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# The Legal Status of the OECD Commentary: A Comparative Analysis on the Status Quo and Future Considerations Through the MLI and the Two-Pillars Solution Implementation

*By Gaetano Manzi, Nupur Jalan, and Jose María Vargas-Machuca Reyes*[*]
*Italy, India, and Spain*

## I. INTRODUCTION

Although the OECD Model Tax Convention (OECD MC) Commentary is widely referenced for treaty interpretation purposes,[1] since the publication of the first version and multiple revised versions (latest in 2017),[2] there have been doubts about its legal status, the role it plays in the interpretation of double tax treaties (DTTs), and the degree of reliance that can be placed on it. This circumstance has sparked a (still not resolved) debate in the international tax community that has led to the proliferation of different interpretations and to the non-uniform application of OECD MC Commentary in various court cases across the globe.

The publication of the BEPS Actions Final Reports and the coming into play of the Multilateral Instrument (MLI)[3] have added an extra layer of complexity to the debate, with many parts of certain BEPS Action Final Reports being implemented in the 2017 OECD MC and its related Commentary. In fact, concerning the legal status of such additions, different considerations could be made depending — in its turn — on the legal status that is attributed to the BEPS materials adopted in the relevant treaty network through the MLI.

Similar issues could arise due to the agreement on the two-pillar solution reached by 137 Inclusive Framework (IF) countries, seeking to address the tax challenges arising from the digitalization of the economy.[4] According to the OECD, in fact, most likely this agreement will be implemented through a Multilateral Convention (Pillar 1) and a Multilateral Instrument (Pillar 2), and the signing of these docu-

[*] Gaetano Manzi is a tax lawyer based in Italy. His area of expertise is in corporate and international tax. He can be reached at gaetano.manzi@outlook.com. Nupur Jalan is a tax professional specializing in corporate tax, international tax and transfer pricing and an interdisciplinary researcher. She can be contacted at jalannupur@outlook.com. Vargas-Machuca Reyes is a tax lawyer from Spain. His area of expertise is in corporate and international tax. He can be reached at josemaria.vargasmachuca@cuatrecasas.com.

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[1] Michael Lang and Florian Brugger, *The Role of the OECD Commentary in Tax Treaty interpretation*, 23 Australian Tax Forum (2008), p. 96.

[2] The OECD released the first Draft of the Double Taxation Convention on Income and Capital in 1963, followed by the Model Tax Convention on Income and Capital in 1977. The OECD MC is accompanied by a commentary. Since 1992, the OECD MC and the related Commentary have been updated on a regular basis.

[3] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (June 7, 2017), Treaties & Models IBFD.

[4] OECD/G20 Base Erosion and Profit Shifting Project, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (Oct. 8, 2021).



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ments could also have some impact on the debate at hand depending on their actual way of drafting and subsequent implementation.

This article aims to assess the above, starting from the main issues underlying the possible adoption of the OECD MC Commentary[5] for tax treaty interpretation purposes and a comparative analysis of the different approaches adopted so far by the Indian, Italian, and Spanish tax courts.[6] We chose these countries not only because they are our respective countries of origin, but also because they have different tax and legal backgrounds (e.g., Italy and Spain are OECD/EU/IF members from similar legal traditions and MLI signatory parties, with slightly different approaches on the debate at hand; India is not an OECD member though it is an IF member country that joined the MLI), and their tax courts/tax authorities discussed the issue under debate in multiple judicial precedents with diverging viewpoints.

## II. ISSUES RELATED TO THE UNCERTAIN LEGAL STATUS OF THE OECD MC COMMENTARY

### A. The Absence of a Direct Link With the DTTs

The main question with respect to the OECD MC Commentary is whether it is a binding source of legal obligations or not and, thus, whether it needs to be taken into consideration for DTT interpretation purposes. Generally, the answer given to this question has been negative[7] for the following reasons.

1. The OECD itself has affirmed that such Commentary does not have the same legal status as the actual DTTs, notwithstanding that they are of ''great assistance in the application and interpretation of the conventions and, in particular, in the settlement of any disputes''[8] and ''have been extensively quoted and analysed, and have frequently played a key role in the judge's deliberations.''[9]

2. The OECD MC Commentary has been agreed upon and drafted by a working party that represents a limited number of countries,[10] but DTTs don't always involve those countries. Even when they do, the legal status of such Commentary is doubtful. It can be treated as a mere supplementary means of interpretation with the meaning of article 32 of the Vienna Convention on the Law of the Treaties (VCLT). By reason of the above, many countries have expressed their position[11] (in the form of either reservation or observation[12]) on the legal status of the Commentary including observations with regard to parts of it.

3. In most cases, the actual DTTs do not provide a direct reference to/reliance on it.[13] In fact, generally, the DTTs do not oblige the contracting states

[5] Certain considerations made in this article could be extended, *mutatis mutandis*, to certain parts of the UN Model Convention and the related Commentary, which are outside the scope of this article.

[6] For the purpose of this article, only certain relevant judgments issued by the tax courts of the countries under analysis (i.e., Italy, Spain, and India) are covered.

[7] That is, in most cases it is not regarded as a binding means of interpretation.

[8] 2017 OECD MC Commentary, Introduction, §29.

[9] 2017 OECD MC Commentary, Introduction, §29.3.

[10] The Committee of Fiscal Affairs is responsible for commentaries and mainly consists of representatives of OECD member states and other appointed experts. *See* Ulf Linderfalk and Maria Hilling, *The Use of OECD Commentaries as Interpretative Aids — The Static/Ambulatory—Approaches Debate Considered from the Perspective of International Law*, Nordic Tax J. 2015; 1:34–59.

[11] For example, see IV., below, where the approaches adopted through the Italian, Spanish, and Indian tax systems are described.

[12] Michael Lang and Florian Brugger, *The Role of the OECD Commentary in Tax Treaty interpretation*, 23 Australian Tax Forum (2008), p. 101. According to these authors, ''by entering a reservation, a member country indicates that it does not intend to follow the OECD Model with regard to a certain provision when concluding double taxation convention.. . . Consequently, the OECD Commentary has to be disregarded to the extent that the adopted provision deviates from the OECD Model. If, however, the wording follows the OECD Model despite the fact that a reservation has been entered by a contracting state, it may be assumed that the OECD Model Convention and the OECD Commentary are still relevant. Member countries may also enter observations on the OECD Commentary. An observation indicates that a member country does not agree with the interpretation given in the OECD Commentary on a certain provision.''

Over the years, the influence of the OECD MC and its Commentary has increased beyond OECD member and non-member) countries. But even member countries may find areas where they are unable to agree with the text of the OECD MC articles or with the interpretation of the Commentary.

[13] Treaties rarely specifically deal with the role of the OECD MC Commentary. Many examples in this respect can be found in the Austrian treaty network. For example:

Protocol (11) of the DTT Chile-Austria: ''11. Interpretation of the Convention: It is understood that the OECD and UN Model Commentaries — as they may be revised from time to time — constitute a means of interpretation in the sense of Vienna Convention of 23 May 1969 on the Law of Treaties as far as the provisions of this Convention correspond to those Model Conventions and subject to any contrary interpretations in this Protocol and any contrary interpretation agreed to by the competent authorities after the entry into force of this Convention or any future reservations or observations to the OECD and UN Model or their Commentaries by either Contracting State.'';

Protocol (4) of the DTT India-Austria: ''4. It is understood that in addition to the above mentioned principles for the interpreta-


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to use the OECD MC Commentary to apply and interpret the DTTs. Thus, the lack of this direct link between the actual treaties and the Commentary seems to prevent the interpreters (e.g., tax authorities/tax courts) from being formally bound by the latter.

4. Even if the DTT is based on the OECD MC, to which the OECD MC Commentary belongs and relates, it is not possible to be sure whether the parties intended to give to the words used in the DTT the same meaning given by the drafters of the OECD MC in the relating Commentary. On the one hand, it is true that the treaty partners generally use the OECD MC as the basis for the treaties' negotiations and that, very often, the final wording of most of the articles adopted is identical to the one used in the OECD MC (especially in the case of DTTs between OECD member countries). However, on the other hand, the treaty partners always customize the DTTs during the negotiations; such customizations can entail (a) the modification of the wording used in the OECD MC taken as a draft basis, and/or (b) just an agreement between the Contracting States on the meaning to be given to a term used in the OECD MC and transposed in the DTT, or also (c) the inclusion/exclusion in the DTTs of only certain articles/paragraphs included in the OECD MC. In other words, since the mentioned customization part cannot be excluded during a treaty negotiation, it would be difficult to prove the link/match between the meaning of the words used in a DTT and in the OECD MC.[14] The absence of such a link/match should prevent the possibility of making express reference to the clarifications included in the OECD MC Commentary to interpret the terms/concepts included in the actual DTTs.

5. The OECD MC Commentary is usually phrased in relatively flexible language considering a wide range of possible interpretations. Therefore, it may be difficult to devise a clear and precise meaning of items in the Commentary.[15]

## B. The Need for a Case-by-Case Analysis Through the Vienna Convention

Notwithstanding the above, additional considerations must be made on a case-by-case basis. In fact, the approach that should be upheld on the issue at hand could vary depending on the specific circumstances and the DTTs under consideration.

In particular, when a DTT must be interpreted, it has to be checked whether or not the OECD MC Commentary can be considered a binding tool for interpretation purposes.

Such a test should be done through the principles of the VCLT, even though most DTTs include special interpretative provisions such as article 3(2) OECD MC, which deals with DTTs' undefined terms.[16] That provision is well known as having a vague and general wording that needs to be interpreted in its turn, leading to many different interpretations and approaches.[17] For example, it does not provide for a clear definition of the term ''context,'' and does not clarify to interpreters which means of interpretation can be used to determine the meaning of the terms that are used but not defined in the treaty.[18]

The VCLT, in fact, is probably the most relevant international legal source for interpretation purposes; it established a common set of interpretation principles/rules for all the relevant parties.[19] Thus, differently from article 3(2) OECD MC, the VCLT should at least force all the interpreters to assess the same elements for interpretation purposes, imposing a sort of ''minimum standard'' of interpretation.[20] It is considered customary law and, therefore, it applies to all countries regardless of whether or not they are signatory

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tion of Article 26 the principles established in the OECD Commentaries shall be considered as well subject to the reservations or observations or positions of India or Austria''; and

Protocol (16) of the DTT Austria-Germany: ''It is understood that provisions of the Convention which are drafted according to the corresponding provisions of the OECD Model Convention on Income and on Capital shall generally be expected to have the same meaning as expressed in the OECD Commentary thereon.''

*See* John F. Avery Jones, *Treaty Interpretation — Global Tax Treaty Commentaries — Global Topics IBFD*, §3.12.8. Similar wording has been found in the DTT between Switzerland and Japan and in the DTT between Belgium and Isle of Man.

[14] That is, as explained in the OECD MC Commentary.

[15] B. Arnold, *The Interpretation of Tax Treaties: Myth and Reality*, 64 Bull. for Int'l Tax'n 1 (2010), p. 8; Maarten J. Ellis, *The Influence of the OECD Commentaries on Treaty Interpretation — Response to Prof. Dr. Klaus Vogel*, 54 Bull. for Int'l Tax'n 12 (2000), p. 618.

[16] Gaetano Manzi, *The Autonomous Interpretation of the Multilateral Instrument with Particular Relevance to Article 2(2)*, 74 Bull. for Int'l Tax'n 12 (Nov. 25, 2020), §3.2.

[17] Edwin Van der Bruggen, *Unless the Vienna Convention Otherwise Requires: Notes on the Relationship Between Article 3(2) of the OECD Model Tax Convention and Articles 31 and 32 of the Vienna Convention on the Law of Treaties*, 43 European Tax'n (2003), p. 143, n. 32.

[18] Hence it is not clear from article 3(2) OECD MC whether the OECD MC Commentary is included in the concept of ''context'' and whether it can be used for interpretation purposes.

[19] Manzi, §3.2 and §5.

[20] Manzi, §3.2.



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parties,[21] unless it has been specifically provided otherwise.[22]

For purposes of this article, the most relevant provisions of the VCLT are articles 31 and 32. Article 31 VCLT has been headed ''general rule of interpretation''; the singular form has been chosen to underline that it comprises different approaches (i.e., literal, systematic and teleological approach),[23] which the interpreter should adopt and combine to understand the meaning of a treaty term. Although there is no hierarchy among these elements,[24] article 31 expresses the concept that the ''text must be presumed to be the authentic expression of the intentions of the parties'';[25] therefore, the interpreter should first assess the wording of the provision under investigation and cannot start the analysis from the ''intention of the parties.''[26] However, the text of the provision is only the starting point, since thereafter the interpreter could/should take into account also all the other elements mentioned in article 31(1),[27] i.e., (i) the *good faith*,[28] (ii) the *ordinary meaning* to be given to the terms of the treaty,[29] (iii) the treaty *context*,[30] and (iv) its *object and purpose*.[31]

Articles 31(2), (3), and (4) VCLT further elaborate the general rule provided in article 31(1). In particular, the second and the third paragraph clarify the meaning of the term ''context,''[32] while the fourth one gives particular relevance to the special meaning given by the relevant parties to a specific term.[33]

Article 32 VCLT deals with the *supplementary means of interpretation*,[34] which have a more limited scope, i.e., to support the general interpretation rule codified in article 31 VCLT, under certain circumstances.[35] The materials used, according to article 32 VCLT, are in fact considered less authentic or less representative of the agreement reached by the parties.

