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The OECD Multilateral Instrument from a Mexican Perspective: What Are the Most Significant Challenges?

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In this article, the author provides an analysis of the most significant challenges that arise from the language of the OECD Multilateral Instrument, or the MLI, implementing treaty related-measures to prevent base erosion and profit shifting from a Mexican statutory (tax) and constitutional perspective.

1. Introduction

The OECD "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting" (the Multilateral Instrument or "MLI") was published on 24 November 2016 with effect from 7 June 2017.[1] The MLI is derived from Action 15 of the OECD/G20 Base Erosion and Profit Shifting (BEPS) initiative.[2] It was circulated among all of the countries that had participated in the OECD/G20 BEPS Project for their study, signature and ratification.

Mexico actively participated in all of the stages of the OECD/G20 BEPS initiative together with most of its treaty partners.[3] However, this article only considers the implications of the MLI regarding Mexico's most important tax treaties from the perspective of foreign direct investment (FDI) into the country.

The article is structured as follows. In section 2., the author addresses the specific modifications to Mexico's most important tax treaties that are derived from the MLI. Then, in section 3., the author considers the most significant challenges arising from the language of the MLI in a Mexican statutory and constitutional context. The author's conclusions are set out in section 4.

2. The MLI and Specific Modifications to Mexico's Most Important Tax Treaties

2.1. Legislative history in Mexico

Mexico signed the MLI together with other states at the plenary session held at the OECD's headquarters in Paris on 7 June 2017.[4] It submitted a document entitled "Status of List of Reservations and Notifications at the Time of Signature", which was later amended in some matters to produce the final list to be deposited. One of those matters deals with change to Mexico's position regarding article 3 of the MLI. In the final list as deposited, Mexico reserved its right for the entirety of article 3 of the MLI not to apply to its Covered Tax Agreements (CTAs). This final reservation aligns with Mexico's strong international tax policy in dealing with fiscally transparent entities and vehicles.

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1. OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (7 June 2017), Treaties and Models IBFD.
2. OECD, *Action 15 Final Report 2015 – Developing a Multilateral Instrument to Modify Bilateral Tax Treaties* (OECD 2015), Primary Sources IBFD [hereinafter the *Action 15 Final Report* (2015)].
3. *See* OECD, *Ground-breaking multilateral BEPS convention signed at OECD will close loopholes in thousands of tax treaties worldwide* (OECD 2017), available at www.oecd.org/tax/ground-breaking-multilateral-beps-convention-will-close-tax-treaty-loopholes.htm (accessed 13 May 2023) [hereinafter *Ground-breaking multilateral BEPS convention signed*]. *See also* OECD, *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting Status as of 1 June 2023* (OECD 2023), available at www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (accessed 5 June 2023).
4. OECD, *Ground-breaking multilateral BEPS convention signed*, *supra* n. 3.

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In accordance with Mexican constitutional law and its provisions for the approval of international treaties, the Mexican Senate finally approved the MLI on 6 October 2022.[5] The Senate's approval was published in the Mexican *Diario Oficial de la Federación* (Official Gazette of the Federation, or "Federal Official Journal") on 22 November 2022.[6]

Mexico deposited also its instrument of ratification with the OECD on 15 March 2023 together with the "Status of List of Reservations and Notifications upon Deposit of the Instrument of Ratification".[7] As a result, in accordance with article 34(2) of the MLI, the MLI entered into force with regard to Mexico on 1 July 2023.[8] In addition, the provisions of the MLI in respect of withholding taxes at source will come into effect in accordance with Mexico's final list of Notifications and Reservations deposited with the OECD for "fiscal years" commencing on or after 1 January 2024.[9] This option adopted by Mexico is in line with the fact that, under Mexican domestic law, it is mandatory for taxpayers to determine their tax obligations in respect of fiscal years following the calendar year end. Attention should be paid to the fact that the MLI provisions modifying CTAs in matters such as, for example, the new Preamble following article 6(1) of the MLI and other provisions applying to the limitation on benefits (LOB) or dispute resolutions that can come into effect as soon as 1 July 2023.

With regard to the effects of the MLI on the mutual agreement procedure (MAP) articles in its tax treaties, Mexico reserved the right for article 35(4) of the MLI not to apply to its CTAs. Accordingly, where the provisions of article 16 of the MLI modify the provisions of a CTA once such provisions come into effect on 1 July 2023, these provisions have to be read in the entire text and in the context of the corresponding MAP article that is already in place in a CTA. Moreover, with regard to the effect of the principal purpose test (PPT) clause in article 7(1) of the MLI, as that article deals with the application or the denial of treaty benefits associated with withholding taxes, it is the author's opinion that it should not have effect until 1 January 2024.

2.2. Mexico's most important tax treaties

Mexico's six most important tax treaties that are in effect in the context of the FDI into the country are those with Canada, Germany, Japan, the Netherlands, Spain and the United States. In 2022, the FDI from these countries into Mexico represented 78.25% of the country's total FDI.[10] The FDI flowing from these jurisdictions has traditionally been put into specific and highly regulated and audited industries, such as those relating to manufacturing, banking and finance, insurance, mining, oil and gas, consumer products and pharmaceuticals.

Much of what Mexico tracks as FDI is the result of earnings derived from reinvestments, which, in a tax context, means only one thing, i.e. the largest corporations have not been distributing dividends. Consequently, with regard to dividends and perhaps capital gains on the sale of Mexican shares, it is very unlikely to believe that Mexico's tax treaties that are in effect have created opportunities for low or double non-taxation by way of artificial tax strategies for the benefit of residents in third jurisdictions.

Other countries that have traditionally been sources of significant amount of FDI into Mexico number five countries. These countries are, in declining order, Belgium (3.15%), the United Kingdom (2.8%), France (1.66%), Switzerland (1.66%) and Italy (1.41%).

In sections 2.3. to 2.9., the author provides a specific analysis of the MLI provisions that will modify the text of the six (and one other) most important tax treaties noted previously in this section, as well as a more general analysis of the MLI provisions affecting all of Mexico's other treaty partners. Even though the FDI from Luxembourg into Mexico is not material (0.6%), the author, nevertheless, provides an analysis because the Luxembourg-Mexico Income and Capital Tax Treaty (2001)[11] has not been used for treaty shopping purposes as a way of creating any disturbance to Mexico's treaty policy.

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5. MX: "*Dictamen de las Comisiones Unidas de Relaciones Exteriores y de Hacienda y Cédito Públco Con Proyecto de Decreto por el que se Aprueba Convención Multilateral para Implementar las Medidas relacionadas con los Tratados Fiscales Destinadas a Prevenir la Erosión de las Bases Imponibles y el Traslado de Beneficios, hecha en París, Francia, el veinticuatro de noviembre de dos mil dieciséis, asi como sus reservas y notificaciones", Senado de la República* ("Opinion of the United Commissions on Foreign Relations and the Treasury and Public Credit With Project Decree approving the Multilateral Convention to Implement the Measures related to Tax Treaties Aimed at Preventing the Erosion of Taxable Bases and the Transfer of Benefits, made in Paris, France, on 24 November 2016 as well as its reservations and notifications", Senate of the Republic), (6 Oct 2022) [hereinafter the "Senate's Approval"].
6. MX: *Diario Oficial de la Federación* (Official Gazette of the Federation, or the "Federal Official Journal") (22 Nov 2022).
7. *See* MX: Ministry of Foreign Affairs, Status of List of Reservations and Notifications upon Deposit of the Instrument of Ratification, (15 Mar 2023) [hereinafter the Ministry of Foreign Affairs List]. *See also* OECD, Mexico deposits its instrument for the ratification of the Multilateral BEPS Convention, 15 March 2023, available at www.oecd.org/tax/treaties/mexico-deposits-its-instrument-for-the-ratification-of-the-multilateral-beps-convention.htm (accessed 13 May 2023).
8. Article 34(2) of the MLI, which reads: "the Convention shall enter into force on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit by such Signatory of its instrument of ratification, acceptance or approval".
9. Ministry of Foreign Affairs List, *supra* n. 7: "Pursuant to Article 35(3) of the Convention, solely for the purpose of its own application of Article 35(1)(b) and 5(b), Mexico hereby chooses to replace the reference to "taxable periods beginning on or after the expiration of a period" with a reference to "taxable periods beginning on or after 1 January of the next year beginning on or after the expiration of a period".
10. The total FDI in Mexico for the period of 1999 to 2022 is estimated to be approximately USD 666 billion.
11. *Convention between the United Mexican States and the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (7 Feb. 2001) (as amended through 2009), Treaties & Models IBFD.

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2.3. The Mexico-United States Income Tax Treaty (1992)[12]

According to the statistical information available from the Mexican government, the FDI from the United States into Mexico between 1999 and 2022 is estimated to be approximately USD 309 billion dollars, representing an estimated 47% of all of the FDI received by Mexico in the same period.[13] Also according to the same source, the trade balance for the last ten years between these two countries is favourable to Mexico in an amount estimated to be USD 1.5 trillion. Consequently, it can be said that the economic objects and purposes behind any tax treaty signed by Mexico, i.e. to attract FDI and develop favourable trade have been more than fully realized by way of the Mexico-United States Income Tax Treaty (1992) in combination with first the North American Free Trade Agreement (NAFTA) and now the United States-Mexico-Canada Agreement (USMCA).[14]

The MLI has no direct effect on the Mexico-United States Income Tax Treaty (1992), as, for a variety of reasons, the United States did not subscribe the MLI, including its argument that US treaty policy is already consistent with most of the provisions of the Multilateral Instrument.[15] The Mexico-United States Income Tax Treaty (1992) is Mexico's oldest tax treaty that is still in effect, and there is no indication that this tax treaty will be re-negotiated in the near future. It is already very strongly worded in its provisions establishing its intentions to ensure that its:

> benefits [are] limited to residents of the two countries meeting certain standards designed to prevent residents of third countries from inappropriately using the Convention.[16]

The very strong LOB provisions in the Mexico-United States Income Tax Treaty (1992) and the anti-avoidance provisions included in Mexico's domestic tax legislation make this tax treaty Mexico's strongest tax treaty for countering treaty shopping or any undue and artificial tax avoidance strategies. Furthermore, the exchange of information provisions in the Mexico-United States Income Tax Treaty (1992), together with the Foreign Account Tax Compliance Act (FATCA),[17] provide the economic relationship between these jurisdictions with a strong defence against tax evasion. Accordingly, the MLI would have not added anything to "ensure that [the] existing agreement" with the United States would be interpreted to eliminate double taxation with regard to the taxes covered without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in those agreements for the indirect benefit of residents of third jurisdictions). It can, therefore, be asserted that the trillions of US dollars in bilateral trade between Mexico and the United States that there has been since 1994 when the Mexico-United States Income Tax Treaty (1992) came into effect and the flow of resulting bilateral FDI have been well protected against unintended tax evasion or artificial tax avoidance.

2.4. The Mexico-Spain Income and Capital Tax Treaty (1992)[18]

According to the statistics of the Mexican government, Spain is the second largest source of FDI into Mexico with an estimated value of USD 81 billion between 1999 and 2022.[19] Of this USD 81 billion, it is estimated that USD 35 billion derives from the reinvestment of earnings. Bilateral trade between the two countries is not significant in terms of GDP, however. The main industries in which Spanish FDI is invested in Mexico are those in respect of banking, finance, insurance, food and consumer products.

