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THE CONFERENCE OF THE PARTIES: A FUTURE FOR A MORE PROFOUND MULTILATERALISM IN TAX MATTERS?

Abstract: *The present contribution is aimed at assessing the potential practical reach of the Conference of the Parties, a mechanism provided for under art. 31 of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, which was signed on 7 June 2017 in Paris and to which currently 94 taxing jurisdictions are signatories. Since the scope of application of the Conference of the Parties is conditioned on the legal nature and modus operandi of the said Convention, the first part of the article will be dedicated to their analysis. Furthermore, the author will consider in detail the provisions of the Convention intended to establish the procedural framework for the operation of the Conference of the Parties. The analysis will then be focused on some of the essential questions which the Convention failed to regulate: the decision-making process applicable by the Conference of the Parties and the legal effect of its future decisions, by having recourse to the Vienna Convention on the Law of Treaties.*

Although it remains questionable if the Conference of the Parties could have a role as important as it does in other fields of public international law, considering the countries' traditionally vigilant approach to the limitations of their fiscal sovereignty, the author contends that this mechanism could potentially serve as a basis for a more thorough cooperation between taxing jurisdictions worldwide, especially now that the world is struggling with yet another economic crisis. What seems to be necessary in this respect is the shift of international tax policy design from a handful of richest countries to a more inclusive circle of jurisdictions, for which the Conference of the Parties could provide a framework.

Keywords: *Conference of the Parties. – Multilateral instrument (MLI). – Double Taxation Treaties. – Tax Sovereignty. – Tax Cooperation.*

1. INTRODUCTION

The matter of taxation has traditionally been regarded as a quintessential question of state sovereignty. As pointed out by Graetz: “No function is more at the core of government than its system of taxation”.¹ Since tax policy establishes and reflects relationships between the market, the citizen and the state, it is often put forward that decisions involving taxation issues are to be made within national borders, without the interference from other countries.² However, in the domain of international tax law, effective policy design and implementation often require interaction and, in recent times, ever increasing cooperation between countries around the globe.³

An overview of the historical development of the international tax system reveals that substantial advancements in its evolution usually ensued following extensive shocks in the global economy, be it those caused by warfare, or other reasons.⁴ One recent example is the 2008 financial crisis and the resulting recession, which prompted countries worldwide to impose harsh austerity measures in an attempt to achieve fiscal consolidation and financial stability. Austerity meant, among other things, an ongoing political focus on the fight against tax avoidance and aggressive tax planning, especially those conducted by multinational enterprises. The crisis enabled unprecedented political support for the revision of the long-established international tax regime.

The most comprehensive development stemming from the described political agenda was the so-called Base Erosion and Profit Shifting (hereinafter: BEPS) Action Plan published in 2015 by the Organisation for Economic Cooperation and Development (hereinafter: OECD) under a mandate of G20 countries. The underlying objective of this initiative was (1) the prevention of abuse of discrepancies between various national tax laws by multinational enterprises and (2) the improvement of basic principles of international taxation, for which it had become increasingly evident that they are not suitable for the globalized and digitalized economy. In order to achieve these goals, the BEPS Action Plan laid down 15 actions containing recommendations for measures which are intended to be in-

¹ Michael J. Graetz, “Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies”, *Brooklyn Journal of International Law*, Vol. 26, Issue 4, 2001, 1371.

² Allison Christians, “Sovereignty, Taxation and Social Contract”, *Minnesota Journal of International Law*, Vol. 18, 2009, 99.

³ Diane Ring, “What’s at Stake in the Sovereignty Debate?: International Tax and the Nation-State”, *Boston College Law School*, Research Paper 153, 2008, 1.

⁴ Take, for instance, the fact that the work resulting in building the basis for the drafting of the first double tax treaty model ensued after the World War I. Moreover, it was after the World War II that the personal income tax was remodelled in numerous countries around the world from a tax targeting upper class citizens exclusively to a generalized tax levied on all citizens.

troduced into national tax legislations, as well as measures focused on the modification of double tax treaties.⁵

However, the implementation of treaty-focused measures into more than 3.000 existing double tax treaties around the world by way of usual bilateral negotiations would have been rather time-consuming⁶ and, inevitably, inconsistent. For this reason, Action 15 of the BEPS Action Plan envisaged the development of the so-called *Multilateral instrument*,⁷ which would allow for a simultaneous modification of all the existing tax treaties by implementing tax treaty measures formulated by the BEPS Action Plan, thereby facilitating an efficient and coordinated modification of the present tax treaty network. The actual outcome of BEPS Action 15 was the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter: the Convention or the Multilateral instrument). It was signed on 7 June 2017 in Paris by 67 jurisdictions and entered into force on 1 July 2018. To this date, 94 jurisdictions became signatories to the Convention, with four more jurisdictions expressing their intent to sign it.⁸

At the time of its inception, the Convention was hoped to lay the foundation of a new era for the international tax regime – an era of multilateralism – by initiating the harmonization of rules on cross-border taxation.⁹ However, as the process of its designing progressed, it became obvious that various compromises will have to be made in order for the Convention to be embraced by a significant number of signatories.