If, according to the specific circumstances under consideration, the OECD MC Commentary can be embedded in one of the mentioned paragraphs of article 31 VCLT, it may qualify as a binding legal source for interpretation purposes (see III., below);[36] otherwise, it would represent just a supportive means of interpretation without any binding effect.

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[21] Avery Jones, §1.2.4.2.; Arnold, p. 5.

[22] Frank Engelen, *Interpretation of Tax Treaties Under International Law* (IBFD 2004), §10.1; Jörg Manfred Mössner, *Klaus Vogel Lecture 2009 — Comments*, 64 Bull. for Int'l Tax'n 1 (2010), p. 18; OECD MC Commentary (2017), Introduction, §16.2.

[23] Andrés González Becerra, *The Interpretational Approaches to the Vienna Convention — Application to (Tax) Treaty Analysis*, 65 Bull. for Int'l Tax'n (2011), §2.2; Michael Lang, *Chapter 4: The Interpretation of Double Taxation Conventions, Introduction to the Law of Double Taxation Conventions* (2d rev. ed.) (IBFD 2013), p.1.

[24] K. van Raad, *Official Commentary on a Preliminary Draft of The Vienna Convention*, Materials on International, TP and EU Tax Law (Int'l Tax Ctr. Leiden 2018–2019), p. 2269.

[25] K. van Raad, *Official Commentary on a Preliminary Draft of The Vienna Convention*, Materials on International, TP and EU Tax Law p. 2270 (Int'l Tax Ctr. Leiden 2018–2019); in this respect, according to footnote 6 at page 2270, the International Court underlined that on many occasions the function of the interpretation is not to read into treaties ''what they do not, expressly or by implication, contain.''

[26] K. van Raad, *Official Commentary on a Preliminary Draft of The Vienna Convention*, Materials on International, TP and EU Tax Law p. 2269 (Int'l Tax Ctr. Leiden 2018–2019).

[27] K. van Raad, *Official Commentary on a Preliminary Draft of The Vienna Convention*, p. 2269.

[28] This means that the interpretation should be carried out loyally and honestly, in accordance with the agreements reached by the parties and the *pacta sunt servanda* rule provided by article 26 VCLT, to protect the legitimate expectations of the parties and avoid abusive application of the relevant treaty. *See* Van der Bruggen, at n. 32, p. 145; *Official Commentary on a Preliminary Draft of The Vienna Convention*, p. 2270.

[29] This entails a literal interpretation of the treaty. The ordinary meaning of a term could be its dictionary meaning or relate to its common understanding and usage. *See* Engelen, ch. 10.2; González Becerra, §4.2–4.3; Ekkehart Reimer, *Interpretation of Tax Treaties*, 39 European Tax'n (1999), p. 459; *Official Commentary on a Preliminary Draft of The Vienna Convention*, p. 2270.

[30] The possible lack of an ordinary meaning or the existence of different ordinary meanings for a single term requires a further investigation of the term in its environment. See *Official Commentary on a Preliminary Draft of The Vienna Convention*, p. 2270; González Becerra, §4.3; Reimer, p. 459.

[31] The treaties are agreed by the parties for a specific purpose, in a specific social, historical and legal environment. Therefore, they should be interpreted in accordance with a meaning that promotes the intention of the parties rather than frustrates it. *See* González Becerra, §4.5; Arnold, p. 5.

[32] González Becerra, §4.3.; Van der Bruggen, at n. 72, p. 147; Avery Jones, §3.4.5.; Engelen (2004), ch. 10.4.

[33] Avery Jones, §3.4.11.; Arnold, p. 5; Van der Bruggen, p. 149.

[34] The article does not give a comprehensive definition of such means (which apparently is left to the interpreters); however, they should comprise, for example, parallel treaties or preparatory works. *See* Van der Bruggen, p. 150; Nathalie Bravo, *A Multilateral Instrument for Updating the Tax Treaty Network* (IBFD 2020), p. 2.

[35] They can help the interpreter to confirm the meaning of a term/concept resulting from the application of article 31 VCLT or to determine the meaning of that term/concept when the interpretation according to article 31 VCLT leaves it ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. *See* Avery Jones, §3.5; *Official Commentary on a Preliminary Draft of The Vienna Convention*, p. 2272. Notwithstanding the above, however, it has to be noted that frequently the analysis according to article 31 VCLT can lead to ambiguous/obscure results; thus, even if the OECD MC Commentary theoretically qualifies as just a supplementary means of interpretating *ex* article 32 VCLT, it can have a key/binding role in the interpretation process.

[36] *But see* Arnold, p. 7.



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## III. MOST RELEVANT APPROACHES UPHELD IN ACADEMIA

Most authors share the view upheld in the above paragraphs,[37] testing the relevance of the OECD MC Commentary through the principle of the VCLT.

Depending on the different circumstances, the approaches that have been adopted are diverse. In particular, as described by Engelen[38] and Avery Jones,[39] so far the Commentary has been included as follows.

A. Article 31(1) VCLT [Vogel][40] as ''ordinary meaning'' of the terms/concepts under consideration, since the OECD MC and Commentary led the development of the DTT's language. According to this Author, these conclusions are valid only where these terms/concepts are included in a DTT which is at least similar to the OECD MC, and it is agreed between OECD members. With respect to treaties signed between non-OECD members the ''intention to conform to the Commentaries for the purpose of interpretation may only be presumed if the text of the treaty is identical to that of the OECD MC and the context suggests no other interpretation.''[41]

B. Article 31(2) VCLT [Avery Jones,[42] Lang,[43] Wattel and Marres,[44] Engelen and Douma[45]]: the version of the Commentary available at the time of the DTTs signing could be part of the ''context'' within the meaning of article 31(2) VCLT, as a tacit agreement between the parties (e.g., when the DTT is concluded between OECD countries, is identical or pretty similar to the OECD MC and the parties involved did not make any reservation/observation to the OECD MC and Commentary). In particular, Avery Jones said that in the absence of contrary indications, it should be assumed that the meaning of the terms/concepts of the DTT is the same described in the OECD MC Commentary where the DTT is identical to the OECD MC.

C. Article 31(3)(b) VCLT [Pijl],[46] as a subsequent practice that represents the agreement of the parties regarding interpretation issues. According to this Author, the Commentary is a general non-binding tool for interpretation purposes but can represent a ''contextual source of interpretation,'' reflecting (at least in some of its parts) State practice. This status, of course, would depend on the behavior of that State's tax courts judges/tax authorities.

D. Article 31(3)(c) VCLT, as rules of international law, provided their strong influence in the DTTs interpretation.[47]

E. Article 31(4) VCLT [Avery Jones,[48] Vogel][49] as a special treaty meaning; however, in this respect, it should be proven that the parties intended to give such a meaning to that term.

Others — Ault,[50] Ward[51] but also Engelen[52] — think that the Commentary can be in any case (at least) a supplementary means of interpretation according to article 32 VCLT, useful to support the interpretation carried out in accordance with article 31 VCLT. According to these authors, the Commentary can nevertheless be included in article 31(4) VCLT in relation to certain terms/concepts, assuming that an agreement between the parties can be proved in this regard. The above, however, would be true only with respect to

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[37] That is, the legal status of the Commentary must be checked and tested through the VCLT, regardless of the fact most DTTs include special interpretative provisions (such as art. 3(2) OECD MC).

[38] Engelen (2004), §10.9.1.

[39] Avery Jones, §3.11.

[40] Engelen (2004), n. 1332, §10.9.1; *see also* Reimer, p. 468.

[41] The approach of Dr. Klaus Vogel became more restrictive in the subsequent years due to the many versions of the OECD MC Commentary that have been issued so far — *see* Engelen (2004), §10.9.1.

[42] Engelen (2004), §10.9.1.

[43] Engelen (2004), §10.9.1.

[44] Peter Wattel and Otto Marres, *The Legal Status of the OECD Commentary and Static or Ambulatory Interpretation of Tax Treaties*, 43 European Tax'n (2003), p. 234.

[45] Frank Engelen, *How 'Acquiescence' and 'Estoppel' Can Operate to the Effect That the States Parties to a Tax Treaty Are Legally Bound to Interpret the Treaty in Accordance With the Commentaries on the OECD Model Tax Convention, The Legal Status of the OECD Commentaries* (S. Douma et al. eds.) (IBFD 2008), §5.

[46] *See also* Hans Pijl, *The OECD Commentary as a Source of International Law and the Role of the Judiciary*, 46 European Tax'n (2006), p. 220.

[47] Reimer, n. 124, p. 468.

[48] Engelen (2004), §10.9.1.

[49] *See also* Reimer, p. 468.

[50] H.J. Ault, *The Role of the OECD Commentaries in the Interpretation of Tax Treaties*, 22 Intertax 4 (1994), pp. 144–148. According to this author, the OECD MC Commentary can nevertheless fall within article 31(4) VCLT in relation to certain terms/concepts, assuming that an agreement between the parties can be proved in this regard. This, however, would be true only with respect to the version of the OECD MC Commentary in force at the conclusion of the relevant DTT.

[51] David A. Ward, *The Role of the Commentaries on the OECD Model in the Tax Treaty Interpretation Process*, 60 Bull. for Int'l Tax'n (2006), p. 98. The author thinks that the OECD MC Commentary forms part of the context of the DTT, even if, since they are not binding, they could be just a useful tool for the interpreter.

[52] Engelen (2004), §10.9.4.1. According to this author, the cogency of these materials depends on the ''extent to which it can be said that they furnish proof of the common understanding of the parties as to the meaning to be attached to the terms of the applicable treaty.''



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the version of the OECD MC Commentary in force at the conclusion of the relevant DTT.[53]

However, some other authors (e.g., Arnold[54]) think that the OECD MC Commentary cannot be included in any provision of the VCLT. They are not binding for tax courts and tax administrations but are only a useful means of interpretation, an ''expert opinion of great weight.''[55]

From the above, according to the vast majority of authors, if the OECD MC Commentary does not fit within the VCLT rules (i.e., article 31), it does not bind the tax courts and administrations.[56]

## IV. JUDICIAL APPROACHES: COMPARATIVE ANALYSIS OF THE ITALIAN, SPANISH, AND INDIAN MOST RELEVANT CASES

In relation to the legal status of the OECD MC Commentary, non-uniform views and practices are shared by the different tax courts/tax authorities worldwide.[57] Some countries have adopted OECD MC Commentary as a primary legal source for treaty interpretation purposes, while others consider it just a supplementary means of interpretation.

An analysis in this respect is carried out below, comparing the Indian, Italian, and Spanish tax systems.[58] Such analysis starts from Italy and Spain which share a more similar legal background; subsequently the Indian position is assessed.

### A. Italy

The approach shared by the Italian judges on the legal status of the OECD MC Commentary has been built up in the last 20 years. At first sight, the Italian judges seem to share a similar approach — with few exceptions (see below) — considering the OECD MC Commentary as ''soft law,'' therefore not binding for interpretation purposes. They can be used for interpretation purposes but only to support/confirm/inspire the interpretation *prima facie* made on the basis of other legal binding means of interpretation (e.g., the Italian domestic law or European Court of Justice case law).

Notwithstanding the above, a mismatch has been noticed between the above (formal) approach stated by the Italian judges in the text of their decisions and the approach actually adopted by the same judges. In fact, in multiple decisions, the judges make direct reference to the OECD Commentary to structure their reasoning and not to simply confirm or support it. In other words, some decisions seem *de facto* mandatory, stating, on the one hand, the non-binding nature of the Commentary, but then, on the other hand, relying on it without any analysis of the domestic laws or other binding legal sources for interpretation purposes.

In the light of the above, four categories of decisions have been detected, i.e., those that consider the OECD MC Commentary (i) as means of ''inspiration'' for negotiation purposes; (ii) as a mere ''recommendation'' for the OECD members; (iii) as a supplementary means of interpretation; (iv) as a binding means of interpretation.

The different approaches and main contradictions detected are described below and can give a different nuance to the approaches adopted by the Italian judges.

#### 1. First Approach: OECD MC Commentary as Means of Inspiration for Negotiation Purposes

According to Supreme Court decision no. 1122 (Feb. 2, 2000), the OECD MC does not represent a law directly applicable in the Italian domestic system, but rather is simply a ''model'' that can inspire the OECD member states during DTT negotiations.

