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Vergouwen, T.M.; Broekhuijsen, D.M.; Reijnen, J.J.H.

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The Effectiveness of the Multilateral Instrument in Amending the Bilateral Treaty Network: (On) the Measure of Multilateral Success

T.M. Vergouwen,^[*]
D.M. Broekhuijsen^[**]
and J.J.H. Reijnen^[***]

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In this article, the authors discuss the implications of their study on the effectiveness of the Multilateral Instrument (MLI). Their analysis finds that there are 79 parties to the MLI and that the MLI covers 1,231 tax treaties and that the OECD currently overreports the effectiveness of the MLI.

1. Introduction

The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the Multilateral Instrument, or MLI),^[1] which was created to implement swiftly the treaty-related measures of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project, has been described as “ground-breaking”, “marking a turning point in tax treaty history” and as “the first multilateral treaty of its kind”.^[2] Having been adopted six years ago on 24 November 2016,^[3] a review of the effectiveness of the MLI is due. Is all this praise deserved?

In this article, the authors seek to answer the question of whether the MLI has achieved its purpose of swiftly implementing (part of) the OECD/G20 BEPS Project in terms of the parties and the bilateral tax treaties covered. The central approach of the analysis of the authors has been to assess whether the degree of implementation of the Multilateral Instrument on 31 December 2022 aligns with this purpose and the OECD’s ambitions regarding the implementation of the MLI under the OECD/G20 BEPS Project.^[4] To this end, the authors have studied empirically the (number of) parties to the Multilateral Instrument and the bilateral tax treaties whose application has been modified by the MLI as at 31 December 2022. They then discuss the findings and implications of the research regarding the effectiveness of the MLI.

The article is structured as follows. The purpose of the MLI and the OECD’s ambitions are first considered (see section 2.). The approach and methodology adopted for the purposes of empirically studying the effectiveness of the MLI are then set out (see section 3.). This is followed by the results of the research (see section 4.) and a discussion of its findings (see section 5.). The article ends with its conclusions and recommendations regarding the aim of the OECD and the G20 to conclude (yet) another multilateral tax agreement relating, in particular, to Pillar One (see section 6.).^[5]

* LLM and PhD fellow, Leiden University, and tax advisor De Brauw Blackstone Westbroek, Amsterdam. The author can be contacted at t.m.vergouwen@law.leidenuniv.nl.

** LLM and PhD and assistant professor, Leiden University, and tax inspector with the Dutch tax authorities. The author can be contacted at d.m.broekhuijsen@law.leidenuniv.nl.

*** LLM and lecturer, Leiden University. The author can be contacted at j.j.h.reijnen@law.leidenuniv.nl.

1. OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (7 June 2017), Treaties & Models IBFD [hereinafter the *Multilateral Instrument* or MLI].

2. See OECD, *Ground-breaking multilateral BEPS convention signed at OECD will close loopholes in thousands of tax treaties worldwide* (OECD), available at www.oecd.org/tax/ground-breaking-multilateral-beps-convention-will-close-tax-treaty-loopholes.htm (accessed 1 Dec. 2022).

3. The MLI was adopted 24 November 2016 and entered into force on 1 July 2018. On 7 June 2017, a high-level signing ceremony took place in Paris, with more than 70 states participating. With regard to these dates, see OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (OECD), available at <http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm> (accessed 1 Dec. 2022).

4. The research of the authors for this article is limited to the direct effects of the text of the MLI only. They recognize that their research does not take into account the broader effects of the *Multilateral Instrument* under the OECD/G20 BEPS Project of 2013 (for example, instances in which tax treaties are not brought within the scope of the MLI, but are (or have to be) subsequently updated in line with the minimum standards on the OECD/G20 BEPS Project).

5. OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, OECD/G20 Base Erosion and Profit Shifting Project, 8 October 2021 (OECD), available at <http://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> (accessed 1 Dec. 2022).

2. Assessing the Effectiveness of the Multilateral Instrument: The MLI's Purpose

In assessing the effectiveness of the MLI, reference is made to its purpose. With regard to this purpose, the starting point is that the MLI has been drawn up to swiftly implement the treaty-related measures of the OECD/G20 BEPS Project into the bilateral treaty network by multilateral means.^[6] It follows from this purpose that the effectiveness of the MLI should be measured by the following two metrics:

- (1) the speed by which it implements the treaty-related measures of the OECD/G20 BEPS Project; and
- (2) the number of tax treaties in respect of which such measures have been implemented by the MLI.

