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## The Mauritius Convention on Transparency and the Multilateral Tax Instrument: models for the modification of treaties?

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The investment treaty network and the tax treaty network comprise more than 3,000 treaties each. The provisions of these treaties generally are highly customized on the basis of the investment flows and economic interests of the contracting States. The number of treaties in force and their customization potentially turn the amendment of these treaty networks in their entirety into a cumbersome and long process. To modify the treaty networks in a swift and coordinated manner, the investment treaty makers and the tax treaty makers almost contemporaneously developed the idea of implementing treaty changes through a single multilateral convention. On 10 December 2014, the United Nations adopted the Convention on Transparency in Treaty-based Investor–State Arbitration, also known as the Mauritius Convention. In addition, on 24 November 2016, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS), commonly referred to as the Multilateral Tax Instrument, was concluded under the aegis of the Organisation for Economic Co-operation and Development (OECD). The Mauritius Convention and the Multilateral Tax Instrument share the object and purpose of modifying an extensive number of treaties. However, due to their novelty, little research has been done until now on their common characteristics and differences. The article aims at filling this gap by comparing both multilateral conventions. It also aims at drawing lessons from the analysis of both multilateral conventions that might be of benefit for future modifications of an extensive number of treaties through a single instrument.

**Keywords:** Multilateral Tax Instrument, BEPS, bilateral tax treaties, bilateral investment treaties, Mauritius Convention

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## 1. Introduction

International investment agreements (IIAs) are concluded between States to promote and protect the investments made by investors from one of the contracting States in the territory of another contracting State.<sup>1</sup> IIAs grant rights to investors against arbitrary conduct by host States<sup>2</sup> and, most importantly, typically allow for investment disputes to be resolved by international arbitration rather than by potentially biased domestic courts.<sup>3</sup> In contrast, tax treaties are concluded between States to allocate taxing rights over the income of taxpayers active in their jurisdictions to only one of them and thus avoid double taxation.<sup>4</sup> Tax treaties also provide for the resolution of double taxation disputes through an administrative procedure, known as the mutual agreement procedure, that in some treaties is complemented by a mandatory binding arbitration procedure.<sup>5</sup> The ultimate object and purpose of IIAs and tax treaties is to remove barriers to international trade and impediments to economic growth.

In addition to their common object and purpose, the investment treaty network and the tax treaty network share a similar size, in that each comprises more than 3,000 treaties. The provisions of IIAs and tax treaties generally are highly customized on the basis of the investment flows and economic interests of the contracting States. Therefore, the provisions found in IIAs and tax treaties vary considerably. The number of treaties in force in the investment treaty network and the tax treaty network, and the customization of the treaty provisions potentially turn the amendment of these treaty networks in their entirety into a cumbersome and long process. To modify the treaty networks in a swift and coordinated manner, the investment treaty makers and the tax treaty makers almost contemporaneously developed the idea of implementing treaty changes through a single multilateral convention.

After recognizing the need for provisions on transparency in the resolution of treaty-based investor–State disputes to account for the public interest involved in such

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<sup>1</sup> <http://investmentpolicyhub.unctad.org/IIA> (consulted on 8 June 2017).

<sup>2</sup> These rights include the right to not have investments unlawfully expropriated, the right to fair and equitable treatment, rights against discrimination in the forms of national and most-favored-nation treatments, and the right to free transfer of capital. For more details, see, for example, Davie, “Taxation Based Investment Treaty Claims”, 8 *Journal of International Dispute Settlement* (2015), at 202.

<sup>3</sup> Boyarsky, “Transparency in Investor-State Arbitration”, 21 *Dispute Resolution Magazine* (Summer 2015), at 34.

<sup>4</sup> However, the State of source and the State of residence frequently share taxing rights over the so-called passive income, e.g. dividends, interests and royalties.

<sup>5</sup> The number of tax treaties that provide for mandatory binding arbitration procedure is limited since the mandatory binding arbitration procedure clause was introduced – in paragraph 5 of Article 25 of the OECD Model Tax Convention – only in 2008. Moreover, less developed economies in general reject the introduction of a mandatory arbitration procedure in their tax treaties, an action based in part on the argument that the notion of fiscal sovereignty does not allow for a third-party arbitrator to decide on tax-sovereign matters such as tax disputes.

arbitration procedures, the United Nations Commission on International Trade Law (UNCITRAL) enacted on 1 April 2014 the Rules on Transparency in Treaty-based Investor-State Arbitration (The Rules on Transparency).<sup>6</sup> These Rules provide for the transparency and accessibility of treaty-based investor–State arbitration to the public. However, the Rules on Transparency can apply only to disputes arising out of IIAs concluded on or after 1 April 2014. To address the lack of transparency in investor–State arbitration procedures in IIAs concluded before 1 April 2014, the United Nations adopted the Convention on Transparency in Treaty-Based Investor–State Arbitration (the Mauritius Convention).<sup>7</sup> The Mauritius Convention thus allows its parties to apply the Rules on Transparency to disputes arising out of IIAs concluded before 1 April 2014.

The Base Erosion and Profit Shifting (BEPS)<sup>8</sup> Project of the G20 and the Organisation for Economic Co-operation and Development (OECD) derived from a public urge to counter tax planning practices, undertaken mainly by multinational enterprises that despite obtaining high income in certain jurisdictions paid almost no corporate taxes therein. The discussions on BEPS showed that eliminating such practices would require changes to tax treaties. On 24 November 2016, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (the Multilateral Tax Instrument) was concluded to implement the required changes in tax treaties.<sup>9</sup>

This article aims to clarify how the Multilateral Tax Instrument and the Mauritius Convention modify treaties. It also aims to draw lessons from the analysis of both multilateral conventions that might be of benefit for future modifications of an extensive number of treaties through a single instrument. As already advocated in the *World Investment Report 2015*, policymakers who engage in the discussions of changes to IIAs and to tax treaties should consider the impact that these treaties have on investment and adopt coordinated solutions.<sup>10</sup> This article shows that the techniques to modify both kinds of treaties lately used by policymakers are similar. Thus, if the Multilateral Tax Instrument and the Mauritius Convention turn to be successful, coordinated solutions could be simultaneously implemented in tax treaties and IIAs through a single multilateral treaty that could modify all of them. To this end, section 2 introduces the G20/OECD BEPS Project and the Multilateral

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<sup>6</sup> *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, U.N. Doc. A/68/109, available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> (consulted on 8 June 2018).

<sup>7</sup> *United Nations Convention on Transparency in Treaty-based Investor-State* (10 October 2014).

<sup>8</sup> The OECD has defined BEPS as referring to “tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations”; available at <http://www.oecd.org/tax/beps/> (consulted on 8 June 2018).

<sup>9</sup> *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (24 November 2016).

<sup>10</sup> UNCTAD; *World Investment Report 2015: Reforming International Investment Governance*. New York and Geneva: United Nations; at 209.

Tax Instrument in more detail. Section 3 summarizes the techniques used in the Multilateral Tax Instrument to modify tax treaties, and section 4 summarizes the techniques used in the Mauritius Convention to modify IIAs. Section 5 compares the two multilateral conventions and draws lessons from the analysis of both. Section 6 concludes and draws lessons.