In this case, the reasoning of the Italian judges was allegedly based on the Gilly decision of the European

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[53] The mentioned main outcomes change when later OECD MC Commentaries are concerned. The general understanding in this respect seems that these Commentaries do not have much weight in the interpretation process since they do not reflect the intentions of the parties at the time of the negotiations; this unless a mere clarification of what was agreed by the parties is concerned. *See* Reimer, p. 469; Johann Hattingh, *The Relevance of BEPS Materials for Tax Treaty Interpretation*, 74 Bull. for Int'l Tax'n (2020) n. 19, pp. 183–184.

[54] Arnold, p. 9.

[55] *See also* Frank van Brunschot, *The Judiciary and the OECD Model Tax Convention and Its Commentaries*, 59 Bull. for Int'l Tax'n (2005) pp. 7–8. The author stated that: ''we, the courts, are not bound by the OECD Model and/or Commentaries as if they were a treaty.''

[56] Needless to say, this approach is not accepted by all — and some disagree with it. *See* Arnold, p. 7.

There are other interpretation issues connected to the OECD MC Commentary, for example: (i) which version of the OECD MC Commentary the interpreter should refer while interpreting the DTTs, e.g., those existing at the time of the DTT negotiation and/or at the time of interpretation by tax courts (static vs dynamic approach debate); (ii) which is the legal status of the changes made to the OECD MC Commentary after the conclusion of the DTT. However, for the purpose of this article we have not delved down into these aspects and focused on analyzing the legal status of the OECD MC Commentary in the country under analysis.

[57] For a brief overview of the different approaches upheld by tax courts and administrations, see Stéphane Austry et al., *The Proposed OECD Multilateral Instrument Amending Tax Treaties*, 4 British Tax Rev. (2016), n. 5, p. 456.

[58] In relation to the debate at hand, each author has assessed some of the most relevant case law published in its respective jurisdiction of origin, without any presumption of completeness.



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Court of Justice (ECJ), according to which it is not ''unreasonable for the Member States to base their agreements on international practice and the model convention drawn up by the OECD.''[59]

However, the reference to this decision of the ECJ seems not entirely appropriate for the reasoning of the Italian judges. Reading carefully that decision, in fact, a different outcome should be picked up. In particular, points no. 24 and 25 of the same decision say that:

> *24. The Member States are competent to determine the criteria for taxation on income and wealth with a view to eliminating double taxation by means, inter alia, of international agreements and have concluded many bilateral conventions based, in particular, on the model conventions on income and wealth tax drawn up by the Organisation for Economic Cooperation and Development ('OECD').*
>
> *25. That is the context in which the Convention concluded between the French Republic and the Federal Republic of Germany applies. . . .*

With respect to the above, it should be noted that the ECJ judges qualify the OECD MC as the ''context'' in which the DTT under consideration is drafted. Such a circumstance could allow the inclusion of the OECD MC and its Commentary among the legal sources of article 31(2) VCLT, giving binding effects to them.

The same contradictory line of reasoning has been shared by the Supreme Court in no. 9942 (July 28, 2000).

**2. Second Approach: OECD MC Commentary as Mere 'Recommendation' for OECD Members**

Many other Italian case laws consider the OECD MC and its Commentary a mere ''recommendation'' for the OECD members with non-binding nature.

In general, the dictionary definition of ''recommendation'' is: ''suggestion that something is good or suitable for a particular purpose/advice about what is the best thing to do'';[60] thus, coherently with what said above, something that does not entail an obligation.

The Italian case laws referred to a more specific concept derived from the document issued by the OECD Council on October 23, 1997, which recommended to the governments of the OECD countries:

> *2. when concluding new bilateral conventions or revising existing bilateral conventions, to conform to the Model Tax Convention, as interpreted by the Commentaries thereon;*
>
> *3. that their tax administrations follow the Commentaries on the Articles of the Model Tax Convention, as modified from time to time, when applying and interpreting the provisions of their bilateral tax conventions that are based on these Articles.*

The first part of the recommendation appears limited to treaty negotiators only, asking them to conform the actual DTTs to the OECD MC, as interpreted by the related Commentary; the second one, instead, appears limited to the tax authorities, asking them to follow the Commentary (but only) when a DTT ''based'' on the OECD MC has to be applied/interpreted. Thus, literally speaking, it apparently does not apply before tax courts also.

However, Italian judges have interpreted it in a broader way, considering it applicable in court and also to non-typical circumstances, where the situation to be interpreted does not necessarily refer to concepts included in the OECD MC/DTT, e.g., the definition of a PE for VAT purposes in accordance with the OECD MC Commentary (see below).

In this respect, the first relevant decision of the Italian Supreme Court is no. 17206 (July 28, 2006), in which the existence of a PE of a foreign (Panamanian) company in the Italian territory is discussed for VAT purposes. The decision, on the one hand, states that the OECD MC Commentary does not have the same value of the domestic tax law but, rather, represents a ''recommendation'' for OECD members.[61]

On the other hand, it states that for the qualification and definition of that PE, express reference shall be made to article 5 of the OECD MC and to the relating Commentary.[62] The contradiction is evident: The OECD MC and its Commentary are the necessary means of interpretation to determine the PE concept in this case, but at the same time they are (formally) considered just a non-binding ''recommendation'' for the OECD members.[63]

The reason for the above could be probably due to the fact that the Italian legal system introduced the concept of PE only in 2004,[64] on the basis of article

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[59] ECJ decision C-336/1996 (Gilly), point no. 31.

[60] *See* Cambridge online dictionary.

[61] In addition, the decision stated that no decisive relevance can be attributed to the subsequent versions of the OECD MC Commentary.

[62] The reason for this reference is probably due to the fact that the Italian legal system introduced the concept of PE only in 2004 by reason of article 1(1), D.Lgs. Dec. 12, 2003, no. 344, with effects starting from January 1, 2004, and the relevant fiscal year for the purposes of the case law was 1993.

[63] The same contradictory line of reasoning has been included in the decision of the Supreme Court no. 3889/2008 and no. 3891/2008.

[64] It has been introduced in the Italian Income Tax Code by reason of article 1(1), D.Lgs. Dec. 12, 2003, no. 344, with effects starting from 1 January 2004.



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5 of OECD MC,[65] and the relevant fiscal year for the purposes of the case law at hand was 1993. However, if the reference to the OECD MC and its Commentary is imposed for interpretation purposes — because they are actually the context in which the Italian concept of PE has been built — these means of interpretation cannot maintain the status of mere ''recommendations'' for the OECD members, but should rise to the rank of binding legal sources ex article 31(2) VCLT.

In this context, a less famous (but probably more coherent) case law was published in 2002 (Supreme Court decision no. 7682, May 25, 2002). According to these judges, since the Italian tax system did not have a definition of PE in the relevant fiscal year, all the parties involved have made reference to the OECD MC and its Commentary to define such a concept. This circumstance was not challenged by the Italian judges. Thus, these documents were considered *de facto* binding legal sources (*rectius*, the only means of interpretation) on the basis of which the judges had to structure their reasoning and decisions. This approach has been shared and implemented in Supreme Court decision no. 10925 (July 25, 2002); here, the judges also stated that the applicability of the OECD MC and its Commentary is generally recognized by all the OECD members' tax authorities, Italy included. The same line of reasoning has been shared again in Supreme Court decision no. 9167 (Apr. 21, 2011).[66]

Following the line of reasoning of the above-mentioned no. 17206/2006, the Court in Supreme Court decision no. 14756 (July 10, 2020) affirmed, on the one hand, the nature of mere ''recommendation'' of the OECD Commentary, and, on the other hand, used the same Commentary to determine the concept of ''beneficial owner'' in relation to the payment of passive income. Also in this case, the formal statement of the Court differs from the substantial approach adopted. Similar approaches have been found in Supreme Court decisions no. 6242 (Mar. 5, 2020) and no. 8500 (Mar. 25, 2021) on PE definition.[67]

Where, in all the cases mentioned above, the OECD MC and its Commentary are used as the actual legal basis for decisions, in our opinion they should qualify as binding means of interpretation *ex* article 31 VCLT, since their role will be much more than merely supportive. In fact, if one imagines the text of the decisions mentioned above without the reference to the OECD MC Commentary, it would acknowledge that the line of reasoning of the judges would be deprived of its basis and substance.

### 3. Third Approach: OECD MC Commentary as Supplementary Means of Interpretation

According to this approach, the OECD MC Commentary has only a supportive function in the interpretation process. It does not represent a mere ''recommendation,'' but a sort of tool to guide and help the judges during the interpretation process (when it relates to double tax treaties based on the OECD MC), to support/confirm the interpretation *prima facie* made on the basis of the Italian domestic law and principles of interpretation or other legal sources. Therefore, in principle, they should fall within the scope of article 32 VCLT qualifying as a *supplementary means of interpretation*.

Supreme Court decision no. 25374 (Oct. 17, 2008) is relevant in this respect. It deals with the assessment of the existence of a non-written anti-abuse principle at a domestic and international level. The line of reasoning of the judges takes into consideration some parts of the OECD MC Commentary, clarifying the fact that they are very relevant yet non-binding means of interpretation. Also, the reference to such Commentary is just supportive; it confirmed the principles stated in other binding legal sources, like domestic law or the jurisprudence of the ECJ. The same approach has been detected in Supreme Court decisions in no. 27116, Dec. 28, 2016 (on beneficial ownership); no. 11865, May 15, 2018 (on royalties' definition); no. 10706, Apr. 17, 2019 (on treaty entitlement); no. 2618, Feb. 5, 2020 (on treaty entitlement); and very recently in no. 3380, Feb. 3, 2022 (on beneficial owner definition).

This approach has been further implemented by Supreme Court decision no. 23984 (Nov. 24, 2016). In this case, the Italian judges considered too restrictive qualifying the OECD MC Commentary a mere non-binding ''recommendation'' for the OECD members. According to them, the OECD MC Commentary should be considered at least a relevant tool to confirm and support the interpretations made *prime facie* on the basis of the text of the treaty under investigation (even if non-binding for interpretation purposes). This approach is supported directly by the VCLT, which gives a sort of preeminence to the text of the treaties (*ex* article 31 VCLT), but at the same time allows the use of supplementary means of interpretation (*ex* article 32 VCLT).

### 4. Fourth Approach: OECD MC Commentary as Binding Means of Interpretation

Less frequently, the Italian judges have qualified the OECD MC Commentary as a binding legal

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[65] Maurizio Leo, *Le imposte sui redditi nel Testo Unico*, 2019 Tomo II, p. 2883.

[66] In particular, also this decision imposes the reference to article 5 of the OECD MC and its Commentary for the definition of the PE concept.

[67] Further, according to this decision, given the non-binding nature of the OECD MC Commentary, the interpreter can also use versions of the same document issued after the conclusion of the relevant DTT.



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source; this approach has been stated (directly or indirectly) in a few Italian case laws.

The most relevant decision in this regard has been issued by the Supreme Court (Criminal Law section), decision no. 1811 (Jan. 17, 2014). According to this case law, the criteria and principles set forth in the OECD MC and related Commentary have represented the basis for the negotiation and drafting of the actual DTTs concluded by and between the OECD members. Thus, they have reached the rank of ''binding rules'' for the OECD members in accordance with the international law principles.

Such principles have not been expressly mentioned in the text of the decision. However, the latter suggests that the OECD MC and its Commentary have been the ''context'' (with the meaning of article 31 VCLT) of the actual DTTs for the OECD members and, thus, should be essential for interpretation purposes. This case law is the only one that expresses this concept in such an explicit manner, which, by the way, seems more reasonable and carefully thought than many other contradictory decisions mentioned above. Even if it has never been shared again by another Italian tax court, it is supported by academia, as described in III., above.[68]

There are other decisions that support such an approach, even if in a less explicit manner. For example, Supreme Court no. 32081 (Dec. 12, 2018), according to which for the qualification and definition of a PE express reference shall be made to article 5 OECD MC and its Commentary, since this concept was born in the OECD context and only subsequently implemented in the Italian domestic law. In this respect, the line of reasoning mentioned above in IV.A.2. can be extended to this decision. The only difference with case laws mentioned there[69] is that this decision does not say anything about the allegedly non-binding nature of the OECD MC Commentary (thus, supports more strongly the arguments in favor of its binding nature for interpretation purposes).[70] Thus, also in this case there is a complete reliance of the judges on the OECD MC Commentary, which means they cannot be considered as mere supplementary means of interpretation. Also in this context, this statement can be supported by the *fictio juris* mentioned above in IV.A.2.: imagining the text of the decision without the reference to the OECD MC Commentary will show the degree of the judges' reliance on these means of interpretation. These circumstances can trigger some other critical issues: in particular, if the decision (without the reference to the OECD MC Commentary) lacks its substance, one may also argue that such a decision is invalid. Under the Italian Code of Civil Procedure (articles 132 and 161), in fact, invalid decisions are those that lack a comprehensive explanation of the arguments based on which the same decision is well founded.