The Mexico-Spain Income and Capital Tax Treaty (1992) as amended by the Mexico-Spain Protocol (2015),[20] which has been in effect fully since 2017 covers some of the MLI non-negotiable minimum standards. These encompass the inclusion of a new Preamble in line with article 6(1) of the MLI[21] and the PPT clause provided for by article 7(1).[22] The two provisions can be

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12. *Convention between the Government of the United Mexican States and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (18 Sept. 1992) (as amended through 2002), Treaties & Models IBFD.
13. *See* MX: Data Mexico, United States, available at https://datamexico.org/es/profile/country/estados-unidos (accessed 10 May 2023).
14. The text of the *United States-Mexico-Canada Agreement* is available at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between (accessed 10 May 2023).
15. *See Treasury Official on Why U.S. Did Not Sign BEPS Multilateral Instrument*, Orbitax Tax News & Alerts (12 June 2017), available at www.orbitax.com/news/archive.php/Treasury-Official-on-Why-US--25360 (accessed 10 May 2023).
16. US: The White House, Letter of Transmittal of the US-Mexico Tax Treaty (Op Cit) (20 May 1993).
17. US: Agreement between the Department of the Treasury of the United States of America and the Ministry of Finance and Public Credit of the United Mexican States to Improve International Tax Compliance Including with Respect to FATCA (*Acuerdo entre la Secretaría de Hacienda y Crédito Público de los Estados Unidos Mexicanos y el Departamento del Tesoro de los Estados Unidos de America para Mejorar el Cumplimiento Fiscal Internacional Incluyendo con Respecto a FATCA*), Federal Official Journal (21 Aug 2014).
18. *Convention between the Kingdom of Spain and the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (unofficial translation) (24 July 1992) (as amended through 2015), Treaties & Models IBFD [hereinafter the *Mex.-Spain Income and Capital Tax Treaty* (1992)].
19. *See* MX: Data Mexico, Spain, available at https://datamexico.org/es/profile/country/espana (accessed 10 May 2023).
20. *Protocol Amending the Convention between the Kingdom of Spain and the United Mexican States for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital and the Prevention of Tax Evasion and Avoidance and Its Protocol, Signed at Madrid on 24 July 1992* (unofficial translation) (17 Dec. 2015), Treaties & Models IBFD [hereinafter the *Mex.-Spain Protocol* (2015)].
21. Id., at art. I.

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said to derive from the MLI preparatory work as reported by the OECD in the Report on Action 15 of the OECD/G20 BEPS Project.[23]

The first thought that comes to the author's mind is that the concerns of treaty abuse, tax evasion and tax avoidance effected by way of treaty shopping had been evident in Mexico and Spain for some years prior to the start of work on the OECD/G20 BEPS initiative. However, how significant was this concern? It is difficult to say. Nevertheless, the Mexico-Spain Protocol (2015) introduced a number of new rules that applied to different articles of the Mexico-Spain Income and Capital Tax Treaty (1992), some to limit its benefits and others to widen them, as in the case of withholding taxes on interest and capital gains for financial institutions and insurance companies.

As noted previously in this section, a large proportion of the total FDI from Spain into Mexico derives from the reinvestment of earnings, and there is little bilateral trade. This situation means that most of the business carried on is domestic, as in the banking industry. The Mexico-Spain Protocol (2015) also introduces new articles providing for information exchange[24] and assistance in tax collection,[25] which have traditionally been the machinery for states to counter tax evasion.

With regard to the MLI, Mexico and Spain notified their reservations to articles 6(1) and 7(1) on the grounds that the Mexico-Spain Income and Capital Tax Treaty (1992) contained preamble language with the same intentions as in article 6(1) of the MLI, and provisions that deny all of the benefits that would otherwise be provided under the relevant CTAs where the principal purpose or one of the principal purposes of any arrangement or transaction, or of any person concerned with an arrangement or transaction, was to obtain those benefits[26] as in the case with article 7(1). Consequently, these provisions of the MLI would not modify the existing text of the Mexico-Spain Income and Capital Tax Treaty (1992). Nonetheless, it is reasonable to conclude that the preparatory work in respect of the MLI would be a good source of extrinsic material with which to interpret the ordinary meaning of the terms already in the Mexico-Spain Income and Capital Tax Treaty (1992). Another possibility to use extrinsic materials to interpret these new provisions in the Mexico-Spain Protocol (2015) Protocol can be found in the OECD Model (2017)[27] and the related Commentaries on the OECD Model (2017),[28] which was amended substantially to introduce the MLI provisions into the OECD Model.

Other MLI provisions will modify the text of the Mexico-Spain Income and Capital Tax Treaty (1992), such as article 8(1) of the MLI on dividend transfer transactions. This provision will introduce the new 365-day holding period on existing provisions in article 10(2) of the Mexico-Spain Income and Capital Tax Treaty (1992) as modified by Article VI of the Mexico-Spain Protocol (2015). Article 9(4) of the MLI will also apply and will modify the text of article 13(2) of the Mexico-Spain Income and Capital Tax Treaty (1992), as modified by article IX(1) of the Mexico-Spain Protocol (2015). In this context, the new text from the MLI reads as follows:

> ... gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting Jurisdiction if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property (real property) situated in that other Contracting Jurisdiction.

The new text derived from the MLI will delete the last sentence of the existing provision where real estate used in the industrial, commercial, agricultural industry or the provision of services was not included in the computation of the 50% threshold. This provision covers the sale of shares or partnership interest issued by a company or partnership in Mexico or third states, such as, for example, the interests in a limited liability company (LLC) organized in the United States, the value in respect of which is derived from real estate located in Mexico.

The MLI will also modify the provisions in articles 10(1) to (3) of the Mexico-Spain Income and Capital Tax Treaty (1992), which deal with the "Anti-abuse Rule for Permanent Establishments Situated in Third Jurisdictions". Neither the OECD's MLI Matching Database[29] nor Mexico's or Spain's[30] Lists of Reservations and Notifications deposited before the OECD indicate where in the Mexico-Spain Income and Capital Tax Treaty (1992) these provisions should be included:

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22. Id., at art. XVII(1).
23. *See* OECD, *Action 15 Final Report* (2015), *supra* n. 2.
24. Article XIV of the *Mex.-Spain Protocol* (2015), amending article 27 of the *Mex.-Spain Income and Capital Tax Treaty* (1992).
25. Article XV of the *Mex.-Spain Protocol* (2015), introducing new article 28 of the *Mex.-Spain Income and Capital Tax Treaty* (1992).
26. Ministry of Foreign Affairs List, *supra* n. 7.
27. *OECD Model Tax Convention on Income and on Capital* art. 29(9) (21 Nov. 2017), Treaties & Models IBFD.
28. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 29(9)* (21 Nov. 2017), Treaties & Models IBFD.
29. OECD, *MLI Matching Database (beta)*, available at www.oecd.org/tax/treaties/mli-matching-database.htm (accessed 10 May 2023) [hereinafter the *MLI Matching Database*].
30. ES: Reservations and Notifications under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, *Ministerio de Hacienda y Función Pública* (Ministry of Finance and Public Function), deposited with the OECD on 28 September 2021.

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> Thus, according to Article 10(4) of the MLI, these provisions: shall apply in place of or in the absence of provisions of a Covered Tax Agreement that deny or limit benefits that would otherwise be granted to an enterprise of a Contracting Jurisdiction which derives income from the other Contracting Jurisdiction that is attributable to a permanent establishment of the enterprise situated in a third jurisdiction.[31]

The MLI Matching Database, simply establishes that these provisions should apply, and supersede the provisions of the agreement to the extent of incompatibility.

As a result, the first question in respect of the Mexico-Spain Income and Capital Tax Treaty (1992) is to determine whether it is entirely or even legally possible to read into the tax treaty a provision that is not written on the text of a statutory document. And who must determine the extent of incompatibility?

From the perspective of Mexico tax law, Mexico does not have any participation exemption provisions regarding foreign permanent establishments (PEs) either in its domestic law or in any of its tax treaties. Spain, however, may have such provisions in some of its 88 listed CTAs, especially those with other Member States of the European Union. Accordingly, it appears that the Mexican parties to a transaction with a foreign PE of a Spanish home office will have some challenges to determine whether they are participating in an abusive or artificial situation. However, the challenge will remain regarding the reading of something not written into a statutory tax document. This may pose constitutional challenges. In the author’s view, this situation requires a competent authority agreement under the MAP to establish the proper interpretation, and especially the application, of this provision and where it modifies the provisions of the Mexico-Spain Income and Capital Tax Treaty (1992).

Lastly, with regard to the Mexico-Spain Income and Capital Tax Treaty (1992), the MLI provisions in articles 12(1) and (2), 13 Option A and (4) and 15, which all deal with the concept of PEs will modify the reading and interpretation of article 5(4), (5) and (7) of the Mexico-Spain Income and Capital Tax Treaty (1992).

The Mexico-Spain Income and Capital Tax Treaty (1992) reflects the fact that the Mexican and Spanish negotiators understood the position since 2015, when the work on the OECD/G20 BEPS Project was still ongoing in respect of the MLI. The negotiators simply took a step forward first. The first question will be to establish if it is too difficult to conclude an amending protocol. Without doubt, the provisions resembling articles 6(1) and 7(1) of the MLI will have substantially greater weight in the Mexican legal and statutory context as is discussed further in section 3.6.

The second question will be whether the new provisions in the Mexico-Spain Protocol (2015) and the MLI will support the flow of new FDI into Mexico through the improvement of the economic relationship between Mexico and Spain, which are more united by ancestry than by trade. The main Spanish multinational enterprises (MNEs) operating in Mexico have been regulated and are under continuous inspection. Accordingly, it is very difficult to foresee how much it can be ensured that the Mexico-Spain Income and Capital Tax Treaty (1992) cannot be used for illegal or undue aggressive tax planning, thereby leading to avoidance and/or evasion.

It is also important to note that, in accordance with the Mexico-Spain Protocol (2015), both parties retain the right to apply their domestic general anti-avoidance rules (GAARs) in the context of the Mexico-Spain Protocol (2015). [32] This brings into the equation the new and very tough Mexican GAAR introduced in 2020, which is discussed in section 3.7.[33]

2.5. The Canada-Mexico Income Tax Treaty (2006)[34]

According to the statistics of the Mexican government, the FDI from Canada and invested in Mexico between 1999 and 2022 is estimated to be USD 50 billion dollars, which represents 7.5% of the total FDI received by Mexico in the period.[35] This FDI makes Canada the third largest investor in Mexico. The main industries in which Canadian FDI is invested are heavily regulated and audited by the government administrations. Such industries include banking and finance, mining, manufacturing, and oil and gas services. Nevertheless, trade with Canada is not nearly as significant as that with the United States. The trade balance between Canada and Mexico is favourable to Mexico, but being barely USD 20 billion in the last ten years. Out of the USD 50 billion of Canadian FDI invested in Mexico, USD 15 billion can be accounted from as the reinvestment of earnings.

The first tax treaty between the two countries was the Canada-Mexico Income Tax Treaty (1991).[36] This was the first tax treaty concluded by Mexico that followed the OECD Model (1977)[37] and the UN Model (1980),[38] which were versions extant at that

31. OECD, *supra* n. 1, Article 10 (4).
32. Art. XVII(1)(1)(a) *Mex.-Spain Protocol* (2015).
33. MX: *Código Fiscal de la Federación* (Federal Fiscal Code, CFF), art. 5-A, as amended from time to time and in effect in 2023,.
34. *Convention between the Government of Canada and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (12 Sept. 2006), Treaties & Models IBFD.
35. *See* MX: Data Mexico, Canada, available at https://datamexico.org/es/profile/country/canada (accessed 13 May 2023).
36. *Convention between the Government of Canada and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to taxes on Income* (8 Apr. 1991), Treaties & Models IBFD.
37. *OECD Model Tax Convention on Income and on Capital* (11 Apr. 1977), Treaties & Models IBFD.

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time. The Canada-Mexico Income Tax Treaty (1991) was renegotiated in 2006 and the new Canada-Mexico Income Tax Treaty (2006) came into effect in 2007. The Canada-Mexico Income Tax Treaty (2006) included much stronger LOBs provisions in article 26, which were intended to limit the benefits of this tax treaty to residents of third states. The Canada-Mexico Income Tax Treaty (2006) also includes several LOBs that somewhat resemble those of the PPT in article 7(1) of the MLI as is discussed in this section.

