Comments received on Public Discussion Draft

BEPS ACTION 15

Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures

30 June 2016
## Summary

On 31 May 2016, public comments were invited on technical issues identified in a [Request for Input](#) related to the development of a multilateral instrument to implement the tax-treaty related BEPS measures. This revised document compiles the comments received in response to that Request for Input.
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Italian Banking Association welcomes the opportunity for dialogue offered by the OECD concerning the issues that may be caused by the development of a multilateral instrument to implement the tax treaty-related BEPS measures as proposed in Action 15 of the BEPS project.

A multilateral instrument seems an important tool to swiftly implement and streamline some of the tax treaty measures developed in the course of the BEPS Project. However, it may cause many technical issues and downsides that should not be underestimated but on the contrary should be carefully considered before implementing such a measure.

**General comments**

As mentioned, we believe that a multilateral instrument – as long as it respects the principle of tax sovereignty – may be the right answer to enable modification of the international tax treaty network in a coordinated way. This would solve, *inter alia*, a significant problem that has been caused by the BEPS project: legal uncertainty. In fact, notwithstanding the fact that the conclusions of the OECD Actions cannot be considered hard law, they are constantly used by tax administrations and judges in the absence of a change of the relevant domestic law. This practice is leading not only to uncertainty, unpredictability of the tax treatment of cross-border activities and confusions among operators, but also to the erosion of the value of the existing tax treaty network and international tax law.

Moreover, the implementation of a multilateral instrument should *also be the opportunity to address and solve double taxation issues* that may arise in a cross-border scenario. In this context, a mandatory binding MAP arbitration provision able to solve treaty related disputes in a specific (and, above all, reasonable) time frame is very much welcomed.

Furthermore, we want to stress the need to take into account the relationship between this multilateral instrument and EU law. One of the main challenges to implement a successful tool is to define how the compatibility of this multilateral instrument with EU law can be guaranteed.

**Specific comments in response to the questions posed in the public consultation**

**The relationship between the provisions of the multilateral instruments and the existing tax treaty network**

From a general perspective, we point out that the question of the relationship between a multilateral instrument and the bilateral treaties modified by it should *explicitly* be defined in the multilateral instrument. In the latter, the effects of future amendments of this instrument must be explicitly stated as well. At the same time the consequences deriving from signatories that want to conclude bilateral agreements between them or with a third party must be clearly indicated. This would
allow a better understanding on how the multilateral treaty works and would favor clarity, certainty and predictability to both businesses and governments.

Moreover, it is important to indicate the starting date of each measure provided for in the multilateral instrument without allowing any retroactive effect.

The conclusion of protocol(s) to the multilateral instrument seems a reasonable way to address specificity (e.g. reservations) and peculiarities of each State.

**Mechanisms to ensure consistent application and interpretation of the provisions of the multilateral instrument**

Both the multilateral agreement and the protocols should be accompanied by a commentary to achieve a common understanding and interpretation of the new provisions of the multilateral instrument. With regard to the interpretation of the commentaries, a static approach should be favored to allow a clear and unambiguous interpretation.

**Multiple authentic language**

Due to the main issues and discrepancies that language may cause, it is fundamental to have official texts in languages other than English and French to be established after the signature of the multilateral instrument. Ideally all the languages used in bilateral tax treaties should be considered.

Approach to be taken in developing the optional provision on mandatory binding multilateral agreement procedure (“MAP”) arbitration

A dispute resolution mechanism is of utmost importance. In order to guarantee its effectiveness and legal certainty, there is the need to define (through an hard law instrument) the specific (and reasonable) timeframe within which the dispute must be resolved and to extend its scope to any cross-border dispute. Best practices related to the MAP procedure may also be published yearly.
Dear Sir,

Discussion draft on the development of a multilateral instrument to implement the tax treaty related BEPS measures

We refer to the OECD discussion draft entitled “Development of a multilateral instrument to implement the tax treaty related BEPS measures” published on 31 May 2016.

We welcome the work of the OECD to develop a multilateral instrument to allow countries to amend their tax treaties to implement the tax treaty related recommendations on BEPS.

In particular, we note in Paragraph 8 of the discussion draft that an optional provision on mandatory binding MAP arbitration is being developed as part of the negotiation of the multilateral instrument. We strongly support the inclusion of such a provision.

We would be happy to assist the OECD as its work develops further in this area.

Yours faithfully,

Richard Middleton
Managing Director
Policy
AIMA - Alternative Investment Management Association

Dear Sirs

OECD public discussion draft 31 May 2016

BEPS Action 15: Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures

The Alternative Investment Management Association\(^1\) (AIMA) responded to previous OECD consultation documents on BEPS tax treaty related measures and now wishes to comment on the public discussion draft released on 31 May 2016 for the development of a multilateral instrument.

AIMA acknowledges the complexity and technical challenges of the undertaking. The framework that the OECD is aiming to assemble must be able to address BEPS concerns in a sensible time frame and facilitate swift implementation. This coordinated approach would result in a more coherent international tax framework, and should prevent unilateral action, and the adoption of initiatives that are not appropriate. The intention to streamline the process through a comprehensive instrument should be well received by stakeholders and other interested parties, for whom tax certainty is of critical importance when making business decisions. Nevertheless, there remains the risk that the basic principle behind double tax treaties could be undermined – the focus must remain to eliminate double taxation and assist to the greatest extent possible cross-border trade and investment.

A negotiated multilateral instrument can avoid cumbersome thousands of bilateral negotiations and produce efficiency through synchronised outcomes and clarity of BEPS related tax treaty rules\(^2\). A single text instead of numerous similar but varying texts should be more likely to produce a consistent interpretation and provide certainty for persons investing or carrying on business in other countries.

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\(^1\)AIMA, the Alternative Investment Management Association, is the global representative of the alternative investment industry, with more than 1,600 corporate members in over 50 countries. AIMA works closely with its members to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes, and sound practice guides. Providing an extensive global network for its members, AIMA’s primary membership is drawn from the alternative investment industry whose managers pursue a wide range of sophisticated asset management strategies. AIMA’s manager members collectively manage more than $1.5 trillion in assets. AIMA is committed to developing industry skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the industry’s first and only specialised educational standard for alternative investment specialists. For further information, please visit AIMA’s website, www.aima.org.

\(^2\)We agree that anti-BEPS measures if introduced without coordination and applied unilaterally will give rise to more complexity and more protocols that would only add additional layers of technical complications.
achieve this, clarity in guidance\(^3\) is also required, and a commitment to work for its continuous improvement. In the asset management sector, just as in other sectors, business and investment structures are subject to change as a result of regulatory and commercial pressures, and this should be reflected in the operation of the multilateral instrument. Whilst it should be a stable instrument, AIMA considers that for its success it must also be a dynamic and adaptable tool.

The multilateral instrument must be flexible as well as targeted in scope. Opt out mechanisms should be able to achieve some level of flexibility in the multilateral instrument, so that countries which for policy reasons will not accept provisions that would be binding (e.g. for mandatory arbitration) may still join the instrument. We agree with the position set out in the 2014 Final Report that, as a technical matter, the multilateral instrument should modify rather than amend existing bilateral treaties, so that certain provisions of the bilateral treaties will be superseded by the multilateral treaty, but those provisions not covered will remain in force.

Bilateral treaties can be adapted to the particular circumstances of the treaty parties. Indeed, some jurisdictions have set their own requirements for tax treaties to meet. The multilateral instrument will not itself be able to address these issues or it would become unwieldy in length and detail in attempting to accommodate them. These differences between jurisdictions participating in the multilateral instrument emphasises the need for the instrument to be an elastic tool that can accommodate the different needs of the signatory countries. It remains to be seen whether the multilateral instrument will be able to reflect the economic drivers and mutual synergies that have led countries to sign a double tax treaty in the first place.

AIMA agrees that “[a] treaty does not create either obligations or rights for a third State without its consent” and “[a]n obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.”\(^4\) Countries are entitled to preserve their fiscal sovereignty and may be unwilling to adopt BEPS measures if this would appear to place them at a disadvantage in comparison with countries which are not subscribing to the multilateral instrument or supporting the BEPS project. It also follows that the multilateral instrument cannot create obligations between two countries between whom there is not a bilateral treaty in existence.

AIMA would like to comment further on some of the outstanding issues that the discussion draft identifies:

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3 The OECD proposed in its 2015 report an “explanatory report” to accompany the multilateral instrument. Regardless of the nomenclature we encourage the OECD secretariat to institute an inclusive process, so that not only government officials but also interested parties can comment on the details that will inform provisions of the multilateral instrument.

Relationship between provisions of the multilateral instrument and the existing tax treaty network

We approve the view that a multilateral instrument which coexists with the existing bilateral conventions is the more appropriate approach to adopt. As well as agreeing with the application of the general principle established in article 30.3 Vienna Convention on the Law of the Treaties (lex posterior derogat legi priori), generally, on those aspects where bilateral treaties and the new instrument interact, the latter should prevail, unless the contrary is indicated.

A compatibility clause will be required to govern the relationship between the multilateral instrument and bilateral conventions, whether in existence or entered into after the multilateral instrument is concluded, with regard to the potential conflicts that may arise from the interaction between new multilaterally agreed provisions and provisions that wholly or partly cover the same subject matter. It should provide that the multilateral instrument will supersede provisions which relate to the same specific subject matter but confirm that rights and obligations arising from bilateral treaties are not affected by the multilateral instrument to the extent that they are compatible with it. There may be scope to preserve more favourable provisions of a bilateral convention existing at the time of the conclusion of the multilateral instrument “to the extent possible” where these relate to issues such as access to treaty entitlements (i.e. the scope of a limitation of benefits rule or principal purpose test).

The compatibility clause should also require that bilateral conventions entered into after the multilateral instrument is concluded are not to be in contradiction to the object and purpose of the relevant provisions of the multilateral instrument. However, countries should not be bound to excessively strict rules going forward, as circumstances may change or the international landscape may differ. In AIMA’s view, countries should be permitted to enter into conventions which complement, supplement or extent the provisions of the multilateral instrument.