With regard to metric (1), the Final Report on Action 15 of 2015 makes it clear that the choice for a multilateral treaty – instead of implementation of the treaty-related measures of the OECD/G20 BEPS Project by bilateral means – was based on an urgent need for change.^[7] Being aware of the decades-long process for bilateral renegotiations, the OECD considered a multilateral instrument such as the MLI to be the only way to address treaty-based base erosion and profit shifting concerns in a swift manner.^[8]

With regard to the term “swift”, the OECD has not provided clear parameters in terms of the number of years within which the treaty-related measures in respect of the OECD/G20 BEPS Project should be implemented in the bilateral treaty network. The only guidance provided regarding the timing of implementation of the MLI is that the MLI should implement such measures within a “reasonable timeframe”^[9] or “over a reasonably short period”.^[10] Given this guidance, it is difficult to quantify the timeframe within which the MLI is intended to implement the treaty-related OECD/G20 BEPS Project measures. Is it five years? Ten years? Fifteen years? Notwithstanding this lack of guidance, the Final Report on Action 15 does contain strong indications to the effect that the MLI is intended to allow for an implementation of the treaty-related measures of the OECD/G20 BEPS Project in a way that is faster than would have been the case if such measures had been implemented by bilateral means, i.e. following bilateral renegotiation of each individual bilateral tax treaty. Based on the research of Broekhuijsen and Vergouwen (2021) regarding the time it takes to update the bilateral treaty network of the founding OECD member countries,^[11] this would entail that the MLI would be more effective – in terms of swiftness – if it were to allow for an implementation of the treaty-related measures in the OECD/G20 BEPS Project within a timeframe of 18.56 years for each individual bilateral tax treaty.^[12]

Whereas it is unclear which period of time should be considered reasonable (other than at least shorter than 18.56 years), this is less the case with metric (2). In its press releases, the OECD has stated that the MLI “will transpose results from the OECD/G20 Base Erosion and Profit Shifting BEPS Project into more than 2,000 tax treaties”,^[13] and that it “will close loopholes in thousands of tax treaties worldwide”.^[14] These statements appear to be aligned with the intention of the MLI in the Final Report on Action 15, where it is stated that:

governments have agreed to explore the feasibility of a multilateral instrument that would have the same effects as a simultaneous renegotiation of thousands of bilateral tax treaties.^[15]

It, therefore, seems to follow that it has been the (envisaged) purpose of the MLI to implement the treaty-related measures of the OECD/G20 BEPS Project in thousands, i.e. at least 2,000, bilateral tax treaties. Taking this aim into account, the purpose of the MLI can be stated as being aimed at implementing the treaty-related measures of the OECD/G20 BEPS Project in at least 2,000 bilateral tax treaties within a reasonable timeframe, which, in any event, should be a period of less than 18.56 years.

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6. To this end, see Preamble to the MLI and OECD, *Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, paras. 6 and 14 (7 June 2017), Treaties & Models IBFD. See also N. Bravo, *A Multilateral Instrument for Updating the Tax Treaty Network* sec. 2.2. (IBFD 2020), Books IBFD.
 7. OECD, *Action 15 Final Report 2015 – Developing a Multilateral Instrument to Modify Bilateral Tax Treaties* para. 6 (OECD 2015), Primary Sources IBFD [Action 15 Final Report (2015)].
 8. Id., at para. 12.
 9. Id., at para. 6.
 10. Id., at para. 8.
 11. In using the term “state”, the authors refer to states as well as territories (“jurisdictions”) for which a state is responsible (compare article 2(1) of the MLI).
 12. D.M. Broekhuijsen & T.M. Vergouwen, *How Often Do OECD Member Countries Update Their Tax Treaties?* 75 Bull. Intl. Taxn. 10, p. 447 (2021), IBFD Journal Articles & Opinion Pieces.
 13. OECD, *Countries adopt multilateral convention to close tax treaty loopholes and improve functioning of international tax system* (OECD), available at <http://www.oecd.org/tax/treaties/countries-adopt-multilateral-convention-to-close-tax-treaty-loopholes-and-improve-functioning-of-international-tax-system.htm> (accessed 1 Dec. 2022).
 14. See OECD, *supra* n. 2.
 15. Executive Summary, OECD, *Action 15 Final Report* (2015), *supra* n. 7.

3. Approach and Methodology

3.1. Approach

The effectiveness of the Multilateral Instrument is assessed by comparing the current state of its implementation, in terms of bilateral tax agreements covered, with the stated purpose of the MLI to modify at least 2,000 bilateral tax treaties within a reasonable timeframe. For the purposes of making this assessment, the following approach was adopted.