In Canada, the MLI entered into force on 1 December 2019[39] after its formal ratification and instrument deposit before the OECD on 29 August 2019.[40]

The non-negotiable minimum standards provided for under articles 6(1) and 7(1) of the MLI will apply generally to the Canada-Mexico Income Tax Treaty (2006). However, most of the MLI other provisions of the MLI will not apply in general, as Canada generally reserved the application of most of those provisions.[41]

According to Canada's List of Reservations and Notifications deposited with the OECD, in respect of article 7(1) of the MLI, Canada intends, where possible, to adopt a LOB provision, in addition to, or instead of article 7(1) of the MLI, effected by way of bilateral negotiations.[42] At the time of writing this article, there is no indication from the Canada Revenue Agency (CRA) regarding the status of treaty renegotiations with Mexico.[43] However, it can be expected that the provisions of article 7(1) of the MLI modifying the relevant treaty provisions as indicated by both countries and as discussed in more detail subsequently in this section will be agreed.

Article 6(1) of the MLI will introduce a new Preamble into the Canada-Mexico Income Tax Treaty (2006) to "ensure" that its provisions are interpreted:

> without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in those agreements for the indirect benefit of residents of third jurisdictions).[44]

The first question that comes to mind is interpretation by whom? Taxpayers, of course. It is axiomatic that a tax statute, such as a tax treaty, is never intended to be read, much less interpreted, in a way that it may facilitate tax evasion or illegal avoidance as if these were the intentions of the treaty negotiators. Tax authorities and courts will surely never do that, and a taxpayer can only do that following an interpretation in bad faith[45] that is contrary to the principles of the UN Vienna Convention on the Law of Treaties (the "Vienna Convention") (1969).[46]

Canada's judiciary system is based on common law or the *stare decisis*[47] doctrine, which relies on the principle that precedent decisions are to be followed by the courts, i.e. the courts abide by or adhere to the conclusions reached in decided cases. In Canada, the leading authority in the interpretation of tax treaties is the unanimous decision of the Supreme Court of Canada (SCC) in *Crown Forest Industries* (1995).[48] This case established the principle that "the goal of the Convention is not to permit companies incorporated in a third-party country to benefit from a reduced tax liability on source income".[49] Accordingly, to say that the Canada-Mexico Income Tax Treaty (2006) needed the new Preamble to ensure that a taxpayer would not make use of it to effect tax evasion or unintended tax avoidance is to disregard the well-established Canadian treaty interpretation principles developed over many years by its judiciary.

Article 7(1) of the MLI will replace the existing provisions in articles 10(7), 11(8) and 12(10) of the Canada-Mexico Income Tax Treaty (2006). The current LOB to be replaced is similar in intention and language to article 7(1) of the MLI. The new modified and existing texts are set out in Table 1.

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38. *UN Model Double Taxation Convention between Developed and Developing Countries* (1 Jan. 1980), Treaties & Models IBFD.
39. CA: Canada Revenue Agency (CRA), Canada Ratifies the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (29 Aug. 2019), available at www.canada.ca/en/department-finance/programs/tax-policy/tax-treaties/notices/2019/canada-ratifies-multilateral-convention-prevent-base-erosion-profit-shifting.html (accessed 13 May 2023).
40. *See* CA: Canada: Status of List of Reservations and Notifications upon Deposit of the Instrument of Ratification (29 Aug. 2019), available at www.oecd.org/tax/treaties/beps-mli-position-canada-instrument-deposit.pdf (accessed 13 May 2023).
41. Id.
42. Id., at p. 23.
43. *See* CRA, Tax treaties: Notices of Developments, available at www.canada.ca/en/department-finance/programs/tax-policy/tax-treaties.html#III (accessed 13 May 2023).
44. Preamble, para. 7 *MLI*.
45. The term "bad faith" has also been mentioned by the International Court of Justice (ICJ). *See*, for example, CA/ES: ICJ, 4 Dec. 1998, *Fisheries Jurisdiction (Spain v. Canada)*, dissenting opinion of Judge Vereshchetin, at para. 20: The Court cannot impute to a State bad faith, intent by way of a reservation to cover a violation of international law".
46. *UN Vienna Convention on the Law of Treaties* (23 May 1969), Treaties & Models IBFD.
47. *Stare decisis* is a Latin expression meaning "to stand by that which is decided".
48. CA: SCC, 22 June 1995, *Crown Forest Industries Ltd. v. Her Majesty the Queen*, 23940, [1995] 2 S.C.R. 802 (S.C.), Case Law IBFD.
49. Id., at para. 49.

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Table 1. Article 7(1) of the MLI and articles 10(7), 11(8), 12(10) of the Canada-Mexico Income Tax Treaty (2006)

Article 7(1) of the MLI	**Articles 10(7), 11(8) and 12(10) of the Canada-Mexico Income Tax Treaty (2006)**
(1) Notwithstanding any provisions of a Covered Tax Agreement, *a benefit* under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement [emphasis added].	Article 10(7): The provisions of this Article shall not apply if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the shares or other rights in respect of which the dividend is paid to take advantage of this Article by means of that creation or assignment. Article 11(8): The provisions of this Article shall not apply if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the debt-claim in respect of which the interest is paid to take advantage of this Article by means of that creation or assignment. Article 12(10): The provisions of this Article shall not apply if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the rights in respect of which the royalties are paid to take advantage of this Article by means of that creation or assignment.

The reader and interpreter of these provisions should be aware that these articles will have to be read together with the other provisions in the same articles of the Canada-Mexico Income Tax Treaty (2006), including the strong element of the beneficial ownership in relation to the LOB test.

In the author's opinion, the provisions as they were prior to the MLI were strong enough, and did not need any additional provisions to ensure that they would not be used in treaty shopping situations or to create evasion or illegal avoidance opportunities. The ambiguous language of article 7(1) of the MLI regarding the reasonability to conclude may even give rise to positions of the tax authorities that are harder to defend if a situation is disputed before a court. Taxpayers always have reasons, based on the facts and circumstances of their case and the advice of professionals who are experts in such matters, to conclude that they are obtaining a benefit that is not contrary to the object and purpose of the tax treaty.

The following question regarding article 7(1) of the MLI will arise, i.e. where else it will apply in the absence of provisions that deny all or part of the benefits that would otherwise have been provided where the principal purpose or one of the principal purposes of any arrangement or transaction, or of any person concerned with an arrangement or transaction, is to obtain those benefits? The answer must be obtained by the identification of other provisions in the Canada-Mexico Income Tax Treaty (2006) that provide economic benefits with regard to the domestic laws of the source state.

In this respect, the only other economic benefits that come to mind are those provided in article 13(5) of the Canada-Mexico Income Tax Treaty (2006), where the sale of shares in a Mexican company representing less than 25% of the capital in that company are only taxable in Canada, as the residence state. In accordance with Mexican domestic law, such a sale of a participation in a Mexican company would be taxable. Nevertheless, this benefit may also be limited by article 26(4) of the Canada-Mexico Income Tax Treaty (2006), which reads as follows:

Where under any provision of the Convention any income is relieved from tax in a Contracting State and, under the law in force in the other Contracting State a person, in respect of that income, is subject to tax by reference to the amount thereof that is remitted to or received in that other Contracting State and not by reference to the full amount thereof, then the relief to be allowed under the Convention in the first-mentioned Contracting State shall apply only to so much of the income as is taxed in the other Contracting State.

This LOB reflects the fact that the Mexico treaty negotiator understood when the Canada-Mexico Income Tax Treaty (2006) was concluded that, in Canada, capital gains were taxable only on 50% of the gain and not of the full gain.

The new PPT provision may also, perhaps, be read in the absence of such by having regard to article 7(1) of the Canada-Mexico Income Tax Treaty (2006) (Business profits) where some items of income with Mexican source would be protected by this provision, such as technical assistance, marketing and publicity or commission fees. However, there could be legal challenges in doing so, as discussed in section 6.3.

With regard to article 8(1) of the MLI, the 365-day holding period will be introduced into article 10(2)(a) of the Canada-Mexico Income Tax Treaty (2006).

Lastly, a subtle but significant change in the Canada-Mexico Income Tax Treaty (2006) will derive from article 9(4) of the MLI replacing article 13(4) of the Canada-Mexico Income Tax Treaty (2006). This change is set out in Table 2.

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Table 2. Article 9(4) of the MLI and article 13(4) of the Canada-Mexico Income Tax Treaty (2006)

Article 9(4) of the MLI	Article 13(4) of the Canada-Mexico Income Tax Treaty (2006)
(4) For purposes of a Covered Tax Agreement, gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting Jurisdiction if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property (real property) situated in that other Contracting Jurisdiction.	(4) Gains derived by a resident of a Contracting State from the alienation of: (a) shares, participations or other rights in the capital of a company, the value of which is derived principally from immovable property situated in that other State, or (b) an interest in a partnership, trust or estate the value of which is derived principally from immovable property situated in that other State, may be taxed in that other State. *For the purposes of this paragraph, the term "immovable property" does not include any property, other than rental property, in which the business of the company, partnership, trust or estate is carried on* [emphasis added].

The elimination of the italicized sentence in article 13(4) of the Canada-Mexico Income Tax Treaty (2006) will eliminate immovable property subject to an active business from the tax treaty protection. This will reverse the potential effects of the most recent landmark decision of the SCC in *Alta Energy*(2021)[50] if a similar case relating to the Canada-Mexico Income Tax Treaty (2006) were to be brought before a court in Canada.

It is fair to say that at the time of writing this article, there has never been a dispute in Canada or Mexico in relation to treaty abuse. Is this an indication, perhaps, that it has never been abused to create situations of tax evasion or unlawful tax avoidance? Although not conclusive, it is a clear indication that the Canada-Mexico Income Tax Treaty (2006) has never been abused in relation to treaty shopping by residents of third states.

In conclusion, the Canada-Mexico Income Tax Treaty (2006) as modified by the MLI can hardly be regarded as an instrument that will, if at all possible, "further develop their economic relationship and to enhance their cooperation in tax matters". If anything, it will only increase the already heavy burden of taxpayers in respect of tax administration and investment decision making.

Accordingly, the author is of the opinion that the modification of the Canada-Mexico Income Tax Treaty (2006) is more a matter of non-negotiable policy as dictated by the OECD than a question of necessity to ensure that taxpayers would not interpret it in bad faith contrary to the well-established purpose of preventing fiscal evasion and artificial tax avoidance.

2.6. The Germany-Mexico Income and Capital Tax Treaty (2008)[51]

According to the statistics of the Mexican government, the FDI from Germany to Mexico between 1999 and 2022 is estimated to be USD 30 billion, which represents 4.50% of the entire FDI received by Mexico in this period.[52] Moreover, according to the same source, the bilateral trade between these two jurisdictions from 2006 to 2022 has also been significant, being in the USD 100s of billions. Consequently, it can be said that the Germany-Mexico Income and Capital Tax Treaty (2008) has attained its economic object and purpose in fostering the economic relationships between the two countries.

With regard to the MLI, Germany did not include Mexico in its definitive list of CTAs in its final notification to the OECD deposited on 18 December 2020.[53] As a result, the MLI will have no direct effect on the Germany-Mexico Income and Capital Tax Treaty (2008). Nevertheless, these jurisdictions have concluded a new Germany-Mexico Protocol (2021),[54][55] which adopts most of the significant provisions provided for by the MLI. Germany ratified the Germany-Mexico Protocol (2021) according to its domestic laws on 26 September 2022 that was published in the *Bundesgesetzblatt* (German Federal Law Gazette) on 18 October 2022. At the time of writing this article, Mexico had not yet ratified the Germany-Mexico Protocol (2021).