Supreme Court decision no. 33215 (Dec. 21, 2018) represented a step forward, stating that where article 5 of the relevant DTT is identical to article 5 OECD MC, the PE's qualification must be done based on the OECD MC and its Commentary. This acknowledgement should not be underestimated because — although debatable — it is critical for the matter at hand. In fact, the judges established a direct link between the OECD MC and the actual DTT where the latter is modeled on the basis of the same OECD MC. In such circumstances, according to the Italian judges, the meaning of the terms and concepts included in the DTT match with those included in the OECD MC as clarified in the OECD MC Commentary.

## 5. Conclusive Remarks

The analysis carried out above shows that no uniform consent has been reached so far among the Italian judges on the legal status of the OECD MC Commentary. Some judges qualify it as a means of *inspiration* for negotiation purposes, others a mere *recommendation* for the OECD members, others a *supportive means of interpretation*, and others a binding one. In many cases, however, it has been noted a mismatch between the formal statement that the judges made on the issue at hand and the substantial approach that they adopted to decide their cases. Frequently, in fact, notwithstanding the statement made at the beginning of the relevant case laws (i.e., *the Commentary is not a binding tool for interpretation purposes*), the Italian judges have been inclined to adopt a different approach in practice, supporting their decisions with the only help of the same Commentary, treating it *de facto* as a binding means of interpretation.

[68] It recalls the approaches upheld by Vogel, who considered the possible inclusion of the OECD MC Commentary in article 31(1) VCLT as ''ordinary meaning'' of the given term under investigation (where this term is included in a DTT which is at least similar to the OECD MC), since the OECD MC and Commentary led the development of the DTT's language; or by Avery Jones, Wattel and Marres, Engelen and Douma, who — under certain circumstances — included the OECD MC Commentary in the concept of ''context'' ex article 31(2) VCLT as a tacit agreement between the parties (see III., above).

[69] E.g., no. 17206 (July 28, 2006), no. 7682 (May 25, 2002), no. 9167 (Apr. 21, 2011), no. 14756 (July 10, 2020).

[70] The same reasoning is shared by the following Supreme Court decisions: no. 32078/2018 (on PE definition), no. 31609/2019 (on PE definition), no. 12240/2018 (on PE definition), no. 24291/2019 (on beneficial ownership), no. 23355/2019 (on PE definition), no. 7802/2020 (on PE definition).



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## B. Spain

From a legal standpoint, OECD MC and its Commentary are not part of the Spanish legal system.[71] According to the Spanish Constitution, to be part of such a system, international rules or treaties have to be adopted and published in the State Official Gazette following the internal procedure. Nevertheless, the recourse to the OECD MC Commentary by the Spanish tax administration and tax courts, as an interpretative means, is frequent, and both tax administrations and courts take the Commentary into account when interpreting a DTT.

Its use is so far-reaching that a wide range of decisions of the Spanish Supreme Court (*Tribunal Supremo*) has used the Commentary as a mandatory interpretative tool, not by expressly stating that OECD MC Commentary forms part of the Spanish legal sources, but by considering it an interpretative content that must be observed. Albeit this position has varied over time to restrict its application and seems that it will be further curtailed as from the *Colgate* and *Stryker* decisions issued by the Court (see below).[72]

On the other hand, some tax treaties that form part of the Spanish network have specific mandates to interpret the relevant DTTs (e.g., Costa Rica, Albania, and Croatia) according to the Commentary. For instance, the Albania-Spanish DTT states that those articles that are redacted following the OECD MC Commentary have to be interpreted according to the OECD Commentary as part of the Vienna Convention means of interpretation. This example could serve as a justification for our previous assertion (in II.A., above) that for tax treaties not lacking direct identification in the wording between the relevant DTT and the OECD MC, the recourse to the Commentary for its interpretation should not be rejected.

Likewise, Italian courts' tax decisions are not adopted by judges specialized in tax law but, rather, they are instructed in general public law; this circumstance, together with the complexity of the international tax law field, has contributed to the adoption of different approaches by the Spanish tax courts as summarized below.

### 1. First Approach: OECD MC Commentary Is Binding for Spain Unless Parties Formulated Reserves

Key decisions issued by the Spanish Supreme Court have applied the OECD Commentary as a mandatory interpretative tool, representing the *authentic interpretation* of the DTT where the relevant states did not make a reservation on the relevant article.

An example of this approach could be found in the Spanish Supreme Court Decision Appeal no. 6349/2000 (July 29, 2000), which stated that the Commentary is binding based on the acceptance by the states by not making any reservations on the OECD MC. We reproduce it verbatim given the clarity and implications of the words:

> the ''Commentaries to the Articles of the 1977 Model Convention,'' which are binding on the Contracting States, have been accepted by them, unless they have entered ''reservations'' to the Article in question, which is not the case with Spain and Germany, which, unlike several other States, have not entered any reservations to Article 13. The Court must make it clear that these comments are fully valid in respect of Article 13(3) of the 1963 Model Convention, and therefore of the same provision of the Spanish-German Convention, because its wording has not changed (author translation).

Likewise, the Supreme Court in Decision Appeal no. 6206/1995 (June 3, 2000) established that the Spanish Tax Administration ''is unquestionably obliged to respect the authentic interpretation, agreed within the OECD, since it has not formulated any reservation.'' In that case, the Court ruled in favor of the taxpayer by stating that, according to the OECD MC Commentary, the transfer of intangible rights property should be included within article 13 (capital gains) of the Spanish-German Convention. The Court assumed that the OECD principle embodied in article 13 of the OECD MC and its Commentary (''It is normal to give the right to tax capital gains on a property of a given kind to the State which under the Convention is entitled to tax both the property and the income derived therefrom'') was directly applicable to the case.

### 2. Second Approach: OECD MC Commentary as Part of the Context or as Part of the Intention of the Parties

As stated in the introduction of this Spain segment, the use of the OECD MC Commentary, both in tax procedures and in court cases, is widespread. Meanwhile, the legal justification of its deployment remains obscure, without the mention of the Vienna Convention and creating legal uncertainty for tax authorities and taxpayers.

A clear example of this phenomenon is Spanish Supreme Court Appeal no. 10106/2003 (Oct. 15, 2009), where the Spanish Supreme Court accepted the OECD MC Commentary and the OECD MC in relation to article 5 of the OECD MC to interpret the VAT notion of the PE. In this decision, the Court states that

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[71] Case no. 281/2012 (Oct. 7, 2015).

[72] For discussions on the implications of these judgments, see C. González-Cotera and A. de la Arroyo, *Tax Treaty Interpretation: A New Beginning?*, 61 European Tax'n 2/3 (2021), pp. 60–67.



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the Commentary is not just a simple proof of the right interpretation. Thus, the Court apparently considers the OECD Commentary a privileged means of evidence of a correct interpretation.

Leaving aside the technical correctness of making equivalent the VAT PE and the OECD direct taxation PE concept, the Supreme Court decision welcomes the OECD MC Commentary as part of the context of the relevant tax treaty. At fault in this decision, and in the Court's reasoning in general, is the lack of mention of the Vienna Convention, even though they classified the OECD Commentary and the OECD MC as part of the ''context'' of the treaty.

In this line, the Supreme Court in Decision Appeal no. 754/2000 (May 18, 2005) expressly stated that the OECD MC Commentary may reveal the intention of the parties (which is one of the relevant means of interpretation of tax treaties, according to the VCLT) and that ''the intention of the parties must be followed, and the commentaries accompanying the models are of great help in this respect.''

Notwithstanding, with Supreme Court Decision Appeal no. 4496/2009 (June 8, 2012), the Court has limited the context, stating that the Commentary cannot be the expressions of parties to a treaty signed at an earlier time. In the Court's words, it cannot be upheld that the OECD Commentary, which was ''approved within the OECD during the 2008 fiscal year can reflect the intention of the Spanish and Argentine in 1992, which is when they signed the corresponding international treaty; since what can in no way be admitted is the autonomous normative force of the so-called comments to the OECD model treaties for the avoidance of double taxation, by themselves considered.''

In our opinion, the approach adopted by the latter judges can be shared to a certain extent. In fact, the OECD MC Commentary that does not exist when the treaty is signed should not be an authentic expression of the parties' intentions; this should be true unless it can be upheld that the relevant OECD MC Commentary taken into consideration is limited to a better explanation of certain concepts that were already present in the version of the Commentary that existed when the DTT was signed, and these clarifications do not entail a change in the meaning of the wording of the relevant DTT article. The contrary, as the Court expresses, could lead the Commentary to have ''autonomous normative force on their own,'' and to the breach of the *pacta sunt servanda* principle provided by the VCLT.

### 3. Third Approach: OECD MC Commentary Could Substantially Vary the Scope of the Relevant Provisions of the DTT

Some Spanish court decisions could be upheld as using the OECD MC Commentary as a source of new legal obligations for the DTT's parties, by way of a dynamic interpretation of the same Commentary that are subsequent to the signing of the relevant tax treaty, which, in our view, is objectionable.

For example, Spanish Supreme Court Decision Appeal no. 7710/2002 (June 11, 2008) refers to the Commentary to article 17(2) of the 1992 OECD MC to add, by way of interpretation, the ''rent-a-start company'' clause[73] to the Netherlands-Spain DTT concluded in 1972.[74] In the case, the use of the 1992 OECD MC Commentary allowed the Spanish Supreme Court to conclude that Spain had the right to tax the income obtained by a singerman accrued to a non-resident legal entity even though the wording of the DTT did not foresee this anti-abuse clause. In other words, the OECD MC Commentary was not treated as a mere interpretative tool, but has been used to allocate taxing rights to Spain. Thus, it could be said that the Spanish courts raised the status of the OECD MC Commentary from a supportive means of interpretation to a *de facto* legal source, even implementing an anti-abuse rule.[75]

However, this judicial doctrine was rejected in subsequent decisions, for example, Spanish National Court *(Audiencia Nacional)* Decision Case no. 281/2012 (July 10, 2015), according to which the OECD Commentary cannot be used to indirectly modify the wording of the text of a DTT.

In summary, as this approach was rejected, the OECD MC Commentary could be used as a binding means of interpretation only where it respects the legitimate expectation principles and the wording of the relevant DTT.

### 4. Fourth Approach: The OECD MC Commentary Is Not a Legal Source and Could Only Endorse the Interpretation Arrived at by Other Means

More recently, two decisions from the Spanish Supreme Court, *Colgate* and *Stryker*, may have helped raise legal certainty by reducing the interpretative force of the OECD MC Commentary.

In the *Colgate* case (Spanish Supreme Court Decision Appeal no. 1996/2019 (Sept. 23, 2020), the Court

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[73] In the same vein, the Spanish Supreme Court Decision Appeal no. 456/2006 (Apr. 13, 2011).

[74] The rent-a-start clause, settled in art. 17.2 of the OECD MC 2017, deals with cases where the artist or sportsman interposes a legal entity to receive the income. It allows the source state to tax the income by a look through the hands of the artist or sportsman.

[75] J.M.C. Carrero and A.J.M. Jiménez, *Los tratados internacionales. Los convenios de doble imposición en el ordenamiento español: naturaleza, efectos e interpretación,* in *Convenios fiscales internacionales y fiscalidad de la Unión Europea* (2006), pp. 37–68. CISS. ''One thing is to interpret (even retroactively) and quite another is to presume the existence of an anti-abuse clause in a tax treaty which does not foresee it'' (author translation).



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reprimands the lower court that accepted the beneficial owner clause by the recourse to the OECD Commentary where the tax treaty did not foresee this clause.

The Court clarified that the OECD MC Commentary is not a legal source that binds the judicial criterion. In the decision, the Court said it understands that the Commentary inspires the contracting states, but its direct application as a *de facto* binding legal source must be forbidden. In the words of the Court: ''The infringement committed by the Court of First Instance is not only appreciable in the fact of applying the interpretative guideline provided by a commentary to the model conventions, which is not admissible without the support of a direct justification in the sources of the legal order itself, including the treaties and conventions.''

Similarly, in the Stryker case (Spanish Supreme Court Decision Appeal no. 5448/2018 (Mar. 3, 2020), the Court held that the interpretation process of a treaty could not be based exclusively on ''commentaries, models or interpretative guidelines that have not been explicitly adopted by the signatory states in their conventions.'' Notwithstanding the aforementioned, the Court recognized that the OECD MC Commentary may serve as guidance for DTT interpretation where it coincides with an interpretation that could be established using legal sources such as the Convention itself.