## **2. The G20/OECD BEPS Project and the Multilateral Tax Instrument**

Taking advantage of the lack of coordination of the international tax rules and domestic tax systems, many taxpayers, particularly multinational enterprises, exploit arbitrages in tax treaties and domestic tax laws to reduce their worldwide tax burden. The recurring discussion in the public media of this phenomenon shaped a collective indignation that resulted in the perfect momentum for a multilateral reaction of the G20 and the OECD members. On 12 February 2013, the OECD released its report on BEPS. The report recognized that BEPS “constitute a risk to tax revenues, tax sovereignty and tax fairness for OECD member countries and non-members alike”<sup>11</sup> and, therefore, concluded that a multilateral and coordinated response to this phenomenon was needed.

Subsequently, on 19 July 2013, an action plan with 15 action points was published. The BEPS Action Plan set the stage for policy recommendations to eliminate the flaws detected in the international and domestic tax systems. The last action point, BEPS Action 15, referred to the development of a multilateral treaty to modify the entire tax treaty network. The purpose of BEPS Action 15 was summarized in the following terms:

Analyze the tax and public international law issues related to the development of a Multilateral Instrument to enable jurisdictions that wish to do so to implement measures developed in the course of the work on BEPS and amend bilateral tax treaties. On the basis of this analysis, interested Parties will develop a Multilateral Instrument designed to provide an innovative approach to international tax matters, reflecting the rapidly evolving nature of the global economy and the need to adapt quickly to this evolution.<sup>12</sup>

On 14 September 2014, a deliverable on BEPS Action 15 was published.<sup>13</sup> On 5 October 2015, the deliverable was released with very few changes as the Final

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<sup>11</sup> OECD, *Addressing Base Erosion and Profit Shifting* (2013), at 5.

<sup>12</sup> OECD, *Action Plan on Base Erosion and Profit Shifting* (2013), at 24.

<sup>13</sup> OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties – Action 15: Deliverable* (2014).

Report on BEPS Action 15.<sup>14</sup> In it, the OECD concluded that developing a multilateral instrument to update the tax treaty network was desirable and feasible.<sup>15</sup> Moreover, the OECD indicated that in the context of the BEPS Project a multilateral instrument was an essential tool, since it would swiftly eliminate the flaws detected in the tax treaty network that allow multinationals to implement BEPS practices.<sup>16</sup>

The OECD's plan of concluding the Multilateral Tax Instrument was based on the idea that renegotiating and amending all the tax treaties in force would demand a monumental effort. And, the time required to amend the entire tax treaty network most probably would play against the BEPS Project. The longer that updating the tax treaty network were to take, the longer taxpayers could continue to exploit arbitrages in tax treaties and domestic tax laws. Moreover, if updating the tax treaty network were to take too long, the political willingness to do so might vanish. The Multilateral Tax Instrument, in principle, would allow the speedy and synchronized modification of the tax treaty network. In addition, it would result in uniform international tax rules designed to counter BEPS practices, avoiding the proliferation of uncoordinated unilateral or bilateral tax measures.<sup>17</sup>

On 6 February 2015, the OECD issued a mandate to launch the negotiations on the Multilateral Tax Instrument.<sup>18</sup> On 27 May 2015, an ad hoc Group independent from the OECD was created to negotiate the Multilateral Tax Instrument.<sup>19</sup> In general, the ad hoc Group was in charge only of designing the instrument – i.e. negotiating the form of the provisions of the Multilateral Tax Instrument – as its substance was already agreed. Indeed, the substance of the provisions of the Multilateral Tax Instrument was agreed and published in the 2015 Final Reports on BEPS Action 2, *Neutralising the Effects of Hybrid Mismatch Arrangements*;<sup>20</sup> BEPS Action 6,

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<sup>14</sup>OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties – Action 15: Final Report* (2015).

<sup>15</sup>OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties – Action 15: Final Report* (2015), at 17.

<sup>16</sup>OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties – Action 15: Final Report* (2015), at 16.

<sup>17</sup>OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties – Action 15: Final Report* (2015), at 16.

<sup>18</sup>OECD, *Action 15: A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS* (2015).

<sup>19</sup>OECD, "Work Underway for the Development of the BEPS Multilateral Instrument" (28 May 2015), available at <http://www.oecd.org/tax/treaties/work-underway-for-the-development-of-the-beps-multilateral-instrument.htm> (consulted on 18 June 2018).

<sup>20</sup>OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements – Action 2: Final Report* (2015). Action 2 of the BEPS Project tries to establish a common approach to hybrid mismatch arrangements to prevent cases of double non-taxation. Among others, this Action establishes rules that seek to eliminate the tax benefits of mismatches, end the use of multiple deductions for a single expense and end the generation of multiple foreign tax credits for one amount of foreign tax paid.

*Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*;<sup>21</sup> BEPS Action 7, *Preventing the Artificial Avoidance of Permanent Establishment Status*;<sup>22</sup> and BEPS Action 14, *Making Dispute Resolution Mechanisms More Effective*.<sup>23</sup> Within the ad hoc Group, a sub-group on arbitration was created to produce the form and substance of the provisions on a mandatory binding arbitration procedure, which were not discussed in the course of other Actions of the BEPS Project owing to the lack of support for it of many of the participants.<sup>24</sup>

The ad hoc Group started its substantive work in November 2015. More than 100 States and non-State jurisdictions, including not only OECD members, G20 countries and other developed countries but also many developing countries, participated in the negotiation of the Multilateral Tax Instrument. Also, international organizations were represented in the negotiations.

The negotiation process lasted for almost a year and a half. During this period, a public consultation was launched to obtain input from civil society on what technical issues would arise from implementing the Multilateral Tax Instrument, in their view, and how to overcome them.<sup>25</sup> In addition, during this period, so-called speed matching sessions took place between the parties to the tax treaties subject to modification. In those sessions, the parties discussed and matched their positions on the application of the provisions of the Multilateral Tax Instrument to their common tax treaties. As the instrument implements a complicated system of opting-ins, alternative provisions and reservations, the speed matching sessions

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<sup>21</sup>OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Action 6: Final Report* (2015). Action 6 tries to prevent treaty abuse, including the implementation of treaty-shopping strategies. For such a purpose, Action 6 includes several provisions, some of which are presented as alternatives to each other (although they can also complement each other), as is the case with the general anti-avoidance rule, known as the principal purposes test or PPT, and the specific anti-abuse rule that limits treaty benefits to taxpayers that do not fulfil certain objective predetermined conditions, known as the Limitation on Benefits or LoB.

<sup>22</sup>OECD, *Preventing the Artificial Avoidance of Permanent Establishment Status – Action 7: Final Report* (2015). Action 7 suggests updating the concept of permanent establishment. The changes suggested in Action 7 addresses techniques used to inappropriately avoid the tax nexus, including the replacement of distributors with commissionaire arrangements or the artificial fragmentation of business activities.

<sup>23</sup>OECD, *Making Dispute Resolution Mechanisms More Effective – Action 14: Final Report* (2015). Action 14 suggests changes to the mutual agreement procedure in order to provide taxpayers with a more effective and timely resolution of their tax disputes. It also suggested the implementation of a mandatory binding arbitration procedure.