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50. CA: SSC, 26 Nov. 2021, *Canada v. Alta Energy Luxembourg S.A.R.L. v. the Queen*, 2021 SCC 49, available at www.canlii.org/en/ca/scc/doc/2021/2021scc49/2021scc49.html (accessed 6 June 2023).
51. *Agreement between the Federal Republic of Germany and the United Mexican States for the Avoidance of Double Taxation and Tax Evasion with Respect to Taxes on Income and on Capital* (9 July 2008), Treaties & Models IBFD.
52. *See* MX: Data Mexico, Germany, available at https://datamexico.org/es/profile/country/alemania. (accessed 13 May 2023).
53. *See* DE: Federal Republic of Germany: Status of the List of Reservations and Notifications upon Deposit of the Instrument of Ratification (18 Dec 2020), available at www.oecd.org/tax/treaties/beps-mli-position-germany-instrument-deposit.pdf (accessed 13 May 2023).
54. *Protocol Amending the Agreement of 9 July 2008 between the Federal Republic of Germany and the United Mexican States for the Avoidance of Double Taxation and of Tax Evasion with Respect to Taxes on Income and on Capital* (8 Oct. 2021), Treaties & Models IBFD [hereinafter the *Ger.-Mex. Protocol* (2021)]. *See also* DE: Federal Law Gazette (2022), Part II, No. 18, Bonn, 18 October 2022, available at www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl222s0534.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl222s0534.pdf%27%5D__1677529037618 (accessed 13 May 2023).
55. MX: *Gaceta del Senado* (Gazette of the Senate) (22 Feb 2022), LXV/1SPO-15-2985/123819, available at www.senado.gob.mx/65/gaceta_del_senado/documento/123819 (accessed 13 May 2023).

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The second paragraph to the Preamble of the Germany-Mexico Protocol (2021) establishes the desire and intentions of the parties to:

> implement the measures of the Multilateral Convention to implement tax treaty related measures to prevent base erosion and profit shifting, according to their respective positions.[56]

Accordingly, it is reasonable to conclude that the MLI, and perhaps, its Explanatory Statement (2017),[57] may become a form of extrinsic material to be read together with the text and context of the new provisions in the Germany-Mexico Protocol (2021).

The amendments adopted from the MLI in the text and context of the Germany-Mexico Protocol (2021) include a new Preamble[58] in line with Article 6(1) of the MLI. Here, it should be noted that the language provided in article 6(3) of the MLI was already included in the Germany-Mexico Income and Capital Tax Treaty (2008). The Germany-Mexico Protocol (2021) also includes the PPT provision[59] in line with article 7(1) of the MLI as well as other new LOBs that are intended to deny treaty benefits when the taxation of the items of income in the other contracting state is attributable to a PE in a third state, and the taxation of such items of income in the third state is less than 60% of the taxation that would have arisen in the source state.[60]

Other provisions deriving from the MLI are also included in the new Protocol, for example, the 365-day period to obtain the treaty benefits on dividends[61] and capital gains[62] as well as a new provision in article 25(2) of the Germany-Mexico Income and Capital Tax Treaty (2008) to mandate the competent authorities to implement any agreements reached by way of a MAP, notwithstanding the time limits provided for under domestic laws of the parties.[63]

Will these changes adopted from the MLI promote mutual economic relations by removing fiscal obstacles to new investments and trade between Germany and Mexico? It will be necessary to wait and see to obtain the answer to this question. The main industry that unites the two jurisdictions is the automotive industry. Most German car manufacturers have production plans in Mexico and the most important trade relates to the export and/or import of cars and automobile parts.

In 2022, the total FDI from Germany into Mexico was flat. Consequently, the Germany-Mexico Protocol (2021) with all of its changes has not produced anything to favour new investments into Mexico. According to the statistics of the Mexican government, German FDI includes USD 10 billion of reinvestment of earnings by German companies already operating in Mexico.[64] This is indicative that there is no sign of any unintended tax planning causing damage to Mexico's *Secretaria de Hacienda y Crédito Público* (Treasury Department).

In conclusion, the new provisions in the Germany-Mexico Protocol (2021) that have been adopted from the MLI will not enhance the already existing economic relationship between these two jurisdictions, and will add not much, if anything, to ensure that the Germany-Mexico Income and Capital Tax Treaty (2008), as amended by the Protocol, is interpreted to eliminate double taxation without creating opportunities for non-taxation or reduced taxation by way of tax evasion or avoidance (including through treaty-shopping arrangements.

2.7. The Japan-Mexico Income Tax Treaty (1996)[65]

According to the statistics of the Mexican government, Japan's FDI into Mexico between 1999 and 2022 is estimated to amount to USD 30 billion, representing 4.5% of the total FDI received by Mexico in the same period.[66] This makes Japan the fifth largest investor in Mexico in terms of FDI. Nevertheless, trade between the two jurisdictions over the last 20 years has not been any significant in exports from Mexico compared to the country's total exports. The main industry uniting Japan's and Mexico's jurisdictions is the automotive industry.

The Japan-Mexico Income Tax Treaty (1996) dates back to the end of the 20th century. It has not been amended or renegotiated since.

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56. Preamble, para. 2 *Ger.-Mex. Protocol* (2021).
57. *Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (7 June 2017), Treaties & Models IBFD [hereinafter the *Explanatory Statement* (2017)]. *See also* OECD, available at www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf (accessed 13 May 2023).
58. Art. 1 *Ger.-Mex. Protocol* (2021).
59. Id., at art. 6(3).
60. Id., at art. 6(2).
61. Id., at art. 3, modifying art. 10(2)(a).
62. Id., at art. 4, modifying art. 13(2).
63. Id., at art. 5.
64. *See* Data Mexico, Germany, *supra* n. 52.
65. *Convention between the United Mexican States and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (9 Apr. 1996), Treaties & Models IBFD.
66. *See* MX: Data Mexico, Japan, available at https://datamexico.org/es/profile/country/japon (accessed 13 May 2023).

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The new modifications from the MLI will include a new Preamble in line with articles 6(1) and 6(3), as well as changes to the existing LOB on interest and royalties set in articles 11(a) and 13 of the Protocol to the Japan-Mexico Income Tax Treaty (1996) and will following article 7(1) of the MLI. Under the existing provisions of the Protocol to the Japan-Mexico Income Tax Treaty (1996), a competent authority agreement was necessary to deny the benefits of article 11 and 12 of the Japan-Mexico Income Tax Treaty (1996). Now, no such competent authority agreement will be required to deny the benefits of these articles. However, the provisions on article 7(1) of the MLI may also apply to other articles of the Japan-Mexico Income Tax Treaty (1996) in line with article 7(2) of the MLI in the absence of any provisions that would deny all or part of the benefits that would otherwise have to be provided for where the principal purpose or one of the principal purposes of any arrangement or transaction, or of any person concerned with an arrangement or transaction, was to obtain those benefits.

Other benefits of the Japan-Mexico Income Tax Treaty (1996) with regard to Mexican domestic law can be found in article 10(2)(b) and 10(2)(c) with regard to dividends and in article 7, where the business profits article may exempt from withholding tax some items of income that would be taxable in Mexico as a source state. These items of income include technical services, publicity, commission fees, and so on. The Japan-Mexico Income Tax Treaty (1996) will also be modified by the MLI in respect of other provisions dealing with capital gains on the sale of shares where the value derives mainly from real estate and some of the provisions regarding the concept of a PE.

As a result, the question remains whether the Japan-Mexico Income Tax Treaty (1996) needed the MLI modifications to ensure that its provisions were not interpreted in bad faith. Neither Mexico nor Japan is internationally noted as a jurisdiction that plays a role in treaty shopping. Consequently, in the author's view, none of the MLI modifications were necessary to ensure that taxpayers would continue to interpret the Japan-Mexico Income Tax Treaty (1996) in good faith in accordance with its object and purpose, one of which is the prevention of fiscal evasion.

2.8. The Mexico-Netherlands Income Tax Treaty (1993)[67]

According to the statistics of the Mexican government, the FDI from the Netherlands into Mexico between 1999 and 2022 was in the region of USD 21 billion. This makes the Netherlands the sixth largest investor in Mexico with a 3.5% participation in the total FDI received by Mexico in this period.

The Mexico-Netherlands Income Tax Treaty (1993), together with other treaties, makes the economic relationship between the two countries strong in relation to tax evasion and aggressive tax avoidance, which promotes the protection of investments[68] and exchange of tax information.[69] Furthermore, the largest of the Dutch MNEs have been operating in Mexico for quite some time in some of Mexico's strategic and highly regulated and audited industries, such as the oil and gas, manufacturing, food and liquor, telecoms and chemicals.

The Mexico-Netherlands Income Tax Treaty (1993) was concluded in the early 1990s, and the new Mexico-Netherlands Protocol (2008)[70] was concluded in the late 2000s. Under the Mexico-Netherlands Protocol (2008), a new article 26 was introduced into the Mexico-Netherlands Income Tax Treaty (1993), dealing with the assistance in tax collection and a new LOB provision, which makes it clear that:

> The benefits of the Convention shall not apply to companies or other persons which are wholly or partly exempted from tax by virtue of a special regime under the laws or administrative practice of either State. A special regime referred to in the first sentence of this provision shall be considered as such only after the competent authorities of the States have decided by mutual agreement that this is the case.[71]

With regard to the MLI, according to the OECD MLI Matching Database, there appears to be a mismatch between these two jurisdictions regarding the application of article 6(1). Although, in the author's analysis of the final list of notifications deposited by the Netherlands,[72] and that of Mexico's,[73] there appears to be no such mismatch, it is still, nevertheless, very advisable for the competent authorities of the two jurisdictions to clarify this situation by way of public notifications under a MAP.

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67. *Convention between the Kingdom of the Netherlands and the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (unofficial translation) (27 Sep 1993) (as amended through 2008), Treaties & Models IBFD.
68. *Agreement on Promotion, Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the United Mexican States* (13 May 1998).
69. *Agreement between Mexico and the Netherlands in Relation to the Netherlands Antilles on the Exchange of Information on Tax Matters* (2009) and *Agreement between Mexico and Netherlands, with Respect to Aruba, for the Exchange of Information with Respect for Taxes* (2013).
70. *Protocol Amending the Convention between the Kingdom of the Netherlands and the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, together with a Protocol, Signed at The Hague on 27 September 1993* (unofficial translation) (11 Dec. 2008), Treaties & Models IBFD.
71. Id., at art. 9.
72. NL: Status of List of Reservations and Notifications upon Deposit of the Instrument of Acceptance, submitted by the Kingdom of the Netherlands in respect of the Netherlands, Deposited before the OECD on 29 March 2019, available at https://www.oecd.org/tax/treaties/beps-mli-position-netherlands-instrument-deposit.pdf.
73. *See* Ministry of Foreign Affairs List, *supra* n. 7.

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Although not that relevant, the Mexico-Netherlands Income Tax Treaty (1993) will also adopt the Preamble text suggested in article 6(3) of the MLI, being "Desiring to further develop their economic relationship and to enhance their co-operation in tax matters". However, there is no modification in the MLI that will support this new object and purpose of the Mexico-Netherlands Income Tax Treaty (1993).

With regard to the provisions in article 7(1) of the MLI, the new language will replace the existing provisions in articles 11(8) and 12(7) of the Mexico-Netherlands Income Tax Treaty (1993). However, the LOB that is to be replaced by article 7(1) of the MLI was included in the Mexico-Netherlands Income Tax Treaty (1993). Following article 7(2) of the MLI, article 7(1) may also be applicable in other articles of the Mexico-Netherlands Income Tax Treaty (1993), where such articles provide a benefit regarding the domestic legislation of the source state. Some other articles in the Mexico-Netherlands Income Tax Treaty (1993) that could eventually provide an economic benefit by reducing or eliminating Mexican withholding taxes are article 7 (Business profits), article 10 (Dividends) and article 13 (Capital gains).

Yet other provisions of the MLI will modify the Mexico-Netherlands Income Tax Treaty (1993). These provisions include those that will modify article 8(1) in the Mexico-Netherlands Income Tax Treaty (1993) with reference to article 10(2)(a) to apply the 365-day rule to the dividend distributions, article 9(1) to replace article 13(1), second paragraph, thereby removing the existing benefit to real estate used in the business of a company whose shares could be sold, as well as other provisions regarding PEs situated in third jurisdictions following article 10(1) to (3) of the MLI.

Accordingly, it is very difficult to think of the Mexico-Netherlands Income Tax Treaty (1993) as an instrument promoting any unlawful tax evasion or aggressive and artificial tax avoidance. In particular, Mexico's economic statistics do not support any other conclusion.[74]

The FDI from the Netherlands into Mexico in 2022 is negative in an amount of USD 248 million. As a result, it can hardly be said that the modifications derived from the MLI will enhance any economic relationship between the countries that will attract significative new investments, and much less increase bilateral trade.