*Colgate* and *Stryker* have already been cited by courts in subsequent decisions. In this sense, the National Court Decision Appeal no. 250/2018 (July 22, 2021) established that if the beneficial owner requirement is not foreseen in the relevant tax treaty (e.g., Netherlands-Spain), then the OECD MC Commentary shall not be used to include such a clause.

On the other hand, the recent the National Court Decision Appeal no. 863/2017 (Mar. 4, 2021) accepted the OECD Commentary (curiously, the Court identified the Commentary as ''OECD Guidelines'') as ''soft law'' from where the Court has interpreted the concept of permanent establishment.

Therefore, according to the latest Spanish judicial doctrine, the OECD MC Commentary is not part of the Spanish legal order, hence, it is not binding. The Commentary could be seen, rather, as ''technical or practical rules rather than legal rules''[76] that could not change or modify the interpretation of a treaty but to provide guidance in the DTT interpretation. Thus, the Spanish Supreme Court relegates OECD MC Commentary to a mere subsidiary means of interpretation that could be employed only to confirm an interpretation arrived at by the use of actual binding means.

[76] Spanish Supreme Court Decision Appeal no. 1996/2019 (Sept. 23, 2020).

### 5. Conclusive Remarks

In essence, the legal status of the OECD MC Commentary in the Spanish courts has been ambiguous so far. Previous decisions even accepted the use of the OECD MC Commentary not just as a source of interpretation, but as capable of substantially modifying the treaty, hence, creating legal uncertainty and damaging the *pacta sunt servanda* principle. Nowadays, the trend is toward the following idea: the OECD Commentary does not form part of the Spanish legal system, but this fact does not detract from its prominence as a guidance in the application of a tax treaty by Spanish courts.

Looking ahead, post-*Colgate* and *Stryker*, the OECD MC Commentary has been relegated to a subsidiary position where it can be invoked to confirm the interpretation that can be arrived at using legal sources.

## C. India

India has *observer* status on the OECD MC Commentary. Thus, notwithstanding that it is not an OECD member like Italy and Spain, it gives its reservations/observations on various parts of the OECD MC and the related Commentary.[77] The practice of giving such reservations/observations started from the 2008 version of the OECD MC Commentary and continues in the latest version (OECD MC Commentary (2017)).

The approaches adopted in the Indian cases have been divergent so far. While in some cases, OECD MC Commentary was held to have persuasive value, in others, reliance placed on it was not accepted (see below).

In the Indian context, the OECD MC Commentary's principles were discussed first in *CIT v. Visakhapatnam Port* (1983)[78] and later in a series of judgments including the landmark case of the *Union of India and in another v. Azadi Bachao Andolan* (2003).[79] There could be two main reasons for considerations of the OECD MC Commentary. First, the doctrine of ''jus cogens''[80] and obligations flowing out from customary international law (for example, India tries to follow VLCT even though it is not a signatory to the VCLT). Second, the Constitution of India as the Directive Principles of State Policy as en-

[77] Such reservations/observations are included in the OECD Commentary. *See* Deepshikha Sikarwar, India Finally Gets a Say in OECD Tax Convention (2008).

[78] (Andhra High Court), 144 ITR 146.

[79] (Supreme Court), 263 ITR 706.

[80] In the Lexico dictionary, the meaning of ''jus cogens'' is stated as ''The principles which form the norms of international law that cannot be set aside''; available at https://www.lexico.com/definition/jus_cogens.



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shrined in Article 51 of the Indian Constitution enjoin upon the State to endeavor, *inter alia*, respect for international law and treaty obligations.[81]

The prominent approaches adopted by Indian courts, as discussed in the following paragraphs, are those that consider the OECD MC Commentary as (i) a supplementary means of interpretation; (ii) more than just a mere supportive material; and (iii) not a usable tool for interpretation purposes.

### 1. First Approach: OECD MC Commentary Is Regarded as a Supplementary Means of Interpretation and Hence Has Persuasive Value

In many Indian cases, the OECD MC Commentary is regarded as a supplementary means of interpretation. Some of them are discussed below.

In *GE Energy Parts Inc. v. CIT* (2019),[82] the OECD MC Commentary was discussed extensively. The High Court of Delhi, while examining the issue of agency permanent establishment (PE), stated that taxpayers must read the spirit of the OECD MC Commentary, not just quote selectively from it. The taxpayers relied on paragraph 33 of the Commentary to Article 5[83] to interpret the term ''such authority'' for agency PE — ''a person who is authorized to negotiate all elements and details of a contract in a way binding on the enterprise can be said to have exercised this authority'' and ''the mere fact, however, that a person has attended or even participated in negotiations (. . .) will not be sufficient, by itself, to conclude that the person has exercised in that State an authority to conclude contracts in the name of the enterprise.''

The court stated (para. 66 of the ruling): ''Regarding the OECD commentary this court notices that the position in Para 32.1[84] runs contrary to Para 33 that GE relies on. Therefore, the assessee cannot selectively quote only certain parts of the commentary — rather, must read the spirit of the entire commentary.'' The court also mentioned that the Commentary is not binding,[85] as it does not form part of any tax treaty under the doctrine of incorporation, but can be used as guidance for interpretation purposes.[86]

In the landmark case of *Union of India v. Azadi Bachao Andolan* (2003),[87] the Supreme Court, while interpreting whether ''liable to tax'' and ''payment of taxes'' for article 4 of the tax treaty would mean the same, concluded that ''liability to tax'' is not the same as ''payment of tax'' made by making reference to the OECD MC and Commentary.[88]

In the case of *Sumitomo Mitsui Banking Corp. v. DDIT*[89] (2012), it was noted that the purpose and scope of a provision in the relevant DTT could be understood from the OECD MC Commentary when the provisions of the treaty are in *pari materia* with the OECD MC. While analyzing the applicability of article 11(6) of the Indo-Japanese DTT, reference was made to article 11(4) of the OECD MC and related Commentary as article 11(6) of DTT was *pari materia* with article 11(4) of the OECD MC (see §§66–67 of the ruling).

In the case of *MasterCard Asia Pacific Pte. Ltd., In re* (2018),[90] the Authority for Advance Rulings (AAR) referred to the OECD MC Commentary while interpreting the phrase ''habitually secures orders'' included in article 5(8)(c) of the India-Singapore DTT in relation to agency PE. Article 5(5) of the (2014) OECD MC on agency PE does not include the above sentence; the adverb ''habitually'' is present in the wording of the same article only in connection with the term ''concludes contracts.'' Notwithstanding the above, the AAR held that the interpretation of the word ''habitually'' given in the OECD Commentary (in relation to ''concludes contracts'') had to be equally applicable to the words ''secures orders.'' This was also supported by the fact that the same adverb (i.e., ''habitually'') was used in the context of both ''securing order'' and ''authority to conclude contract,'' the Commentary would be equally applicable to ''securing orders.''

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[81] Gagan Kumar, *OECD Instruments Are Merely a Policy Consideration?*, 68 taxmann.com 343 (2016).

[82] (2019) (Delhi High Court), 411 ITR 243/101 taxmann.com 142.

[83] OECD MC Commentary (2014) on art. 5 (condensed version) (p. 108).

[84] Paragraph 32.1 of the OECD MC Commentary (2014) on art. 5 (condensed version) describes ''authority to conclude transactions in the name of the enterprise'' and clearly states that ''Lack of active involvement by the enterprise in the transactions may be indicative of a grant of authority to an agent.'' (pp. 107–108).

[85] The court mentioned that this finds support from the judgment of *Chryscapital Investment Advisors India (P) Ltd v. DCIT*, 376 ITR 183.

[86] As per doctrine of incorporation ''rules of international law automatically form part of municipal law.'' *See* Oxford reference.

[87] 263 ITR 706 (SC).

[88] OECD MC Commentary on article 4, defining ''resident,'' says: ''Conventions for the avoidance of double taxation do not normally concern themselves with the domestic laws of the Contracting States laying down the conditions under which a person is to be treated fiscally as 'resident' and, consequently, is fully liable to tax in that State.'' The expression used is ''liable to tax therein,'' by reason of various factors. This definition has been carried over even in article 4 dealing with ''resident'' in the OECD Model Convention 1992.

[89] (Mum) (SB), 136 ITD 66.

[90] (Authority of Advance Ruling), 406 ITR 43/94 taxmann.com 195 (AAR).



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In *Engineering Analysis Centre of Excellence Private Limited v. CIT & Anr.* (2021),[91] the Supreme Court discussed the relevance of OECD MC Commentary while interpreting the article on Royalties. In the decision under discussion, the OECD MC Commentary was regarded as instructive and a supplementary means of interpretation.[92]

Further, this decision restricted the impact of India's positions[93] on the OECD MC and Commentary which are not incorporated into its agreements. In particular, the reliance placed by tax administration on India's positions on the royalties article of the OECD MC and Commentary has been rejected on the ground that a unilateral reservation/observation would not be sufficient to set aside the persuasive value of the relevant articles of the OECD MC and Commentary; this also considering that India took no bilateral treaty amendments to change the definition of royalties contained in its DTTs (which are often similar/identical to the royalties article foreseen in the OECD MC).

Lastly, in this case, the Court referred to the Australian High Court case of *Thiel v. Federal Commissioner of Taxation*,[94] where it mentioned article 31 and 32 of the VCLT, and to the Supreme Court judgment of *Ram Jethmalani*[95] wherein it was noted that, though India is not a party to the VCLT, the principles of international law and the principle of interpretation contained in article 31 thereof provide broad guidelines to interpret treaties in the Indian context also thus laying down the importance of customary international law.[96]

The above judgments do reflect Indian courts wide acceptance of OECD MC Commentary (at least) for reference purposes. However, in some cases (e.g., *Engineering Analysis Centre*), courts have accepted to rely on the OECD MC Commentary, while in others (e.g., *GE Energy Parts Inc.*), the courts — after discussing the relevant paragraphs of the OECD MC Commentary — finally disagreed to place reliance on them. In our view, considering both the fact that India is not an OECD member and the difficulties to establish a direct link between the actual DTTs and the OECD MC and Commentary, in principle these latter tools should have (at most) persuasive and interpretative value; under these circumstances, it is unlikely the tax authorities and courts would be bound by the same instruments for interpretation purposes (however, see V. and VI., below, for further considerations). Though, this position does raise uncertainties for taxpayers as they can never be certain that the reliance placed by them on the OECD MC Commentary will be accepted by the tax authorities or not.

### 2. Second Approach: The OECD MC Commentary Is More Than Just a Mere Supportive Material

In certain other Indian's decisions, the judges seem to rely on the OECD MC Commentary and do not just use them as mere supportive tools (rather use them as a primary source) to confirm an interpretation made in accordance with other (principal) legal sources of interpretation.

For example, in the case of *Formula One World Championship v. Commissioner of Income Tax* (2017),[97] the Supreme Court referred to the principles/examples from OECD MC Commentary while analyzing the issue of the fulfillment of ''disposal test'' and ''permanence test'' for determination of the fixed place of a PE. While analyzing the satisfaction of the ''disposal test'' the Court referred to examples from OECD MC Commentary to determine its decision. On the ''permanence test,'' the Court mentioned that 'permanence' has to be seen in regards to the nature of business and stated that: ''Having regard to the OECD commentary and Klaus Vogel's commentary on the general principles applicable that as long as the presence is in a physically defined geographical area, permanence in such fixed place could be relative having regard to the nature of the business, it is hereby held that the circuit itself constituted a fixed place of business.''[98]

In *Asstt. DIT v. E-Funds IT Solution Inc.* (2017),[99] the Supreme Court was analyzing whether services must be furnished by a foreign enterprise within India to customers in India through employees or other personnel for examining Service PE. The Court placed reliance on OECD MC Commentary while stating if service is rendered to any customer in India, whether a resident of India or outside India, a service PE

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[91] (Supreme Court); Civil (Appeal) 8733–8734 of 2018 (batch of 103 appeals).

[92] The Court did refer to many other judgements in the ruling where OECD Commentary was considered as a means of supplementary interpretation.

[93] In the form of either reservation to the OECD MC or observations to the OECD Commentary.

[94] 94 ALR 647 (1990).

[95] *Ram Jethmalani v. Union of India*, (2011) 8 SCC 1. The Court also observed that OECD MC Commentary has been relied upon in several earlier rulings and noted the following: *Union of India v. Azadi Bachao Andolan*, (2004) 10 SCC 1 at pages 42–43; *Formula One World Championship Ltd. v. CIT*, (2017) 15 SCC 602 at pp. 629–630; and *CIT v. E-Funds IT Solution Inc.* (2018) 13 SCC 294 at pp. 322–323.

[96] Mukesh Butani et al., India's Supreme Court Finally Settles a Two Decade Old Dispute on Software Taxation (2021).

[97] (2017) (Supreme Court); 394 ITR 80/80 taxmann.com 347/248 Taxman 192(SC).

[98] Para. 53 of the judgment.