<sup>24</sup>Although more than 45 countries actively participated in the BEPS Project, only 20 agreed to implementing mandatory binding arbitration in their tax treaties. The participants that committed to mandatory binding arbitration are Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States. See OECD, *Making Dispute Resolution Mechanisms More Effective, Action 14: Final Report* (2015), at 41.

<sup>25</sup>OECD, "OECD releases discussion draft on the multilateral instrument to implement the tax-treaty related BEPS measures" (31 May 2016), available at <http://www.oecd.org/ctp/treaties/discussion-draft-beps-multilateral-instrument.htm> (consulted on 8 June 2018).

had the purpose of ensuring agreements between the parties to tax treaties on the forms in which their tax treaty relations would be modified through this instrument.

The Multilateral Tax Instrument was concluded on 24 November 2016, and on 7 June 2017 a signing ceremony was held. During the signing ceremony ministers and high-level officials from 68 States and non-State jurisdictions signed or formally expressed their intention to sign the Multilateral Tax Instrument.<sup>26</sup> The signing ceremony was ground-breaking for two reasons: the Multilateral Tax Instrument is the first multilateral treaty of its kind in the international tax law arena, and the support expressed by States was tremendous, especially considering that all previous worldwide initiatives to coordinate international tax rules related to the allocation of taxing rights had failed.<sup>27</sup>

Since the signing ceremony, other States have signed the Multilateral Tax Instrument or have expressed their intention to do so.<sup>28</sup> As of 29 June 2018, the Multilateral Tax Instrument had 82 parties and signatories. Nine of them have ratified the Multilateral Tax Instrument and notified their final positions on the application of the provisions of the instrument.<sup>29</sup> The Multilateral Tax Instrument entered into force on 1 July 2018, and it will start producing effects as from 1 January 2019.

### **3. Techniques used in the Multilateral Tax Instrument to modify tax treaties**

The object and purpose of the Multilateral Tax Instrument is to swiftly incorporate into the tax treaty network the treaty changes proposed in the course of the BEPS Project.<sup>30</sup> The scope of the Multilateral Tax Instrument has been established in its Article 1 in the following terms: “This Convention modifies all Covered Tax Agreements as defined in subparagraph a) of paragraph 1 of Article 2 (Interpretation of Terms).” According to Article 2(1)(a) of the Multilateral Tax Instrument, a Covered

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<sup>26</sup>OECD, “Ground-breaking multilateral BEPS convention signed at OECD will close loopholes in thousands of tax treaties worldwide” (7 June 2017), available at <http://www.oecd.org/tax/ground-breaking-multilateral-beps-convention-will-close-tax-treaty-loopholes.htm> (consulted on 8 June 2018).

<sup>27</sup>As, for example, the United Nations initiatives developed between the 1920s and the 1950s and the OECD initiatives developed between the 1950s and the 1960s.

<sup>28</sup>OECD, “Major step forward in international tax co-operation as additional countries sign landmark agreement to strengthen tax treaties” (24 Jan. 2018), available at <http://www.oecd.org/tax/major-step-forward-in-international-tax-cooperation-as-additional-countries-sign-landmark-agreement-to-strengthen-tax-treaties.htm> (consulted on 8 June 2018).

<sup>29</sup>Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, Status as of 29 June 2018. <http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf> (consulted on 29 June 2018).

<sup>30</sup>OECD, *Explanatory Statement to the Multilateral Tax Instrument* (2016), para. 14.

Tax Agreement is a treaty for the avoidance of double taxation with respect to taxes on income in force between two or more parties to the Multilateral Tax Instrument as long as each of the parties has notified it as a treaty covered by the Multilateral Tax Instrument.

The definition of Covered Tax Agreement thus contains two conditions, both of which must be fulfilled. First, the treaty must have been concluded with the intention of avoiding double taxation with respect to taxes on income, and it must be in force between two or more parties. Second, each of the parties to the tax treaty must have sent a notification to the depositary listing this tax treaty and any amending or accompanying instruments thereto as a Covered Tax Agreement. Only if both conditions are fulfilled may the respective tax treaty be considered a Covered Tax Agreement subject to modification through the Multilateral Tax Instrument.<sup>31</sup>

The Multilateral Tax Instrument reflects a positive-listing approach, as its parties must notify the tax treaties they are willing to modify. In this sense, the Multilateral Tax Instrument provides States with flexibility, since they do not need to notify all their tax treaties as Covered Tax Agreements. As a consequence, not all the tax treaties of the parties to the Multilateral Tax Instrument will necessarily be modified through the instrument. The Explanatory Statement to the Multilateral Tax Instrument indicates that this flexible approach was adopted because parties may prefer to renegotiate some tax treaties on a bilateral basis or because a tax treaty may have been recently renegotiated and already implements the anti-BEPS measures.<sup>32</sup> On the basis of the tax treaty network of the members of the ad hoc Group, the OECD initially estimated that more than 2,000 tax treaties could be modified through the Multilateral Tax Instrument.<sup>33</sup> However, a review of the notifications sent by the parties and signatories to the depositary as of 29 June 2018 shows that from the total of 2,563 tax treaties notified, only 1,367 tax treaties have been notified by all their contracting States as Covered Tax Agreements.<sup>34</sup> Thus, only 1,367 Covered Tax Agreements will be modified through the Multilateral Tax Instrument once the instrument enters into force for the respective parties. However, the possibility that the parties to the Multilateral Tax Instrument will notify other tax treaties – whether entered into force before or after the Multilateral Tax Instrument – as Covered Tax Agreements should not be underestimated.

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<sup>31</sup>For more details, see Damberger, “Scope of the Multilateral Instrument”, in *The OECD Multilateral Instrument for Tax Treaties – Analysis and Effects* (M. Lang et al., eds., Wolters Kluwer, 2018), at 4-14.

<sup>32</sup>OECD, *Explanatory Statement to the Multilateral Tax Instrument* (2016), para. 26.

<sup>33</sup>OECD, “Countries adopt multilateral convention to close tax treaty loopholes and improve functioning of international tax system”, available at <http://www.oecd.org/tax/countries-adopt-multilateral-convention-to-close-tax-treaty-loopholes-and-improve-functioning-of-international-tax-system.htm> (consulted on 8 June 2018).

<sup>34</sup>OECD, MLI Database – Matrix of options and reservations, available at <http://www.oecd.org/tax/treaties/mli-database-matrix-options-and-reservations.htm> (consulted on 30 June 2018).



The general rule of the Multilateral Tax Instrument is that its parties are bound by the entire instrument unless the parties make a reservation. However, all the provisions of the Multilateral Tax Instrument providing for anti-BEPS measures are subject to reservations. In addition, the Multilateral Tax Instrument provides for some opting-in mechanisms in the form of unilateral declarations and alternative provisions that apply only if the parties expressly opt in to such optional or alternative provisions.<sup>35</sup> The objective of the tax treaty makers was to provide for a high level of flexibility so that all States and non-State jurisdictions interested in fighting BEPS could join the Multilateral Tax Instrument so as to swiftly implement the anti-BEPS measures into their tax treaty network despite their different tax policies and economic interests.<sup>36</sup> As a consequence, the Multilateral Tax Instrument, to a great extent, favors universal participation over the integrity of its text.