The trade relationship between Netherlands and Mexico as well as the relatively small amount of FDI from the Netherlands into Mexico makes the author believe that the Mexico-Netherlands Income Tax Treaty (1993) has not been used by parties in third jurisdictions as a platform for unlawful tax evasion or artificial tax avoidance. Accordingly, with the modifications in particular those resulting from article 7(1) of the MLI, the only outcome may be that the burden of tax administration will increase greatly for existing bona fide taxpayers applying the Mexico-Netherlands Income Tax Treaty (1993) in accordance with its well-established intentions, object and purpose, including that of the prevention of fiscal evasion.

2.9. The Luxembourg-Mexico Income and Capital Tax Treaty (2001)

A potentially controversial jurisdiction, as some believe that it might have been used by some to conduct unlawful treaty shopping, is Luxembourg. The recent decision of the Canadian SCC in *Alta Energy*[75] may cast some light on this issue. Nevertheless, the question here is whether there is any substantial evidence that the Luxembourg-Mexico Income and Capital Tax Treaty (2001) has been used to conduct unlawful treaty shopping, affecting Mexico's Treasury Department or contrary to its treaty policy.

According to the statistics of the Mexican government, between 1999 and 2022, Mexico received a total amount of FDI in the range of USD 4,570 million from Luxembourg, of which USD 1,574 million were proceeds from the reinvestment of earnings.[76] This represents barely a 0.69% of the total FDI received by Mexico in this period.

Furthermore, the Mexican government tracks all cash flows in and out to Luxembourg, literally, to the dollar. In the fourth quarter of 2022, the amount of cash transferred to Luxembourg from Mexico was USD 133 (one hundred and thirty-three dollars!).

Is or was there a necessity to "ensure" that the Luxembourg-Mexico Income and Capital Tax Treaty (2001) would not be interpreted in bad faith against the true intentions of the parties, one of which, according to its title, is to avoid fiscal evasion? At the time of writing this article, there were no known cases in dispute in the Mexican courts dealing with any abusive situation whatsoever involving the Luxembourg-Mexico Income and Capital Tax Treaty (2001).

74. *See* MX: Data Mexico, Netherlands, available at https://datamexico.org/es/profile/country/paises-bajos (accessed 6 June 2023).
75. *Alta Energy* (2021), *supra* n. 50, at para. 26. "[t]here is nothing inherently proper or improper with selecting one foreign regime over another" and that, though "the selection of a low tax jurisdiction may speak persuasively as evidence of a tax purpose for an alleged avoidance transaction, ... the shopping or selection of a treaty to minimize tax on its own cannot be viewed as being abusive".
76. *See* MX: Data Mexico, Luxembourg, available at https://datamexico.org/es/profile/country/luxemburgo (accessed 6 June 2023).

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The Luxembourg-Mexico Income and Capital Tax Treaty (2001) was concluded in the early 2000s. It was then amended by the Luxembourg-Mexico Protocol (2009).[77] In the Luxembourg-Mexico Protocol (2009), a stronger exchange of information article was introduced. However, no other provisions of the Luxembourg-Mexico Income and Capital Tax Treaty (2001) were modified. This fact to the author's opinion is a clear indication that the Mexican government and its treaty negotiators had no concerns whatsoever regarding the potential opportunities to use the Luxembourg-Mexico Income and Capital Tax Treaty (2001) in an unintended manner so as to enable residents of third-party states to access its benefits against the object and purpose of the tax treaty.

Furthermore, article 29 of the Luxembourg-Mexico Income and Capital Tax Treaty (2001), which is still in effect, provides a clear indication that Mexico's treaty negotiators understood the domestic tax regime in Luxembourg when the tax treaty was being negotiated and concluded. Specifically, article 29 of the Luxembourg-Mexico Income and Capital Tax Treaty (2001) establishes that:

> The Convention shall not apply to holding companies within the scope of the special Luxembourg laws (currently the Act (*loi*) of July 31, 1929 and the Decree (*arrêté grand-ducal*) of December 17, 1938) or any other similar provision enacted in Luxembourg after the signature of the Convention, or other companies that enjoy a similar special fiscal treatment by virtue of the laws of Luxembourg, such as investment funds in accordance with the law in force at the moment of signature of this Convention. It shall not apply either to income derived by a resident of Mexico from such companies nor to shares or other rights in the capital of such companies owned by such person.

Notwithstanding that there is evidence that the Luxembourg-Mexico Income and Capital Tax Treaty (2001) has not been used systematically for, and is well protected against, the practice of unlawful treaty shopping, the tax treaty will still be modified by the MLI in accordance with the OECD non-negotiable minimum standards set out in articles 6(1) and 7(1). With regard to article 7(1) of the MLI, its provisions will replace existing provisions of the Luxembourg-Mexico Income and Capital Tax Treaty (2001) regarding articles 11(8) and 12(7), as well as in other unspecified provisions where a benefit is provided under the tax treaty, for example, in article 7 (Business profits), article 10 (Dividends) and article 13 (Capital gains).

As is the case with other tax treaties, the Luxembourg-Mexico Income and Capital Tax Treaty (2001) did not require a new protocol or LOB provision, much less the modifications from the MLI to ensure that its provisions were not interpreted in bad faith by residents of third states by way of unlawful treaty shopping or any similar structures.

2.10. Mexico's other tax treaties

All of the other tax treaties that Mexico has concluded and which are in effect, except those tax treaties with jurisdictions that have not signed the MLI, for example, Brazil, Ecuador, Guatemala and the Philippines, will eventually be modified in general to comply with the non-negotiable minimum standards of the MLI set out in articles 6(1) and 7(1). With regard to the extent of matching, Mexico's tax treaties will also be modified by the provisions in article 8(1) of the MLI on dividends, for example, that with France, but not those with Belgium, Italy and Switzerland, article 9(4) on capital gains, for instance, that with France, but not those with Belgium, Italy and Switzerland, together with some of the provisions dealing with PEs.

Readers are encouraged to visit the OECD's MLI Matching Database[78] to gain initial guidance to identify which provisions could modify the tax treaty of interest. However, with regard to the Mexico tax system, it must be appreciated that any information on the OECD's Database can only be used as guidance, as it cannot institute any statutory basis that could be relied on in respect of any interpretation or application dispute in Mexico.

3. The MLI's Language and the Most Significant Challenges in a Mexican Statutory (Tax) and Constitutional Context

3.1. Introductory remarks

In sections 3.2. to 3.7., the author addresses the most significant challenges for all those interpreting and applying any of Mexico's tax treaties that result from the implementation of the MLI.

77. *Protocol to Amend the Convention between the Grand Duchy of Luxembourg and the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (7 Oct. 2009), Treaties & Models IBFD.
78. *See* OECD, *MLI Matching Database*, *supra* n. 29.

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3.2. Authentic texts of the MLI: The first challenge

The authentic texts of the MLI are written in English and French.[79] Nevertheless, the Mexican Senate has approved and passed to the Executive for final ratification the MLI text in Spanish. The ultimate publication on the Federal Official Journal passing the MLI into Mexican statutory law will also be in Spanish. Accordingly, the statutory provisions that will ultimately derive rights (if any at all) and mostly all the new obligations for taxpayers, including foreign residents with Mexican source income, the Mexican *Servicio de Administración Tributaria* (Tax Administration Service, or SAT), and Mexican courts in relation to a CTA as modified by the MLI will necessarily have to be read, interpreted and applied for purposes of domestic law in accordance with the domestic statutory legislation, i.e. in Spanish.

The Senate's approval notes the fact that the authentic languages of the MLI are English and French.[80] Nevertheless, the domestic statutory language for purposes of taxation will be Spanish. This situation may well give rise to interpretation and application conflicts where the text and context of the MLI in English or French may render a different ordinary meaning with regard to the statutory meaning of the terms to be used under the Mexican mandatory language for domestic tax legislation, i.e. again in Spanish.

Any language conflicts relating to interpretation and application will eventually have to be resolved by the tax administrations under the specific provisions provided for in a CTA by way of a MAP. Although article 16 of the MLI provides for a MAP, it would hardly, if at all, change the current provisions already in effect in any of the Mexican CTAs.

Although the OECD issued the Explanatory Statement (2017) to the MLI, the issue of authentic language with regard to the statutory language may play a significant role, especially in addressing such substantial terms or expressions that have been introduced into the text of a statutory document, such as a tax treaty, where there are no definitions either on the tax treaty as modified by the MLI or the domestic tax legislation of Mexico, for example, regarding treaty shopping.

According to the Explanatory Statement (2017), the MLI will modify the tax treaties, it will not amend them as a protocol would. The MLI would be "applied alongside existing tax treaties, modifying their application in order to implement the BEPS measures".[81] Consequently, a reader and interpreter, will need to read at the least the original tax treaty in effect prior to modification by the MLI, the MLI in its authentic language, i.e. English or French, the MLI in its statutory language, i.e. Spanish in Mexico, the notifications and reservations made by Mexico in its statutory language, i.e. again Spanish, the list of notifications and reservations in its statutory language of the other contracting state, say, Dutch for the Netherlands, establish if there is a match regarding the provisions, interpret these provisions where there is a match, and then decide whether to enter into a transaction. As complicated as it sounds, this appears to be the only way to proceed. As a result, the new process will increase significantly the complexities, vulnerabilities and possibly the inconsistency of the already very complex tax system in Mexico.

Moreover, ironic as it may sound, the Explanatory Statement (2017) indicates that the Parties "may develop consolidated versions of their Covered Tax Agreements as modified by the Convention". Nonetheless, "doing so is not a prerequisite for the application of the Convention".[82]

This approach will give rise to many more complexities in the context of Mexico and also perhaps in other non-English and non-French speaking jurisdictions. The lack of consolidated versions and now official tax statutes, such as a tax treaty, and a modifying instrument and several other necessary documents in different languages may create constitutional conflicts, as the situation may leave taxpayers unable to comply with the provisions of a statute and be confronted with lack of certainty in the application of the newly modified tax treaties by a tax administration that will be executing its new attributions under the MLI, or trying to do so at the very least. In the author's view, the core principle of legal certainty that lays behind tax treaties, the rule of law and the fundamental notion that the words used in a tax treaty should be clear so that the application is consistent with the obvious meaning in accordance with the object and purpose of the tax treaty may well be affected by these potential sources of linguistic conflict.

3.3. Interpretation and application of the MLI and CTAs

Interpretation and application are two very different processes in the context of tax treaties in Mexico.[83] The interpretational process may be based fundamentally on the treaty interpretation rule codified on the Vienna Convention (1969). However, the application process requires more the use of statutory definitions provided for in relation to the text of the tax treaty itself or,

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79. *See* the OECD, M*ultilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (OECD), available at www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm (accessed 13 May 2023).
80. *See* Senate's Approval, *supra* n. 5, at p. 90.
81. *Explanatory Statement* (2017), *supra* n. 57, at para. 13.
82. Id. It is also ironic that the words "modification" and "amending" are synonyms.
83. M. Hallivis Pelayo, *Interpretación de Dragados Internacionales Tributarios* pp. 252-255 (Porrrúa 2011).

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in the absence of such definitions, on the text of the domestic legislation of the jurisdiction applying the tax treaty, which has already been interpreted.[84]

Accordingly, based on these precepts, it is safe to say that the MLI should, in principle, as a multilateral convention, be interpreted following the terms of the Vienna Convention (1969), while, according to article 2(2) of the MLI:

> As regards the application of this Convention at any time by a Party, any term not defined herein shall, unless the context otherwise requires, have the meaning that it has at that time under the relevant Covered Tax Agreement.