[99] (2017) (Supreme Court), 399 ITR 34/86 taxmann.com 240/251 Taxman 280.


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would be established in India (para. 18 of the ruling). The judge, while agreeing with the approach of the High Court, stated that as per OECD Commentary: ''it does not mean that services need not be rendered by the foreign assessees in India.''

The use of the OECD Commentary played an important role in the above decisions, hence as the actual legal basis for them; in our opinion the Commentary in the above cases has not merely a supportive role.

### 3. Third Approach: The OECD MC Commentary Cannot Be Used for Interpretation Purposes

In the landmark case of *CIT v. P.V.A.L. Kulandagan Chettiar*,[100] the Supreme Court stated that it is not necessary to refer to the terms addressed in the ''OECD'' or to those enunciated in any decisions of the courts of foreign jurisdictions or in any other agreements,[101] thereby treating OECD MC Commentary as having non-binding effects on the courts. In this case, the Court did not accept the plea that capital gains were not income and, therefore, was not covered in the ambit of tax treaty because according to the Income-Tax Act, i.e., in the domestic tax law, capital gains is always treated as income arising out of immovable property though subject to different kinds of treatment. It was stated that any term not defined in the tax treaty would draw meaning from domestic laws. The definition of ''income'' would, therefore, include capital gains. Thus, according to the Court, capital gains derived from immovable property is income and, therefore, article 6 would be applicable. Paragraph 16 of the judgment says that:

> *Taxation policy is within the power of the Government and Section 90 of the Income Tax Act enables the Government to formulate its policy through treaties entered into by it and even such treaty treats the fiscal domicile in one State or the other and thus prevails over the other provisions of the Income Tax Act, it would be unnecessary to refer to the terms addressed in OECD or in any of the decisions of foreign jurisdiction or in any other agreements.*

Many subsequent decisions relied on the *Chettiar* judgment for not accepting the reliance placed on the OECD MC Commentary.[102] For example, in the *Gracemac Corp.* judgment, the Tribunal, referring to *CIT v. P.V.A.L. Kulandagan Chettiar*, stated that the OECD Commentary would not be a safe or acceptable guide and aid for interpretation of tax treaties and reference to it would not be warranted in the absence of ambiguity in the language of the treaty. Further, it was stated that OECD commentary cannot be equated to a Supreme Court decision or law enacted by the Parliament.

In our view, the situation of outrightly rejecting the reference to OECD MC Commentary happened only in a few old cases in the Indian context. Per the recent practice of tax authorities, as stated earlier, tax authorities in India in most situations at least treat the OECD MC Commentary as having persuasive and interpretative value.

### 4. Considerations of India's Position on the OECD MC and Commentary

Some courts in the past did rely on the positions[103] taken by India on the OECD MC and Commentary, denying treaty benefit to the taxpayer.[104] However, in the landmark case of *Engineering Analysis Centre*, the Court disregarded such positions in granting the benefit to the taxpayer (see IV.A.3.a., above) and stated that they would not make the Commentary on the relevant clause inapplicable unless such positions are included in the actual DTTs through bilateral negotiations with the respective countries.

In *DIT v. New Skies Satellite*[105] (2016), the Delhi High Court stated that India's change in position to OECD MC Commentary could not influence the manner in which words defining royalty are to be read (para. 59 of the judgment). The court appreciated the fact that: ''A change in executive position cannot bring about a unilateral legislative amendment into a treaty concluded between two sovereign states. It is fallacious to assume that any change made to domestic law to rectify a situation of mistaken interpretation can spontaneously further their case in an international treaty. It is imperative that such an amendment is brought about in the agreement as well.''

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[100] 267 ITR 654.

[101] The Court stated: ''Taxation policy is within the power of the Government and Section 90 of the Income Tax Act enables the Government to formulate its policy through treaties entered into by it and even such treaty treats the fiscal domicile in one State or the other and thus prevails over the other provisions of the Income Tax Act, it would be unnecessary to refer to the terms addressed in OECD or in any of the decisions of foreign jurisdiction or in any other agreements.''

[102] *E.g.*: *Gracemac Corp. v. ADIT* (2010) 42 SOT 550 (Del.); *DDIT v. Safmarine Container Lines NV* (2009) 121 TTJ 50 (Mum.).

[103] Either in the form of reservations to the OECD MC or to observations to the OECD MC Commentary.

[104] Pinakin D. Desai and Bhaumik M. Goda, *Overview of International Taxation*, The Chambers of Tax Consultants, Int'l Tax Compendium, vol. I (2013), CCH.

In the case of *Schellenberg Wittmer, In re* (2012) 24 taxmann.com 229 (AAR), treaty benefit was denied because of India's reservation in OECD MC Commentary in the context of a fiscally transparent entity.

[105] (2016) (Delhi High Court), 382 ITR 114.



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However, in *GE Energy Parts Inc. v. ADIT(IT)* (2017),[106] the Delhi Tribunal held that India's position on such Commentary would have a binding effect on the treaties entered into by India after giving the position and in such cases positions should be taken into consideration. In §65 of the ruling, the Tribunal noted that *"India's position has a binding effect on all conventions entered after the date — but does not retrospectively apply to conventions entered before the date."*

India's reservations/observations do provide an understanding of India's view on particular clauses of the tax treaty. Though, from the above judgments, it can still be said that India's positions on OECD MC and Commentary do provide guidance on the intention/approach of the Government in relation to a particular issue, but they do not represent a binding precedent on the issue, and courts have diverging viewpoints on the same.

In our view, observations and reservations mentioned in the OECD Commentary made by either treaty partner that were existing at the time of signing the relevant treaty could have an interpretative value as the treaty partners were aware of those reservations/observations at the time they signed the relevant treaty.

### 5. Conclusive Remarks

The above assessment shows that diverse viewpoints and approaches have been followed by Indian courts while interpreting the relevant tax treaties; the courts tend to consider the OECD MC Commentary during the interpretation process in order to decide the case at hand. This is due to the fact that the OECD MC and related Commentary are recognized sources of interpretation of tax treaties, and Indian courts are increasingly placing reliance on and quoting them in the relevant judgements.

However, differently from the situations of Italy and Spain, the Indian courts have never qualified the OECD MC and Commentary as binding means of interpretation. This is supported by the fact that India is not an OECD member country, thus, in principle, the Commentary should have even less relevance for interpretation purposes compared to the situation of Italy and Spain (see IV.C.2. and IV.C.3., above, for further considerations on this point).

Notwithstanding the above, it has been noticed that in practice, in some cases, the Indian judges have (implicitly) considered the mentioned interpretation sources as more than just supportive materials, totally relying on the OECD MC Commentary to support their decisions (see IV.C.2., above).

[106] (2017) (Delhi Tribunal), 78 taxmann.com 2.

## V. HOW THE MLI AND THE BEPS FINAL REPORTS CAN IMPACT THE DEBATE

In relation to what has been said in the previous paragraph, it has to be noticed that the publication of the MLI and BEPS Actions Final Reports have put an extra layer of complexity on the debate at hand, at least for certain parts of the 2017 OECD MC Commentary.

The BEPS Action Final Reports suggested the implementation of both the OECD MC and the related Commentary. In particular, they provided new paragraphs to be added to the 2017 OECD MC[107] and the respective articles of the 2017 OECD MC Commentary.

Many of the mentioned BEPS implementations became the MLI articles and/or were literally reported/cited in the MLI Explanatory Statement; this circumstance is also proved by the express reference made in the MLI Explanatory Statement to the relevant paragraphs of the BEPS Action Final Reports.[108] The same BEPS implementations have been included in the 2017 OECD MC and Commentary.

Given the vital link between the MLI articles and the BEPS Action Final Reports, the latter should be considered an essential tool for interpreting the MLI articles (see below). The same statement should be

[107] For the provisions of the 2017 OECD Model Convention implemented by the BEPS Action Final Reports, see Hattingh, p. 186, Table 2.

[108] For example, see the Explanatory Statement: (i) §§39 and 40 related to art. 3 MLI: ''The Action 2 Report, 'Neutralising the Effect of Hybrid Mismatch Arrangement', produced new Article 1(2) of the OECD Model Tax Convention.. . . Article 3(1) of the Convention replicates this text''; (ii) §49 related to art. 4 MLI: ''Paragraph 1. . .is based on the text of Article 4(3) of the OECD Model Tax Convention produced in paragraph 48 (page 72) of the Action 6 Report''; (iii) §60 related to art. 5 MLI: ''Paragraphs 442 through 444 of the Action 2 Report describe three alternative ways. . . . These alternatives are reflected in paragraph 2 and 3 (option A), paragraph 4 and 5 (Option B) and paragraph 6 and 7 (Option C) of Article 5''; (iv) §75 related to art. 6 MLI: ''model preamble text was produced in paragraph 72 (page 92) of the Action 6 Report''; (v) §91 related to art. MLI: ''Paragraph 1 includes the PPT, which is based on paragraph 7 of Article X (Entitlement to Benefits) of the OECD Model Tax Convention produced in paragraph 26 (page 55) of Action 6 Report''; (vi) §118 related to art. 8 MLI: ''Paragraph 1. . .based on Article 10(2) of the OECD Model Tax Convention as revised in paragraph 36 (pages 70 and 71) of the Action 6 Report''; (vii) §128 related to art. 9 MLI: ''Paragraph 1 (. . .) based on Article 13(4) of the OECD Model Tax Convention as revised in paragraph 44 (page 72) of the Action 6 Report).'' Similar references are also provided for art. 10 MLI (§142), art. 11 MLI (§147), art. 12 MLI (§§157–158), art. 13 MLI (§168–169), art. 14 MLI (§183), art. 15 MLI (§188), arts. 16–26 MLI (§193, 209) etc.


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true also for the following parts[109] of the 2017 OECD MC Commentary that literally reproduce the BEPS Action Final Reports to clarify the meaning of the OECD MC new provisions implemented in the MLI:

| MLI articles | | BEPS clarifications[110] | 2017 OECD MC Commentary[111] |
|---|---|---|---|
| 3(1) | Transparent entities | Action 2 §435 p.139 §26.3–26.16 | §§2–15 commentary on art. 1(2) |
| 4 | Dual resident entities | Action 6 §48 p. 72 | §§21–24.5 commentary on art. 4(3) |
| 5 | Application of methods for elimination of double taxation | n.a. | n.a. |
| 6 | Purpose of a Covered Tax Agreement (new Preamble) | Action 6 §74 p. 92 | §§2–3, 16–16.2 Introduction |
| 7(1) | Prevention of Treaty Abuse — PPT | Action 6 §26 p. 55 | §§169–182 (until example J), 183–187 commentary on art. 29(9) |
| 8(1) | Dividend Transfer Transactions | n.a. | n.a. |
| 9(1) | Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property | n.a. | n.a. |
| 10 | Anti-abuse Rule for PE Situated in Third Jurisdictions | Action 6 §52 p. 76 | §§161–162 commentary on art. 29(8) (with some amendments) |
| 11(1) | Application of Tax Agreements to Restrict a Party's Right to Tax its Own Residents | Action 6 §63 p. 86 | §§17–21 commentary on art. 1(3) |
| 12(1) 12(2) | Artificial Avoidance of PE Status through Commissionaire Arrangements and Similar Strategies | Action 7 p. 17 | §§82–101 commentary on art. 5(5) and §§102–114 commentary on art. 5(6) |
| 13(2) 13(3) | Artificial Avoidance of PE Status through the Specific Activity Exemptions | Action 7 p. 29 | §§58–65, 67–71, 73, 75–78 commentary on art. 5(4) |
| 13(4) | Artificial Avoidance of PE Status through the Specific Activity Exemptions | Action 7 p. 40 | §§79–81 commentary on art. 4(1) |
| 14(1) | Splitting-up of Contracts | Action 7 p. 43 | §§51–53 commentary on art. 5(3) |
| 15 | Definition of a Person Closely Related to an Enterprise | Action 7 p. 26 | §§120–121 commentary on art. 5(8) |
| 16 | MAP | Action 14 p. 22 | §§7, 14, 16–19, 23, 31–35, 42 commentary on art. 25(1). |
| 17 | Corresponding Adjustments | Action 14 p. 35 | §§59.1, 62 commentary on art. 7. §§6.1, 10 commentary on art. 9. |

[109] Only the *substantive provisions* of the MLI have been assessed for the purposes of this table.

[110] These are the parts of the BEPS Action Final Reports that clarify the meaning of the new provisions included in the 2017 OECD MC/MLI.



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[111] These are the parts of the 2017 OECD MC Commentary which reproduce the BEPS clarifications mentioned at the previous footnote.

However, could these parts of the 2017 OECD MC Commentary have a binding legal status for interpretation purposes, at least for the countries that joined the MLI and with respect to the MLI provisions adopted by them?