With regard to determining the number of tax treaties whose application is modified by the Multilateral Instrument, the authors consider a tax treaty to have been modified by the MLI if it qualifies as a Covered Tax Agreement (CTA) within the meaning of article 2(1)(a), given that article 1 states that the Multilateral Instrument modifies such CTAs.^[16] This approach entails that a bilateral tax treaty is only considered to be a CTA if, in accordance with article 2(1) of the MLI, (i) both states have deposited their Instrument of Ratification, acceptance or approval and, as such, whether the MLI has entered into force for both contracting states to the bilateral tax treaty in question,^[17] while (ii) both states have also listed that tax treaty as a CTA in their Instrument of Ratification (or in a later notification made after becoming a party).^[18] Taking these conditions into account, the number of states that have deposited their Instrument of Ratification would have to be assessed as well as the bilateral tax treaties listed in such instruments.^[19]

The next question is whether the period of six years since adoption of the MLI should be regarded as exceeding the reasonable timeframe. In order to answer this question, the authors assess how the current number of bilateral tax treaties modified by the MLI relates to the alternative of bilateral renegotiations based on the outcomes of earlier research of Broekhuijsen and Vergouwen (see section 2.).^[20]

3.2. Methodology

In order to assess the extent to which the MLI has been implemented, the authors have adopted the following methodology. As a first step, they have identified the tax treaties in force by means of the *IBFD Treaties & Models Collection* (hereinafter: the *IBFD Database*). Based on the *IBFD Database*, 3,484 tax treaties are in force (as at 19 October 2022).^[21] In the second step, the authors determined the extent to which the MLI affects the application of these tax treaties by consulting: (i) the *IBFD Database*, (ii) the so-called Matching Database of the OECD (the *OECD Database*);^[22] and (iii) the list of signatories and parties to the MLI as most recently published by the OECD (6 October 2022).^[23] Based on these three sources, the following information has been gathered regarding the implementation of the MLI:

- the date of signing and ratification of the Multilateral Instrument by a state, to the extent that it is a party to the MLI;
- the date upon which a bilateral tax treaty qualifies as a CTA;
- the date on which the MLI enters into force in respect of a state; and
- the date on which the MLI affects the application of a tax treaty.

16. In this research, the effectiveness of the *Multilateral Instrument* in terms of the bilateral tax treaties covered is measured based solely on whether the tax treaties qualify as CTAs in terms of article 2 of the MLI. The level of the coverage (minimum standards only and/or opt out of non-minimum standards) has not been taken into account. Consequently, the results of the research (see section 4.) reflect all CTAs equally, regardless of the level of coverage, and, therefore, represents treaty coverage in the broadest sense of the word.

17. As noted in *supra* n. 16, the MLI requires two "parties" to notify the CTA.

18. Art. 29(5) MLI.

19. With regard to this approach, it should be acknowledged that the qualification of a bilateral tax treaty as a CTA does not necessarily entail that the *Multilateral Instrument* already affects such a tax treaty. The timing of the modification of a CTA depends on the rules of the MLI regarding its entry into effect (see article 35). In this respect, the *Multilateral Instrument* distinguishes between the entry into force of withholding taxes and other taxes (i.e. corporate income taxes). Nevertheless, it still follows from article 1 of the MLI that it modifies each CTA. Accordingly, the qualification of a bilateral tax treaty as a CTA entails that it is modified, or shall be modified by the MLI.

20. Broekhuijsen & Vergouwen, *supra* n. 12.

21. The authors note that this number excludes four tax treaties that are in force on 31 December 2022. The reason for excluding these tax treaties is that there is a mismatch between the IBFD's *Treaties & Models Collection* and/or the *OECD Database* and the status of the relevant tax treaty on the basis of the lists of CTAs as deposited with the OECD. This relates to *Agreement between the Government of the State of Qatar and the Government of the Republic of Turkey for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (18 Dec. 2016), *Treaties & Models IBFD*; *Agreement between the Republic of India and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income* (2 Nov. 1994) (as amended through 2010), *Treaties & Models IBFD*; *Convention between the Republic of Poland and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital* (2 Sept. 1991) (as amended through 2010), *Treaties & Models IBFD*; and *Convention between the Republic of Mauritius and the Republic of Senegal for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (unofficial translation) (17 Apr. 2002), *Treaties & Models IBFD*.

22. See OECD, *MLI Matching Database (beta)* (OECD), available at www.oecd.org/tax/treaties/mli-matching-database.htm (accessed 19 Oct. 2022).

23. See OECD, *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (OECD), available at www.oecd.org/tax/treaties/beps-ml-signatories-and-parties.pdf (accessed 19 Oct. 2022).

All items of information were manually coded in an excel database freely available online through DANS, the Netherlands Centre of Expertise and Repository for Research Data.^[24]