Nonetheless, the treaty makers have adopted several measures to ensure a certain level of coordination in the implementation of the provisions of the Multilateral Tax Instrument. For example, with the exception of the reservations on the scope of the cases subject to mandatory binding arbitration,<sup>37</sup> each of the provisions establishing anti-BEPS measures lists the only reservations that parties and signatories can make and precludes them from making any reservations not listed.<sup>38</sup> Therefore, although parties do not need to accept all the commitments provided in the Multilateral Tax Instrument to fight BEPS practices, they can exclude or modify the effects of the provisions of the Multilateral Tax Instrument only by making the reservations that were acceptable for the tax treaty makers from an international tax policy perspective in the fight against BEPS. If parties avail themselves of the flexibility provided by the tax treaty makers and reserve the application of some of the rules of the Multilateral Tax Instrument, they will not adopt all the rules of the instrument. However, they still will implement coordinated rules across the tax treaty network, instead of unilateral or bilateral measures.

The coordinating effect of the Multilateral Tax Instrument is even more obvious when one considers that reservations apply to all the Covered Tax Agreements

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<sup>35</sup>For details on the functioning of the opting-in mechanisms in the Multilateral Tax Instrument, see Miladinovic and Rust, "Options under the Multilateral Instrument", in *The OECD Multilateral Instrument for Tax Treaties – Analysis and Effects* (M. Lang et al., eds., Wolter Kluwer, 2018), at 139-164.

<sup>36</sup>OECD, Frequently Asked Questions on the Multilateral Instrument, available at <http://www.oecd.org/tax/treaties/MLI-frequently-asked-questions.pdf> (consulted on 18 June 2018).

<sup>37</sup>Unlike in the rest of its provisions, the Multilateral Tax Instrument does not include an exhaustive list of defined reservations that States can make in connection with the scope of the mandatory binding arbitration procedure. Article 28(2) sets out that a State "may formulate one or more reservations with respect to the scope of cases that shall be eligible for arbitration under the provisions of Part VI (Arbitration)". States are, therefore, free to decide on the scope of the cases subject to arbitration.

<sup>38</sup>Article 28(1) of the Multilateral Tax Instrument states that "Subject to paragraph 2, no reservations may be made to this Convention except those expressly permitted by:" and continues by listing each of the paragraphs of the provisions of the instrument that exhaustively list the permitted reservations.

of a reserving party.<sup>39</sup> Thus, when parties decide on their reservations, they must make decisions based on tax policy rather than on their economic interests vis-à-vis other parties to a Covered Tax Agreement. This feature of the reservations should contribute to the creation of an international tax playing field and avoid the creation of new disparities that could be used for BEPS practices. Opting-ins and alternative provisions established in the Multilateral Tax Instrument also, in general, apply to all the Covered Tax Agreements of the party that declares to opt in to those provisions.<sup>40</sup> It is expected that the coordinated implementation of the BEPS tax treaty output will diminish the competitive advantages or disadvantages derived from the use of certain tax treaties and, consequently, diminish treaty-shopping and tax arbitrage opportunities.<sup>41</sup>

The Multilateral Tax Instrument can attain further coordination of the tax treaty network if its parties decide in the future to opt in to some of the optional provisions or alternative provisions. That can also be the case if parties decide to withdraw or replace some of their reservations by a new formulation having a more limited scope.<sup>42</sup> In this sense, a party that may be initially skeptical about the application of certain provisions of the instrument can change its position in the future and further modify its tax treaties by opting in to a provision or withdrawing or replacing a reservation. This is particularly relevant for the provisions setting out the mandatory binding arbitration procedure. As mentioned earlier, the implementation of a mandatory binding arbitration procedure did not receive broad support from the participants in the BEPS Project, nor did it receive broad support from the members of the ad hoc Group that negotiated the Multilateral Tax Instrument. Therefore, the provisions setting out the mandatory binding arbitration procedure are optional, which means that parties must opt in to their application. As of 29 June 2018, of the 82 parties and signatories of the Multilateral Tax Instrument, only 28 have opted in to the application of the mandatory binding arbitration procedure.

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<sup>39</sup>This effect of the reservations of the Multilateral Instrument is found in Article 28(8), according to which “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...”

<sup>40</sup>The only exceptions to this rule can be found in Article 5, dealing with the application of methods for the elimination of double taxation and in Articles 18 to 26, dealing with mandatory binding arbitration, particularly in connection with Covered Tax Agreements that already provide for mandatory binding arbitration of unresolved issues arising from a mutual agreement procedure case, as they can be excluded from the scope of the Multilateral Tax Instrument through reservations. For more details, see Articles 5(8), (9) and 26(4) of the Multilateral Tax Instrument.

<sup>41</sup>In this sense, see Helminen, *The Nordic Multilateral Tax Treaty as a Model for a Multilateral EU Tax Treaty* (IBFD, 2014), at 6, which discusses the coordinating effects of multilateral tax treaties in general.

<sup>42</sup>For more details, see Walker, “Reservations to the Multilateral Instrument”, in *The OECD Multilateral Instrument for Tax Treaties – Analysis and Effects* (M. Lang et al., eds., Wolters Kluwer, 2018), at 186-189.

However, if objections commonly made against the implementation of a mandatory binding arbitration procedure can be overcome by, for example, ensuring affordable proceedings, providing competent tax authorities with expertise and having access to unbiased arbitrators, more parties to the Multilateral Tax Instrument – especially less developed countries<sup>43</sup> – may be willing to accept the arbitration procedure in their tax treaty relations and, therefore, opt in to those provisions of the Multilateral Tax Instrument.

The provisions of the Multilateral Tax Instrument providing for anti-BEPS measures bind only those parties that have previously concluded a Covered Tax Agreement. Thus, the provisions of the Multilateral Tax Instrument modify the provisions of the Covered Tax Agreements without changing their bilateral structure and reciprocal effects.<sup>44</sup> After the Multilateral Tax Instrument enters into force, the obligations to avoid double taxation, whether by exempting certain items of income or by giving a credit for the tax paid in another State, will continue to be binary; that is, between a State of residence and a State of source. The exact form in which the provisions of the tax treaties will be modified through the Multilateral Tax Instrument is set out in compatibility or conflict clauses that interact with notification clauses and the notifications made by the parties.

The Multilateral Tax Instrument also includes compatibility clauses in each of its provisions establishing anti-BEPS measures.<sup>45</sup> The compatibility clauses describe the provisions of the Covered Tax Agreements that are subject to modification. Through such descriptions the tax treaty makers try to overcome the difficulties deriving from the fact that, owing to customization, Covered Tax Agreements may use different terminology and have different enumeration styles, different wording and even different scopes. In addition, the compatibility clauses prescribe the effects of the provisions they relate to on the provisions of the Covered Tax Agreements.<sup>46</sup>

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<sup>43</sup>On these matters, see Owens, Gildemeister and Turcan, "Proposal for a New Institutional Framework for Mandatory Dispute Resolution", 82 *Tax Notes International* (2016), and United Nations – Committee of Experts on International Cooperation in Tax Matters, *Secretariat Paper on Alternative Dispute Resolution in Taxation*, E/C.18/2015/CRP.8 (2015), [http://www.un.org/esa/ffd/wp-content/uploads/2015/10/11STM\\_CRP8\\_DisputeResolution.pdf](http://www.un.org/esa/ffd/wp-content/uploads/2015/10/11STM_CRP8_DisputeResolution.pdf) (consulted on 18 June 2018).

