions to the extent of incompatibility. If the CTA does not contain article 7(1) (or the simplified LOB provision described under articles 7(8) to 7(13)), the latter shall apply in the absence of such or be added to it.[3]

[3]For the elaboration on the interaction between multilateral and bilateral agreements, see Chan, *supra* note 1.

Table 4. Notifications to Achieve Legal Effect and Clarity

	Optional Provisions	Notification to Take Effect	Notification For Clarity
(i)	Grant discretionary relief under article 7(4).	Article 7(17)(b): Notify Depositary (first sentence) and apply only where all give matching notifications (second sentence).	Not applicable.
(ii)	Adopt simplified LOB option under article 7(6).	Article 7(17)(c): Notify Depositary (first sentence). Article 7(6): Apply only where all give matching notifications (second sentence).	Article 7(17)(c) (second sentence), unless article 7(15)(c) applies.
(iii)	For each party not choosing simplified LOB option to adopt article 7(7)(a) or 7(7)(b).	Article 7(17)(d) Notify Depositary of agreement reached under article 7(7)(a) or 7(7)(b) (first sentence).	Article 7(17)(d) (second sentence), unless article 7(15)(c) applies.

Simplified LOB Special Application

A party can either adopt the PPT-alone option or the PPT and simplified LOB option, the PPT-plus. Table 5 shows the possible interactive relationship between contracting jurisdictions if one party chooses the simplified LOB option and all members of a multilateral agreement are the other party, with some members agreeing to adopt the simplified LOB option while some other members do not.

Table 5. Relationship Between Article 7(6) and 7(7)

<table>
<tr><th>Start</th><th>Node 1</th><th>Node 2</th><th>Node 3</th><th>End</th></tr>
<tr><td rowspan="6">Some, but not all, of the parties adopt the simplified LOB provision under article 7(6), in a multilateral agreement setting.</td><td rowspan="6">Do all the parties not adopting article 7(6) agree to adopt article 7(7)(a) symmetrically, or article 7(7)(b) asymmetrically?</td><td rowspan="2">If yes for (a), does either party make reservation not to adopt simplified LOB under article 7(15)(c)?</td><td>If yes, article 7(7)(a) shall not apply.</td><td>Notify application of article 7(15)(c), as per article 28(8).</td></tr>
<tr><td>If no, article 7(7)(a) shall apply in place of, or in the absence of, a simplified LOB provision symmetrically.</td><td>Notify Depositary, in accordance with article 7(17)(d), which CTA article and paragraph will be modified.</td></tr>
<tr><td rowspan="2">If yes for (b), does either party make reservation not to adopt a simplified LOB under article 7(15)(c)?</td><td>If yes, article 7(7)(b) shall not apply.</td><td>Notify application of article 7(15)(c), as per article 28(8).</td></tr>
<tr><td>If no, article 7(7)(b) shall apply in place of, or in the absence of, a simplified LOB provision asymmetrically.</td><td>Notify Depositary, in accordance with article 7(17)(d), which CTA article and paragraph will be modified.</td></tr>
<tr><td rowspan="2">If no agreement is reached, does either party adopting article 7(6) make reservation for entire article 7 not to apply, in accordance with article 7(16)?</td><td colspan="2">If yes, article 7 does not apply, subject to a mutually satisfactory solution reached that meets the minimum standard.</td></tr>
<tr><td colspan="2">If no, the simplified LOB option does not apply because the condition in the second sentence of article 7(6) cannot be satisfied.</td></tr>
</table>

According to the information kept by the OECD Depositary as of April 30, article 7(7) applies to the CTAs of six contracting jurisdictions: Denmark, Iceland, Jamaica (provisionally), and Norway adopted (7)(a), while Ivory Coast (to be confirmed) and Greece adopted (7)(b).[4] Denmark, Iceland, and Norway are members of a multilateral agreement, the Convention Between the Nordic Countries for the Avoidance of Double Taxation With Respect to Taxes on Income and on Capital.

The fourth peer review reported that there were five multilateral agreements, including the agreement among members of the Caribbean Community (not compliant) and the Nordic Convention (becoming a compliant agreement on November 6, 2018).

Table 6. MLI and Tax Agreements Signed by Members of the Nordic Convention

	MLI (Multilateral Agreement)	Nordic Convention (Multilateral Agreement)	Bilateral Agreement With the United Kingdom
Denmark	Yes	Yes	Yes
Faroe Islands	No	Yes	Yes
Finland	Yes	Yes	Yes
Iceland	Yes	Yes	Yes
Norway	Yes	Yes	Yes
Sweden	Yes	Yes	Yes

The Faroe Islands is a member of the inclusive framework and a member of the Nordic Convention, but not a signatory of the MLI. The government of the United Kingdom has concluded a tax agreement with the government of the Faroe Islands. Assume that Nordic Convention signs up the MLI. In the bilateral relationship between the United Kingdom and the Nordic Convention, article 7(1) supersedes the denial-of-benefit provision in the Nordic Convention to the extent of incompatibility because the Faroe Islands is not a party to the MLI, in accordance with article 7(17)(a).

Respectively, in describing how the compatibility clause under article 7(2) (article 7(14)) modifies article 7(1) (article 7(8) to (13)), the second and third sentences in paragraph 17(a) of article 7 (paragraph 17(e) of article 7) carry the same language pattern (see Table 7).

The same language pattern is also used in article 6(5) (see Table 2) and other articles in the MLI, to which the later-in-time rule does not apply.

Table 7. Application in Multilateral Tax Agreements

Article 7(17)(a)	Article 7(17)(e)
The provision shall be replaced by the provisions of paragraph 1 . . . *In other cases, paragraph 1 . . . shall supersede the provisions of the Covered Tax Agreement only to the extent that those provisions are incompatible* with paragraph 1. [Emphasis added.]	Where all Contracting Jurisdictions have made a notification under subparagraph c) or d) with respect to a provision of a Covered Tax Agreement, *that provision shall be replaced by* the Simplified Limitation on Benefits Provision. *In other cases, the Simplified Limitation on Benefits Provision shall supersede the provisions of the Covered Tax Agreement only to the extent that those provisions are incompatible* with the Simplified Limitation on Benefits Provision. [Emphasis added.]

Conclusion

The MLI has proved to be an efficient way — indeed, the preferred way — to implement the minimum standard. This is particularly true for the inclusive framework members that need to update the existing treaty network that vary in different ways from the OECD model tax convention, concluded over a long period of time in the past.

However, the MLI cannot come into play if an inclusive framework member does not sign it. Also, the MLI cannot help in cases in which the inclusive framework members wish to adopt detailed LOB rules, for which the bilateral route must be used. Despite the above-mentioned

[4]OECD, "Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting" (updated Apr. 21, 2022).

limitations, a party that adopts the PPT alone can meet the action 6 minimum standard, which can be effectively achieved by signing the MLI. Lastly, article 7(17)(a) provides that the MLI is not exclusive in that a party can declare that while it accepts the application of PPT alone as an interim measure, it intends when possible to adopt a detailed LOB option in addition to, or in replacement of, the PPT option through bilateral negotiation. ■