4. Results

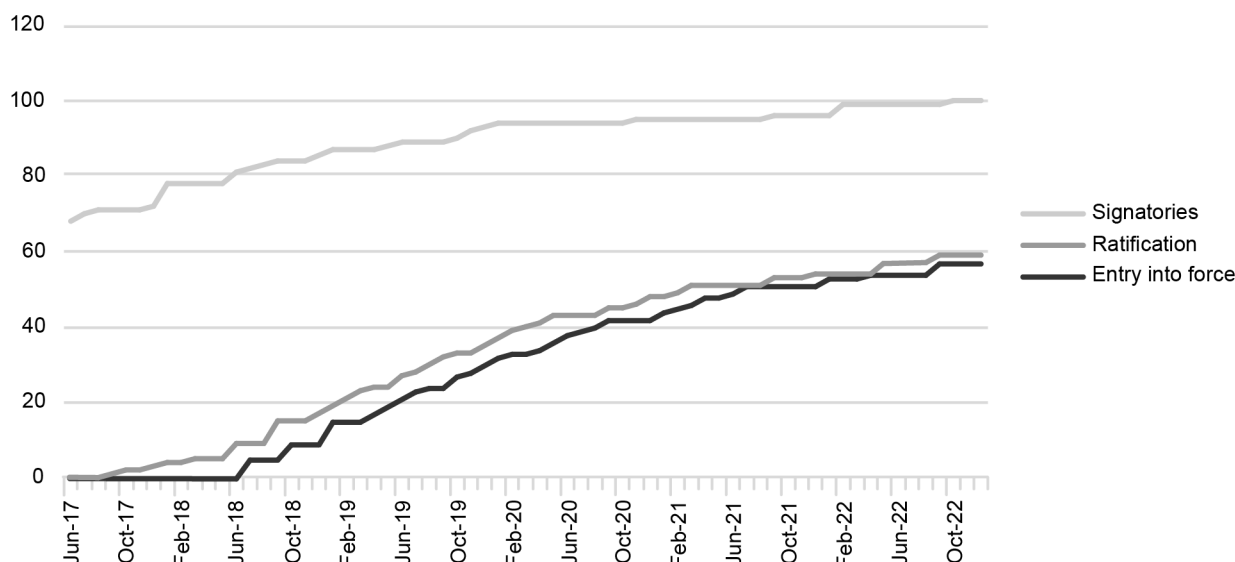
4.1. Introductory remarks

In sections 4.2. and 4.3., the results regarding the effectiveness of the Multilateral Instrument are set out in respect of each of the relevant metrics set out in section 2. These metrics are: (i) the parties to the MLI; (ii) the CTAs; and (iii) the timing of the modification of bilateral tax treaties by the Multilateral Instrument.

4.2. The parties to the MLI

Under article 2(1)(a) of the Multilateral Instrument, only bilateral tax treaties of contracting states in respect of which the MLI has entered into force can qualify as CTAs and, therefore, be modified by the Multilateral Instrument. Based on article 34 of the MLI, such entry into force takes place on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit by a signatory of its Instrument of Ratification. At the time of writing this article, there were 100 states that had signed the Multilateral Instrument, 79 states that deposited an Instrument of Ratification and 77 states in respect of which the MLI had entered into force. The development of these numbers between signing of the MLI on 7 June 2017 until 31 December 2022 are illustrated in Figure 1.

Figure 1. Development of signing, ratification and entry into force



4.3. The number of bilateral tax treaties modified by the MLI (CTAs)

Application of the definition of a CTA as set out in article 2(1)(a) of the MLI entails that there have been, on 31 December 2022, 1,231 bilateral tax treaties that qualify as a CTA. As such, the Multilateral Instrument has entered into effect with regard to these tax treaties, or will enter into effect in the future in accordance article 35 of the MLI, i.e., in principle, within six months of the entry into force of the Multilateral Instrument for both parties.^[25] The delay in qualification as a CTA and the entry into effect of the MLI is illustrated by Figure 2.^[26]

24. DANS, *The Effectiveness of the MLI in Amending the Bilateral Tax Treaty Network: (On) the Measure of Multilateral Success*, available at <https://doi.org/10.17026/dans-2cv-g4jt>. As entries were manually coded, all errors in the database are the authors'.

25. Article 35(1) of the *Multilateral Instrument* provides, for example, that the MLI enters, in principle, into effect with regard to a CTA as of the next calendar year following the entry into force of the *Multilateral Instrument* for both parties to a CTA or, if earlier, six calendar months after such entry into force for both parties.

26. For the purposes of Figure 2, reference has been made to the dates of entry into force of the MLI as published by the OECD and the lists of CTAs as confirmed on deposit of the Instrument of Ratification. If a bilateral tax treaty was included in both lists, it was considered to be a CTA as of the date of the latest entry into force of the MLI for both states. Furthermore, reference has been made to the *OECD Database* to determine the date of entry into effect of the MLI. In this database, information is provided with respect to 1,120 of the CTAs regarding the entry into effect of the MLI for each jurisdiction in respect of: (i) withholding taxes; and (ii) other taxes. This information made it possible to gather the dates on which the *Multilateral Instrument* modified the application

Figure 2. Development of entry into effect of the MLI (in terms of CTAs)