One issue that will require consideration in this context is the position of countries which are bound by treaty provisions with which particular aspects of the BEPS Project may be in conflict. In the case of EU member states, while management of direct taxes, including the entering into of bilateral tax treaties and similar obligations assumed by Member States are within their individual fiscal sovereignty, these acts must not give rise to breaches of the fundamental freedoms. For example, a requirement to operate a limitation on benefits clause would be problematic as the EU has stated that it is detrimental to the working of the internal market. We agree that a “disconnection clause” defining the circumstances in

5 The EU Commission working document [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0006&from=EN] establishes that “the Commission considers LOB clauses to be detrimental to the Single Market and, in particular, Capital Markets Union. The more general anti-avoidance rules based on the PPT, if adopted by Member States, should be adapted to meet the requirements of a Single Market in order for them to be EU law compliant. The principle of equal treatment requires that companies owned by shareholders resident elsewhere in the EU/EEA can benefit from the same advantages derived from the Treaty as those available to companies owned by domestic shareholders”.

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which such countries would not be bound by provisions of the multilateral instrument should be included.

**Consistent application and interpretation**

AIMA acknowledges the intention that a common international understanding should develop about the meaning of the text of the provisions of the multilateral instrument. By addressing a number of contested questions surrounding international tax rules in a definitive way, a multilateral instrument can restore clarity and ensure future certainty for the status of a variety of important rules that business relies upon to be able to invest with confidence cross-border.

The issue of a common interpretation arises in the context of the multilateral instrument because one of its main purposes is to implement uniform wording of provisions across the treaty network. Thus, even though judicial or administrative decisions and awards may not be binding on other contracting states, those decisions and awards may be persuasive in the interpretation of provisions of the multilateral instrument and can be consulted or used as a reference by other arbitral tribunals or even by domestic courts.

On the different tools that would help in such joint interpretation, an explanatory report, guidance notes, or a set of defined terms would be welcome initiatives to ensure clarity and consistency in the application of the rules of the multilateral instrument. In particular, AIMA would support the inclusion of examples to determine the application of certain rules.

Nevertheless, flexibility will be required in the operation of the multilateral instrument. The level of commitment of all other countries should provide the opportunity for participating countries to exclude the application, partly or in full, of certain provisions, and for certain measures alternative optionality must be made available. Further, it should be expressly manifest that the level of commitment among the different jurisdictions will not be the same, so that countries can modulate the range of rights and obligations undertaken depending on the partner country.

There will be a need for opt out provisions and reservations. Parties to the multilateral instrument should be permitted to exclude the application of certain provisions (as a whole or in part) with regards to certain jurisdictions or more generally. Reservations are a core part of international law. The choice of alternative provisions should not contain a defined minimum standard. Opt in mechanisms to additional commitments should be made available through the conclusion of protocols to the multilateral instrument, which can be opened for signature at the same time or after the entry into force of the main treaty.

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6 For example, if a principal purpose test (PPT) were to be included in the multilateral instrument, AIMA would like to see examples from different sectors that reflect clearly where certain structures are within the scope of the rules.
Consideration should be given to the manner of future amendment of the multilateral instrument. The general rule, codified in Article 39 of the Vienna Convention on the Law of Treaties, is that treaties can be amended “by agreement between the parties”. It is important to note that “the amending agreement does not bind any State already a Party to the treaty which does not become a Party to the amending agreement”.

The multilateral instrument must make clear when its provisions are to be effective with regard to the bilateral conventions which it modifies. Countries may have different domestic procedures to follow before the multilateral instrument is effective under their laws. There is also a need for agreed versions of modified bilateral conventions to be published. There should be a transitional period so that countries can make sure they are on an equal footing. The capabilities of tax administrations are unequal among participating countries.

The annex to this letter contains particular responses to substantive issues on the BEPS tax-treaty related measures which would be the subject of the multilateral instrument.

Yours faithfully,

Paul Hale
Managing Director, Global Head of Tax Affairs

ANNEX

Provisions developed under Action 2 (Neutralising the Effects of Hybrid Mismatch Arrangements)

The report on hybrid mismatch arrangements was finalised in 2014, and although there has been further work, some countries have already adopted the rules in their domestic legislation. The UK has included anti-hybrid rules in the Finance Bill 2016, which are largely in line with BEPS recommendations, but depart in a few aspects from the framework set by the OECD. The EU is also proposing measures to be included in an amended directive on administrative cooperation. AIMA considers that the provisions
to be included in the multilateral instrument will need to permit flexibility and discretion in their application to arrangements that could be caught but which represent normal commercial dealings that are not tax-driven.

**Provisions developed under Action 6 (Preventing the granting of treaty benefits in inappropriate circumstances)**

This is a key area for analysis if some of the proposed Action 6 provisions are to be included within the multilateral instrument.

AIMA would support the principal purpose test (PPT) as the better solution if signatories wish to include an anti-avoidance provision in their tax treaties. If properly framed, the general anti-abuse rule seems a more sensitive approach to tackle situations where treaty benefits have been claimed in inappropriate circumstances.

There will be a need for guidance (in an explanatory report or elsewhere) to ensure the consistent application and interpretation of a PPT. One of the areas for guidance will be the treatment of funds, whether CIVs or non-CIVs. AIMA welcomes the OECD’s commitment to examine this further but this exercise must not draw attention away from the basic principles which the guidance should acknowledge: that collective investment schemes provide a means of pooling capital provided by investors; that this is to the benefit of society through promoting savings and to the benefit of the global economy through promoting investment; and that tax neutrality is a necessary attribute of such pooling (i.e., pooling should not generate an additional level of taxation). Where a sufficient number of investors would be able to obtain treaty benefits in the case of a direct investment, they should not be penalised when investing collectively.

**Provisions developed under Action 7 (Preventing the Artificial Avoidance of PE Status)**

There remains a concern that arrangements which are generally considered to be part of the ordinary course of management and administration of investment funds and other financial services entities, and which do not lead to base erosion or profit shifting, could be caught by the test in Article 5(5) (and to a lesser extent under Article 5(4)). We think it is unhelpful to both tax authorities and taxpayers to narrow the commentaries on Article 5(5) in a manner which would not lead to a significant number of new permanent establishments (PE) arising, where there is little activity taking place in the
source country, but which could better be solved through sound transfer pricing guidelines and by informed commentaries to the Model Tax Convention\(^7\).

There are various structures which we consider would be inappropriately caught by the new rules. We note that it is difficult to ascribe a standard form to business practices that are constantly evolving to respond to new regulatory frameworks, a different economic context, or a simple variation in the nature of the activities undertaken. Legitimate commercial arrangements should not be at risk of being perceived as entered into for tax avoidance or unacceptable tax planning purposes.

It also remains in question whether changes to the permanent establishment concept are compatible with EU law. Impediments to carry out cross-border activities may (depending upon the details of local implementations) amount to a restriction of the EU law fundamental freedoms. The Court of Justice of the European Union has permitted restrictions of fundamental freedoms only when "wholly artificial arrangements" are put in place, but most of the arrangements the BEPS proposals are designed to counter are in no sense "wholly artificial"\(^8\).

Therefore, again, guidance (in an explanatory report or elsewhere) will be required to ensure the consistent application and interpretation of these provisions.

\(^7\) The proposed amendments to the definition of PE are far-reaching and will affect all businesses that carry on any cross-border supplies. A certain level of subjectivity has been introduced into these proposed rules, which could result in many permanent establishments being created even in cases where tax may not have been the main driver behind the arrangements. While the existence of more PEs does not necessarily translate into a material increase in tax liabilities, especially where an arm’s length amount is payable for the services received, there will almost certainly be additional compliance costs and administrative burden for businesses in applying the new rules. Further, there could be an increase in the number of disputes between tax authorities when allocating the primary taxing rights and the amount of profits attributable, which may increase uncertainty and compliance costs for businesses, as well as result in double taxation. For example, in many countries, there is an obligation to register a permanent establishment for tax purposes. For some businesses, registration (and other tax administration) obligations could be imposed in multiple countries. This could be a significant burden for large groups, which will need to consider the position of all entities within the group. Because these administrative obligations generally arise even if no tax is actually payable by the permanent establishment, administrative costs could be higher than the relevant tax in many cases. Likewise, there will be a cost for tax authorities in terms of application of resources which could be better directed elsewhere.

\(^8\) [http://www.cliffordchance.com/briefings/2015/10/beps_action_7_whatdotheoecdsnewpermanent.html](http://www.cliffordchance.com/briefings/2015/10/beps_action_7_whatdotheoecdsnewpermanent.html)
ALFI - Association of the Luxembourg Fund Industry

Dear Sirs,

Response to OECD Public Discussion Draft on Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures - 31 May 2016

The Association of the Luxembourg Fund Industry (ALFI) is the representative body of the Luxembourg investment fund community. The Luxembourg Fund Industry is the largest fund domicile in Europe and a worldwide leader in cross-border distribution of funds. Luxembourg-domiciled investment structures are distributed on a global basis in more than 70 countries with a particular focus on Europe, Asia, Latin America and the Middle East.

ALFI is grateful for this opportunity to express its views and suggestions on this OECD Public Discussion Draft on the Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures. With an existing treaty network of thousands of bilateral Double Tax Treaties (“DTTs”), the coexistence between the Multilateral Instrument (“MLI”) and said DTTs could lead to technical issues, some of which are underlined below.

As a general remark, it is of the utmost importance to preserve clarity, transparency and legal certainty for all stakeholders (tax authorities, tax payers, etc....) when it comes to the application and interpretation of the MLI.

This implies to clearly define the MLI scope and purpose as well as its various provisions that will be inserted in order to serve as a basis for interpretation in case of doubt or incompatibility between existing treaties and the MLI. This could be achieved either in the preamble of the MLI or in an ad-hoc explanatory report, provided that it is ensured that this report has the same legal value as the MLI itself, i.e. the explanatory report should be legally binding on all parties to the MLI.