It has been anticipated, as mentioned in II., above, that the most relevant problem with the legal status of the OECD MC Commentary is related to the impossibility of establishing a certain match/link between the meaning of the wording used in the DTTs with the one of the OECD MC (as described in the related Commentary).

This circumstance is probably due to the customization phase carried on by the treaty negotiators (i.e., the situation whether both contracting states negotiate the terms of the tax treaties as per their requirements). The basis for their discussions is frequently the wording of the OECD MC, but then they (can) give those same words a different meaning for negotiation purposes.

This customization phase is totally absent with respect to the MLI provisions. The contracting jurisdictions that decide to join the MLI can opt in/opt out for certain MLI articles,[112] but the latter cannot be modified and have to be accepted in shape and with the meaning given by the MLI drafters in the relating Explanatory Statement. In fact, the MLI and its Explanatory Statement have been drafted by an *ad hoc* group that was open to all the interested parties participating on equal footing;[113] it was a free choice of that given country — that subsequently decided to join the MLI — to be part of the drafting team or to leave this task to other countries without having the possibility to give its own say.

Consequence of the above is that binding nature for interpretation purposes can be attributed to the Explanatory Statement as well as to the BEPS Action Final Reports expressly cited in the former document; this is because it is possible to establish a link between these documents and the MLI.[114]

Such a circumstance has been confirmed recently by the Conference of the Parties of the MLI on 3 May 2021,[115] during which it has been agreed that: (i) the Explanatory Statement forms part of the 'context' *ex* article 31(2) VCLT and, therefore, is a binding legal source of interpretation. In fact, it reflects the agreed understanding of the negotiators with respect to the MLI provisions and provides relevant clarifications on the MLI approach/how each provision is intended to affect covered tax agreements; (ii) all the questions of interpretation and implementation of the BEPS-MLI related measures should be addressed in the light of the policy objective of the relevant BEPS Final Reports. Substantive provisions are intended to be identical in their effect to the provisions that were produced in the BEPS Reports.

From the implicit acceptance of the Explanatory Statement and the BEPS Action Final Reports[116] as binding means of interpretation should stem the binding nature of the relevant parts of the 2017 OECD MC Commentary, according to article 31(2) VCLT.[117] The same would not be extended to the old parts of the same Commentary (*ante* BEPS Reports) or to those parts of the Commentary that do not derive from the BEPS Reports but are an OECD MC Commentary original content;[118] these parts, in fact, lack a strong link with the MLI and the Explanatory Statement.[119]

The above would bring practical challenges for the interpretation process. The relevant interpreters (e.g.,

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[112] The relevant parties have to make ''reservations'' to opt out; such reservations, however, are limited to those provided for in the MLI and cannot be customized. *See* A. Bosman, *General Aspects of the Multilateral Instrument*, 45 Intertax 10 (2017), p. 649–650.

[113] OECD, Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting [2017] in OECD Multilateral Convention (MLI), §7. At the end it was composed of 99 countries as members, four non-State jurisdictions and seven international or regional organizations as observers. Manzi, §4.2.

[114] The MLI drafters decided to rely on the BEPS Final Reports for drafting and interpretation purposes. After all, this seems a logical approach since, at the end of the day, the MLI represents mainly just a means to implement the BEPS Action Final Reports in the treaty network. This also seems clear from the text of the Explanatory Statement, which is considered a binding interpretative document for MLI joiners, even if it is not signed jointly with the MLI text. The binding nature of the Explanatory Statement and of the BEPS Action Final Reports for interpretation purposes has been assessed in more detail, also through an example, in: Manzi, §4.2.

[115] Opinion of the Conference of the Parties of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, approved by the Parties to the MLI under written procedure on 3 May 2021, §2.1. and 2.2.

[116] That is, through the Explanatory Statement and the mentioned Opinion of the Conference of the Parties of the MLI.

[117] That is, the parts of the OECD MC Commentary that reproduce the (binding parts of) BEPS Reports (i.e., the paragraphs mentioned in the table above). *See* Manzi, §4.2 and §4.2.4.; Hattingh, table 2, p. 186.

[118] *See* Manzi, §4.2.4: an example in this respect is represented by the examples K, L, and M, made in the OECD MC Commentary to article 29(9) OECD MC, which are not provided in the BEPS Action 6 Final Report. This report includes only examples from A to J which were also included in the OECD MC Commentary to article 29(9).

[119] As a consequence, their legal status would be subject to the



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tax authorities, tax court judges), when deciding to use the OECD MC Commentary to solve a given issue, will have to identify the parts of the Commentary that can have binding effects for interpretation purposes and those that cannot. If the considerations made above are correct, in fact, not all the parts of the OECD MC Commentary would carry equal weight on the interpreter's decision/approach in the relevant cases. In certain situations, a decision supported only by parts of the OECD MC Commentary that do not qualify as binding means of interpretation can be theoretically considered not valid, lacking a comprehensive motivation/explanation. The mentioned circumstance could create some chaos for the interpreters and, therefore, could have negative effects on case law decisions and tax ruling or interpretation in general.

An example can be made using court decision assessed in IV.A.1.c., above, i.e., the Italian Supreme Court decision no. 25374 (Oct. 17, 2008), which dealt with the assessment of the existence of a non-written anti-abuse principle. In that case, the Italian Supreme Court quoted the so-called ''guiding principle'' contained in §61 of the OECD MC Commentary to article 1 of the OECD MC, just to support their argumentations, confirming its non-binding nature.

The decision was issued in 2008. As is well known, after that date the concept included in the ''guiding principle'' has been implemented and confirmed in a treaty provision, i.e., article 29(9) OECD MC (PPT clause); such a provision has been introduced, first, in the text of article 7(1) of the MLI and then in the 2017 version of the OECD MC.

In the above situation — assuming that (i) the relevant DTT was a Covered Tax Agreement (CTA), (ii) implemented with the text of 7(1) of the MLI, and (iii) the issue assessed in the decision arose after the entry into force of the MLI — the weight given to the OECD MC Commentary could have been different. The relevant CTA would have been implemented with a provision similar to the one provided by article 29(9) OECD MC. Because of the above implementation through the MLI,[120] on the basis of the consideration made in this paragraph, the Commentary to such article could have binding effects for interpretation purposes.

considerations made in the previous §3 and vary depending on the different circumstances and jurisdictions. Many other authors did not make such a distinction, extending to the interplay between the MLI provisions and the OECD MC Commentary the same considerations made in the past with regard to the interplay between the DTT/OECD MC provisions and the same Commentary. *See* Bosman, p. 648; Svetlana Wakounig, *Interpretation of Terms Used in the Multilateral Instrument* (M. Lang et al. eds., Kluwer Law Int'l 2018), pgs. 25, 29.

## VI. HOW THE IMPLEMENTATION OF THE TWO-PILLARS SOLUTION CAN IMPACT THE DEBATE

### A. Background

Between October and November 2021,[121] Inclusive Framework countries joined a two-pillar solution ''to reform the international taxation rules and ensure that multinational enterprises pay a fair share of tax wherever they operate and generate profits in today's digitalised and globalised world economy.''[122]

Pillar 1 aims at reallocation of profit from in-scope companies by setting new nexus to the market jurisdictions. Pillar 2 operates through a set of (domestic and treaty) rules and aims at ensuring minimum taxation of the in-scope multinational enterprises.[123]

According to the OECD blueprints, the two-pillars solution statement (Statement on the Two-Pillar) and relating brochure,[124] the two pillars should be implemented through a Multilateral Convention (Pillar 1) and a Multilateral Instrument (Pillar 2); details discussed below:

[120] Of course, the mentioned situation will be also impacted by the inclusion in the actual DTT of an article including an anti-abuse provision (e.g., a provision similar to article 29(9) OECD MC).

[121] The number of countries joining the two pillars solution was 135 as of October 8, 2021 and became 137 as of November 4, 2021; see updated list.

[122] OECD/G20 Base Erosion and Profit Shifting Project, *Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, Oct. 2021, Brochure, p. 3.

[123] *Id.*, pp. 6–8.

[124] OECD, Tax Challenges Arising from Digitalisation — Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing, Paris 2020), §10.2.2., p. 201. OECD/G20 Oct. 2021 Brochure, pp. 10–11. OECD/G20 Base Erosion and Profit Shifting Project, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, Oct. 8, 2021.



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| Pillar Solution | Instrument of Implementation | Timelines |
|---|---|---|
| Pillar 1 | Multilateral Convention (MLC) | — MLC text and Explanatory Statement (ES) is expected to be published in early 2022 to implement Amount A.[125] |
| | | — Signing ceremony of the MLC to take place in mid-2022. |
| | | — Ratification of MLI in 2023 by countries for Amount A, in some cases changes in domestic law would be required |
| Pillar 2 | Multilateral Instrument (MLI) | — MLI is expected to be released in mid-2022 to implement the subject-to-tax rule (STTR) in the relevant bilateral tax treaties.[126] |
| | | — Signing and possible ratification of MLI and domestic adoption of the GLOBE rules (2022–2023) |
| | | — Adoption of MLI STTR (2023) |

[125] OECD/G20 Oct. 2021 Brochure, p. 5.

[126] *Id.*, pgs. 5, 8, 11.

The implementation documents (i.e., MLC for Amount A under Pillar 1 and probably MLI for STTR under Pillar 2) may have an impact on the debate on the legal status of the OECD MC Commentary. The information available on the implementation and drafting of these documents is still limited and uncertain. Therefore, the purpose of the next paragraphs is to make some hypotheses on the potential impact that the MLC and the MLI could have on the debate at hand.

## B. Implementation of Pillar

The Blueprint on Pillar 1 acknowledged that the implementation of Amount A could have different consequences depending on the existence of bilateral tax treaties between the relevant parties.

Where a tax treaty exists, the implementation of the new rules by the relevant countries' domestic law will be limited by the traditional provisions/principles included in such treaties (e.g., those concerning business profit/PE and the relating physical presence requirements).[127] These treaty rules need to be amended in order to allow the application of the Pillar 1 rules. In this regard, considering that a bilateral modification/negotiation of the relevant treaty rules would have been time consuming and not efficient, the OECD suggested the implementation of the new set of rules through the MLC.[128]

Instead, in case of no treaty, the implementation of the rules at hand can be simply demanded to the domestic law (at least in theory).[129] However, the need for a consistent and uniform application of the Pillar 1 rules among the Inclusive Framework parties also imposes, in this case, the use of the MLC.[130]

In the light of the above, the development of the text of the MLC was demanded by the Inclusive Framework to the Task Force on the Digital Economy; all jurisdictions that have committed to the Statement on the Two-Pillar will be able to participate in the content's negotiation.[131]

According to the OECD, the ''MLC will be developed to introduce a multilateral framework for all jurisdictions that join, regardless of whether a tax treaty currently exists between those jurisdictions.''[132] The MLC will contain all the necessary rules ''to determine and allocate Amount A and eliminate double taxation, as well as the simplified administration process, the exchange of information process and the processes for dispute prevention and resolution in a mandatory and binding manner between all jurisdictions.''[133] To ensure that Amount A is applied in a uniform and consistent manner it will also be supplemented by an Explanatory Statement to ''describe the purpose and operation of the rules and processes.''[134]

In other words, the MLC should provide the taxpayers/contracting states with all the rules necessary to apply the Pillar 1 provisions, regardless of whether or not the relevant parties already have a tax treaty. Thus, in principle the MLC seems conceived to be an autonomous set of laws/principles, able to include ''all the essential elements of a new taxing right (the rules on the identification of the taxpayer and the object of taxation and those on the tax base, the tax period, the tax rates, etc.) consistent with the design of Amount A and domestic legislation.''[135]

Existent double tax treaties will remain in force and will govern international relations among the treaty

[127] OECD (2020) Report on Pillar One Blueprint, §10.2.2.

[128] OECD (2020) Report on Pillar One Blueprint, §10.2.2.

[129] OECD (2020) Report on Pillar One Blueprint, §10.2.2.

[130] OECD (2020) Report on Pillar One Blueprint, §10.2.2.

[131] OECD/G20 BEPS Statement, 8 Oct. 2021, p. 6.

[132] OECD/G20 BEPS Statement, 8 Oct. 2021, p. 6.

[133] OECD/G20 BEPS Statement, 8 Oct. 2021, p. 6.

[134] OECD/G20 BEPS Statement, 8 Oct. 2021, p. 6.

[135] OECD (2020) Report on Pillar One Blueprint, §10.2.2. For



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partners for all the aspects other than those concerning Pillar 1.[136] They will co-exist with the MLC, but the latter document will prevail in case of conflicts.[137]

Unlike the MLI discussed in §5, aimed to implement BEPS measures, the MLC should not seek to amend the wording of the treaties' articles (e.g., the new nexus rule will not require the amendment of the PE article), but it will provide with new standalone provisions.[138]

## C. Implementation of Pillar 2

As mentioned above, Pillar 2 should operate through a set of interrelated rules. The coordinating rules also highlighted the need for MLI to facilitate the implementation of the rules.