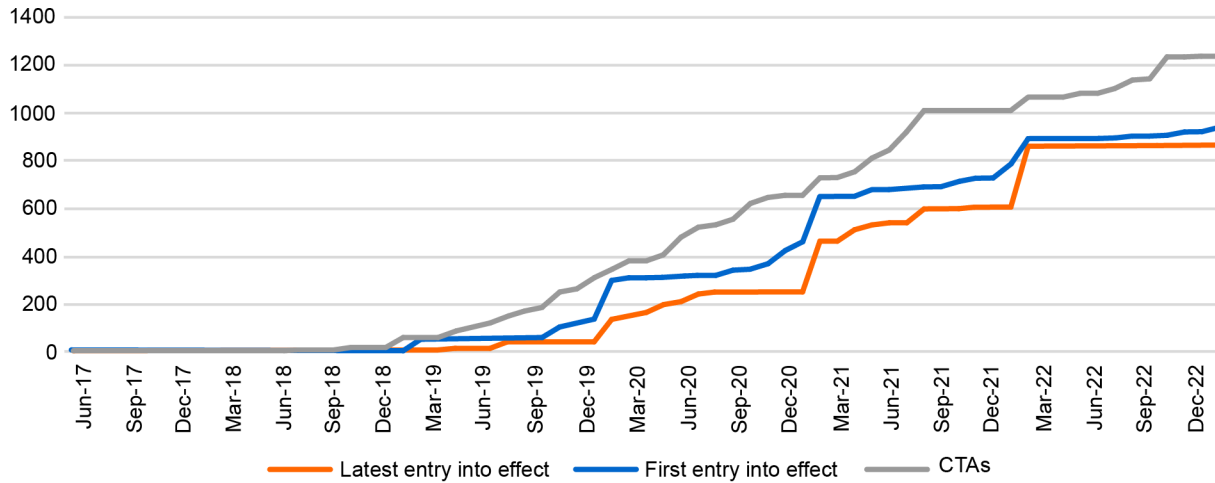


Figure 2 also demonstrates that the MLI has not immediately modified bilateral tax treaties. The MLI was adopted on 24 November 2016, ratified by the fifth state on 22 March 2018, and entered into force as of 1 July 2018. As such, bilateral tax treaties could not qualify as CTAs or, for that matter, be modified by the MLI before 1 July 2018. From 1 July 2018, the number of CTAs has increased over time, as well as – with some delay – the number of bilateral tax treaties the application of which is modified by the MLI.

5. Discussion

5.1. Introductory remarks

Based on a comparison between the results set out in section 4. and the OECD's reports regarding the implementation of the Multilateral Instrument, the authors observe that the approach and, therefore, the results of their research differ from what the OECD has reported on the degree of implementation of the MLI in terms of the number of CTAs in its press releases (see section 5.2.). Additionally, the authors comment on the number of signatories as a yardstick for the effectiveness of the Multilateral Instrument in terms of participating states (see section 5.3.). Also, the authors observe that focusing on the number of signatories and CTAs may result in key insights being overlooked.

5.2. Comparison of OECD implementation reporting: Overreporting of CTAs

It follows from section 4. that there were, as of 31 December 2022, 1,231 CTAs within the meaning of article 2(1)(a) of the MLI. This number of CTAs appears, at first glance, difficult to reconcile with the statement of the OECD that, on 6 October 2022, the MLI “covers around 1850 bilateral tax treaties”.^[27] Based on an assessment of the number of bilateral tax treaties that would be covered by the Multilateral Instrument if all signatories would have deposited an Instrument of Ratification and would have confirmed their lists of CTAs as deposited on signing, the authors can explain the difference by reference to the circumstance

of a CTA and the date on which the MLI affected the CTA for both jurisdictions regarding withholding taxes and other taxes. With regard to the *OECD Database*, the authors note that they have also assessed the number of CTAs in respect of which the MLI was effective according to the *IBFD Database*. With regard to such an assessment, the authors note that the number of CTAs in respect of which the *Multilateral Instrument* would be effective according to the *IBFD Database* is different from the number of CTAs with regard to which the MLI would be effective based on the *OECD Database*. Based on the *OECD Database*, the MLI has entered into effect (for at least one state's withholding taxes or other taxes) in respect of 931 CTAs. In contrast, the *IBFD Database* indicated that the MLI has entered into effect with respect to 966 CTAs. The difference between these two numbers can be explained as follows. First, there are 97 CTAs for which the status in the *IBFD Database* is set as in effect, while it follows from the *OECD Database* that the MLI has not yet entered into effect (44) or that no notification(s) under article 35(7)(b) have (or has) been made (53). Second, there are 62 CTAs in the *IBFD Database* where the *Multilateral Instrument* is considered to be in force, while it follows from the *OECD Database* that the MLI has (partially) entered into effect with regard to such CTAs. Although the absolute gap in terms of the number of CTAs in respect of which the MLI is in effect based on the *IBFD Database* and the *OECD Database* seems to be limited, i.e. only 35 CTAs, this signals that a common understanding as to whether a CTA's application is affected by the *Multilateral Instrument* is lacking. Nevertheless, this “mismatch” appears the largest part to be just temporary. The MLI, being in effect on a particular state, will come into force for that state on the first day of the next calendar year (in relation to withholding taxes) or after the passing of a waiting period of six months (with regard to other taxes).