The preamble / report will also have to include concrete examples of how some technical issues must be solved, in order to further ensure the consistency of understanding regarding the interaction of the MLI with existing DTTs. In addition, the compatibility clauses included in the MLI (as suggested below) will have to be interpreted in the light of this preamble / report.

Technical issue 1: Documentation

In order to ensure legal certainty and preserve clarity, i.e. in particular a consistent interpretation and application between existing provisions and provisions newly modified through MLI, it is essential

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9 Created in 1988, the Association today represents over 1300 Luxembourg domiciled investment funds, asset management companies and a wide range of service providers such as custodian banks, fund administrators, transfer agents, distributors, legal firms, consultants, tax experts, auditors and accountants, specialist IT providers and communication companies.
that consolidated versions of DTTs concluded between signatory parties to the MLI be publicly available as soon as possible, once the MLI enters into force.

For the same reason, it is indispensable that the OECD Model Convention (“OECD MC”) and its commentaries be updated in line with the MLI, both in terms of content and timing: the OECD MC (and its commentaries) should be updated simultaneously with the conclusion of the MLI. This is required in order to:

- achieve legal certainty for both taxpayers and tax authorities when referring to the OECD MC and its commentaries for the interpretation of the various provisions of the MLI; and
- avoid any possible inconsistencies between both legal frameworks.

**Technical issue 2: Timing**

Conclusions on all BEPS action points impacting the provisions of the OECD MC and its commentaries (e.g. current OECD work on the Limitation on Benefits clause (“LOB clause”) and other BEPS Action 6 provisions to finalise the provisions related to non-CIV funds as well as to adapt the wording of the LOB clause further to the release of the final version of the new US Model convention) should be reached before the MLI is finalized in order to avoid unnecessary uncertainties and inconsistencies in the application of DTTs and an immediate need for renegotiation of the MLI and/or the inclusion of new clauses on a very short-term basis.

**Technical issue 3: Conflict situations**

In general, according to international law, a subsequent treaty would prevail over a previously concluded treaty on the same matter. The MLI would thus prevail over DTT for specific provisions.

To stress the matter, even though this is the application of international law, we would strongly recommend to follow the option suggested in the BEPS Action 15 Report issued in October 2015 (the “Report”) whereby a compatibility clause would be included to explicitly define the relationship between MLI provisions and (similar) provisions of existing bilateral treaties. Further, in order to avoid conflicts, a specific mechanism should be set up to solve possible issues related to the implementation of such a primacy clause.

As envisaged in the Report, it should be agreed and specified in writing that the provisions of the MLI apply and supersede other rules in case of conflict with pre-existing rules of DTTs.

Furthermore, any subsequent amendment to existing DTTs (made after the entry into force of the MLI) should be made in line with the MLI. Here again, it is essential that consolidated versions of DTTs concluded between signatory parties to the MLI be publicly available as soon as possible, in order to facilitate any subsequent amendments made to these DTTs and their application.
Technical issue 4: Relationship with other existing multilateral instruments and / or regional regimes

The Report suggests that this should be solved with a “disconnection clause”. The drafting of the provisions of the MLI will notably have to take into account constraints existing for Member States of the European Union deriving from EU law.

This issue should be carefully taken into account to ensure clarity to all stakeholders.

Technical issue 5: Observations / reservations made to the OECD MC

For DTTs based on the OECD MC, some countries have made observations and/or reservations.

When including provisions in the MLI superseding DTT articles based on the current OECD MC and commentaries on which countries have previously made observations and/or reservations, concerned countries should

- discuss and clarify the matter and their position prior to the finalization of the MLI, and
- include appropriate guidance and/or remarks in the interpretative guidance to the MLI.

Where such clauses could be subject to an opt-out mechanism, this could solve the issue. However, this should not be applicable to core provisions (i.e. for which reservations would not be permitted), which would thus necessarily require prior discussions and clarification documented in the interpretative guidance, as described above.

Other technical recommendation on the implementation of alternative measures

Even though the purpose of this OECD Public Discussion Draft is not to provide some input on the content of the MLI, we would like to draw the OECD attention to the fact that, on some of the actions of the various OECD BEPS Reports, alternative recommendations are made (as opposed to single recommendations) and that this will bring some issues when implementing BEPS measures by means of the MLI.

This is particularly relevant in respect of Action 6, where several alternative provisions are proposed to be included into DTTs in order to fight treaty abuse. The fact that alternative measures are proposed means that the parties to the MLI may not necessarily, and will most probably, not always choose the same alternative provision to be included in their DTTs. In such case, the question arises as to how to handle MLI situations where the parties to a specific DTT have chosen two different approaches: Shall one of the approaches prevail? Should in such case the two countries enter into bilateral negotiations? There are several possibilities. Our recommendation would be a two steps approach:
Step 1:
Each state chooses and applies its preferred approach (e.g. the Principle Purpose Test vs. the LOB).

Step 2:
If the two countries have chosen the same alternative for all their DTTs, then the effect of the MLI will be that the DTT will be amended without needing any further action by the two contracting states.

If the two states have not chosen the same approach, they will have to enter into some negotiations within a certain deadline to be defined in the MLI in order to make sure that they can agree on a solution as soon as possible. In such case, the DTT will only be amended once the two states have agreed on an approach.

We are grateful in advance for your attention to the comments expressed in this letter and we welcome the opportunity to discuss these with you.

Should you need any additional information, ALFI would be pleased to assist you.

Kind regards,

ALFI
Barsalou Lawson Rheault

Introduction: Mandatory Arbitration

We understand that the OECD and the Ad Hoc Group for the multilateral instrument have already begun developing the optional provision on mandatory binding Mutual Agreement Procedure (“MAP”) arbitration, but cannot release specific information on the results of that confidential work. Some Member States (such as EU Member States, and other States already including mandatory binding arbitration clauses in their treaties) have the benefit of significant experience with such arbitration (approach as well as potential issues, and tools to resolve issues such as codes of conduct, memorandums of understanding, etc.). The OECD has also benefitted from significant discussion in the past stemming from its proposed changes to article 25 of the OECD Model Tax Convention including the public comment received.

In this context, it is difficult to foresee the areas where additional comment will be most useful to the Ad Hoc Group. We would however be happy to further elaborate on potential solutions for specific topics, or reasons for preferring one approach over another, where it is of particular interest to the Ad Hoc Group.

There are a number of issues that may arise depending on the approach taken in developing the optional provision on mandatory binding MAP arbitration (“Mandatory Arbitration”). The comments below are not written with the intent to provide a comprehensive list of considerations, but rather as a discussion tool with a view to engaging on the topic. The first section discusses more generally the approach for the Mandatory Arbitration provision. The second section discusses specific technical issues, and the last deals with transitional measures and harmonization.

Comments

The Approach

Meeting the Needs of Committed vs. Uncommitted Signatories

As it is foreseeable that some signatories will “opt-in” to Mandatory Arbitration and others will not, those who do should be able to immediately benefit from the mutual commitment of all such signatories opting into the provision. Whereas the EU Arbitration Convention delayed the coming into effect of the provisions until after all States had signed and ratified, this new multilateral instrument should be designed to foresee its immediate (or soon thereafter) application upon ratification by each State vis-à-vis other States that have also ratified their signature of the instrument and their decision to opt into Mandatory Arbitration.10

10 Presumably a procedure will be devised to permit signatories to easily opt-in at a later date, perhaps through the option being selected alongside their signature such that a later decision to opt-in would require a new
For those signatories not initially opting in, optional *ad hoc* binding arbitration should be permitted through the multilateral instrument provisions, and specifically encouraged in the commentary to the provisions. The commentary could thus recommend that signatory States choose to submit to binding arbitration when cases arise and meet the criteria that would otherwise trigger Mandatory Arbitration had the State chosen to opt-in at the outset. Thus, States that are concerned about delegating decision-making power through blanket treaty provisions, could continue to exercise the decision-making power on an *ad hoc* basis each time a case meeting the criteria would arise.

Although this provides less certainty to taxpayers, it seems better to accommodate and encourage non-committed signatories than to assume they will not participate in the Mandatory Arbitration procedures.

**Last Best Offer**

“Last best offer” (also known as “pendulum”, “final offer”, or “baseball”) arbitration is an approach that limits the arbitration commission’s choice to the proposals submitted by the competent authorities, corresponding to the last best offer made by each authority. This would appear to be the preferred approach for Mandatory Arbitration because it may provide for a more rapid outcome and involve more limited time investment and costs for cases where one proposal is obviously more reasonable than the other. It also preserves more amicable relations between the competent authorities and discourages polarization of the respective competent authority proposals to extreme positions. Above all, it encourages the tax authorities to put in their best efforts to resolve double taxation before reaching arbitration.

On the other hand, further consideration must be given to the question of whether it would be appropriate in multilateral proceedings, when more than two States are involved. Presumably baseball arbitration in a multilateral setting would work similarly in that only one proposal will be selected by the arbitration commission; and the benefits are similar, in that it encourages the competent authorities to take more reasonable positions and to reach agreement prior to arbitration. However, the difference would be that unless exceptions or additional procedures are foreseen, proposals may not be “complete” in that they fail to address pricing in one or more of the other States, and as such, there is no guarantee that any of the proposals would cover all of the different flows or would result in a coherent solution if more than one proposal is accepted.

There may however be situations where baseball arbitration may not be appropriate or effective, such as where the ultimate arbitration decision would significantly impact the pricing of a transaction involving another State whose competent authority is not party to the proceedings. It may also be inappropriate for less sophisticated competent authorities and who lack resources to engage experts to help them prepare a proposal.

signature and ratification with the new option selection, and appropriate transitional measures to ensure continued application of the multilateral instrument.
Reasoned Decisions

If baseball arbitration is the approach followed by the Mandatory Arbitration commission, reasoned decisions may seem superfluous. However, requiring reasoned decisions from the Mandatory Arbitration commission may be appropriate in certain situations, even though it may lengthen the procedure and increase the cost.