As a result, following the rule of interpretation in the Vienna Convention (1969), it is necessary to identify first and foremost the object and purpose of the MLI before attempting to interpret its provisions. The clear object and purpose of the MLI can be identified in article 1, which establishes that "This Convention modifies all Covered Tax Agreements...".[85] Accordingly, the MLI modifies, but does not amend the existing bilateral provisions of a CTA. Although the action of modifying and that of amending appear to be synonyms, the Explanatory Statement (2017) appears to think otherwise.[86]

In order to ascertain the meaning of the term "good faith" for the interpretational rule to mean anything, it is necessary to identify the intentions of the parties when accepting the non-negotiable minimum standards as advanced by the OECD. This has been identified in the Preamble of the MLI to be:

> *the need to ensure* that existing agreements for the avoidance of double taxation on income are interpreted to eliminate double taxation with respect to the taxes covered by those agreements without creating opportunities for nontaxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in those agreements for the indirect benefit of residents of third jurisdictions) [emphasis added].[87]

This "need to ensure" appears to indicate that there is room for doubt that tax treaties could be interpreted legally in bad faith, i.e. providing avenues for unlawful tax evasion or artificial tax avoidance.

Is treaty interpretation in accordance with the Vienna Convention (1969), therefore, possible in Mexico? Mexico passed the Vienna Convention (1969) into its domestic legislation in 1975.[88] Consequently, since then, it is statutory law in Mexico. Rule 2.1.33 of Mexico's *Resolución Miscelánea Fiscal 2023* (Miscellaneous Tax Rulings 2023)[89] also states that tax treaties should be interpreted in accordance with the provisions of articles 31, 32 and 33 of the Vienna Convention (1969). Furthermore, Mexico's *Tribunal Federal de Justicia Fiscal y Administrativa* (Federal Court of Fiscal and Administrative Justice, TFJFA) has issued decisions establishing that it is binding on the courts to observe the Vienna Convention (1969) for treaty interpretation.[90]

However, the application of tax treaties is not regulated by the Vienna Convention (1969). Rather, application is effected in such situations in accordance with the text of the MLI and CTAs by way of the application of domestic statutory legislation (*see* sections 3.4. to 3.7. for additional discussion).

From the author's perspective, those CTAs modified by the MLI should continue to be interpreted as they should have always been interpreted in accordance with the Vienna Convention (1969). As a result, any confusion caused by the approach to the effect that the MLI and the CTA are two separate documents that must be read together with all of their accompanying complexities caused by linguistic challenges should be ignored.

Mexico's CTAs did not need extra language to ensure that their object and purpose, which was already well established, had any room for unlawful tax evasion or artificial tax avoidance. This idea raises a discussion of what exactly are tax treaties, and how they will be modified by the relevant provisions of the MLI. From the author's point of view, in Mexico, tax treaties are both documents of public international law as they relate to the government of Mexico and the other jurisdiction, and also documents of statutory law as they concern taxpayers, tax authorities and the domestic courts.

As documents of public international law, tax treaties may be interpreted by the parties following the Vienna Convention (1969). However, as documents of statutory law for taxpayers, tax authorities and the courts, their application may not necessarily follow the principles of the Vienna Convention (1969) because taxpayers, tax administrations and the courts are not bodies subject to these principles, and are not parties to any tax treaty.

This assertion may be relevant in the "new" texts of CTAs, as the MLI introduces new terms or ideas that modify texts, such as, for example, the phrases "without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance"

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84. Article 3(2) of all of Mexico's tax treaties that are in effect.
85. Art. 1 MLI.
86. *Explanatory Statement* (2017), *supra* n. 57, at para. 13.
87. Preamble, para. 8 MLI.
88. Federal Official Journal (14 Feb. 1975).
89. MX: *Resolución Miscelánea Fiscal 2023* (Miscellaneous Tax Rulings 2023), Federal Official Journal (27 Dec. 2022), at p. 99.
90. MX: TFJFA, Aug. 2002, Tesis, V-P-1aS-86, at 26, R.T.F.J.F.A., 5a Época, Año II, No. 20.

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and “treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions”.

How should taxpayers, tax administrations and the courts in Mexico interpret and apply these new ideas, or language, that are to be inserted in the statutory text of CTAs? Following the ordinary meaning of the terms in accordance with article 31 of the Vienna Convention (1969) or in accordance with the statutory meaning provided for under domestic tax law? The parties addressed in this paragraph may only read the statutory provisions derived from a tax treaty or domestic legislation, which are all in Spanish.

3.4. Treaty shopping: The second challenge

What is treaty shopping if not another treaty word of art?[91] Prior to the MLI and all of the work surrounding the OECD/G20 BEPS initiative, this expression had never been included in the statutory text of a tax treaty that is in effect in Mexico. But now, once the MLI comes into effect and modifies all of Mexico’s CTAs, the expression, or now the legal term, must be given an ordinary meaning in its interpretation at the level of public international law in accordance with the Vienna Convention (1969) and a statutory meaning at the level of domestic law for the purpose of its application by tax administrations, taxpayers and especially, very especially, by the courts.

It is safe to say that the United States was the first jurisdiction to introduce this concept into the OECD Model (1992).[92] In its observation to paragraph 21 of the Commentary on Article 1 of the OECD Model, the United States seems to equate the use of a “classic treaty shopping” to a “conduit operation” engaged by residents in third countries.[93] Accordingly, this concept or expression has been around in the minds of treaty negotiators, tax administrations, taxpayers and the courts for well over 30 years.

Can it be said that the ordinary meaning of the expression “treaty shopping” is something like “a conduit operation”? Perhaps it is also necessary to look at the OECD Report on Conduit Companies of 1986[94] to decide that. The Report provides a “reference” to what could be understood as “treaty” shopping as follows:

> ... where a company situated in a treaty country is acting as a conduit for channelling income economically accruing to a person in another State who is thereby able to take advantage “improperly” of the benefits provided by a tax treaty. This situation is often referred to as “treaty shopping”.[95]

As a result, the notional reference to the ordinary meaning of the expression “treaty shopping” has been around for at least 37 years. This Report also provides examples of what may be understood as “direct conduits” or “steppingstone conduits”, terms that might be beneficial to use where there is still doubt in the minds of any reader or interpreter of a tax treaty as to what is the ordinary meaning of the term “treaty shopping” or “a conduit operation”.

Furthermore, the concept or knowledge of “conduit operations” or structures is far older in the United States. The US Tax Court (USTC) in its decision in *Aiken Industries* (1971),[96] denied treaty benefits in a transaction that the court characterizing as a “*mere conduit* for the passage of interest” [emphasis added], which were beneficially owned by a third party. As the United States is the largest capital exporting country, it is reasonable to believe that treaty negotiators around the world became aware of the concept of “conduit companies or operations”. They may even have been hearing the concept of treaty shopping for well over 40 years.

Accordingly, it is reasonable to believe that the ordinary meaning of the concept “treaty shopping” for the purpose of its interpretation in relation to tax treaties as modified by the MLI may be equivalent to the concept of a conduit operation, structure or transaction. As a result, in attempting to read this new provision in relation to Mexico’s CTAs, it can be said a Mexican CTA should be interpreted in a way that would:

> eliminate double taxation with respect to the taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through” tax avoidance including through “conduit operations or structures” for the “indirect benefit of residents of third jurisdictions.

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91. *See* the decision of the US Court of Appeals (USCA) in US: USCA, 16 Jan. 1963, *Jules Samann v. Commissioner of Internal Revenue*, Docket No. 8640, 313 F.2d 461 (1963), p. 463, Case Law IBFD. The USCA referred to the treaty term “Permanent Establishment” as an “almost tax treaty word of art”. Now following the *MLI*, the term “treaty shopping” will officially become another statutory word that does not have a definition under any statute, at the least, in Mexico.
92. *OECD Model Convention on Income and on Capital: Commentary on Article 1* para. 27 (1 Sept. 1992), Treaties & Models IBFD.
93. Id.
94. OECD, *Double Taxation Conventions and the Use of Conduit Companies* (OECD 1986), Primary Sources IBFD.
95. Id., at para. 2.
96. US: USTC, 5 Aug. 1971, *Aiken Industries, Inc. v. Commissioner of Internal*, Docket No. 292-67, 56 T.C. 925 (1971), Case Law IBFD.

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Nevertheless, with the inclusion of the expression “treaty shopping” in the text in all of Mexico’s CTA, the SAT, taxpayers and the courts will be required to find a statutory meaning to be able to apply such expression. At the time of writing this article, none of Mexico’s CTAs provides for a definition of this expression. Consequently, applying a tax treaty in the context of domestic statutory law to define treaty shopping will not be feasible in terms of article 2(2) of the MLI.[97]

Furthermore, Mexican domestic legislation does not define the expression “treaty shopping”. As a result; article 3(2) of the relevant tax treaty cannot be applied either.

Lastly, the statutory text of the MLI in Spanish as passed and approved by the Senate, does not refer to a translation of the term “treaty shopping”, as it does not exist in Spanish. The statutory text simply reads as follows:

> *incluida la práctica de la búsqueda del tratado más favorable que persigue la obtención de los beneficios previstos en este acuerdo para el beneficio indirecto de residentes de terceras jurisdicciones*[98]

These words can be roughly translated as meaning “a practice to find a most favourable treaty”. From the author’s perspective, the simple reference to a “practice” is insufficient to be a specific definition of a term for the purposes of statutory application. A taxpayer could well defend a case by questioning the practice of whom or the practice under what standards.

Any attempt to apply an idea without a statutory definition may pose significant constitutional challenges in Mexico, as it could certainly give rise to challenges regarding legal certainty in relation to an official inspection or a dispute in the Mexican courts. In other words, when a Mexican court carries out its duty to apply the text of a tax treaty strictly or literally, what definition should it use to read and apply the new term of “treaty shopping” or a practice to find a most favourable treaty route? This is statutory impossible in the context of statutory law in Mexico.

It is bad that the idea of treaty shopping is meaningless in the context of its statutory application in Mexico. However, it should not be forgotten that existing Mexican tax treaties, as they were prior the MLI, together with existing domestic GAARs make any attempt of unlawful non-taxation almost impossible.

A different question arises regarding the legality of carrying on some form of accepted treaty shopping. Can an MNE reorganize its business in such a way that it brings enough substance to a jurisdiction, establish its business activities there, and at the same time make use of the legal rights in relation to existing treaty network?

The answer to this question should be considered in the context of abuse. Accordingly, a better question to raise is whether the treaty shopping at hand is abusive. It is necessary to remember that tax is not the only reason why a company or taxpayer decides to remit funds to a jurisdiction by way of a third country. These reasons may include investment protection, the protection of intellectual property (IP), access to arbitration and open market conditions to develop a business.

Mexico is also far from being a jurisdiction in which it is suitable to establish any form of abusive structure for residents in other jurisdictions, given its worldwide income taxation regime. In other words, in Mexico, all items of income, including foreign dividends, are subject to tax at a 30% rate.

Lastly, currently Mexico has concluded tax treaties with 61 jurisdictions, ten of which constitute 90% of the total FDI invested in the country.[99] It is hard to think of an MNE with residence in a jurisdiction with which Mexico does not have a well-negotiated and well-protected tax treaty that is vulnerable to abusive treaty shopping.

3.5. Tax evasion and tax avoidance: The third challenge

Tax evasion is a criminal activity in Mexico that can be punish by penalties and jail.[100] In contrast to tax avoidance or lawful treaty shopping, tax evasion is well defined in the Mexican *Código Fiscal de la Federación* (Federal Fiscal Code) as being:

> an action committed with the use of deception or exploitation of errors, to totally or partially omit the payment of any contribution or obtain an undue benefit with detriment of the federal treasury.[101]

All of Mexico’s CTAs for the purposes of the MLI, (except for the Mexico-Russia Income Tax Treaty (2004)[102] and the Mexico-Switzerland Income Tax Treaty (1993)[103]) have in their title “for the prevention of tax [fiscal] evasion”. Consequently, it is

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97. Article 2(2) of the MLI reads: “As regards the application of this Convention at any time by a Party, any term not defined herein shall, unless the context otherwise requires, have the meaning that it has at that time under the relevant Covered Tax Agreement”.
98. Senate’s Approval, *supra* n. 5, at p. 9.
99. Senate’s Approval, *supra* n. 5, at pp. 90-101.
100. Art. 108 CFF.
101. Id., at art. 108, para. 1, (author’s unofficial translation).
102. *Agreement between the Government of the Russian Federation and the Government of the United Mexican States for the Avoidance of Double Taxation with Respect to Taxes on Income* (7 June 2004), Treaties & Models IBFD.
103. *Convention between the Swiss Confederation and the Government of the United Mexican States for the Avoidance of Double Taxation with Respect to Taxes on Income* (unofficial translation) (3 Aug. 1993) (as amended through 2009), Treaties & Models IBFD.