2. THE NATURE AND MODUS OPERANDI OF THE MULTILATERAL INSTRUMENT

In substance, the Convention represents a multilateral treaty under public international law. However, it is extraordinary in that it does not replace the ex-

⁵ Being a soft-law instrument and, as such, not legally binding, the BEPS Action Plan required transposition into national law, i.e. national tax legislation and double tax treaties. European Parliament, *Understanding BEPS: From tax avoidance to digital tax challenges*, EPRS Briefing, October 2019, 4.

⁶ As the OECD's final report on BEPS Action 15 indicated, renegotiation of one jurisdiction's treaty network may well take a decade to finalize. OECD/G20, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Base Erosion and Profit Shifting Project, Action 15: 2015 Final Report*, OECD Publishing, Paris 2015, 16.

⁷ *Ibid.*, 11.

⁸ OECD, *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting, Status as of 29 September 2020*, <http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf>, 8 October 2020.

⁹ Multilateralism is traditionally a rarity when it comes to treaties for avoidance of double taxation. Prior to the signing of the Multilateral instrument, there were only a few examples of multilateral tax treaties, among which the most notable one was the Nordic tax treaty concluded between Denmark, the Faroe Islands, Finland, Iceland, Norway and Sweden.

isting double tax treaties, although it regulates essentially the same subject matter. Namely, it is not intended to be a completely independent instrument, but operates as a complementary tool.¹⁰ This means that the Convention applies *alongside* with the existing tax treaties, modifying thereby the application of some of their provisions (provided, of course, that the treaty partners in question became parties to the Convention itself).¹¹ As such, the Convention leaves the bilateral nature of the tax treaty framework untouched.¹² Thanks to its distinct function, the Multilateral instrument contains two types of provisions. The first type includes norms which are directed at modifying specific provisions of existing tax treaties and which are therefore referred to in the literature as substantive provisions.¹³ The second type refers to provisions which address the functioning of the Multilateral instrument itself, as well as those regulating the relationship between the Multilateral instrument and the existing tax treaties, for which reason they are referred to as instrumental provisions.¹⁴

In order to generate a wide consensus and gather a noteworthy number of signatories, the Multilateral instrument permitted a varying level of signatories' commitment toward various treaty partners,¹⁵ as well as *vis-à-vis* different substantive issues.¹⁶ In practice, this endeavour manifested itself in a multiplicity of options for signatories being incorporated into the Convention. These were technically implemented by way of opt-in clauses, opt-out clauses, and the so-called alternative clauses, which allowed the signatories to choose among alternative solutions of equal value.¹⁷

Due to the peculiar nature of the relationship between the Multilateral instrument and each of the existing tax treaties, it was crucial to specifically address the mechanism for resolving potential conflicts between them. While conflicts

¹⁰ Alexandra Miladinovic, Alexander Rust, "Options Under the Multilateral Instrument", *The OECD Multilateral Instrument for Tax Treaties*, Wolters Kluwer, Alpen aan den Rijn 2018, 147.

¹¹ Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, para. 13.

¹² CFE Fiscal Committee, "Opinion Statement FC 15/2014 on Developing a Multilateral Instrument to Modify Bilateral Tax Treaties (BEPS Action 15)", *European Taxation*, April 2015, 157.

¹³ It should be borne in mind that these provisions do not, on their own, allocate taxing rights, as it is the case with the substantive provisions contained in double tax treaties. Nevertheless, they may affect the allocation of taxing rights conducted by double tax treaties.

¹⁴ Werner Haslehner, "A Multilateral Interpretation of the Multilateral Instrument (and Covered Tax Agreements)?" *Bulletin for International Taxation*, Vol. 74, Issue 4/5, 2020, *Journal Articles & Papers*, IBFD Research Database, 3.

¹⁵ The Multilateral instrument provides an option for the signatories to exclude from its scope tax treaties which they wish to keep unchanged or they prefer to amend bilaterally. The treaties which are designated to be modified by the Multilateral instrument are referred to in this article (as well as in the Convention) as the Covered Tax Agreements.

¹⁶ OECD/G20, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties*, 22.