For example, it could be particularly beneficial in situations where the decision would significantly impact the pricing of transactions with another State that is not party to the proceedings. It could also be appropriate to require reasoned decisions whenever baseball arbitration is not the approach followed.

Extension to APAs and ACAPs

It would be highly beneficial to extend the application of the Mandatory Arbitration to Advanced Pricing Agreements (APAs) (including application for renewal) and Accelerated Competent Authority Procedures (ACAPs) whereby competent authorities are asked to resolve the issue for following years as well as the reassessed MAP years.11

However, given the forward-looking nature of APAs, and their often heightened level of complexity, it may be appropriate to apply different procedural rules to these arrangements.

Secondary Adjustments

Secondary adjustments may be applied by tax authorities in the form of a withholding tax on the primary income adjustment, taxing the income adjustment as though it was a deemed dividend. The Mandatory Arbitration procedure would have enhanced value if it accommodated “repatriation” of funds, so as to avoid (or reverse) application of withholding taxes that may be or may have been applied by the State initiating income adjustments, such as is the case with regular MAP agreements.

Furthermore, if imputed interest income is applied in one State (e.g., from the date of the transactions), where repatriation is effected, it would be appropriate for there to be an equivalent imputed interest deduction granted in the other State. Relying on reciprocal domestic provisions would be burdensome. It is therefore preferable for these issues to be dealt with in the final determination by the arbitration commission.12

Role of the MNE

11 There is an opportunity for harmonization of the Mandatory Arbitration procedure with regular MAP, to the extent that some States do not currently accept to include taxation years following the MAP years.

12 There is an opportunity for harmonization with regular MAP procedures, to the extent that MAP procedures do not currently deal with imputed interest income and deductions, consistent with the suggested Best Practice No. 20 in the OECD’s Manual on Effective Mutual Agreement Procedures.
Although regular MAP procedures do not typically recognize any official role for MNEs, there appears to be significant advantages in permitting the MNE to make submissions and to appear in the Mandatory Arbitration process. Most notably, given that the MNE will ultimately be asked to accept or decline the arbitration decision, it would be inefficient to not permit the MNE to make its position and arguments known to the Mandatory Arbitration commission. Providing for MNE oral and written involvement therefore enhances the process with more information and increases the chances of successful elimination of double taxation. This could be easily achieved by simply incorporating the OECD’s Manual on Effective Mutual Agreement Procedures (“MEMAP”) into commentary for the multilateral instrument.\(^\text{13}\)

Many States do not currently grant the MNE the opportunity to make oral and written submissions. There is however an inconsistency between excluding MNEs from the bilateral negotiations preceding the Mandatory Arbitration, and introducing a role for the MNE at the latter stage. It is desirable to harmonize regular MAP procedures with the final Mandatory Arbitration provisions, such that MNEs would already have been heard by the competent authorities during the regular negotiation proceedings (in addition to providing for the MNE to make oral and written submissions to the arbitration commission).\(^\text{14}\)

**Confidentiality**

In order to preserve the integrity of the process and to ensure MNEs can benefit from the provisions, taxpayer information must be kept confidential, even if this means keeping the arbitration proceedings private and “black-lining” confidential information in the decisions. Where it is decided to make decisions public, the MNE should (at a minimum) be given the opportunity to review the final draft black-lined versions, and to appeal the disclosure of any confidential information contained in the document, prior to release to public forums.

It is estimated that treaty-based requests for information will be unnecessary during the Mandatory Arbitration proceedings, as all required information will already have been obtained during the prior MAP negotiations. However, to the extent that information is required from another State, the procedures should promote transparency and thus the procedure should foresee that the MNE main contacts be consulted regarding any intended treaty-based requests.\(^\text{15}\)

**Technical Issues**

**Triangular and Multilateral Arbitration**

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\(^\text{13}\) See, for example, MEMAP Best Practice No. 13.

\(^\text{14}\) See section C for specific suggestions on how to achieve improved harmonization with regular MAP.

\(^\text{15}\) This would in fact be an appropriate best practice to extend all the way down the line, to the auditors initially proposing reassessments.
It is assumed that in developing the Mandatory Arbitration provisions of the multilateral instrument, some thought would be given to the most common triangular arbitration situations. For example, there are often situations where it may be considered inadequate to resolve double taxation as between two transacting parties (resident in two States), because the resolution of double taxation in that instance would require adjustment of prices with an affiliate in a third State. Consideration could also be given to other situations, including those involving more than three States or where permanent establishments are involved. The solutions retained should seek to optimize the impact of the multilateral instrument.

There exist differing opinions as to whether such a Mandatory Arbitration provision would need to directly accommodate triangular or multilateral transactions or whether all situations may be resolved without such considerations (we observe for example, the many discussions that have taken place in the context of the EU Arbitration Convention); a thoughtful discussion would therefore be in order.

It would however be more efficient to foresee the opportunity to extend the proceedings to involve other States which may be impacted by the pricing decision of the Mandatory Arbitration commission (e.g., due to domino-effect adjustments to transactions involving their State), with of course the appropriate consents and confidentiality assurances. This possibility to extend the proceedings should not be dependent on whether those other States are signatories of the multilateral instrument or whether they have opted in or out of the Mandatory Arbitration provision. If a State opts out and chooses not to participate, however, this should not impact or affect the Mandatory Arbitration process vis-à-vis the other States, as the MNE should be entitled to benefit from full relief from double taxation regardless of decisions made by other States.

Where all parties are participating in the Mandatory Arbitration procedure, perhaps a simplified procedure may be envisaged for States who are only incidentally affected by the pricing of the transactions. An example would be where a transaction is priced in such a way that the IP owner/manufacturer foresees a small margin for the intermediary affiliate, and pricing is challenged in the State of the distributor. In such an instance, it may be optimal to allow for the State of the intermediary to first submit its own margin proposal to the other two States, and allow for all parties to agree that it be applied in the outcome. In this manner, the intermediary State is not required to take any position on the margin of the distributor, nor the profits/losses of the IP owner/manufacturer; rather it prepares its case defending the margin that will be applied to the ultimate sale price to the distributor (to be determined by the arbitration commission), and if all parties agree, the outcome of the arbitration commission would implement that margin on the transaction involving the intermediary State.\(16\)

**Impact of Domestic Appeals/Settlements**

Technical questions arise when it comes to the impact of domestic appeals procedures (administrative and judicial) and taxpayer settlements at appeals.

\(16\) There is an opportunity for harmonization with regular MAP procedures, to the extent that MAP procedures in some States do not easily accommodate triangular MAP negotiation involving more than two States.
Given that relief from double taxation is a priority for Mandatory Arbitration, this process should provide for relief even if the MNE has already reached an administrative appeals settlement in one or both of the States. The argument would be even stronger if settlement was only reached at the audit / examination stage.\(^{17}\)

Where an administrative appeals decision with agreement by the taxpayer, or a judicial decision has been rendered and not appealed, it would be preferable to permit MNEs to obtain relief from double taxation even in these instances, however consideration must be given to domestic law if it dictates that court-determined cases may only be presented to the other competent authority and not negotiated. There is no reason to deny relief from double taxation to taxpayers simply because they have pursued judicial remedies, particularly if the judicial decision conforms to the arm’s length principle. It would be preferable for Mandatory Arbitration to at least be available to determine the unilateral relief to be provided by the other State (which may or may not relieve 100% of the double taxation) if agreement cannot otherwise be reached with the competent authority approached for relief from double taxation.\(^{18}\)

**Ranking of the Multilateral Instrument**

It is obvious that technical issues may arise where other bilateral treaties (such as the Protocol to the Canada-US Tax Treaty) or multilateral instruments (such as the EU Arbitration Convention) provide for different mandatory arbitration provisions. An example could be where a bilateral treaty provides for “baseball” arbitration whereas the Mandatory Arbitration of the multilateral instrument does not. One could also envisage the contrary, where a bilateral treaty only foresees optional conventional binding arbitration whereas the multilateral instrument provides for baseball arbitration. In both instances, it is easy to see how it would be insufficient to indicate primacy of one or the other.

Incorporating several different arbitration clauses in the multilateral instrument may be cumbersome (e.g., one incorporating by reference the EU Arbitration Convention for EU member States, one envisaging another conventional arbitration process for relationships between EU and non-EU member States, and yet another one envisaging baseball arbitration). All potential technical issues would need to be considered.

However, the issue of the ranking of the multilateral instrument is much broader than simply the Mandatory Arbitration provision, and should be encompassed by the “compatibility clauses” that

\(^{17}\) There is another opportunity here for harmonization with regular MAP procedures, to provide for the competent authorities and the arbitration commission to over-ride any direct or indirect relinquishment obtained from tax administrations of the MNE’s rights to pursue competent authority relief, as a condition of reaching settlement. In this respect, we fully agree with Best Practice No. 19 of the OECD’s Manual on Effective Mutual Agreement Procedures, which describes the best practice to avoid the inclusion of a waiver of access to MAP in audit settlements and unilateral MAP agreements.

\(^{18}\) In this case, baseball arbitration would not be appropriate since one of the States will not be presenting any proposal.
describe under what circumstances the new provision is intended to be added to or to replace the provisions of an existing tax treaty.

**Prescription**

Greater efficacy will be achieved if domestic law time limitations are overridden through the Mandatory Arbitration procedure, assuming the MNE agrees with the outcome. Ideally this would be built into the approach without reservation by any committed States.

**Time Extensions**

Should additional States be added to the MAP proceedings, it may be necessary to foresee an additional time extension to accommodate proposals / position papers from such additional parties and further negotiations. Time extensions may also be required in the context of the Mandatory Arbitration procedures (e.g., more time would be required to write a reasoned decision).  

It would be helpful to restrict the circumstances in which time extensions may be permitted, however, and to define the extensions clearly in the provisions so as to preserve the certainty of the process. For example, it could be beneficial to foresee that MNEs may wish to exhaust their domestic appeal rights prior to pursuing Mandatory Arbitration. In such cases, exceptions may be provided to permit for such Mandatory Arbitration cases to be held in abeyance until such appeal process is exhausted, with the assurance that the procedure will not be terminated, and that time limits will continue after the appeals process is terminated.