<sup>44</sup>Exceptionally the provisions of Article 5 and some of the provisions of Article 7 of the Multilateral Tax Instrument may be applied by only one of the parties to a Covered Tax Agreement. However, agreement of the other parties to the respective Covered Tax Agreement is required so that the provisions of the Multilateral Tax Instrument can be applied unilaterally.

<sup>45</sup>Except for the compatibility clause dealing with the mandatory binding arbitration procedure, which is established in Article 26 but applies to the entire Part VI of the Multilateral Tax Instrument.

<sup>46</sup>For details on compatibility clauses, see Bravo, "The Multilateral Tax Instrument and Its Relationship with Tax Treaties", 8 *World Tax Journal* 3 (2016), at 285-287 and 296-300, and Govind and Pistone, "The Relationship Between Tax Treaties and the Multilateral Instrument: Compatibility Clauses in the Multilateral Instrument" in *The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects* (M. Lang et al., eds., Wolters Kluwer, 2018), at 118-122.

These effects may be to replace, to change the scope of application, to supplement or to supersede.<sup>47</sup>

The exact effect of the provisions of the Multilateral Tax Instrument on the provisions of a Covered Tax Agreement depends on the content of the latter, on the fact that none of the parties has made a reservation (or that all of them have opted in to the application of the provision) and on whether parties have notified that a similar provision exists or does not exist in the Covered Tax Agreement. Indeed, as mentioned earlier, the compatibility clauses of the Multilateral Tax Instrument interact with the notification clauses also found in each provision of the Multilateral Tax Instrument establishing anti-BEPS measures and the notifications made by the parties. These notifications ensure that parties agree on which provisions of their Covered Tax Agreement are or are not subject to modification through the Multilateral Tax Instrument. Even though the compatibility clauses interacting with the notification clauses and the notifications made by the parties may produce different effects (e.g. replace, change the scope of application, supplement or supersede), one should not lose sight of the fact that all of the compatibility clauses claim that the provisions of the Multilateral Tax Instrument must always prevail over those of the Covered Tax Agreements. The fact that all the compatibility clauses claim the prevalence of the Multilateral Tax Instrument is logical considering that the main object and purpose of this instrument is to modify the Covered Tax Agreements.

#### 4. Techniques used in the Mauritius Convention to modify IIAs

The Mauritius Convention was adopted by the United Nations in its resolution 69/116 of 10 December 2014.<sup>48</sup> After a signing ceremony in Mauritius on 17 March 2015 and following ratification by Canada, Mauritius and Switzerland, the Mauritius Convention entered into force on 18 October 2017.<sup>49</sup> According to its

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<sup>47</sup> The Multilateral Tax Instrument uses four types of compatibility clauses: (i) "in place of", (ii) "applies to" or "modifies", (iii) "in the absence of" and (iv) "in place of or in the absence of".

<sup>48</sup> *Resolution 69/116 adopted by the General Assembly on 10 December 2014 [on the report of the Sixth Committee (A/69/496)]*, available at [https://treaties.un.org/doc/source/docs/A\\_RES\\_69\\_116-E.pdf](https://treaties.un.org/doc/source/docs/A_RES_69_116-E.pdf) (consulted on 8 June 2018).

<sup>49</sup> For more information, see "The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration will enter into force in six months after ratification by Switzerland", available at <http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl244.html> (consulted on 18 June 2018). Another 23 States have signed the Mauritius Convention since it was opened for signature on 17 March 2015. However, they have not completed the ratification process; see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency\\_Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html) (consulted on 18 June 2018). Also, UNCTAD, *Investment Policy Monitor* No. 17, at 11 (March 2017), and UNCTAD, *IIA Issues Note* No. 1, at 11 (March 2016), both available at <http://investmentpolicyhub.unctad.org/> (consulted on 18 June 2018).

preamble, the Mauritius Convention implements the Rules on Transparency in the investment treaty network with the purpose of contributing to the establishment of a harmonized legal framework for a fair and efficient settlement of investor–State disputes. The Mauritius Convention produces its effects irrespective of whether an IIA provides for arbitration rules or procedures different than the UNCITRAL arbitration rules. In particular, the Rules on Transparency “provide for the public release of information and documents generated as part of investment treaty arbitrations as well as the capacity for non-disputing third parties to attend or even participate in the proceedings.”<sup>50</sup> As the Rules on Transparency were enacted by UNCITRAL on 1 April 2014, the Mauritius Convention, like the Multilateral Tax Instrument, implements rules whose substance was previously agreed by consensus.

The Mauritius Convention establishes that all the IIAs of the parties – which include not only States but also regional economic integration organizations – concluded before 1 April 2014 will be modified through the Convention, unless they make a reservation. If reservations are not made by the parties, all their IIAs will be modified through the Convention in order to apply the Rules on Transparency to investor–State arbitration procedures to which they are a party as long as the investor’s host State is also a party to the Convention (bilateral or multilateral application), or the investor has agreed on the application of the Rules on Transparency after an offer made by the respondent State (unilateral application).<sup>51</sup>

Hence, the Mauritius Convention – unlike the Multilateral Tax Instrument – takes a negative-listing approach. In their reservations, parties must identify IIAs by title and by the name of the contracting States, to exclude them from the scope of application of the Convention. As a consequence, not all the IIAs of the parties to the Mauritius Convention concluded before 1 April 2014 will necessarily be modified through that Convention. Therefore, the negative-listing approach adopted in the Mauritius Convention also provides States with flexibility, as they do not need to implement the Rules on Transparency in all their IIAs.

The Mauritius Convention also allows a party to reserve the right not to apply the Rules on Transparency to an investor–State arbitration procedure in which it is a respondent if such an arbitration procedure is conducted using a specific set of arbitration rules or procedures other than the UNCITRAL arbitration rules,<sup>52</sup> e.g. the International Centre for Settlement of Investment Disputes Convention and the Arbitration Rules of the International Chamber of Commerce. It also allows a party to reserve the right to exclude unilateral offers to investors of the application of the

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<sup>50</sup> Shirlow, “Three Manifestations of Transparency in International Investment Law: A Story of Sources, Stakeholders and Structures”, 8 *Goettingen Journal of International Law* 73 (2017), at 87-88.

<sup>51</sup> See Article 2 of the Mauritius Convention.

<sup>52</sup> See Article 3(1)(b) of the Mauritius Convention.

Rules on Transparency in the context of an investor–State arbitration procedure in which it is a respondent,<sup>53</sup> which means that such a party accepts only the bilateral or multilateral application of the Convention. Furthermore, a party to the Mauritius Convention can reserve the right to not automatically apply eventual modifications to the Rules on Transparency.<sup>54</sup> All other reservations to the provisions of the Mauritius Convention are, however, precluded.<sup>55</sup> The list of reservations included in Article 3 of the Mauritius Convention is exhaustive and, as is also the case with the Multilateral Tax Instrument, parties to the Mauritius Convention can make only the reservations listed therein.