¹⁷ For a thorough analysis of the opt-in, opt-out and alternative clauses in the context of the Multilateral instrument see: A. Miladinovic, A. Rust, 141-146.

between norms dealing with the same subject matter can easily be solved in the domain of national law, the same is not true with respect to public international law, because the latter is characterised by the absence of a hierarchical structure.¹⁸ The solution was therefore found in what is usually referred to as “conflict clauses” or “compatibility clauses”. These are clauses included in the texts of international treaties with the purpose of regulating the relationship between the international agreement employing the clause and other treaties.¹⁹ Each provision of the Convention presupposes a separate compatibility clause. This is because the interactions of various MLI’s provisions with existing tax treaties and the corresponding modifications resulting therefrom differ considerably.²⁰

The manner in which the Multilateral instrument was designed is conditioned on the need to respect the principle of fiscal sovereignty of its parties, while at the same time allowing for a minimum level of cooperation required to enable the reform of the existing international tax regime. In this respect, the OECD has at the very beginning stated that the Multilateral instrument “should be conceived in a dynamic way”, in order to serve as a basis for the future facilitation of the implementation of changes into the international tax treaty structure.²¹ It therefore seems reasonable to perceive the Multilateral instrument as a mechanism which is supposed to enable an ongoing cooperation and further developments in the international tax arena, instead of being a one-time driver of reforms.²² Especially one mechanism included in this Convention may provide ground for this reasoning – the Conference of the Parties.

3. THE CONFERENCE OF THE PARTIES

3.1. General overview

Similarly to numerous other multilateral instruments of public international law, the Convention introduced in its art. 31 the so-called *Conference of the Parties*

¹⁸ Kerstin Odendahl, “Article 30: Application of successive treaties relating to the same subject matter”, *Vienna Convention on the Law of Treaties: A Commentary* (eds. Oliver Dörr, Kirsten Schmalenbach), Springer 2012, 506.

¹⁹ Nele Matz-Lück, “Treaties, Conflict Clauses”, *Max Planck Encyclopaedia of Public International Law*, (ed. Rüdiger Wolfrum), Oxford University Press 2012. <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1466#:~:text=1%20Conflict%20clauses%2C%20also%20known,between%20provisions%20stemming%20from%20different>, 9 October 2020.

²⁰ Sriram Govind, Pasquale Pistone, “The Relationship Between Tax Treaties and the Multilateral Instrument: Compatibility Clauses in the Multilateral Instrument”, *The OECD Multilateral Instrument for Tax Treaties* (eds. Michael Lang et al.), Wolters Kluwer, Alpen aan den Rijn 2018, 118.

²¹ OECD/G20, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Base Erosion and Profit Shifting Project, Action 15: 2015 Final Report, OECD Publishing, Paris 2015, 26.

²² Ian Bradley, Jonathan Bright, “State sovereignty and the multilateral instrument”, *Canadian Tax Journal*, Vol. 64, No. 2, 2016, 467.

– a body whose competence is, in short, to provide for continuous governance of the Convention. According to Valke, the Conference of the Parties represents “a type of institutionalized intergovernmental co-operation”.²³ Yet, although it is institutionally separated from the treaty parties constituting it, the Conference of the Parties does not have legal personality and, consequently, cannot form a will of its own.²⁴ Therefore, it may only act on behalf of the parties to the treaty.²⁵

3.2. Competences of the Conference of the Parties under the Multilateral instrument

As per art. 31 of the Multilateral instrument, the parties may convene a Conference of the Parties for the purposes of taking any decisions or exercising any functions as may be required or appropriate under the provisions of the Convention. Although the cited provision clearly refers only to the parties to the Convention, the Explanatory Statement indicates that the signatories²⁶ to the Convention may also participate in the Conference of the Parties, provided that the parties had previously invited them.²⁷ In order to determine the competences of the Conference of the Parties more precisely, recourse should be made to arts. 32 and 33 of the Multilateral instrument. Namely, the Explanatory Statement specifies that the Conference of the Parties could be convened: 1) to address questions of interpretation or implementation of the Convention as foreseen in art. 32(2) of the Convention or 2) to consider a possible amendment to the Convention as provided for under art. 33(2) of the Convention.²⁸

3.2.1. Interpretation and Implementation of the Multilateral instrument

Pursuant to art. 32(2) of the Multilateral instrument, any question arising as to the interpretation or implementation of the Convention may be addressed by a Conference of the Parties convened in accordance with the procedural rules specified in art. 31(3) of the Convention. However, art. 32 contains, in its first paragraph, another provision dealing with interpretational issues. This provision states

²³ Volker Röben, “Conference (Meeting) of States Parties” *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2015, 1.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Pursuant to art. 2, para. 1, indent b) the term *party* means a state for which the Convention is in force, as well as a jurisdiction which has signed the Convention pursuant to subparas. b) or c) of para. 1 of art. 27 and for which the Convention is in force, whereas in line with art. 2, para. 1, indent d) a *signatory* to the Convention means a state or jurisdiction which has signed the Convention but for which the Convention has not yet entered into force.

²⁷ Explanatory Statement, para. 312.