**Downward Adjustments**

Although Tax Treaties are not typically considered taxing instruments, but rather tax-relieving instruments, it would be important to foresee that the outcome of the Mandatory Arbitration may involve downward adjustments (e.g., reducing taxable profits) on some transactions for the State initiating income adjustments (in other words, an upward adjustment for the State that was initially asked to relieve double taxation). In other words, where a State has taken a blanket approach to reassessment, thus seeking to increase income even vis-à-vis jurisdictions where the arm’s length result would dictate a downward adjustment in the taxing State, the arbitration commission would be empowered to restore an arm’s length result to the transaction.

The goal should be to reduce reliance on domestic measures for implementation of the Mandatory Arbitration decision, thus empowering the new procedure to accomplish all necessary adjustments.  

19 Again, this may be an opportunity for harmonization of the Mandatory Arbitration rules with regular MAP proceedings.

20 This of course assumes that the MNE accepts the final outcome.
If any limitations were to be imposed on the ability to recognize such adjustments through the Mandatory Arbitration process, the consequences should be fully assessed, and consideration should be given as to how the multilateral instrument may provide for fair exceptions.

**Transitional Measures and Harmonization**

**Transitional Measures**

Transitional measures will be particularly important in order to regulate which rules apply and starting when, as signatories may opt-in at a later date.

For example, when a signatory initially opts out of the Mandatory Arbitration but subsequently decides to commit, the unilateral instrument must foresee how this intent is to be manifested, including the interaction of ratification and effective date. Similarly, if a committed member subsequently wishes to “opt-out”, special transitional measures must be foreseen so as to safeguard the commitment until all procedures underway are duly processed.

Additionally, it must be clear which dates are to be considered in determining whether a particular MAP case is eligible for Mandatory Arbitration.

**Harmonization**

Throughout this submission, we have noted areas where there are opportunities to harmonize the eventual Mandatory Arbitration procedures with regular MAP procedures. It would be preferable to have a consistent treatment of issues and a coherent approach throughout. Where it is possible to achieve this consistency and coherency through the multilateral instrument, the opportunity should be fully assessed.

In order to achieve this, the OECD Commentary on MAP will presumably be imported as appropriate as commentary to the multilateral instrument. In addition, perhaps the OECD’s Manual on Effective Mutual Agreement Procedures could be updated to harmonize MAP best practices with procedures that would apply to Mandatory Arbitration, and consolidated to form part of the commentary to the multilateral instrument. It could serve as a basis for establishing MAP best practices applicable to all signatories even those opting out of Mandatory Arbitration, as well as a tool to ensure harmonized best practices in both regular MAP proceedings and Mandatory Arbitration.

In fact, this would be the optimal moment to attempt to achieve consensus from all members so as to reduce the number of States that have reserved their position on model convention language for certain aspects of MAP.

**Conclusion**

It is hoped that these submissions will assist the Ad Hoc Group in its efforts to further refine the new optional provision on mandatory binding MAP arbitration.

Further and more in-depth discussions on this and other connected topics are always welcome.
Dear Sir or Madam,

Thank you for the opportunity to provide our comments that allow us to engage with you on these important issues.

The OECD aims to implement the BEPS outcome quickly into the existing landscape of double tax treaties. Even where a change of the OECD Model Tax Convention is consensual, an updating of a large number of bilateral tax treaties would take a considerable amount of time and resources. As a result, the current network will not be well-synchronised.

BDI welcomes the initiative of OECD to create an efficient and effective mechanism to implement the tax-treaty related measures resulting from BEPS project. The multilateral instrument allows countries to swiftly amend their tax treaties in line with OECD recommendations. We see also a clear need to coordinate the implementation globally in the light of ensuring a level playing field. In this respect, BDI calls especially for consistent application and interpretation of the provisions to diverse bilateral tax treaties.

Based on the request of the Ad Hoc Group our comments below focus solely on the technical issues of implementation and on issues related to the development of a MAP arbitration provision – rather than the scope of the provisions covered in the multilateral instrument.

Technical issues of implementation

Time schedule

The OECD submits in its public discussion draft that the negotiations and the draft text of the multilateral instrument will be subject to intergovernmental discussions in a confidential setting. The work on the Multilateral Instrument shall be finished and the multilateral instrument shall be opened for signature by 31 December 2016. It is most likely that, considering this timeline, the OECD aims to put most of the provisions into effect by 1 January 2017.

The final provisions and the mechanism of the multilateral instrument have an extremely high impact to the taxpayers. Thus, having a high level of transparency will be extremely important for taxpayers to be able to implement the final provisions resulting from the BEPS project in their organizational processes and to ensure compliance. Getting knowledge about the concrete content of the multilateral instrument at the end of 2016 then the taxpayers would have only a few days to take measures to implement the specific provisions into their internal processes. This will be impossible for international groups to deal with and does not provide the required legal certainty.

Ensuring consistent application
Any country that signs up to the multilateral instrument that commits to adopt OECD guidance. In principle, this commitment should make a statement that these countries accept the various provisions of multilateral instrument and give an implicit understanding to amend their bilateral tax treaties in respect of the minimum standards. In respect of other provisions which are optional the countries can chose if they adopt.

In order to give a higher level of certainty to the taxpayers and ensure a fair competition for the states as well as the companies a simultaneous implementation of the BEPS measures would be important and welcomed by the German business (i.e. all countries would sign and implement the multilateral instrument at the same time).

After signing the multilateral instrument the ratification would require conventional domestic procedures pursuant to national laws. The ratification process can takes a various amount of time in different jurisdictions (e.g. up to 3 years). OECD should set a time limit for ratification by the member states and also a date of the “entry into force” e.g. one year after signing the multilateral instrument.

If some countries are signing or ratifying the multilateral instrument later, this would lead to a very complex monitoring of the BEPS implementation status, because old and new provisions likely co-exist. This situation would provide a high level of uncertainty for the taxpayers, in particular if they are faced with the old bilateral double tax treaty between two specific countries on the one hand and the specific provisions of the multilateral instrument on the other hand.

In this case it will be quite difficult respectively nearly impossible for a taxpayer to identify the actually relevant conditions of a double tax treaty in a landscape of several thousands of treaties with a reasonable effort. Our members urge the OECD to provide a continuously updated overview on the OECD website about:

- which countries enacted the multilateral instrument,
- which bilateral tax treaties have been amended by the multilateral instrument,
- which provisions of a specific bilateral tax treaty have been amended by the multilateral instrument.

1. **Tax sovereignty of member states**

The concept of sovereign autonomy is a basic principle for the negotiations of international treaties. Governments have used domestic legislation to reach appropriate balance between national tax law and international cooperation in tax treaties. Tax policies differ from one to another country and business expects that not all parties will accept the same commitments to implement the provisions in same precise way as specified in multilateral instrument. Too much flexibility regarding the extent of the rights and obligations of the states can jeopardize the level playing field and transparency.
Additionally, some states are willing to sign the multilateral instrument with reservations (qualified acceptance), for example with regard to the new definition of a permanent establishment (BEPS measure 7). On the one hand, there are states which accept the PE amendments but will not introduce the correction mechanism in line with Article 9 para. 2 OECD Model Tax Convention into the bilateral tax treaty. On the other hand, there are states which will not apply all recommendations on new PE definition. Although these states agree to signing the multilateral instrument, however, such specific bilateral tax treaty provisions should not be effected by a change through the multilateral instrument if they are subject to reservation.

2. Relationship between provisions of the multilateral instrument und tax treaty network

Provisions of multilateral instrument can overlap with certain provisions found in some bilateral tax treaties. Thus, potential conflicts may arise from interaction between new multilaterally agreed regulations and similar rules in the tax treaties that fully or partly cover by the same subject. To avoid any uncertainty the multilateral instrument shall replace provisions of existing tax treaties. This could be resolved through the inclusion of a “primacy clause” in the multilateral instrument (e.g. in the preamble).

Bilateral tax treaties can also be concluded or amended after the entry into force of the multilateral instrument. In order to achieve consistency with the legal treatment the multilateral instrument should include a compatibility clause that the provisions of the multilateral instrument take precedence over the new or later amended bilateral tax treaty provisions. In case that only one party of the bilateral tax treaty has signed the multilateral instrument there should be an option that both parties can apply the provisions of multilateral instrument after mutual agreement.

3. Provide simplifications

As an example, reference is made to Article 5 para. 5 and 6 of the OECD Model Tax Convention draft to implement the measures of BEPS Action 7 (commissionaire structures), where in many cases permanent establishments (PE) are constituted, even though the tax revenue of both affected countries will remain the same like before, as there is no profit attributable to the PE itself (as also confirmed in no. 234 and 235 of the “OECD Report on the attribution of profits to permanent establishments” dated 22 July 2010). In this case, the only impact of BEPS Action 7 would result in a significant administrative burden for the company.

For those cases it would be desirable to implement an exemption rule, similar to the rule included in the protocol to the German-Austrian double tax treaty, where a PE is not constituted if the remuneration for the affiliated company acting as an agent is at arm’s length. The review of this condition can be performed by both countries due to the transfer pricing documentations of both companies so that a PE registration and a separate PE tax return provide no further benefit. Those exemption rules would relieve the taxpayers from massive administrative burden, not affecting the tax revenues of the countries.

4. Ensuring consistent interpretation of the provisions
To ensure consistent interpretation the OECD wants to include agreed commentary to facilitate the 
interpretation of tax treaties. Supplementary comments and explanatory notes are quite helpful to 
implement and interpret the provisions of multilateral instrument consistently and coherently 
throughout all jurisdictions. to the multilateral instrument can also give examples to strengthen a 
common understanding.

The draft commentary included in the final BEPS reports is open to interpretation. For that reason, 
the explanatory report should be refined to give certainty to taxpayers and tax administrations. 
Numerical cross-references to commentaries in OECD Tax Model Convention or to recommendations in 
BEPS final report should be avoided.