²⁷ See OECD, *Mongolia signs landmark agreement to strengthen its tax treaties and South Africa deposits an instrument for the ratification of the Multilateral BEPS Convention* (OECD), available at <http://www.oecd.org/tax/treaties/mongolia-signs-landmark-agreement-to-strengthen-its-tax-treaties-and-south-africa-deposits-an-instrument-for-the-ratification-of-the-multilateral-beps-convention.htm> (accessed 1 Dec. 2022).

that the OECD seems to consider tax treaties to be covered by the MLI in the event that both states to such a tax treaty have signed but not yet ratified the Multilateral Instrument. This is due to the finding that, based on the lists of CTAs provided by the latest of (i) signing or (ii) depositing the Instrument of Ratification, there would be 1,843 CTAs (i.e. approximately 1,850 bilateral tax treaties). As such, the number of CTAs reported by the OECD takes into account CTAs within the meaning of article 2(1)(a) of the Multilateral Instrument as well as “provisional” CTAs, i.e. bilateral tax treaties that would become a CTA within the meaning of article 2(1)(a) if a signatory would deposit its Instrument of Ratification, and confirms its list of CTAs as deposited on the signing of the MLI. In other words, the OECD adopts a different interpretation of the term CTAs than follows from the MLI itself. This different interpretation entails that the OECD reports 610 “provisional” CTAs as being bilateral tax treaties that are covered by the MLI. This, in turn, entails that the OECD is “overreporting” the number of bilateral tax treaties covered by the MLI by approximately 50%.^[28] Such overreporting implies, in turn, that the OECD’s number of bilateral tax treaties covered by the Multilateral Instrument (around 1,850) does not provide an accurate reflection of the effectiveness of the MLI on 31 December 2022. It follows from the Multilateral Instrument that, in order for a tax treaty to be affected by the MLI, the Multilateral Instrument must have entered into force for both states that are parties to a tax treaty and both states must have listed such a tax treaty as a “CTA” in their Instrument Of Ratification, acceptance or approval (or deposited of such instrument by means of a notification within the meaning of article 29(5) of the MLI). As such, the number of “provisional” CTAs should be disregarded in assessing the effectiveness of the Multilateral Instrument on a certain date, especially given the fact that states may change their mind between signing and ratification considering the tax treaties that it intends to bring within the ambit of the MLI. In light of the foregoing, the authors would recommend that the OECD use the real number of bilateral tax treaties affected in line with the definition of CTA in article 2 of the MLI.

5.3. The yardstick for measuring the effectiveness of the MLI in terms of participating states

In measuring the effectiveness of the MLI in terms of participating states, the OECD refers to both the number of signatories (100) and the number of states that have deposited an Instrument of Ratification (79). In the authors’ opinion, the state of implementation of the MLI, in terms of participating states, should be measured in terms of states that have deposited an Instrument of Ratification instead of the number of signatories because of the following reasons. The signing of the Multilateral Instrument merely indicates that a state intends to join the MLI. It does not, by contrast, entail that the MLI will enter into force for that state. This is illustrated by the fact that nine of the sixty-eight states that have signed the MLI on 7 June 2017 had not deposited an Instrument of Ratification before 31 December 2022 (i.e. not within at least 5.5 years).^[29] Moreover, even if it were assumed that the signing of the Multilateral Instrument entails that the MLI will enter into force, it does not indicate that such an entry into force would take place on short notice. This is due to the time that passes on average between the date of signing and the date of depositing the Instrument of Ratification (three months after which the MLI would enter into force). With regard to such an average time, it follows from the research of the authors that, for those states that have signed the MLI and have deposited an Instrument of Ratification, on average approximately 27 months have passed between signing and depositing such instrument (i.e. 2.25 years). Furthermore, with regard to those states that have signed, but not yet deposited an Instrument of Ratification, the average time passed since signing and 31 December 2022 is 37 months (i.e. more than three years).^[30] Based on this latter average, Mongolia (as the most recent signatory that has not yet deposited an Instrument of Ratification) could be expected to deposit its Instrument of Ratification on approximately 1 November 2025 (i.e. 37 months after 6 October 2022) with the MLI entering into force three calendar months after November 2025. The average time between signing and deposit of the Instrument of Ratification, therefore, indicates that the number of signatories does not necessarily accurately reflect the extent to which the MLI has been implemented on a given date. Therefore, the authors recommend measuring the state of implementation of the Multilateral Instrument in terms of the number of states that have deposited an Instrument of Ratification.