Interestingly, except for the reservation on the automatic application of modifications to the Rules on Transparency, which must be made within six months after such modifications have been adopted, parties to the Mauritius Convention can make reservations at any time.<sup>56</sup> As a consequence, reservations can be made by the parties even after the Convention has entered into force for them, in which case the reservations will take effect twelve months after the date of their deposit.<sup>57</sup> Reservations made after the Convention has entered into force for the reserving party – commonly referred to in treaty law as late reservations – would, in the case of the Mauritius Convention, diminish the party’s commitment to ensure transparency in investment arbitration procedures. Indeed, late reservations would allow parties to stop applying the Rules on Transparency at any point in the future with respect to certain IIAs or certain procedures, or as a result of unilateral offers to investors. The possibility of formulating late reservations implies that parties to the Mauritius Convention may unilaterally modify the obligation to apply the Rules on Transparency in the future, irrespective of the position adopted by other parties to an IIA. Moreover, late reservations play against the establishment of a harmonized legal framework for the fair and efficient settlement of international investment disputes, as the reserving parties may restrict their obligations under the Mauritius Convention.

Yet parties can also withdraw their reservations at any time, which means that more of their IIAs may be modified by the Mauritius Convention. A withdrawal of a reservation would produce the exact opposite effect of the formulation of a late reservation. The party withdrawing the reservation would increase its commitment to apply the rules of the Mauritius Convention, whether by covering more of its IIAs under the Convention, by accepting the application of the Rules on Transparency to investor–State arbitrations conducted under other arbitration

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<sup>53</sup> See Article 3(1)(c) of the Mauritius Convention.

<sup>54</sup> See Article 3(2) of the Mauritius Convention.

<sup>55</sup> See Article 3(4) of the Mauritius Convention.

<sup>56</sup> See Article 4(1) of the Mauritius Convention.

<sup>57</sup> See Article 4(4) of the Mauritius Convention.

rules than the UNCITRAL rules, by applying the Rules on Transparency after the acceptance of unilateral offers made to investors, or by accepting the application of further modifications to the Rules on Transparency. Likewise, the withdrawal of a reservation would expand a party's commitment to ensure transparency in investment arbitration procedures and more thoroughly conform to the object and purpose of the Mauritius Convention.

Another interesting feature of the Mauritius Convention is that it allows its parties to unilaterally offer the application of the Rules on Transparency to investors in the context of investor–State arbitration procedures arising under an IIA, even where their home State has not ratified the Convention.<sup>58</sup> A unilateral offer of the application of the Rules on Transparency broadens the scope of application of the Mauritius Convention. It is not necessary that all the contracting States of an IIA are also parties to the Mauritius Convention for the rules of the latter to apply to an investor–State arbitration procedure. It is enough that the respondent State has ratified the Convention and has not made a reservation with respect to the right to unilaterally offer to an investor the application of the Rules on Transparency.<sup>59</sup>

A unilateral offer can also be made by the respondent State to an investor when its home State has made a reservation excluding the respective IIA from the scope of application of the Mauritius Convention.<sup>60</sup> This means that reservations do not reciprocally apply in all cases. Indeed, even if the host State has made a reservation, the Rules on Transparency may still apply to investor–State arbitrations if the investor accepts the unilateral offer of the respondent State.<sup>61</sup>

The Mauritius Convention does not contain detailed compatibility clauses. However, its Article 2(4) establishes the following:

The final sentence of article 1(7) of the UNCITRAL Rules on Transparency shall not apply to investor–State arbitrations under paragraph 1.

The final sentence of Article 1(7) of the Rules on Transparency provides that if a conflict between such rules and the respective IIA arises, the provisions of the IIA shall prevail. Article 2(4) of the Mauritius Convention thus addresses the relationship between the Convention and underlying IIAs by clarifying that the final sentence of

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<sup>58</sup>Fry and Repousis, "Towards a New World for Investor–State Arbitration Through Transparency", 48 *New York University Journal of International Law and Politics* (2015-2016), at 839.

<sup>59</sup> See also, Johnson, "The Mauritius Convention on Transparency: Comments on the treaty and its role in increasing transparency of investor–State arbitration", Columbia Center on Sustainable Investment Policy Paper (2014), at 6 and 7.

<sup>60</sup>For more details, see Bergman, "Introductory Note to United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration", 54 *International Legal Materials* (2015), at 748.

<sup>61</sup>For more details, see Johnson, "The Mauritius Convention on Transparency: Comments on the treaty and its role in increasing transparency of investor-State arbitration", Columbia Center on Sustainable Investment Policy Paper (2014), at 11 and 12.

Article 1(7) of the Rules on Transparency shall not apply. Accordingly, if a conflict of treaties between the Mauritius Convention and the Rules on Transparency, on the one hand, and an underlying IIA, on the other hand, arises, then the Mauritius Convention and the Rules on Transparency should prevail over the IIA. This result is a logical one, considering that the object and purpose of the Mauritius Convention is to update the investment treaty network in order to implement the Rules on Transparency in more than 3,000 IIAs.<sup>62</sup> Moreover, this result reflects the *lex posterior* principle enshrined in Article 30(3) and (4) of the Vienna Convention.<sup>63</sup> According to that principle, if the provisions of conflicting treaties cannot be implemented at the same time, the effects and consequences under the later treaty (the Mauritius Convention) must be implemented, giving them preference over the effects and consequences of the earlier treaty (the underlying IIA).<sup>64</sup>

## 5. Comparison between the Multilateral Tax Instrument and the Mauritius Convention

The Multilateral Tax Instrument and the Mauritius Convention have similar characteristics as well as some differences. Those similarities and differences are highlighted in this section because they may be relevant for future modifications of an extensive number of treaties through a single multilateral instrument. They may also be relevant for policymakers engaged in the discussions of changes to IIAs and changes to tax treaties, if they decide to coordinate efforts to promote investment by aligning IIAs and tax treaties through a single multilateral treaty.

The Multilateral Tax Instrument and the Mauritius Convention were designed as streamlined mechanisms. If these multilateral conventions are successful in achieving a swift modification of the treaty networks, they most probably will serve

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<sup>62</sup>Fry and Repousis, "Towards a New World for Investor-State Arbitration Through Transparency", 48 *New York University Journal of International Law and Politics* (2015-2016), at 840.

<sup>63</sup>Grinberg and Pauwelyn, "The Emergence of a New International Tax Regime: The OECD's Package on Base Erosion and Profit Shifting (BEPS)", 19 *Insights* 24 (2015), available at <https://www.asil.org/insights/volume/19/issue/24/emergence-new-international-tax-regime-oecd-s-package-base-erosion-and> (consulted on 18 June 2018); Fry and Repousis, "Towards a New World for Investor-State Arbitration Through Transparency", 48 *New York University Journal of International Law and Politics* (2015-2016), at 840; Johnson, "The Mauritius Convention on Transparency: Comments on the treaty and its role in increasing transparency of investor-State arbitration", Columbia Center on Sustainable Investment Policy Paper (2014), at 5.