It will be important to ensure one common wording in the double tax treaties. According to the 
public discussion draft the OECD aims to replace provisions in existing double tax treaties which serve the 
same purpose as the BEPS measures, but aims to retain those provisions which are similar to BEPS 
measures. Retaining those provisions has a high risk of disputes with tax authorities, as in case of not 
exactly the same wording, there will always be room for arguing that this specific wording has to be 
interpreted in another way like the wording of the multilateral instrument. To avoid this uncertainty the 
multilateral instrument shall also replace provisions of existing tax treaties which are similar, but not 
equal, to BEPS measures.

As many of the bilateral tax treaties which are amended by the multilateral instrument are also 
concluded in the local languages of the affected countries, the multilateral instrument should contain a 
provision that for the interpretation of any provision of the bilateral tax treaty which has been amended 
by the multilateral instrument, the wording of the English version of the multilateral instrument shall 
prevail.

5. Releasing draft of multilateral instrument for public consultation

The whole BEPS Project was driven by transparency and involvement of taxpayers and associations 
at all time. However, for the most important implementation step the OECD changes its way of 
transparency significantly. In order to give taxpayers the chance to properly take measures to implement 
the provisions it is desirable that the OECD also publishes the draft wording of the multilateral instrument 
so that the taxpayers can understand how the mechanism of the multilateral instrument shall work. 
Moreover, it is difficult to provide good support for the development and technical implementation of 
the multilateral instrument without knowing the exact provisions which should be implemented.

Apart from that, taking into consideration that companies often have to change their internal 
processes significantly to comply with the BEPS measures, it will be unavoidable to put the provisions of 
the multilateral instrument into effect not earlier than 1st of January 2018 (see comments above to the 
time schedule).
Therefore, BDI suggests the OECD to reconsider its decision and provide the draft of multilateral instrument for public consultation in order to enable an opportunity for the business to give input to the context of the provisions from a practical view.

6. Development of a MAP arbitration provision

It is very welcomed that many countries committed on a mandatory binding MAP arbitration as a mechanism to ensure that treaty-related disputes will be resolved within a specified time frame. With regard to some BEPS measures (e.g. country-by-country reporting in action item 13, hybrid mismatches in action item 2 and other transfer pricing adjustments in action items 8 – 10) business anticipates a significant increase of double taxation cases. Hence, a well-functioning mandatory binding arbitration is indispensable.

However, the OECD statistics show that the duration of those MAP’s are still very high. It can be seen that many countries are constantly requesting new documents to postpone the date when the MAP was officially started. For these reasons, the multilateral instrument should include conditions:

- at which time the application to open a MAP is deemed to be officially filed to avoid the artificial postponement of this relevant date,
- that the MAP needs to be concluded after a certain period of time (e.g. 24 months after the application was filed),
  - what will be the consequence if this period has expired,
  - how the arbitration panel will be composed and
  - that the result of the MAP, if the countries come to an agreement, is a binding result of the domestic legal remedies.

A common understanding of the meaning of the provision reaches a consistent interpretation across the jurisdictions. Having a single text with same wording would be more likely produce consistent results and certainty for business.

Furthermore, the countries shall commit on ensuring sufficient capacity on the level of their tax administrations to resolve MAP’s in a timely manner. This may happen not directly in the multilateral instrument, but at least in an explanatory note. One option could be also to implement a competent authority at OECD level (international arbitration court) which is only responsible for MAP’s arbitration process.

Apart from that, especially for multinational transactions covered by the arm’s length principle, a multilateral MAP should be implemented. This way it can be avoided that a taxpayer has to enter into several MAP’s independent from each other to resolve the double taxation of a multinational transaction. Besides, BDI urges that every jurisdiction should apply mandatory binding MAP arbitration who wish to
adopt it (e.g. in bilateral tax treaties) also in case not joining the multilateral instrument. The MAP provision (BEPS action item 14) is of key importance to the entire BEPS project.

Sincerely,

Berthold Welling

Anne Zänker
BEPS Monitoring Group

These comments have been prepared by the BEPS Monitoring Group (BMG). The BMG is a network of experts on various aspects of international tax, set up by a number of civil society organizations which research and campaign for tax justice including the Global Alliance for Tax Justice, Red de Justicia Fiscal de America Latina y el Caribe, Tax Justice Network, Christian Aid, Action Aid, Oxfam, and Tax Research UK. These comments have not been approved in advance by these organizations, which do not necessarily accept every detail or specific point made here, but they support the work of the BMG and endorse its general perspectives. It has been drafted by Sol Picciotto, with contributions and comments from Attiya Waris, Jeffery Kadet and Tommaso Faccio.

Summary

The reports resulting from the project on Base Erosion and Profit Shifting (BEPS) include a number of proposals for changes in tax treaties, formulated as amendments to the OECD Model Convention and its Commentaries. The Multilateral Instrument (MLI) is intended to provide a method for quickly amending existing bilateral treaties. Hence, it must take the form of an actual self-standing treaty, and not a model. However, there are differences in the texts of the actual treaties to be amended, especially those involving developing countries, and based on the UN model. Hence, we suggest that the MLI should be accompanied by Country Schedules, bilaterally agreed, to ensure clarity as regards which treaties are amended and how. This would ensure that tax authorities, taxpayers and courts know which treaties have in fact been amended and their new language.

The core provisions of the MLI should be the basic provisions for preventing abuse of tax treaties and eliminating double non-taxation. Several variants have been proposed in BEPS Action 6, and it is essential that the MLI includes options which are suitable for developing countries. The revisions of the Permanent Establishment definition have been drafted in relation to the OECD Model, and a variant should be included which is compatible with the UN model, in consultation with the UN Committee.

The proposals for strengthening the Mutual Agreement Procedure (MAP) for resolving tax treaty disputes are unsuitable for developing countries, and should remain purely voluntary. This applies in particular to Mandatory Binding Arbitration, which we regard as illegitimate for all countries. Tax treaty provisions are binding in domestic law, and can be enforced through national tribunals. Accordingly, MNEs should not be given further privileges over other taxpayers. The MAP is an ‘amicable procedure’, and it is not appropriate to try to convert it into a supranational dispute settlement procedure. It is contrary to the due process of law, and indeed in many countries regarded as unconstitutional, for contentious interpretations of legal provisions to be made by secret and unaccountable administrative procedures, rather than by courts or tribunals in an open legal process. To make it mandatory for all conflicting interpretations to be resolved would provide a guarantee that aggressive tax planning would be riskless, and create an incentive to continue BEPS behavior. The main cause of the increase in tax disputes is the subjective basis of the transfer pricing rules, and it is inappropriate to expect the MAP to resolve issues which negotiators have failed to deal with in a principled manner.
General Comments

1. The Discussion Draft (DD) asks for comments to be limited to technical issues. However, as we have repeatedly stated, it is impossible to separate discussion of technical details from the underlying policy aims. The attempt to technicise the discussion of BEPS proposals has had the effect of creating significant barriers to the involvement of a wider range of interested persons, limiting involvement in the main to practitioners who are paid to provide tax advice to large multinational enterprises (MNEs). The lack of effective public consultation has greatly weakened the political accountability of the BEPS project.

2. We cannot refrain from pointing out also that the approach adopted in the BEPS project of attempting to patch up existing rules is resulting in an enormous increase in the complexity of the international tax system. This patch-up will require many changes to tax treaties and their commentaries, which are intended to be introduced as rapidly as possible by this multilateral instrument (MLI). Virtually all these changes aim to prevent the abuse of tax treaties by the many ingenious techniques devised by tax advisers. Yet underlying all these techniques is one basic strategy: exploitation of the fiction of separate legal personality and the ‘independent entity’ principle. Ending these abuses could have been achieved far more easily and with greater coherence by clearly stating as a guiding principle that MNEs should be treated in accordance with the economic reality that they operate as integrated firms. This was implicit in the mandate from the G20 to reform the system so that MNEs could be taxed ‘where economic activities occur and value is created’. Instead, the MLI will introduce a plethora of anti-abuse rules for revenue administrations to apply. This will require high levels of expertise and sophistication, which are often beyond the capacity of administrations in developed let alone developing countries. This approach is also a recipe for disagreements and conflicts, which will benefit only the legions of paid tax advisers, to the detriment in particular of developing countries, which do not have the capacity to successfully monitor and challenge potential exploitation of these anti-abuse rules by tax practitioners.

3. Given the above concerns and our belief that the initial two-year BEPS project is only the beginning, we recommend that the OECD and the governmental participants in the ongoing BEPS projects remain aware of the broader G20 mandate to achieve taxation reflecting ‘where economic activities occur and value is created’ and reassess in the future the simplifying recognition of the integrated nature of MNEs.

The Form of the MLI: a Self-Standing Convention

4. The MLI should be designed as far as possible to minimize legal complications. This has been made difficult because the reports from the BEPS Actions which have proposed new provisions for tax treaties with related commentaries have been formulated as amendments to the OECD model convention. Many actual bilateral treaties are not based on this model, especially those of developing countries, which generally begin from the UN model convention. No doubt the OECD countries will in due course integrate the changes resulting from the BEPS project into the OECD Model and its commentaries, perhaps together with other amendments resulting from continuing work. The UN Committee of Tax Experts should also consider for itself whether and how to incorporate these changes into the UN model.
5. The MLI should however be drawn up as a self-standing convention, with its own commentary. It is not intended to provide a model text, but a set of actual treaty provisions for states to accept and ratify as they wish. This will be easiest for the proposals which involve new treaty articles, such as the article on Entitlement to Benefits in Action 6, with its related Commentary (although this will have three alternative versions). It will be more difficult for proposals which have in the BEPS reports been formulated as amendments to particular parts of the OECD model articles, such as the more specific anti-abuse rules proposed in the Action 6 report to amend various articles. Nevertheless, for inclusion in the MLI these proposals must be reformulated as self-standing actual treaty provisions, with an appropriate related commentary. We agree with the statement in the DD that it is important to ensure, as far as possible, consistency and certainty in the interpretation and application of these provisions, and hence that the MLI should be accompanied by its own Commentary. It would not be appropriate for interpretation to rely indirectly on the Commentary to be included in the revised OECD model following implementation of the BEPS reports. This is a treaty and should have its own commentary to enable clarity and consistency in the interpretation and application of its provisions.