²⁸ Explanatory Statement, para. 311.

that any question arising as to the interpretation or implementation of provisions of Covered Tax Agreements²⁹ as they are modified by the Convention shall be determined in accordance with the provision(s) of the Covered Tax Agreement which provide for the resolution by mutual agreement of questions of interpretation or application of the Covered Tax Agreement.

Although both paragraphs of art. 32 deal with mechanisms which may be utilized to address interpretational and implementational issues, they differ with regards to a specific instrument of public international law from which these issues may emanate. Whereas the first paragraph of art. 32 addresses interpretational and implementational questions in the case of Covered Tax Agreements as they are modified by the Multilateral instrument, the second paragraph of the same article concerns questions of interpretation and implementation of the Multilateral instrument itself. This differentiation is important because it is only for the latter category of questions that the Convention envisages the Conference of the Parties as a potential forum for discussion and decision-making.

When it comes to questions of interpretation and implementation of double tax treaties which were modified by the Multilateral instrument, it is stipulated that they are to be addressed through the Mutual Agreement Procedure (hereinafter: MAP). The MAP is prescribed in virtually all double tax treaties concluded around the globe, in a separate article corresponding to art. 25 of the OECD Model Convention,³⁰ or the UN Model Convention.³¹ In both of the models, art. 25(3) stipulates that any difficulties or doubts arising as to the interpretation or application of a tax treaty shall be endeavoured to be resolved through mutual agreement by the competent authorities of the contracting states.³² It is up to the contracting states to designate the authority which will be regarded as competent for the purpose of applying the tax treaty in question.³³ The particular authorities which are endorsed as competent are identified in an article corresponding to art. 3(1)(f) of the OECD Model Convention, or art. 3(1)(e) of the UN Model Convention. This will, in majority of cases, be the official at the highest level of a contracting state's tax administration, i.e. the minister of finance.

The wording of art. 32 seems to imply that there is a clear demarcation line between matters that may be addressed by the two described mechanisms. In fact,

²⁹ See: footnote 13.

³⁰ OECD, *Model Tax Convention on Income and on Capital*, OECD Publishing, Paris 2017.

³¹ United Nations: Department of Economic and Social Affairs, *Model Double Taxation Convention between Developed and Developing Countries*, United Nations, New York 2017.

³² The described type of MAP is referred to in the literature as the *interpretative MAP*. See: Marina Lombardo, "The Mutual Agreement Procedure (Art. 25 OECD MC) – A tool to overcome interpretation problems?", *Fundamental Issues and Practical Problems in Tax Treaty Interpretation* (eds. M. Schilcher, P. Weninger), Linde, Vienna 2008, 462.

³³ Para. 7, Commentary on Art. 3 of the 2017 OECD Model Convention and para. 9, Commentary on Art. 3 of the 2017 UN Model Convention.

the Explanatory Statement makes clear that the purpose of the first paragraph of art. 32 is only to clarify „the mechanism for determining questions of interpretation and implementation of Covered Tax Agreements, *as opposed to* questions of the interpretation and implementation of the Convention itself“ (emphasis added).³⁴ It is therefore evident that the intention of the drafters was to establish two completely separated procedures and not a two-instance procedure which could address the same matters.³⁵ Nevertheless, it is interesting that, in respect to the second paragraph, the Explanatory Statement specifies that the word „may“ is used because „there could be other means by which to address questions of interpretation and implementation of the Convention“ and as an example states the possibility of „competent authorities agreeing between themselves on how the Convention will operate in relation to a particular tax treaty“. This implies that the MAP may be utilized to address both types of issues, whereas the Conference of the Parties is reserved for questions relating to the application of the Multilateral instrument which are multilateral in substance.

It remains to be seen whether interpretational and implementational issues emerging in practice will be so clear-cut to allow for a straight-forward identification of the adequate mechanism for their resolution. After all, the questions of interpretation and implementation of „Covered Tax Agreements which have been modified by the Convention“ presuppose that the questions of interpretation and implementation of the Convention were previously resolved.³⁶ Although the intended rationale appears to be the demarcation between substantive and instrumental provisions of the Multilateral instrument,³⁷ the author is of the opinion that this has not been carried through carefully. The line is especially blurred by the example provided in the Explanatory Statement that the MAP could be used to determine „how the Convention has modified a specific Covered Tax Agreement pursuant to the compatibility clauses and other provisions set out in the Convention“,³⁸ since compatibility clauses clearly fall within the scope of instrumental provisions of the Multilateral instrument.

3.2.2. *Amendment of the Multilateral instrument*

Pursuant to art. 33(2) of the Multilateral instrument, a Conference of the Parties may be convened to consider the proposed amendment in accordance with

³⁴ Explanatory Statement, para. 315.