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reasonable to conclude, considering the intentions of the parties that the emphasis on this part of the title is a clear indication that prevention of tax (i.e. fiscal) evasion is part of the object and purpose of a tax treaty to be considered when a bona fide reader or interpreter examines its provisions. There is no room for doubt or any need to ensure that Mexico's CTAs can be interpreted, much less applied otherwise, i.e. to create opportunities for tax evasion.

Tax treaties that follow the OECD Model have been provided with mechanisms at least to discourage such criminal behaviour, notably through provisions regarding exchange of information and assistance in collection of tax.[104] The MLI does not add anything to the existing provisions on these issues with regard to any of Mexico's CTAs.

Furthermore, new tax treaties to be concluded with existing or new jurisdictions that are not covered by the MLI will most likely follow the OECD Model (2017). The OECD Model (2017) introduced several changes, including the renaming of its title, a new preamble in line with article 6(1) of the MLI to strengthen the emphasis on the object and purpose of tax treaties, and a new LOB provision that is intended to reflect the intention of the parties already contained in the Preamble and other provisions.[105]

It is also understood at the level of those jurisdictions that have negotiated their tax treaties following the OECD Model that the prevention of tax evasion is a matter of domestic law.[106] With specific relevance for subject matter of this article, Mexico's *Ley del Impuesto Sobre la Renta* (Income Tax Law)[107] and Federal Fiscal Code have been substantially amended over the last three years to reflect many of the trends established by the OECD/G20 BEPS Project. These amendments include new mandatory disclosure of qualified transactions[108] and other measures that are intended to deny the deduction of expenses that, directly or indirectly, benefit related parties located in low-tax jurisdictions.[109] Although the intention of the new mandatory disclosure provisions in Mexico are not necessarily aimed at preventing tax evasion, but, rather, more to obtain information on aggressive tax planning that may be viewed as tax avoidance, the provision of false information by taxpayers or their advisors regarding any of the qualified transactions may become tax evasion.

There is no specific definition of "tax avoidance" (in Spanish, "*elusion fiscal*") in any of Mexico's tax treaties or any tax statute of domestic law. Of the 61 CTAs included by Mexico in its List of Reservations and Notifications, only the Guatemala-Mexico Income Tax Treaty (2015)[110] has in its title the object and purpose of preventing fiscal avoidance. Does this mean that all of the other 60 CTAs are vulnerable to "abuse" or "aggressive tax avoidance"? It is very difficult to provide an affirmative answer to this question.

It is sometimes accepted in legal literature that tax evasion and tax avoidance are two separate behaviours. On the one hand, tax evasion can be understood as an intentional behaviour based on falsifying records, hiding income or inflating expenses. On the other hand, aggressive tax avoidance occurs when actions are taken to obviate the intent of the law.[111] Under Mexican statutory tax law both behaviours are linked under the definition of tax evasion noted previously in this paragraph. Both behaviours can be subject to the same penalties and jail sentences, and, if found during an official inspection, both can be indistinguishable.

Mexican tax treaties prior to the MLI had been well protected against aggressive tax avoidance for quite some time. This protection became even stronger in 2020 with the inclusion in the Federal Fiscal Code of a very broad GAAR.[112] The GAAR can apply to tax treaties where tax benefits are addressed. Such benefits include income tax withholding rates lower than those to be found in the Income Tax Law on dividends, interest, royalties or capital gains on the sale of shares, or where the business profits article exempts from withholding certain items that are subject to tax in Mexico as the source state, for example, technical assistance fees, marketing, commissions, etc.

Following the provisions of Mexican domestic law and tax treaties, someone interpreting and applying a tax treaty in a bona fide manner would have to undertake a series of actions. These actions could include obtaining a certificate of residence from its residence jurisdiction and providing it to the Mexican counterparty, developing or having in place business plans or reasons supporting a transaction, and having in place proof that it is the beneficial owner of the item of income subject to a lower withholding rate according to the tax treaty. It would also be necessary to examine the existing LOBs that could apply. Moreover, if the transaction was with a Mexican related party, a transfer pricing study could be required by the residence state

104. Introduction, para. 2 *OECD Model* (2017).
105. Para. 1 *OECD Model: Commentary on Article 29* (2017).
106. Para. 51 *OECD Model: Commentary on Article 23 A and 23 B* (2017).
107. MX: *Ley del Impuesto Sobre la Renta* (Income Tax Law, LISR), Federal Official Journal el (11 Dec. 2013), as last amended (12 Nov. 2022).
108. *Revelación de Esquemas Reportables* (Disclosure of Reportable Schemes), Title Sixth, art. 197-202 CFF.
109. Art. 28 Fr. XXIII LISR.
110. *Convention between the United Mexican States and the Republic of Guatemala for the Avoidance of Double Taxation with Respect to Taxes on Income and the Prevention of Fiscal Evasion* (unofficial translation) (13 Mar. 2015), Treaties & Models IBFD.
111. *See*, for example, CRA, Tax evasion and aggressive tax avoidance know no borders (last updated 22 July 2022), available at www.canada.ca/en/revenue-agency/campaigns/tax-evasion-no-borders.html (accessed 13 May 2023).
112. Art. 5-A CFF.

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in as much as the Mexican counterparty would be in Mexico being a party in a source state that intended to deduct the cost of the item paid for.

There are indirect LOB provisions regarding related party transactions in Mexico's domestic law with very strong stipulations denying or limiting deductions on direct or indirect payments to hybrid entities or through "structured" vehicles that may benefit related parties located in low-tax jurisdictions. Accordingly, with the limitation or elimination of the deduction, Mexican parties are discouraged from entering into these kinds of aggressive tax planning structures.

As a result, someone interpreting and applying existing tax treaties in Mexico in a bona fide manner, if that person intended to apply a tax treaty for a benefit that was already not intended to be provided under the provisions of a tax treaty, could consider creating false claims or documentations so as to satisfy all existing tests. In such a case, the discussion would be on tax evasion and not on aggressive tax planning with the intention of obtaining an undue or unintended benefit.

In the Mexican tax and legal context, it is not only a foreign resident with Mexican-source income that would be caught by the Mexican anti-avoidance rules under Mexican domestic law and tax treaties, but also the counterparty Mexican resident who would be forced to ensure that all proper provisions had been interpreted and applied according to the intentions of the tax treaty. This situation would arise due to the fact that SAT could claim tax co-responsibility with regard to the domestic resident for any undue benefit obtained by a foreign resident.

This tax co-responsibility for the domestic resident is based on the provisions of the Mexican Federal Fiscal Code, which has been in force for a number of years. Such co-responsibility applies to any transactions where the Mexican party is legally bound to withhold income taxes on items of income paid to foreign residents.[113] Consequently, in the course of an inspection of the Mexican counterparty, the SAT would inspect all documents required by law to apply a treaty benefit, and if something was not acceptable, a dispute could arise regarding the claim for the undue benefit from the Mexican party and not from the foreign resident. The Mexican party could end up paying not only the undue benefit but also substantial amounts in respect of additions, surcharges, inflation and penalties. If the dispute was decided in favour of the SAT, the SAT would have its tax interest satisfied and would rarely pursue a foreign resident who could have illegally falsified documents to engage in a transaction with the sole purpose of obtaining a benefit.

With regard to other transactions where a tax treaty may provide a benefit and a foreign resident is required to have a legal representative who is a Mexican resident taxpayer to file returns and other filings on its behalf with the SAT, such legal representatives may also be co-responsible with the foreign resident in respect of treaty benefits unduly obtained. An example of such benefits would be capital gains on the sale of shares subject to withholding taxes.

Given existing domestic regulations noted previously in this section and the potential tax co-responsibilities for Mexican parties, it is hard to accept that Mexico's CTAs need anything to "ensure" the proper application of the tax treaties in question. This situation would arise, as, if there were any doubt, Mexico's tax treaties should not be interpreted as "creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance".[114]

In the author's opinion, Mexico's tax treaties have never provided such opportunities through criminal tax evasion and questionable aggressive and/or artificial tax planning and/or avoidance. Again, if all the tests in respect of LOB provisions and other domestic law GAARs have been satisfied, there could still be "opportunities for non-taxation or reduced taxation" with regard to certain transactions. However these would be well understood by the Mexican treaty negotiators when a tax treaty was negotiated or renegotiated. The proof of this statement is that Mexico has renegotiated many of its tax treaties to include new specific LOB provisions that are based on the understanding of the other jurisdiction's domestic law with a view to restricting the opportunities for non-taxation or double non-taxation.

This is the case with Canada. The first Canada-Mexico Income Tax Treaty (1991) was concluded, but was replaced by the new Canada-Mexico Income Tax Treaty (2006), which is still currently in effect. A new LOB provision in the Canada-Mexico Income Tax Treaty (2006) deals with treaty protection for items of income that are not fully taxable in the taxpayer's residence state. Specifically, the LOB provision in article 26(4) (Miscellaneous rules) of the Canada-Mexico Income Tax Treaty (2006) reads as follows:

> Where under any provision of the Convention any income is relieved from tax in a Contracting State [Mexico] and, under the law in force in the other Contracting State [Canada] a person, in respect of that income, is subject to tax by reference to the amount thereof that is remitted to or received in that other Contracting State [Canada] and not by reference to the full amount thereof, then the relief to be allowed under the Convention in the first-mentioned Contracting State [Mexico] shall apply only to so much of the income as is taxed in the other Contracting State [Canada].

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113. Id., at art. 26(I).
114. Article 6 (1), MLI, *supra* n. 1.

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This provision may indicate that the Mexican treaty negotiators had knowledge of the domestic tax law in Canada, where some items of income, for example, capital gains arising in Mexico may be taxed at 50% and not by reference of the full amount of the capital gain.

Accordingly, to argue that the Canada-Mexico Income Tax Treaty (2006) was vulnerable to tax evasion or aggressive tax avoidance prior to the MLI is not acceptable. If any items of income were subject to low taxation or double non-taxation, it was always the intention of the parties to the Canada-Mexico Income Tax Treaty (2006) to grant relief only in bona fide situations.

Another example of knowledge of the treaty partner's domestic law is provided by the Mexico-Netherlands Income Tax Treaty (1993), in respect of which article X of the Protocol as amended by the Mexico-Netherlands Protocol (2008) reads as follows:

> Notwithstanding the provisions of subparagraph (a) of paragraph 2 of Article 10, where a company which is a resident of the Netherlands, and according to the Corporate Income Tax Act (*Wet op de vennootschapsbelasting*) and future amendments thereto is not subject to corporation tax in the Netherlands in respect of dividends received from a company which is a resident of Mexico, the dividends which are referred to in this paragraph shall be taxable only in that State of which the recipient of the dividends is a resident.

This provision demonstrates an understanding on the part of the Mexican treaty negotiators of the Dutch participation exemption regime and the elimination of any withholding tax in Mexico giving rise to a bona fide and acceptable situation of double non-taxation.

In traditional tax treaties, governments have usually included exchange of information and mutual assistance provisions in tax collection clauses as the mechanisms used to prevent tax evasion and avoidance. Tax avoidance may or may not be complex, but the real question is whether it is legal? Traditional tax avoidance in traditional tax treaties has been described as a moral problem for nearly a century[115] rather than a legal problem.

In addition to LOB provisions, GAARs and exchange of information and assistance in tax collection clauses that can be found in Mexico's tax treaties, Mexico is also a signatory to the Council of Europe–OECD Mutual Assistance Treaty (1988),[116] which provides for administrative cooperation between jurisdictions in the assessment and collection of taxes for the purpose of combating tax avoidance and evasion". The Council of Europe–OECD Mutual Assistance Treaty (1988), as modified by the Council of Europe-OECD Protocol to the 1988 Treaty (2010),[117] entered into force in Mexico on 1 September 2012.[118]

From the author's perspective, in a Mexican context, it is axiomatic to say that a tax statute, such as a tax treaty, is never intended to create opportunities for the illegal behaviour of tax evasion and/or artificial tax avoidance. Furthermore, the aggressive tax planning described on the MLI as passed by the Mexican Senate must be "artificial".[119] As a result, in Mexican terms, tax evasion and artificial avoidance are so closely related, and may fit in well with the statutory definition of tax evasion that is already established under the Federal Fiscal Code. Accordingly, in a Mexican context, it can only be concluded that there was no necessity to introduce the MLI to ensure that readers and interpreters of tax treaties could understand that there was room for taxpayers to engage in these behaviours, and that tax inspectors and courts would accept such behaviours.