Amending Existing Bilateral Treaties: Country Schedules

6. The next key question is how to handle the relationship between the provisions of the multilateral instrument and the existing tax treaty network. The DD suggests that this could be done through ‘compatibility clauses’, which would ‘describe in detail under what circumstances the new provision is intended to be added to or replace the provisions of an existing tax treaty’. In our view this would create unnecessary complications due to the significant differences in the provisions of existing tax treaties that the MLI is expected to modify or supersede. We suggest instead that each jurisdiction’s adherence to the MLI should be on the basis of a Country Schedule, which would list the actual treaties and specific provisions which it intends to amend with the amending language. This would require each state to review all its existing treaties, and determine which specific changes and additions it intends to make to each treaty. These lists would also need to be discussed with each treaty partner to agree those changes, so that the Schedules would be aligned. The process would be similar to that of drawing up national schedules in multilateral trade agreements specifying each country’s commitments to bind tariffs, although in this case each country’s schedule would need to correlate with those of its treaty partners. This would be the best way to ensure clarity about which treaties have been changed and how. Indeed, without such specificity the relationship of these new treaty provisions to those of existing treaties would remain unsure. Lack of clarity about which treaties have been amended and how would be very damaging.

7. This ‘Country Schedule’ procedure would also mean that the MLI would simply provide a multilateral framework agreement, allowing states to choose which provisions they wish to apply to each of their existing treaties. The choices of each state would need to match with those of their treaty partners to create reciprocal binding obligations. Although this procedure would be somewhat complex, it would be far easier than actual separate country-by-country treaty negotiations. Since relevant officials from many countries will be attending the MLI meetings, it is likely that mutual decisions could be reached for a significant percentage of the more important bilateral treaties. While this would require more time and effort of officials to attempt to reach agreement with their treaty partners at the MLI
meetings, it should significantly ease the domestic ratification process for many countries since the bilateral agreements on terms of specific treaties reflected in each Country Schedule would be ratified at the same time that the MLI itself is ratified by each participating country. In view of the benefits of reaching as many agreements as possible between bilateral treaty parties, we suggest that additional days be scheduled in future MLI meetings to allow for such discussions and agreements.

8. The mandate for Action 15 in 2014 referred to the need to ensure balance between ‘need for flexibility in order to ensure broad adoption against the need to develop an instrument that will be effective in preventing BEPS outcomes among signatories’ (para. 12). However, the Action 15 report in 2015 also stressed that ‘The benefits of swift implementation, improved consistency, certainty, and efficiency, can only be achieved if bilateral specificities and tax sovereignty are fully respected’. It is certainly important to ensure that the MLI achieves its aim of rapidly repairing some of the most glaring loopholes in tax treaties. However, it is clear that this cannot be done in a uniform way. Firstly, this is because of the diverse nature of existing bilateral treaties. Many of the proposed new provisions add new sub-clauses to particular articles or paragraphs, identified by their numbering in the OECD model treaty. Actual treaties may have different numbering and even different wording, so it would be unclear what was being added or changed and where. Secondly, the BEPS proposals do not put forward a basic package of uniform changes, but in a number of cases offer alternative versions. This is even the case for the proposals in Action 6 to prevent abuse of treaties, which might be considered core provisions. The draft articles which comprise the minimum standard for preventing treaty abuse propose three alternatives, between which each jurisdiction must choose.

9. The ‘Country Schedule’ procedure we suggest should also resolve the first technical question posed in para.10 of the DD, the decision on which existing bilateral treaty provisions that serve a similar purpose to those to be included in the MLI should be retained, and which replaced. This is surely a matter for each jurisdiction to decide for itself, in conjunction with its treaty partners. It may be appropriate for the MLI to be accompanied by a set of expected standards or recommendations, but ultimately each jurisdiction must decide for itself.

Core Provisions

10. The central purpose of the MLI is to amend existing treaties to ensure that they are interpreted and applied unambiguously to prevent not only double taxation but also double non-taxation. It is therefore appropriate that the MLI should have as its core the basic provisions for preventing abuse of tax treaties in the BEPS reports. The key provisions are therefore those in the Action 6 report on preventing treaty abuse: the changes to the Title and Preamble, and the new article on Entitlement to Treaty Benefits. Three alternatives are proposed in the Action 6 report, and it is essential that the MLI should offer at least one version which is suitable for developing countries. Other provisions may also be regarded as core, if they are clearly aimed at preventing double non-taxation, such as the specific anti-abuse provisions in the Action 6 report, and the anti-hybrid provisions in the Action 2 report. The revisions formulated in the Action 7 report to the article 5 provisions on Permanent Establishment (PE) are directed at treaties based on the OECD model. The UN model’s article 5 does not include the word “delivery” in (a) and (b) of paragraph 4. The changes to be introduced by the MLI should be drafted in a
way which leaves those sub-paragraphs unaffected, or an alternative should be offered, in consultation with the UN Committee of Tax Experts, which allows countries to retain the UN model language.

11. The aim of ensuring that the MLI is effective should not be achieved by attempting to impose excessive uniformity on bilateral treaties which are in fact diverse, since this could create legal complexity and uncertainty. Other procedures and pressures are available to ensure that all jurisdictions comply with the minimum standards and amend their treaties appropriately, including not only the peer-review process, but the pressures of public opinion.

Dispute Resolution, the MAP and Arbitration

12. In our view, it is not appropriate to include as core provisions in the MLI any of the proposals in the Action 14 report on Making Dispute Resolution Procedures More Effective, especially those directed at the Mutual Agreement Procedure (MAP), including the introduction of Mandatory Binding Arbitration. The evidence is clear that the growth of disputes resulting from divergent interpretations and application of tax treaties has been almost entirely among the main OECD countries. It also seems that the bulk of such disputes concern transfer pricing or profit attribution issues, although little is publicly known about the nature of these disputes, due to the total secrecy of the MAP. We understand the fears of business that there may be a further increase in these disputes following implementation of the BEPS proposals. The underlying reason for this, as we have repeatedly stressed in our submissions, is the faulty approach adopted towards revision of the Transfer Pricing Guidelines (TPGs). This approach has retained the requirement that all analysis is based on the fictions of ‘independent entity’ and the contracts and arrangements between related parties devised by tax planners, while strengthening the powers of tax authorities to recharacterise those arrangements. The subjective and indeed arbitrary nature of the judgments involved in this process will inevitably continue to produce conflicts. However, it is entirely inappropriate to seek to resolve these conflicts in an administrative process held behind closed doors.

13. The attempt to coerce tax authorities to abandon their own judgments and interpretations by compelling them to reach agreement through the threat of mandatory binding arbitration is even more inappropriate. MNEs have the same remedies open to them as do all taxpayers in relation to a disputed tax assessment, of referring the issue to domestic tribunals and courts. Indeed, they have the special advantage that tax treaty provisions are generally automatically applied in domestic law, creating a special legal regime for cross-border business on which they can rely. This includes not only the treaty provisions, but also their related Commentaries, and even the Transfer Pricing Guidelines and other reports. Domestic tax courts can and do very commonly refer to and apply these rules. Tax advisers sometimes complain that domestic tribunals always side with national tax administrations, but this is far from uniformly true.

14. The MAP is an ‘amicable procedure’, and it is not appropriate to try to convert it into a supranational dispute settlement procedure. It is contrary to the due process of law, and indeed in many countries regarded as unconstitutional, for contentious interpretations of legal provisions to be made by secret and unaccountable administrative procedures, rather than by courts or tribunals in an open legal process, and subject to a requirement of exhaustion of local remedies. MNEs may well complain of delays
and other difficulties with court procedures, but all citizens suffer from such defects in public administration, the causes of which include pressures on government revenues. Mandatory Binding Arbitration is also likely to exploit the imbalance between the capacity of OECD countries’ tax authorities and developing countries’ tax authorities, solely to the benefit of OECD resident taxpayers.

15. We therefore remain opposed to the adoption of Mandatory Binding Arbitration as proposed in Action 14. In our view it is not appropriate to include even a ‘voluntary’ procedure for Mandatory Binding Arbitration in the MLI, which should be aimed at ending double non-taxation. The effect of making it mandatory for competent authorities to resolve all conflicting interpretations through the MAP is to provide a guarantee that aggressive tax planning would be riskless. It would therefore create an incentive to continue BEPS behavior. We regard the commitment of the 20 OECD states to this as a mistake. There is an overwhelming demand from public opinion for greater transparency in international tax matters. It will not be regarded as acceptable for decisions involving often hundreds of millions of dollars in taxes to be taken behind closed doors, and by applying criteria which can only be described as discretionary. The leading OECD countries which seem determined to adopt this approach should now think again. They certainly should cease to attempt to bully or persuade others to follow them along this very questionable path.
Dear Jesse,

Thank you for the opportunity to comment on the Discussion Draft: BEPS Action 15 – Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures.

The Multilateral Instrument (“MLI”) has the potential to expedite the implementation of the OECD’s recommendations in the Final Reports released in October 2015 and to ensure a swift and co-ordinated execution of the agreed BEPS measures, and in particular the minimum standards. Consistent application of the BEPS outputs would be welcomed by BIAC and the business community. Divergence in implementation creates uncertainty for businesses, which are already facing a rapid transformation in the global tax environment, and risks undermining the project’s purpose to create a coherent tax system which facilitates cross-border trade and ensures fair competition through the elimination of double taxation and double non-taxation.