³⁵ Raphael Holzinger, „The Relevance of the Conference of the Parties for the Interpretation and Amendment of the Multilateral Instrument“, *The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects*, Wolters Kluwer, New York 2018, 56.

³⁶ Cf. Michael Lang, „Die Auslegung des multilateralen Instruments“, *Steuer und Wirtschaft International*, Vol. 27, Issue 1, 2017, 21.

³⁷ See also: W. Haslehner, 3.

³⁸ Explanatory Statement, para. 315.

the procedural rules specified in art. 31(3) of the Convention. It was already in the BEPS Action Plan that the OECD underlined the importance of a built-in procedure in the Multilateral instrument which would enable swift and simple amendment of its provisions in the future.³⁹ However, the manner in which art. 33(2) of the Multilateral instrument is drafted suggests that the Conference of the Parties has a rather limited task in this respect. It is only obliged to consider the proposed amendment, but not to actually reach a decision on it.⁴⁰

3.3. Procedural framework for the functioning of the Conference of the Parties

In regard to both of the above analysed competences of the Conference of the Parties, the same procedural rules are applicable. As the provisions of the Multilateral instrument concerning the Conference of the Parties are rather brief, there is very little information regarding the procedural framework within which the Conference of the Parties is expected to operate in the future.

In its second paragraph, art. 31 establishes the role of the General Secretary of the OECD as the depositary of the MLI within the procedural framework by underlining that „the Conference of the Parties shall be served by the depositary“. The third paragraph of the same article further specifies that Conference of the Parties may be initiated by any party to the Convention via a request to the depositary. The depositary is further obliged to inform all the parties of any requests received. Once informed, the parties have six months to express their stance on the request in question. If, within six months as of the moment the parties were informed of the request, one third of them express their support for the request, the depositary *shall convene* a Conference of the Parties. The Explanatory Statement further states that it is not necessary for the Conference of the Parties to meet in person. Meetings conducted through the use of digital means of communication (e.g. videoconference or teleconference), as well as decision-making in written form are also allowed.⁴¹

However, neither the Convention, nor the Explanatory Statement address the form, or the content of the request capable to initiate the Conference of the Parties. It is therefore unclear what requirements such request must fulfil in order for the depositary to forward it to the parties to the Convention. Moreover, the Convention, as well as the Explanatory Statement, fails to address the time framework regarding the depositary's obligation to inform the parties of the request. The only prescribed deadline – the six months period – conditions the instigation of the Conference of the Parties by requiring one third of all the parties to come forward with their support for the request within that time.

³⁹ OECD/G20, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties*, 22.

⁴⁰ R. Holzinger, 57.

⁴¹ Explanatory Statement, para. 312.

Due to the rather modest provisions regarding the procedural aspects of the operation of the Conference of the Parties, as well as absence of supplementary clarifications in the Explanatory Statement, matters such as the decision-making process and the legal effect of decisions reached by the Conference of the Parties may only be analysed by having recourse to the Vienna Convention on the Law of Treaties (hereinafter: VCLT).⁴²

3.3.1. *The decision-making process*

As regards the decision-making process, the crucial question to be answered is the quorum of attendance and the exact majority needed for the Conference of the Parties to reach a decision. The VCLT provides a clear answer regarding this question in the case of amendment of a treaty. Art. 9(2) of the VCLT applies, as a residual rule, in situations in which the negotiators have not specifically agreed on the majority needed for the adoption of the text of a treaty.⁴³ Although the said provision primarily refers to the initial drafting of a new treaty, it may also be applied to a situation in which the existing treaty text is being amended, provided that the treaty omits the provision specifying the majority needed for the future adoption of its amended text. The article in question stipulates that the adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the states that are present and voting.⁴⁴ The question of quorum of attendance is not dealt with.

Nevertheless, even if the two thirds majority is reached, this only means that, after considering the proposed amendment of a treaty, the parties have reached an agreement on its final version. Voting for a certain version of the text of a treaty does not equate with party's consent to be bound by it in the future.⁴⁵ For this to happen, a party must express its consent by signature, exchange of instru-

⁴² Some of the parties to the Multilateral instrument are not parties to the VCLT. However, the provisions relevant for determining the legal effect of the decision of the Conference of the Parties, i.e. the rules on treaty interpretation contained in art. 31 of the VCLT are considered to reflect customary international law. Accordingly, they are in principle applicable also to the treaties concluded between jurisdictions that are not parties to the VCLT. Chang-fa Lo, *Treaty Interpretation Under the Vienna Convention on the Law of Treaties*, Springer, Singapore 2017, 46. The answer is not as clear-cut in the case of provisions addressing the decision-making process. Nevertheless, the International Law Commission did justify the chosen rule on decision-making majority with the fact that it was "so frequent" in the treaties at that time. International Law Commission, *Draft Articles on the Law of Treaties with Commentaries 1966*, United Nations 2005, 195, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf, 5 November 2020.