<sup>64</sup>McNair, *The Law of Treaties* (Clarendon Press, 1961), at 219 and Giegerich, "Termination or Suspension of the Operation of a Treaty Implied by Conclusion of a Later Treaty", in *Vienna Convention on the Law of Treaties* (Dörr and Schmalenbach, eds., Springer-Verlag, 2012), at 1012. For a more detailed explanation of the use of the *lex posterior* principle for resolving conflicts between modifying treaties and modified treaties, see Bravo, "The Multilateral Tax Instrument and Its Relationship with Tax Treaties", 8 *World Tax Journal* 3 (2016), at 287-289.



as models for the future. In fact, the Multilateral Tax Instrument and the Mauritius Convention have already inspired a study about the implementation of a permanent investment tribunal in treaty-based investor–State arbitration through a single instrument that could swiftly modify numerous IIAs.<sup>65</sup>

The treaty makers of the Multilateral Tax Instrument and the Mauritius Convention sought to avoid the potential complexities of renegotiating and amending the States' entire treaty networks. Another objective of the treaty makers was to implement uniform rules in the tax and investment treaty networks, respectively. To achieve these objectives, the treaty makers opted for dealing with narrow subject matters. Indeed, the Multilateral Tax Instrument implements only treaty rules to prevent BEPS and the Mauritius Convention implements only the Rules on Transparency relevant for investor–State arbitration procedures. By dealing with narrow subject matters, the treaty makers of these multilateral conventions avoided engaging in the negotiation of controversial treaty issues for which consensus may be more difficult to reach – i.e., in the case of tax treaties the allocation of income to the State of source or the State of residence and in the case of IIAs substantive investment protection standards.<sup>66</sup> This approach allows States with different policies and economic interests to conclude multilateral treaties, despite of their differences.<sup>67</sup>

To further encourage States with different policies and interests to conclude the Multilateral Tax Instrument and the Mauritius Convention, the treaty makers in both decided to provide for a high level of flexibility. As discussed in section 3, the Multilateral Tax Instrument combines the use of opting-ins, alternative provisions and reservations. Although the combined use of mechanisms to create flexibility in the Multilateral Tax Instrument adds complexity to its interpretation and application, these mechanisms are also essential tools to ensure universal participation. Without ensuring a high level of flexibility in the implementation of the Multilateral Tax Instrument, the number of signatories and parties probably would not have reached more than 80 States and non-State jurisdictions. Moreover, as discussed in section 4, the Mauritius Convention provides parties with flexibility by allowing them to either carve out specific IIAs or carve out all IIAs that establish procedures other than the UNCITRAL arbitration rules. All of this shows that, although the substance of both

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<sup>65</sup> See Kaufmann-Kohler and Potestà, “Can the Mauritius Convention serve as a model for the reform of investor–State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap”, CIDS-Geneva Center for International Dispute Settlement (2016).

<sup>66</sup> See Kaufmann-Kohler and Potestà, “Can the Mauritius Convention serve as a model for the reform of investor–State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap”, CIDS-Geneva Center for International Dispute Settlement (2016), at 75-76.

<sup>67</sup> For a similar view, see Schill, “The Mauritius Convention on Transparency: A Piece of Constitutional Reform of the International Investment Regime”, 16 *Journal of World Investment & Trade* (2015), at 202.

multilateral conventions was agreed by consensus in advance and that adopting uniform rules was part of the object and purpose of both multilateral conventions, ensuring flexibility was essential for the treaty makers. Probably, the treaty makers feared that without offering a high level of flexibility, the conventions would not be successful in the modification of an extensive number of treaties. In the case of the Multilateral Tax Instrument, the treaty makers' fear seems to have been justified. Many parties and signatories have not opted in to the optional provisions, have chosen different alternative provisions – which means that their options are not always applicable to their tax treaties – and have made many reservations to limit the scope of the modifications applicable to their tax treaties.<sup>68</sup>

As both multilateral conventions provide for a high level of flexibility and parties have availed themselves of it, large-scale harmonization of treaty rules across the tax treaty network and the investment treaty network will probably not be achieved. As a consequence of the flexibility granted by both multilateral conventions, their parties can modify only some of their treaties or parts of their treaties. Despite the existence of different sets of applicable rules in the tax treaty network and the investment treaty network, a certain level of coordination will still be achieved with these multilateral conventions because they establish an exhaustive list of permitted reservations. This means that the treaty makers have decided beforehand which reservations are acceptable from a policy perspective, avoiding that parties produce reservations that may be undesirable. Moreover, both multilateral conventions allow parties to withdraw or replace their reservations at any time as an incentive for the parties to further commit to the fulfillment of the conventions' object and purpose. Future modifications of an extensive number of treaties through a single instrument should carefully balance the benefits of implementing high levels of flexibility against the benefits of implementing harmonized rules across the treaty network. If universal participation is preferred, treaty makers should give preference to flexibility over the harmonized implementation of the treaty rules.

Instead of directly amending each treaty, the Multilateral Tax Instrument and the Mauritius Convention adopted the approach established in Article 30 of the Vienna Convention, which deals with successive treaties dealing with the same subject matter. Thus, these multilateral conventions coexist with the treaties they modify. Whereas the Multilateral Tax Instrument includes detailed compatibility clauses and notification clauses in each of its provisions establishing anti-BEPS measures that indicate the exact effects of those provisions on the ones of the Covered Tax Agreements, the Mauritius Convention follows the *lex posterior* principle. The

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<sup>68</sup>The list of opting-ins, alternative provisions and reservations made by the parties and signatories of the Multilateral Tax Instrument is available at <http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf> (consulted on 30 June 2018).

different techniques used by the treaty makers, however, do not produce different effects. Unless the parties make a reservation or do not opt in to the application of optional or alternative provisions, the provisions of the multilateral conventions in all cases prevail over the ones of the treaties they modify, by either replacing them, modifying their scope of application or supplementing them.

Another difference between the Multilateral Tax Instrument and the Mauritius Convention is the approach used to determine their scope of application. However, as with the use of compatibility clauses combined with the use of notification clauses or the use of the *lex posterior* principle instead, the different approaches to determine the scope of application of the conventions implemented by the treaty makers also produce similar effects. The Multilateral Tax Instrument uses a positive-listing approach to determine the tax treaties that will be modified. Thus, to be subject to modification through the Multilateral Tax Instrument, all the parties to a tax treaty must notify it as a Covered Tax Agreement. The positive-listing approach adopted in the Multilateral Tax Instrument is the opposite of the negative-listing approach adopted in the Mauritius Convention. Indeed, under the Mauritius Convention all the IIAs of the parties concluded before 1 April 2014 will be modified unless at least one of their parties makes a reservation. Consequently, under both multilateral conventions, their parties have the freedom to exclude the treaties that they do not want to modify.