3.6. The PPT clause: The fourth challenge

Before going into the technical challenges of trying to find the real meaning of all of the words in the PPT clause, it is important to try identifying the nature and the extent to which this clause would modify the text of a CTA. In this regard, article 7(1) of the MLI reads as follows:

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

How should this provision be applied? According to article 7(2) of the MLI:

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115. League of Nations Document F.212, *Double Taxation and Tax Evasion, Report and Resolutions submitted by the Technical Experts to the Financial Committee*, Geneva (7 Feb. 1925), p. 28.
116. *Convention between the Member States of the Council of Europe and the Member Countries of the OECD on Mutual Administrative Assistance in Tax Matters* (25 Jan. 1988), Treaties & Models IBFD.
117. *Protocol Amending the Convention on Mutual Administrative Assistance in Tax Matters* (27 May 2010), Treaties & Models IBFD.
118. MX: *DECRETO Promulgatorio del Protocolo que Modifica la Convención sobre Asistencia Administrativa Mutua en Materia Fiscal, hecho en París el veintisiete de mayo de dos mil diez* (DECREE Promulgating the Protocol that Modifies the Convention on Mutual Administrative Assistance in Fiscal Matters, done in Paris), Federal Official Journal, (27 Aug 2012).
119. The Mexican Senate used the words "*Elusión Artificiosa*" several times on the Statutory document approved. According to the Royal Spanish Language Dictionary, the word "*artificiosa*" involves an element of falsehood, being made-up or fictitious.

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

Under the statutory MLI in Spanish as approved by the Mexican Senate, the Mexican government provided a list of tax treaties that already contained provisions that conform to article 7(2) of the MLI and that will be replaced completely by article 7(1). Nevertheless, and most significantly, no mention is given of the sections of a tax treaty where article 7(1) will apply in the absence of relevant provisions. Accordingly, the reader, interpreter and applier of a tax treaty modified by the MLI will have to address this new transactional LOB provision using documents in multiple languages and decide where to read article 7(1) in the absence of relevant provisions.

Given Mexico's strong statutory tax system, the number of documents potentially involved and the need to read an unspecified, unwritten provision may be a difficult constitutional challenge to deal with, as, in more cases than not, taxpayers may be put in a vulnerable position during an inspection and the legal certainty of the taxpayer's rights may be in jeopardy. The provision would have had a much greater effect on Mexico's statutory tax law if Mexico's List of Notifications had indicated where to read this provision when it was absent from the text of a tax treaty. For instance, should the provision be read as being in a new article, for example, entitled miscellaneous provisions, such as the case with the Germany-Mexico Protocol (2021) to the Germany-Mexico Income and Capital Tax Treaty (2008) discussed in section 2.6., to name but one possibility.

Future tax treaties negotiated using the OECD Model (2017) as a basis that incorporate such clause as is included in the equivalent of article 29(9), which mirrors article 7(1) of the MLI, will not have this statutory interpretative problem. This would be a clear-cut provision to read into the text and context of a particular tax treaty.

The most complex part of all now arises. Who has the burden of proof? The scope of the provisions in article 7(1) of the MLI is very broad, and seems to indicate that there will be someone deciding whether it is reasonable to conclude, having regard to all of the relevant facts and circumstances, that the transaction that is being questioned has a major aspect of abuse based on artificial tax avoidance or tax evasion.

There is no clear indication as to who has the responsibility to prove abuse. However, the Commentary on Article 29(9) of the OECD Model (2017) establishes that a contracting state may deny the benefits of a tax treaty.[120] Accordingly, it is reasonable to conclude, having regard to the text and context of a tax treaty as modified by the MLI, that the burden of proof should fall on the tax administration of the contracting state denying the benefit. For the purposes of this article, the tax administration is that of Mexico, i.e. the SAT.

The only way for this to occur is where, in the case of Mexico, the SAT initially conducts an audit on the Mexican counterparty in respect of the transaction being questioned where the foreign party applied a CTA, and claimed treaty benefits. Should the Mexican counterparty have to present all of the evidence, facts and circumstances to the effect that the foreign resident in the transaction is not abusing the tax treaty through any illegal artificial mechanism? In some cases, the Mexican party being audited, perhaps and to some extent, may have such information, especially but not always, in respect of related party transactions where the tax administration also requires by law a transfer pricing study to be undertaken. However, in most cases and even in related party transactions, the answer will be "no". Where a transaction is between unrelated parties, the information available could be more limited, and, even in related party transactions, there is still the significant issue of information confidentiality. Ultimately, in this potential scenario, the taxpayer paying the bill may well be the Mexican party being audited due to legal co-responsibility with foreign parties established under the Federal Fiscal Code as explained in section 3.5.

The first party that has to assert an abusive situation is the tax authority in the performance of an official inspection. They are the first party with the burden of proof to the effect that obtaining a benefit of a particular tax treaty for a particular transaction was abusive.

3.7. Overlapping GAARs

Mexico's domestic tax law includes a very strong GAAR introduced in 2020, which requires taxpayers to have business reasons for every transaction to be entitled to claim any benefits provided for under Mexico's statutory tax law. Mexico's statutory law for this purpose can be understood as being the domestic tax law together with international tax treaties.[121] Nevertheless, this GAAR cannot be compared to the PPT set out in article 7(1) of the MLI, given the phrase "that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit".

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120. Para. 174 *OECD Model: Commentary on Article 29(9)* (2017).
121. Article 5-A, first paragraph, of the CFF reads as follows: "Legal actions that lack a business reason and that generate a direct or indirect tax benefit will have the tax effects that correspond to those actions that would have been performed to obtain the economic benefit reasonably expected by the taxpayer" (author's unofficial translation).

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The domestic Mexican GAAR may recharacterize the tax effects of a transaction and maintain treaty benefits. However, the PPT can only deny a tax benefit when one of the principal purposes of any transaction is to obtain such a tax benefit whether there are sufficient other reasons for the transaction. In other words, if there are, for example, five main business reasons to enter in an arrangement or transaction and one of them is to obtain a tax benefit, the entire benefit may be denied under the PPT provision. At first glance, the PPT appears to be more limiting than the domestic GAAR, as under the domestic GAAR if the business reasons are greater than the tax benefit, the transaction passes the test.

Accordingly, how can the domestic GAARs and the PPT be reconciled? The first point of departure is an analysis of the transaction in question. The transaction will necessarily have two parties, one Mexican and one foreign who is a resident in a CTA state that will be modified, not amended, by the PPT.

During an official inspection, the SAT will audit the Mexican party first, which will have to provide the business case and reasons for entering into the transaction to be able to claim the domestic benefit, i.e. a tax deduction. Would the Mexican SAT stop there and grant the deduction to the Mexican taxpayer? The answer is simple, it should. But also, the transaction had as one of its five main reasons for the foreign counterparty a benefit under the tax treaty. Would the Mexican SAT deny the treaty benefit? It might under the new PPT. However, the SAT should read the PPT in the entire context of the relevant tax treaty, including the new preamble that establishes the new purpose to prevent tax evasion and artificial tax avoidance. As a result, if there are sufficient business reasons and there is no artificiality in the transaction, the SAT should reconcile the GAAR with the last sentence in the PPT, and grant the treaty benefit as “granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement”.[122]

Otherwise, in a situation where the SAT grants the Mexican party its benefit, i.e. the deduction but denies the treaty benefit under the PPT, the party who may end up paying the tax and all if its additions may well be the Mexican party. Such a situation may result in significant complexities in a dispute before the Mexican courts, as the legal certainty of the Mexican party would be very vulnerable.

4. Conclusions

Mexico’s tax treaties in effect prior to the MLI were well protected against unlawful tax evasion and artificial tax avoidance through treaty shopping and other similar strategies. This is the result of the current LOBs included in the tax treaties, Mexico’s domestic GAAR, the indirect domestic tax law provisions limiting deductions for the benefit of related parties in low-tax jurisdictions, the tax co-responsibility provisions for Mexican taxpayers, exchange of information clauses, exchange of information treaties and the Council of Europe–OECD Mutual Assistance Treaty (1988), as modified by the Council of Europe-OECD Protocol to the 1988 Treaty (2010).

Mexico’s tax treaties prior the MLI did not provide any doubt for the view that their object and purpose was to prevent tax evasion, including artificial tax avoidance. That taxpayers may have adopted tax evasion or artificial tax avoidance by creating false information is possible. However, before and after the MLI, it is for the SAT to uncover such a situations, challenge them and dispute them before the courts.

It is axiomatic to say that Mexico’s tax treaties have always been negotiated by negotiators with knowledge of the other jurisdiction’s tax system, and where situations of reduced taxation or even double non-taxation, as in the case of dividends paid from Mexico to the Netherlands, have been situations that have been clearly well understood and accepted as part of the negotiation. Consequently, claiming ignorance of what was negotiated is very unlikely to be accepted.

The new Preamble to Mexico’s tax treaties and the new PPT will unlikely discourage a person’s willingness to engage in the criminal activity of tax evasion or artificial tax avoidance if that person had done so considering all provisions already in place. The new modifications will only increase the administrative burden on bona fide taxpayers who have always read tax treaties in accordance with their well-defined object and purpose, and may create opportunities for treaty override and abuse of power by the SAT. Accordingly, taxpayers may be confronted with a number of legal uncertainties in the course of an official inspection. Interestingly, tax administrations may be confronted with uncertainties in a dispute before the courts, the ambiguous language derived from the MLI may be difficult to reconcile with the statutory tax law for the purposes of the application of the new provisions.

Some difficult constitutional challenges will arise in Mexico from the reading of the new provisions adopted from the MLI in articles 6(1) and 7(1), as there are no statutory definitions of treaty shopping under either a CTA or domestic law. The discrepancy in the MLI official languages with the Spanish statutory language adopted for the purpose of the application of its provisions in Mexico and the overlapping provisions in article 7(1), especially when taxpayers must read into a CTA something that is not written in statutory law, may create vulnerabilities for taxpayers arising from a lack of legal certainty.

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122. Art. 6 (1) MLI.

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The real economic effect of the new provisions on Mexico's Tax Treasury will be meaningless, as Mexico's most important tax treaty – the Mexico-United States Income Tax Treaty (1992) – will not be modified by the MLI. Ironically, the Mexico-United States Income Tax Treaty (1992) is the strongest tax treaty concluded by Mexico to counter unlawful treaty shopping and artificial tax avoidance.

Furthermore, Mexico's substantial FDI is concentrated in very few countries and in very highly regulated and audited industries. These industries include banking and finance, manufacturing, oil and gas, mining, consumer products and pharmaceuticals.

As a result, to say that the MLI will perform its function of a rapid change in Mexico's treaty network is questionable. As stated in section 2.9., there is no precedent in Mexican case law dealing with a dispute with a non-resident taxpayer where the SAT has argued treaty abuse through treaty shopping.

A final word of strong recommendation to the Mexican government and competent authority is that it is necessary to initiate as soon as possible a treaty-by-treaty renegotiation to implement in a proper statutory document all of the MLI provisions following the OECD Model (2017) and to have the new provisions written, especially the PPT, in a well-defined article, such as 29(9) of the OECD Model (2017). Accordingly, all of the constitutional challenges addressed earlier could be mitigated. How hard would this be? Simply prioritize the importance of a CTA by economic indicators such as the FDI into the country, and perhaps, only perhaps, the newly renegotiated tax treaties could perform one of the functions of eliminating economic barriers such as double taxation to attract new economic growth by way of FDI into Mexico.

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