⁴³ Frank Hoffmeister, "Article 9. Adoption of the Text", *Vienna Convention on the Law of Treaties – A Commentary* (eds. Oliver Dörr, Kirsten Schmalenbach), Springer, Berlin-Heidelberg 2012, 137.

⁴⁴ That is, unless the same majority of present and voting states decide to apply a different rule.

⁴⁵ *Ibid.*, 145.

ments constituting a treaty, ratification, acceptance, approval or accession, or by any other means previously agreed upon.⁴⁶ In short, an amending agreement does not by itself have legal effects for all parties to the earlier (amended) treaty.⁴⁷

When it comes to the decision-making process regarding interpretational and implementational matters, the situation is not as straight-forward. The prevailing view presented in the literature is that the two thirds majority is by analogy applicable to this situation as well, having in mind „the parallel regulation” in art. 31(3) of the procedural framework for both competences of the Conference of the Parties, i.e. the amendment of the Convention and the interpretation and implementation thereof.⁴⁸ Additional argument supporting this view is that the decision of the Conference of the Parties regarding a certain interpretational or implementational issue cannot result in more substantial ramifications on the understanding of the Convention than what can be expected to be the case in an event of its amendment. Therefore, if the two thirds majority is acceptable for decisions resulting in amendments, it should be even more so in the case of decisions formulating authoritative interpretation of the Convention.⁴⁹ On the other hand, it seems incautious to assume that the same majority rule should apply in both cases since, when it comes to amending the treaty, agreement of the parties does not on its own accord result in parties being bound by it. In comparison to authoritative interpretation, the amendment of the treaty presupposes, as we have already pointed out, subsequent expression of consent of the parties for it to have any effect on them.⁵⁰

3.3.2. *Legal effect of the decisions reached*

Leaving aside the applicable decision-making majority necessary for the Conference of the Parties to reach a decision concerning interpretational or implementational matters, we will now focus on analysing potential legal effects of such decisions. Section III of the VCLT contains provisions laying down rules for the interpretation of international treaties. The crucial provision here is art. 31 of the VCLT, which sets forth the general rule of treaty interpretation. The first paragraph of this article presupposes that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The cited provision intends, among other things, to avert the interpreter from establishing an abstract ordinary

⁴⁶ Art. 11 of the VCLT.

⁴⁷ Kerstin Odendahl, “Amendment of multilateral treaties”, *Vienna Convention on the Law of Treaties – A Commentary* (eds. Oliver Dörr, Kirsten Schmalenbach), Springer, Berlin-Heidelberg 2012, 715-716.

⁴⁸ M. Lang, 20.

⁴⁹ R. Holzinger, 61.

⁵⁰ See also: W. Haslechner, 6.

meaning of a term, by requiring that the terms be interpreted in their context.⁵¹ The second paragraph of art. 31 defines the meaning of the term *context* for the purpose of the interpretation of a treaty. Pursuant to this definition, context includes, firstly: the text of the treaty itself, together with its preamble and annexes, and secondly: the following instruments of interpretation extrinsic to the treaty: a) an agreement relating to the treaty which was made between all the parties *in connection with the conclusion of the treaty* and b) 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. It is clear that the decision of the Conference of the Parties on authentic interpretation of the Multilateral instrument cannot fall within the scope of the second paragraph of art. 31. Namely, both previously specified instruments of interpretation are required to be „in a certain temporal proximity to a process of conclusion“ of the treaty,⁵² which, when it comes to the decisions of the Conference of the Parties, *de facto* cannot be the case.

On the other hand, the third paragraph of art. 31 requires that the developments emerging *after* the conclusion of the treaty are taken into account.⁵³ In principle, decisions of the Conference of the Parties on interpretational and implementational matters could potentially be subsumed under this provision. However, this paragraph specifies three different categories of subsequent developments that are to be considered: a) subsequent agreement between the parties regarding the interpretation or the application of treaty provisions, b) subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation and c) any relevant rules of international law applicable in the relations between the parties.

It is evident that the decision reached by the Conference of the Parties cannot be regarded as a rule of international law applicable in the relations between the parties, as provided for under art. 31(3)(c) of the VCLT. The purpose of the said provision, referred to in the literature as the principle of systemic integration,⁵⁴ is to establish a basis for systemic approach in treaty interpretation. Hence, it refers to the international legal system as a whole, being a part of the context of a treaty which is being interpreted.⁵⁵ Decisions of the Conference of the Parties also cannot be thought to constitute subsequent practice in treaty application pursuant to

⁵¹ Oliver Dörr, “Article 31. General rule of interpretation”, *Vienna Convention on the Law of Treaties – A Commentary* (eds. Oliver Dörr, Kirsten Schmalenbach), Springer, Berlin-Heidelberg 2012, 543.