5.4. The geographical success (or failure) of the MLI

In sections 5.2. and 5.3., the focus has been on the number of CTAs and the number of participating states as parameters of the current state of implementation of the MLI. However, there may also be other ways of assessing such state of implementation. For instance, reference could be made to the geographical distribution of the signatories and the states that have deposited an Instrument of Ratification (see Table 1). Such geographical distribution would reveal that all of the states of the European continent have signed the MLI, whereas the other continents have not. As such, the MLI appears to have been implemented mainly – in terms of signatories – by the European continent, whereas its implementation would seem to be rather limited in Africa, North America and Oceania. Whether this is problematic depends on the criterion for measuring the successfulness of the implementation of the MLI. In terms of geographical distribution, the MLI has been implemented by

28. That is, 1,843 OECD CTAs – 1,231 MLI CTAs) / 1,231 MLI CTAs.

29. Being Argentina, Armenia, Colombia, Fiji, Gabon, Italy, Kuwait, Mexico and Türkiye.

30. Assuming that the states that have not yet deposited their Instruments of Ratification, acceptance or approval, would not have done so by 31 December 2022.

50% or less of the states of all continents except for Europe. On the other hand, the states that did not sign the MLI – excluding the United States – only represent an aggregate 9% of the global GDP. As such, the question can be raised as to whether it is problematic – in terms of the successfulness of the Multilateral Instrument's implementation measured by the number of signatories – that the MLI has not been implemented, i.e. signed, by 50% or less of the states of the continents excluding European states.

Table 1. Signatory and ratification states by continent

Continent	Number of States in Continent	Signatories	Percentage of States in Continent	Ratifiers	Percentage of States in Continent
Europe	44	44	100	42	95
Asia	48	24	50	19	40
South America	12	6	50	3	25
North America	23	7	30	5	22
Oceania	14	4	29	2	14
Africa	54	15	28	8	15
Total	195	100	51	79	41

In addition to considering the signatories based on their continents, a distinction can also be drawn between developed and developing states that have signed the MLI and/or deposited an Instrument of Ratification.^[31] Drawing such a distinction would indicate that the MLI has been mainly signed and ratified by developing states, in particular, high income states. In contrast, developing states comprise the minority of the signatories and ratifiers of the MLI (see Table 2.)^[32]

Table 2. Signatories and ratifying states by income category

Type of Country		Signatories		Ratifiers	
Developed	High income	55	56.1%	53	67.1%
	Upper middle income	25	25.5%	14	17.7%
Developing	Lower middle income	17	17.3%	9	11.4%
	Low income	1	1.0%	1	1.3%

The parameters used here – continent and status of states – with regard to the signatories indicates that the MLI has been mainly implemented – based on the signatories on 31 December 2022 – by essentially western (the European Union and the OECD), developed states. In the Final Report on Action 15, no such distinction is drawn. As such, it is difficult to assess whether the outcomes based on the parameters used in this section would be aligned with the purpose of the MLI. However, it appears to be unlikely that the implementation success of the MLI for non-OECD countries, and, in particular developing countries, would be less important to the OECD than implementation in OECD member countries, in particular, given the OECD's insistence (from the beginning of the OECD/G20 BEPS Project onwards) on including non-OECD countries expressly in the OECD/G20 BEPS Project and the OECD/G20 Inclusive Framework.^[33] In this regard, a classic “broader-deeper” trade-off of multilateral negotiations appears to indicate^[34] deeper agreements may be necessary and desirable, but may come at the cost of broad support. The authors do not further explore this issue.

31. Countries are classified as developing countries when resorting under the World Bank categories of low-income and lower-middle income economies (for the 2023 fiscal year). See World Bank, *World Bank Country and Lending Groups*, available at <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519> (accessed 1 Dec. 2022).

32. It should be noted that Table 2 does not include Jersey and Guernsey. The reason for excluding these two states is that they are absent in the overview of GDP per country (see worldometers, *GDP by Country*, available at www.worldometers.info/gdp/gdp-by-country (accessed 1 Dec. 2022/3)).

33. OECD, *Action Plan on Base Erosion and Profit Shifting* pp. 25-26 (OECD 2013), Primary Sources IBFD, also available at <http://dx.doi.org/10.1787/9789264020719-en> (accessed 1 Dec. 2022).

34. See B. Koremenos, C. Lipson & D. Snidal, *The Rational Design of International Institutions*, 55 (2001) International Organization 761, p. 785 and G.W. Downs, D.M. Rocke & P.N. Barsoom, *Managing the Evolution of Multilateralism*, 52 Intl. Org. 2, p. 397 (1998). See also G. Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 Harvard Intl. L. J., pp. 323 and 351 (2008) and A.T. Guzman, *How International Law Works: A Rational Choice Theory* pp. 170-176 (OUP 2008).

5.5. Measuring the success of the MLI in terms of “swiftness” of implementation

In section 5.2., it was concluded that the number of bilateral tax treaties covered by the Multilateral Instrument according to the provisions of the MLI is less than the number of CTAs referred to by the OECD. However, this does not necessarily have to entail that the MLI has not been successful in terms of its effect on CTAs. In this respect, it should be recalled that it has been the purpose of the MLI to implement swiftly the treaty-related measures of the Action Plan of the OECD/G20 BEPS Project into the treaty network. Accordingly, the MLI seeks to permit contracting states to amend their bilateral tax treaties in a quicker way than would have been the case were the treaty-related measures of the Action Plan to be implemented following bilateral renegotiations in respect of each bilateral tax treaty.