Although similar effects can be achieved by using the positive-listing approach or the negative-listing approach to determine the scope of application of a modifying multilateral convention, the author believes that the positive-listing approach adopted by the treaty makers of the Multilateral Tax Instrument may have an advantage over the use of the negative-listing approach. The advantage is that parties to the Multilateral Tax Instrument may notify future tax treaties as Covered Tax Agreements. This means that if those parties conclude new tax treaties without implementing all or some of the BEPS tax treaty output, pursuant to Article 29(5),<sup>69</sup> they can notify those tax treaties as Covered Tax Agreements to modify them through the Multilateral Tax Instrument so as to implement the anti-BEPS measures. Conversely, under the Mauritius Convention, parties cannot modify future IIAs because the convention can apply only in respect of treaties concluded before 1 April 2014. Thus, the Mauritius Convention cannot have effect on future IIAs.<sup>70</sup> This approach might be sound, because the Rules on Transparency are supposed to

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<sup>69</sup> Article 29(5) of the Multilateral Tax Instrument states:

A Party may extend at any time the list of agreements notified under clause ii) of subparagraph a) of paragraph 1 of Article 2 (Interpretation of Terms) by means of a notification addressed to the Depository.

<sup>70</sup> See also Schill, "The Mauritius Convention on Transparency: A Piece of Constitutional Reform of the International Investment Regime", 16 *Journal of World Investment & Trade* (2015), at 203.

apply to all IIAs concluded after 1 April of 2014. However, if future modifications of an exhaustive number of treaties through a single instrument intend to turn political commitments into mandatory treaty rules, they should consider the advantages of adopting a positive-listing approach over a negative-listing approach.

The Mauritius Convention may apply as a consequence of a unilateral offer of one of the parties to an investor. Therefore, an agreement between all the parties to an IIA is not necessary in order for the Rules on Transparency to apply to investor–State arbitration procedures. In the case of the Multilateral Tax Instrument, the unilateral application of treaty provisions is not possible without the agreement of all the parties to a Covered Tax Agreement. Some provisions may be applied by only one of the parties to a Covered Tax Agreement. However, this is possible only if the rest of the parties to that Covered Tax Agreement have previously agreed to such a result. The agreement of the rest of the parties to a Covered Tax Agreements results from the absence of a reservation rejecting the unilateral application of the treaty rule by the other party or from not opting in to the application of the same rule or a similar rule offered as an alternative in the Multilateral Tax Instrument.<sup>71</sup>

Finally, the Multilateral Tax Instrument allows parties to make late reservations in very few circumstances. Two reasons might explain the limitations on formulating late reservations. First, treaty makers may have felt that it was necessary to prevent parties from reducing their commitments to counter BEPS practices after they have accepted to tackle them through the Multilateral Tax Instrument. Second, limiting the formulation of late reservations avoids the possibility that a party could unilaterally modify the application of the Multilateral Instrument on a Covered Tax Agreement. Unilateral modifications would most probably affect the decisions taken by the other contracting States to a Covered Tax Agreement without their consent in order to tolerate BEPS opportunities, which might go against their will. Conversely, under the Mauritius Convention the practice of making late reservations is accepted, probably because the unilateral application of the Convention is also accepted. Again, in the case of future modifications of an exhaustive number of treaties through a single instrument, the treaty makers should carefully consider whether the nature of the treaty obligations is compatible with the formulation of late reservations or not and decide whether to permit such a practice.

The common characteristics of the Multilateral Tax Instrument and the Mauritius Convention as well as their differences are summarized in table 1.

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<sup>71</sup>For details, see Articles 5 and 7 of the Multilateral Tax Instrument.

**Table 1. Comparison of the two conventions**

	<b>Multilateral Tax Instrument</b>	<b>Mauritius Convention</b>
<b>Substantive or material provisions agreed before the negotiation of the multilateral treaty</b>	Yes	Yes
<b>Adopted with the object and purpose of modifying treaties and improving the coordination of the provisions found in the bilateral treaty networks</b>	Yes	Yes
<b>Obligation to modify all the treaties of the parties to the multilateral convention</b>	No. The Multilateral Tax Instrument adopted for this purpose a positive-listing approach. That is, the parties must list the treaties that will be modified through the convention.	No. The Mauritius Convention adopted for this purpose a negative-listing approach. That is, the parties must make reservations to avoid the application of the convention to certain treaties.
<b>Possibility of making reservations</b>	Yes. However, the parties can make only the reservations expressly established in the text of the convention. All other reservations are precluded.	Yes. However, the parties can make only the reservations expressly established in the text of the convention. All other reservations are precluded.
<b>Possibility to make reservations at any time</b>	Reservations can be made until the party deposits its instrument of ratification. However, parties can opt in to the application of optional provisions and alternative provisions after the convention has entered into force for them. As a consequence of a late opting-in, the party will increase its treaty commitments.	Reservations can be made after the Convention has entered into force for the parties. As a consequence of a late reservation the party will reduce its commitment to applying the rules of the convention.
<b>Possibility to withdraw reservations</b>	It is possible to withdraw reservations at any time. As a consequence of the withdrawal the party increases its commitment to apply the rules of the convention.	It is possible to withdraw reservations at any time. As a consequence of the withdrawal the party increases its commitment to apply the rules of the convention.
<b>Possibility to unilaterally apply the provisions of the convention</b>	Only exceptionally. This is only possible if the rest of the parties to the Covered Tax Agreement have previously agreed to it.	It is always possible after the party has made a unilateral offer to the investor and the investor has accepted it.
<b>Definition of the relation between the convention and the treaties it modifies</b>	Compatibility clauses are found in each provision of the convention establishing anti-BEPS measures. The compatibility clauses interact with the notification clauses.	Detailed compatibility clauses cannot be found in each provision of the convention. However, in cases of treaty conflicts the Mauritius Convention should prevail over existing treaties on the basis of the application of the <i>lex posterior</i> principle.
<b>Possibility to modify future treaties through the convention</b>	Yes	No. The convention applies only in connection with IAs concluded before 1 April 2014.

## 6. Conclusions

This article has reviewed the techniques used in the Multilateral Tax Instrument and the Mauritius Convention. It has shown that despite the complexity of modifying, through a single instrument, treaty networks comprising more than 3,000 treaties with customized rules based on the investment flows and economic interests of the contracting States, treaty makers have multiple tools to effectively achieve such modifications. Thus, future modifications to numerous treaties can be done using tools similar to the ones implemented in the Multilateral Tax Instrument and the Mauritius Convention.

An important lesson from the comparison of the two conventions is that to attract universal participation, treaty makers need to focus on narrow subjects on which consensus is easier to reach and to provide for a high level of flexibility. The flexibility may be implemented through opting-in mechanisms, alternative provisions, reservations or a combination of all of these, as in the Multilateral Tax Instrument. Although flexibility may jeopardize the implementation of harmonized rules, treaty makers can always adopt measures to attain a certain level of coordination or uniform implementation of the rules across the treaty network; for example, providing for an exhaustive list of the permitted reservations and allowing parties to withdraw the reservations at any time so that parties can more thoroughly conform to the object and purpose of the treaties. If the Multilateral Tax Instrument and the Mauritius Convention succeed, it can be expected that the practice of modifying an exhaustive number of treaties through a single instrument will continue to be used in the future. Moreover, if the Multilateral Tax Instrument and the Mauritius Convention succeed, policymakers engaged in the discussions of changes to IIAs and changes to tax treaties could join forces to coordinate the implementation of treaty changes to IIAs and tax treaties that may be required in order to promote investment through a single treaty.

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