⁵² *Ibid.*, 551.

⁵³ *Ibid.*, 523.

⁵⁴ Campbell McLachlan, “The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention”, *International and Comparative Law Quarterly*, Vol. 54, No. 2, 2005, 280.

⁵⁵ Oliver Dörr, 560.

art. 31(3)(b) of the VCLT, since “practice cannot be established by one isolated incident”.⁵⁶ On the contrary, it presupposes a series of consistent acts by the parties to a treaty.⁵⁷ Finally, it only seems feasible for art. 31(3)(a) of the VCLT to be applicable to the decisions which the Conference of the Parties reaches on questions of interpretation and implementation of the Multilateral instrument. Namely, this provision deals with subsequent agreements relating to interpretation or application of treaty provisions authored by the parties “acting in consensus”.⁵⁸ Certain authors are of the view that, since this provision of the VCLT requires an “agreement” among the parties and, hence, unanimity, such outcome is hardly possible.⁵⁹ However, if we take into consideration that consensus in public international law is usually understood as a general (and not unanimous) agreement among the subjects of public international law^{60,61} the prognosis might not need to be so bleak.

Art. 31(4) of the VCLT allowing for a special meaning to be given to a certain treaty term cannot either be relevant in the present case, as it refers to a situation in which the intention of the parties to give a special meaning to a term ought to exist at the time of the conclusion of the treaty.

It should nonetheless be kept in mind that even in the event that a decision of the Conference of the Parties may be subsumed under art. 31(3)(a), this only means that it “shall be taken into account, together with the context” of the treaty. In other words, it cannot take precedence over the elements of the above-cited general rule of interpretation.⁶²

3.4. Conference of the Parties and Other Multilateral Treaties in Tax Matters

As already explained, multilateral treaties in tax matters are not a commonplace. Consequently, identifying a mechanism having the same or a role similar to that of the Conference of the Parties under the Multilateral instrument is a

⁵⁶ *Ibid.*, 556.

⁵⁷ The Conference of the Parties could, however, be used as a forum where parties to the Multilateral instrument could officially recognize the existence of a certain practice, on which they agree. This would contribute to a more transparent application of the Convention.

⁵⁸ O. Dörr, 553.

⁵⁹ W. Haslechner, 6.

⁶⁰ Francisco Pascual-Vives, “The Notion of Consensus in Public International Law”, *Consensus-Based Interpretation of Regional Human Rights Treaties*, Leiden 2019, 14.

⁶¹ Consensus procedure is generally seen as a medium between the majority voting and unanimity, as it does not require all the parties in the decision-making process to provide their consent. Consequently, it is easier and more probable that the consensus-based decision will be reached, than the unanimity-based decision. Rüdiger Wolfrum, Jakob Pichon, “Consensus”, *Max Planck Encyclopedia of Public International Law* (ed. Rüdiger Wolfrum), Oxford University Press, Oxford, 2010, 5.

⁶² M. Lang, 22.

rather problematic endeavour. Among the existing multilateral treaties in tax matters, the one comparable to the Multilateral instrument in terms of the number of signatories and, to a certain extent, the type of provisions it contains,⁶³ is the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (hereinafter: the Convention on Mutual Administrative Assistance).⁶⁴

In its art. 24, the Convention on Mutual Administrative Assistance contains provisions establishing a Coordinating Body with a seemingly equivalent function to that of the Conference of the Parties. Namely, paragraph 3 of the said article states that a Coordinating Body is composed of representatives of the Parties' competent authorities and is intended to monitor the implementation and development of this Convention, under the aegis of OECD. The Convention further specifies that the Coordinating Body may, in particular, recommend revisions or amendments to the Convention. Paragraph 4 of the same article also stipulates that each party to the Convention may ask the Coordinating Body to furnish opinions on the interpretation of the provisions of the Convention. Unlike the rules contained in the Multilateral instrument, the provisions of the Convention on Mutual Administrative Assistance regarding the Coordinating Body have been thoroughly elaborated upon in the Rules of Procedure which were issued subsequently.⁶⁵ The Rules of Procedure addressed numerous relevant aspects of the procedural framework for the functioning of the Coordinating Body, e.g. its mandate and composition, the designation of its chair and vice chairs, the frequency of its meetings and their scheduling and, most importantly, the decision-making process. In this respect, the Rules of Procedure specifically presuppose that the decisions shall be taken by mutual agreement, i.e. consensus among the Coordinating Body delegates. Nonetheless, if the mutual agreement cannot be reached, a two-thirds majority of the Coordinating Body delegates will suffice.⁶⁶

It seems reasonable to assume that the same rules regarding the decision-making process could be formulated also in the context of the Conference of the Parties under the Multilateral instrument. The argument here is that the Convention

⁶³ To reiterate, the Multilateral instrument contains not only substantive provisions intended to modify the existing network of bilateral tax treaties, but also provisions of procedural nature – the so-called instrumental provisions. It is this category of provisions to which the author is referring here.