In order to reflect on whether the MLI can be regarded as swifter than a bilateral implementation process, reference may be made to Broekhuijsen and Vergouwen who have analysed the time that it takes founding OECD member countries to update their treaty network bilaterally. The key findings were as follows:

- it takes, on average, 18.58 years before a bilateral tax treaty of a founding OECD member country is amended;
- the minority of the bilateral tax treaties concluded by the founding OECD member countries, i.e. 39%, has been amended up to and including 31 December 2019; and
- the most of the bilateral tax treaties concluded by the founding OECD member countries before 2000, i.e. 87.8%, have not been amended and, as such, have not been aligned with the updates of the OECD Model (2003)^[35] onwards as well.^[36]

As the aforementioned study focused on tax treaties of OECD founding members only, a fair comparison can be drawn by excluding from the present study tax treaties of non-founding OECD member states. As at 31 December 2022, 1,625 bilateral tax treaties had been concluded by founding OECD member states that were in force, of which 621 qualify as CTAs within the meaning of article 2(1)(a) MLI.

As such, it is clear that, on 31 December 2022, the MLI had modified approximately 38% of the tax treaties concluded by the OECD founding states within a reasonable period of time (i.e. plus or minus six years, discounting the issue discussed in section 4.3.). This finding indicates that the MLI will amend approximately the same number of bilateral tax treaties of the founding OECD member countries (38%)^[37] as have been amended by bilateral means in their lifetime (i.e. including treaty relationships over 80 years old) (39%).^[38] Accordingly, the MLI appears indeed to have implemented changes to the OECD Model in a swifter way than would have been the case if these changes had been implemented bilaterally. As a result, the multilateral route to implement treaty changes can be described as a success from this perspective.

6. Conclusions and Recommendations

6.1. Conclusions

In this article, the central question has been whether the state of implementation of the Multilateral Instrument on 31 December 2022 is aligned with the purpose of the MLI itself and with the OECD's ambitions regarding the implementation of the OECD/G20 BEPS Project by means of the Multilateral Instrument. For these purposes, the purpose of the MLI (taking into account such ambitions) has been interpreted as being aimed at implementing the treaty-related measures of the OECD/G20 BEPS Project in at least 2,000 bilateral tax treaties within a reasonable period of time, which should be less than 18.56 years, in any event.

At the time of writing this article, 1,231 bilateral tax treaties are (or are to be) modified by the MLI. While this result demonstrates that multilateral instruments are suitable to bring about change in international tax law, the objective of 2,000 bilateral tax treaties being modified has not yet been achieved. At the same time, however, only six years have passed since the adoption of the MLI on 24 November 2016. As such, the MLI could be said to have modified approximately 61% of the intended number of bilateral tax within six years, i.e. approximately one third of the time available (based on a maximum timeframe of 18.56 years). Moreover, it has been found that the MLI has allowed for the implementation of changes to the OECD Model in a swifter way than would have been the case if such changes were implemented by bilateral means with regard to the tax treaties concluded by the founding OECD member countries. This being the case, the MLI appears to be, quite simply, much more efficient than bilateral modifications. Nevertheless, the results indicate that the MLI has been mainly

35. *OECD Model Tax Treaty on Income and on Capital* (28 Jan. 2003), Treaties & Models IBFD.

36. Broekhuijsen & Vergouwen, *supra* n. 12.

37. Measured up to and including 31 Dec. 2022.

38. Measured up to and including 31 Dec. 2019.

implemented by western, developed states. This raises the question: why is participation by developing countries not as successful?

6.2. Recommendations

This article has focused on assessing the effectiveness of the MLI six years after its adoption on 24 November 2016. However, it has also led the authors to formulate the following recommendations in respect of future multilateral tax treaties, such as the envisaged multilateral convention to implement Pillar One.^[39] With regard to assessing the effectiveness of future multilateral tax treaties, the authors would make the following two recommendations:

- (1) quantifying the purpose of future multilateral tax treaties in terms of to-be affected states, also taking into account the distribution between developing and developed participating states, and/or quantifying to-be affected bilateral tax treaties, for example, within a certain timeframe; and
- (2) measuring the state of implementation of a multilateral treaty in terms of the number of treaty relations actually affected, for example, by referring to the number of states in respect of which such a tax treaty has entered into force (or will enter into force following ratification) (see [sections 5.2.](#) and [5.3.](#)).

^{39.} See OECD, *International tax reform: Multilateral Convention to implement Pillar One on track for delivery by mid-2023* (OECD), available at www.oecd.org/tax/beps/international-tax-reform-multilateral-convention-to-implement-pillar-one-on-track-for-delivery-by-mid-2023.htm (accessed 1 Dec. 2022).