More so, it was mentioned in the Statement on the Two-Pillars that the MLI would be necessary to facilitate the implementation of STTR, and it will be implemented as per the timelines mentioned in VI.A., above. Thus, once the model treaty provisions for STTR are released, it is expected that these rules ''will be supplemented by commentary that explains the purpose and the operation of the STTR.''[139]

In the Statement on Two-Pillar, it was also agreed that the implementation framework for GloBE rules would be released by the end of 2022. Effective implementation of these rules may be done through a form of MLC for effective coordination and implementation of GloBE rules.[140] The same Statement mentioned that: ''As part of the work on the implementation framework, IF members will consider the merits and possible content of a multilateral convention in order to further ensure coordination and consistent implementation of the GloBE rules.'' Hence, the use of the MLC also for the implementation of these rules cannot be ruled out. If this is the case, the considerations made in the previous paragraph with respect to the Pillar 1-MLC *mutatis mutandis* could apply here as well.

The MLI and its Commentary for STTR rules would bring changes to the provisions of the existing tax treaties. Thus, corresponding changes may be implemented in the OECD MC and its related Commentary in coming times in relation to parts of Pillar 2 (STTR rule) implemented through the MLI.

## D. Analysis and Possible Interplay With OECD MC Commentary

As discussed in VI.A., above, the OECD is considering implementing Pillar 1 and the Pillar 2 proposals through different instruments (i.e., MLC and MLI), which could operate in slightly different ways. This circumstance could have different effects on the debate as follows.

Regarding Pillar 1, as anticipated above, the MLC will probably qualify as an autonomous international agreement that will coexist with the double tax treaties concluded by the relevant parties (if any). The MLC will include standalone provisions that will not modify tax treaty articles (if any) and will prevail on the latter in case of conflict (e.g., on the basis of article 30 VCLT — *Application of successive treaties relating to the same subject-matter*).[141]

If the above clarifications included in the OECD Blueprint on Pillar 1 will be confirmed, an impact of the MLC and its ES on the debate at hand should not be expected. The OECD Model Convention should not be implemented with the Pillar 1 rules and, as a consequence, neither the relating Commentary should be affected by any modification in this respect.

Instead, if parts of the OECD MC and its Commentary will be amended to take into consideration the new rules set out in the MLC (e.g., those rules that aim to manage inconsistencies/coordinate the application of the MLC with DTTs),[142] different considerations could be made in relation to the question assessed in this paper. If this is the case, there would be some arguments to support the binding nature of those parts for interpretation purposes, following the same line of reasoning explained in V.A., above, to support the binding nature of those parts of the 2017 OECD

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this purpose, the OECD has released to Public Consultation the Model Rules for Domestic Legislation (Model Rules) which would help to implement the Pillar 1 rules in the text of the MLC. Besides, the Model Rules would work as a template for the necessary modifications of the domestic tax rules of the jurisdictions adopting Pillar 1. The Model Rules would be supported by commentaries (such as the OECD MC) to clarify and provide further guidance. Adopting jurisdictions could freely adopt the Model Rules ''to reflect their own constitutional law, legal systems, and domestic considerations and practices for structure and wording of legislation as required.''*See* OECD, Public Consultation Document, *Pillar One — Amount A: Draft Model Rules for Nexus and Revenue Sourcing* (2022), p.2.

[136] OECD (2020) Report on Pillar One Blueprint, §10.2.2.

[137] OECD (2020) Report on Pillar One Blueprint, §10.2.2.

[138] OECD (2020) Report on Pillar One Blueprint, §10.2.2.

[139] OECD/G20 Oct. 2021 Brochure, p. 11.

[140] Patrick Marley et al., 136 countries agree to OECD/G20 Inclusive Framework's two-pillar solution to international tax reform, Osler (2021).

[141] Needless to say, where a double tax treaty between the relevant parties is absent there will not be any compatibility issue to be assessed.

[142] OECD/G20 Oct. 2021 Brochure, p. 6. *See also* Nathalie Bravo and Marianna Dozsa, *A Multilateral Convention to Implement Amount A of Pillar One*, Kluwer Int'l Tax Blog, Friday, Dec. 3, 2021, §3. According to these authors, also Amount A (where applicable to in-scope companies) should have an impact on the existing/future bilateral tax treaties, e.g., on arts. 5, 7, 9, and 25.



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MC Commentary that reproduced the parts of the BEPS Actions Final Reports to which express reference have been made by the Explanatory Statement to the MLI for interpretation purposes.[143] In this case, in fact, the parts of the OECD MC Commentary that would replicate the wording of the MLC and/or its ES could qualify as binding means of interpretation following the binding nature of both the MLC and (probably) its ES (few doubts could arise just with regard to the ES if it is not signed by the relevant countries together with the MLC, following the same challenges that came out with respect to the Explanatory Statement of the MLI, solved lately in May 2021 by the Conference of the Parties of the MLI,[144] in favor of its binding nature for interpretation purposes).

Analogously, the above would be potentially applicable to the Multilateral Instrument conceived to implement the Pillar 2 proposal, notably the STTR. In this case, in fact, the OECD made it clear that this rule will be drafted as a model treaty provision and will have an impact on existing/future treaties. As a consequence, the explanation of the functioning of such a rule, probably included in the *ad hoc* commentary, will be likely implemented in the next version of the OECD MC Commentary. If the *ad hoc* MLI commentary will be considered binding for interpretation purposes (following the line of reasoning made in V.A., above), the same effects should be extended to those parts of the future OECD MC Commentary that replicate its wording.

In any case, the entry into force of the above legal agreements will add an extra layer of complexity to the debate at hand and, more in general, it will complicate the interpretation process.

To exemplify the above, it can be hypothesized the following situation: assume the existence of a MNE (X-Co) incorporated in Country A which is in scope for the two-pillars new rules. Assume also that the tax residence of X-Co is claimed both by Country A and Country B. Country A and Country B signed a DTT with the same wording of the 2014 OECD MC. The DTT between these countries is also a CTA for MLI purposes; Country A and Country B have opted-in with respect to article 4(1) of the MLI (i.e., the corporate tie-breaker rule included in article 4(3) 2017 OECD MC).

In this situation, before assessing the application of the pillars' rules the tax residence of X-Co has to be determined. According to what has been described above, the relevant DTTs remain in force and take care of all the aspects concerning cross border relationships other than those concerning the two-pillar rules.

Under this scenario, first of all the relevant judges will have to determine the tax residence of X-Co on the basis of the applicable DTT between Country A and Country B. The Blueprint on Pillar 2 confirms this approach saying literally that:

> dual residency should be resolved, solely for purposes of the GloBE rules, in accordance with the tax treaty tie breaker rule agreed between the jurisdictions where the entity or arrangement has dual-residence (even if the rules are only relevant to a particular treaty entitlement). Further work will be undertaken to develop rules for determining a Constituent Entity's tax residence in case of no applicable tax treaty tie-breaker rule, or if the tax treaty tie-breaker rule does not solve the issue (e.g., it requires competent authorities to solve the issue through a MAP or denies tax treaty benefits).[145]

Thus, the tax judges will have to assess article 4 of the DTT between Country A and B (assuming it is equal to article 4 of the 2014 OECD MC and further implemented by article 4(1) MLI).

During the interpretation process, with respect to the issues involving article 4(1) of the DTT[146] the respective parts of the OECD MC Commentary would probably qualify as mere supplementary means of interpretation, with the meaning of article 32 VCLT; with respect to this provision in fact it would be difficult to establish a direct link between the Country A–B DTT and the OECD MC and Commentary. Thus, at most, they could be used to confirm the interpretation made according to other legal sources.

Instead, with respect to the issues involving article 4(3) of the DTT[147] the respective parts of the OECD MC Commentary implemented through the MLI (i.e., §§21–24 of the 2017 OECD MC Commentary to article 4(3)) should have binding effects and have the role of primary sources for interpretation purposes; these conclusions will be reached following the line of reasoning described in previous §5.1.

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[143] That is, the OECD MC Commentary is a binding means of interpretation to the extent that it reproduces the BEPS Action Final Reports that are the substance of the MLI since for interpretation purposes express reference is made to them by the Explanatory Statement to the MLI which has been considered, in its turn, a binding tool for interpretation purposes according to the Conference of Parties to the MLI.

[144] *Opinion of the Conference of the Parties of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, §2.1. and 2.2.

[145] OECD, Tax Challenges Arising from Digitalisation — Report on Pillar Two Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing, Paris 2020), §57, p. 27.

[146] That is, involving a provision equal to article 4(1) 2017 OECD MC.

[147] That is, involving a provision equal to article 4(3) 2017 OECD MC.



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After having determined the tax residence of X-Co (let's hypothesize in Country A), the relevant judges will have to assess the allocation of the relevant profits between the contracting states. As anticipated above, in this case the MNE and the related income fall within the scope of the two-pillar rules; further, Country B can qualify as 'market jurisdiction' for the purposes of the mentioned new rules (if it turns out it is not X-Co residence State). Under this scenario, the relevant judges will move the analysis to the relevant two-pillars MLC/MLI; the latter documents, in fact, will likely prevail over the relevant DTTs. For the interpretation of these documents the judges will have to take into consideration the related Explanatory Statement/ad hoc commentary and the parts of the OECD MC Commentary implemented by reason of the same documents (if any). The possible binding nature of these parts of the OECD Commentary will depend on the qualification of the (two-pillars) Explanatory Statement/ad hoc commentary as binding means of interpretation.

In synthesis, the example shows that the interplay between the legal status of the OECD MC Commentary could flow through the analysis on the legal status of other international instruments (e.g., the BEPS Actions Final Reports, the Explanatory Statement to the MLI, the two-pillars MLI/MLC ES and ad hoc Commentary), creating a challenging assignment in practice for the relevant interpreters.[148]

## VII. CONCLUSIONS

The comparative analysis carried out in the previous paragraph has shown that although the approaches upheld in the different countries may have different nuances and connotations, all of them can broadly be reduced to three main categories: (i) those that consider the OECD MC Commentary not applicable as a means of interpretation; (ii) those that consider it a supplementary means of interpretation or a tool of persuasive value, able to support/confirm the interpretation carried out through other legal sources; (iii) those that consider it binding for interpretation purposes. This analysis clearly shows that the question on the legal status of the OECD MC Commentary is far from a uniform consent/solution, and definitely cannot find answers with some common singular approach.

The above appears to be due to two main reasons. First, it is very difficult to establish a certain match/link between the wording of the actual DTTs and the one of the OECD MC; as a consequence, it is hard to be sure that the meaning given by the relevant parties to the words used in the DTTs is identical to the one attributed to the same words by the OECD MC Commentary. This is due to the fact that the treaty negotiation process implies a customization phase by the relevant parties that, inter alia, is generally not public. The second reason appears related to the approach used by the relevant interpreters (e.g., tax authorities, tax court judges). The vast majority of the case law assessed lacks a proper line of reasoning on the binding/non-binding nature of the relevant parts of the Commentary used (at least for reference purposes), which leads to a situation of countries adopting diverse positions on relevance of the OECD Commentary in various judicial precedents.

As said above in V. and VI., the debate at hand may become even more complex because of the BEPS MLI and the two-pillars MLC/MLI. These documents, in fact, impose different considerations on the legal status of those parts of the OECD MC Commentary that are connected to their entry into force. In certain cases, in fact, a link between these legal instruments and the OECD MC Commentary could be established, giving to the latter binding force for interpretation purposes.

The task of the relevant interpreters will be to assess if the relevant parties joined or not the BEPS MLI or the two pillars MLC/MLI, and to identify the parts of the Commentary that have been implemented by reason of the mentioned legal instruments (i.e., those that could qualify as binding for interpretation purposes). As described in the example in VI.D., above, it is definitely not an easy task and it could be challenging from an administrative, interpretative, and methodological point of view, implying, inter alia, a diversified assessment of the Commentary by the relevant interpreters, giving different weight to different parts of the same document.

In light of the above and the role that the OECD MC Commentary is playing before tax courts, with varying degrees of reliance — from binding interpretation tool to mere supplementary means of interpretation — it may be desirable an intervention at the treaty level to give more certainty and a possible solution to the debate at hand.

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[148] On a final and separate note, with respect to Pillar 1, further discussions could also arise with the expected Commentary for the Model Rules for Domestic Legislation which would be reflected in the MLC. Therefore, those commentaries would serve as a guidance for the domestic law interpretation, igniting up its legal status discussion. However, the analysis of the legal status of this commentary is outside the scope of this article. Further, information regarding the way of its implementation are still very limited and prevent foreseeing the possible issues it could trigger. *See* OECD, Public Consultation Document, *Pillar One — Amount A: Draft Model Rules for Nexus and Revenue Sourcing* (2022), p. 2.



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