⁶⁴ The Convention on Mutual Administrative Assistance enables administrative cooperation in the assessment and collection of taxes, with the aim of tackling tax evasion and avoidance. Currently, 124 countries and 17 jurisdictions covered by territorial extension participate in this convention. OECD/Council of Europe, *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol*, OECD Publishing, Paris, 2011.

⁶⁵ OECD, *Rules of Procedure of the Co-ordinating Body of the Convention on Mutual Administrative Assistance in Tax Matters*, June 2015, available at: <https://www.oecd.org/ctp/exchange-of-tax-information/co-ordinating-body-rules-of-procedure.pdf>, 31 October 2020.

⁶⁶ Art. IX, para. 1, it. (a) of the Rules of Procedure of the Co-ordinating Body of the Convention on Mutual Administrative Assistance in Tax Matters.

on Mutual Administrative Assistance is a multilateral convention dealing with procedural tax matters, whereas the Conference of the Parties under the Multilateral instrument is a mechanism intended to be applicable only in relation to cases of interpretation and implementation of the previously mentioned instrumental provisions of the Multilateral instrument, which in substance deal with procedural matters. In any case, it would undoubtedly be recommendable that specific rules of procedure addressing the procedural framework in which the Conference of the Parties is expected to operate be formulated. These could be modelled upon the provisions contained in the Rules of Procedure of the Coordinating Body of the Convention on Mutual Administrative Assistance.

4. CONCLUDING REMARKS

The research has shown that the provisions of the Multilateral instrument governing the functioning of the Conference of the Parties left a number of questions open. Some of them could be best addressed by introducing the rules of procedure which would specifically regulate relevant aspects of the procedural framework for its application. This is even more important if we bear in mind that, although the reach of the Conference of the Parties was initially seen with scepticism when assessed in the context of future promotion of multilateralism, the current social and consequent economic events may provide encouraging environment for multilateral approach to tax policy design. On the basis of previously outlined historical experience one could reasonably anticipate that the economic fallout caused by the Covid-19 pandemics will force governments around the globe into deeper coordination in tax matters. In this sense, it seems that the Conference of the Parties mechanism provides a formal basis for a forum for discussion of interpretational and implementational issues, as well as prospective amendments regarding the Multilateral instrument. Most importantly, this mechanism provides an opportunity to shift the international tax policy-making initiative from the long-privileged “club” of OECD member countries to a much wider group consisting of jurisdictions at various levels of economic development. There is still a very long way to go towards a world in which taxing rights of all sovereign states will not be shaped by principles devised by a relatively small group of affluent countries. Yet, the Conference of the Parties may represent the first step in the right direction.

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Конференција уговорних страна: основ за продубљени мултилатерализам у пореској материји?

Сажетак: Истичујући да је представљено у овом раду има за предмет анализу практичног домаћаја Конференције уговорних страна, механизма који је садржан у чл. 31 Међународне конвенције за примену мера које се у циљу сиречавања ерозије пореске основице и премештања добити односе на пореске уговоре, која је потписана 7. јуна 2017. године у Паризу и међу којима потписанима фигурирају чак 94 пореске јурисдикције. Будући да је домен примене Конференције уговорних страна условљен специфичном правном природом и начином функционисања поменутих конвенције, први део рада биће посвећен њиховом истичању и објашњавању. Наредни део излагања биће усмерен на детаљно разматрање одредаба Конвенције које су усмерене на успостављање процедуралног оквира у коме би Конференција уговорних страна требало да буде примењена. Срж рада чини анализа, са ослонцем на Бечку конвенцију о уговорном праву, кључних аспеката процедуралног оквира Конференције уговорних страна које је Конвенција проуздила да уреди: политика одлучивања Конференције уговорних страна, као и правних ефеката њених будућих одлука.

Према остаје ујачио да ли би Конференција уговорних страна могла да има улогу значајну у мери у којој је то случај у другим семенима међународног јавног права, а имајући у виду традиционално одбојан приступ држава ограничењима њиховог фискалног суверенитета, ауторка закључује да би анализирани механизам могао да послужи као основ за продубљену сарадњу у пореској материји међу јурисдикцијама широм света, посебно у околностима у којима се свет суочава са новом економском кризом. Чини се преко потребним измена формулисања међународне пореске политике из круга шачице најразвијенијих држава у руке шире круга пореских јурисдикција различитог нивоа економског развоја, за шта би Конференција уговорних страна могла да пружи полазни правни оквир.

Кључне речи: Конференција уговорних страна. – Мултилатерални инструменти (МЛИ). – Порески уговори. – Фискални суверенитет. – Сарадња у пореској материји.

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