Of particular importance is the development of a Mutual Agreement Procedure (“MAP”) arbitration provision. As highlighted in our comments below and in our response in respect of the Action 14 discussion draft prepared in January 2015, the effectiveness of dispute resolution mechanisms is critical to the success of the entire BEPS project. BIAC welcomes the final Action 14 report and in particular the recommended minimum standards in respect of MAP and peer reviews. Further, BIAC commends the OECD for already securing the commitment of 20 countries to provide provisions for mandatory binding arbitration in their bilateral tax treaties and we hope other countries will follow suit. We have appended to this letter, as we appended to our January 2015 letter, the results of a survey of our members on their actual experiences with MAP in their countries. We attach the results again to demonstrate the importance of this issue to our members and highlight the problems which taxpayers face in respect of resolution.

We understand that, given bilateral tax treaties are not typically subject to public consultation, no further public consultation is envisaged in respect of the MLI. In our view however, the MLI development process is fundamentally different from a bilateral treaty negotiation. It is a one-of-a-kind instrument built to support the implementation of the consensus outcomes of the BEPS project. The success of the BEPS project to date, and buy-in from so many governments and members of the wider tax community from business and civil society organizations has been in part a result of the rigorous consultation processes conducted by the OECD. We would, therefore, encourage the Ad-hoc Group to reconsider its stance on not releasing the draft text of the MLI for public consultation.

As requested, our detailed comments below focus on the technical issues of implementation and on issues related to the development of a MAP arbitration provision, rather than on the scope of the provisions or on the substance of the underlying BEPS outputs.

Again, we thank you for the opportunity to comment on this discussion draft.

Sincerely,
Will Morris, Chair
BIAC Tax Committee

Introductory comments

BIAC strongly endorses pro-growth tax systems which facilitate cross-border trade and investment, enhancing economic growth and efficiencies in the international market place. Tax treaties enable and support cross-border trade and investment by clarifying which jurisdiction has the right to tax income and ensuring therefore that income is not subject to double-taxation.

The aim of the OECD/G20 BEPS project is to ensure taxation is aligned with economic substance and value creation, while preventing double taxation. Ensuring tax treaties are consistent with the BEPS project outcomes and their purpose of enabling and supporting cross-border commerce is therefore consistent with the goals of all of the countries involved in (or with an interest in) the OECD BEPS Project, and the business community.

The Multilateral Instrument (“MLI”) has the potential to ensure that the BEPS outcomes are implemented in a consistent and coherent way across jurisdictions. This MLI has the potential therefore to reduce uncertainty for business and could be particularly valuable for international businesses that may otherwise face diverging tax rules across the jurisdictions in which they operate. BIAC hopes the MLI project will be successful and offers any support that the Ad-hoc Group and the OECD secretariat require in order to ensure this success.

Technical issues of implementation

The MLI provisions must supersede provisions of bilateral tax treaties in order to be effective. However, bilateral tax treaties are numerous and diverse; even those based on the OECD Model frequently include divergences. Many OECD member countries have reserved the right to depart from the OECD Model Tax Treaty Guidance on numerous issues. Even more challenging is the fact that a great number of countries participating in the BEPS project are not OECD members and do not use the OECD Model as a basis for negotiating bilateral treaties at all. Further, as the consultation draft points out, many treaties are enforced in languages other than English or French, the languages of the MLI.

We are concerned therefore, about the practicability of an all-encompassing compatibility clause that countries could sign up to with a view to modifying multiple treaties in a single action. It would be unclear exactly which provisions of which treaties were affected and, for individual countries, which of the points they may have negotiated as part of the bilateral treaty discussions would be impacted.

There is a careful balance to be struck between complexity and flexibility in the operation of the MLI. If a single, straightforward solution were possible that was also flexible enough to be attractive to
multiple jurisdictions while tackling each of the complex issues it seeks to address, that would be preferable. However, for the reasons noted above, we are uncertain how a single-action solution could be feasible — at least initially — without creating further disputes and uncertainty for those countries which do sign up to the MLI.

**A practical solution: an intermediate step**

A practical solution may be for the MLI to be an intermediate step, which enables all bilateral tax treaties to be amended swiftly and consistently.

We suggest that before the MLI can change any bilateral tax treaty, the two countries exchange official notes with each other ratifying their common understanding of the changes to their treaty. Once exchange of the notes has taken place, the changes to the treaty will become effective.

This will ensure a common understanding of the new provisions — and will be fully accessible to the taxpayers who seek to rely on that treaty.

While this proposed solution is slightly more time consuming than modifying all treaties immediately on the signing of the MLI, it is practical, and would ensure clarity between treaty partners (and for taxpayers) in respect of the exact effect of the MLI modification on the relevant treaty.

**Compatibility with multiple treaties**

There are two distinct and different global Model Treaties under which most bilateral tax treaties are negotiated; the OECD and UN. We understand that the MLI will be primarily drafted to modify or add clauses to treaties based on the OECD Model. However, the reach of the BEPS project expands well beyond OECD jurisdictions and will impact bilateral tax treaties based on the UN Model.

There should, therefore, be specific language and guidance on how exactly the provisions of the MLI will change bilateral treaties that are based on the UN Model Treaty provisions. For example, with respect to Permanent Establishments, it is difficult to see how language could be used to address both treaties prepared under the OECD and under the UN model as they have significant substantive differences.

It is imperative that whether a bilateral treaty being amended is based on either the OECD or UN Model, any country that signs up to the various provisions included in the MLI, also commits to adopting the respective OECD guidance on those treaty aspects. This commitment should be formalized as part of commitment to the MLI to minimize the risk of inconsistency in application of the treaty provisions and to avoid unnecessary disputes in interpretation.

The MLI is very different from a bilateral negotiation where, if a country has a view that differs from the view reflected in the Model and the Commentary, both countries have an opportunity to understand the exact nature of the disagreement and draft language that both countries are willing to accept. If an accommodation cannot be reached; then a bilateral treaty would not be concluded.
In the context of the MLI, however, if the words are acceptable but a country understands those words to mean something very different from the usual interpretation, it would be unfair to other countries, to allow the non-conforming country to sign onto the MLI without resolving the inconsistency. We see two possible resolutions. First, the non-conforming country could commit to the standard interpretation (and, therefore, abandon its position). Second, if the non-conforming country is unwilling to commit to the standard interpretation, it would not be permitted to use the MLI to modify its bilateral treaties with respect to the relevant issue unless the other country explicitly accepted the non-conforming interpretation.

**Minimum standards plus necessary flexibility**

As noted in the Consultation Draft, the MLI ought to cover a number of tax treaty measures developed in the course of the OECD-G20 BEPS Project. Some of these measures relate to minimum standards, others to a revision of OECD guidance or recommended policy approaches only.

For swift implementation, countries need to ensure they comply with the minimum standards so tax treaties need to include BEPS-proof measures that prevent them from granting treaty benefits in inappropriate circumstances and the elements of the dispute resolution recommendations. It is BIAC’s view that, in order to be meaningful and create basic consistency in global taxation systems, countries that sign up to the MLI cannot reserve on these provisions relating to minimum standards if such measures are not already included in their tax treaties.

Further, the OECD should ensure that countries effect these provisions where possible in their other tax treaties once they have signed up (e.g. through the MAP Forum and/or wider BEPS Monitoring process).

If individual countries are not willing to sign up to at least the provisions on the minimum standards and associated OECD commentary, they should not be able to use any part of the MLI and must renegotiate their treaties bilaterally to address BEPS concerns.

We note that even within the OECD-G20 reports on Action 6 (Preventing the granting of treaty benefits in inappropriate circumstances) and Action 14 (Making dispute resolution mechanisms more effective) which are minimum standards, there is optionality in the way those standards are implemented. For example, in respect of Action 6, countries may choose to implement the standard using a Limitation of Benefits (“LOB”) Clause supplemented with conduit rules, a Principle Purpose Test (“PPT”) or a combined approach with a LOB and PPT. We have provided some comments below in respect of Action 14.

To create some flexibility, the portions of the MLI which do not relate to the minimum standards, should be optional for countries to sign up to. For example, some jurisdictions may choose not to implement changes in respect of Action 2, Hybrid Mismatches, as per the October 2015 Final Report this is a recommendation item only. Without this flexibility, there is a risk some countries will not subscribe to the MLI at all, even if they are committed to the agreed minimum standards.
If treaty partners have signed up to the MLI there should be an implicit understanding they will seek to ratify the amendments to their bilateral treaty in respect of the minimum standards, which they must have signed up to, and in respect of any of the other MLI provisions which they have both chosen to adopt.

In order to ensure swift ratification of the MLI treaty amendments across jurisdictions, the MLI should include non-negotiable draft language in respect of each provision to avoid lengthy negotiations between bilateral treaty partners. Choosing exactly which bilateral treaty clauses the MLI provisions replace and ensuring they are accurately translated into the appropriate language(s) will require agreement between treaty partners. Treaty partners however should not be negotiating on substance of each provision, as this would greatly delay the process and severely reduce the effectiveness of the MLI.

Development of a MAP arbitration provision

The desirability of mandatory binding arbitration

As noted above, changes to ensure that Treaties apply with the Action 14 minimum standards are required and should apply to all jurisdictions who wish to adopt the MLI (and indeed, all countries who have agreed to the BEPS consensus).

BIAC strongly holds the view, as expressed in our previous correspondence in respect of the BEPS Project, that the MAP provision is of key importance not just to the success of the MLI, but to the entire BEPS project. Effective dispute resolution provides the necessary framework to ensure mismatches in interpretations of the international tax rules are adequately dealt with.

A dispute resolution mechanism that is robust and ensures outcomes are fair and predictable will help to mitigate the uncertainty for business created by unilateral action in taxation and inconsistent application of the BEPS recommendations in some jurisdictions. It is our view that several of the BEPS Action items will increase the incidence of disputes over taxing rights between governments and a meaningful way to resolve these disputes is necessary to ensure that double taxation (or the risk of double taxation) does not distort market outcomes and hinder international commerce.

BIAC welcomed many aspects of the Final Action 14 Report. The Report sets out in detail the requirements of the minimum standard. Some of the key features of the standard are that: i. taxpayers can access MAP when eligible; ii. administrative processes promote resolution of disputes within target of 24 months; and iii. treaty obligations related to MAP are implemented in good faith.

The MLI should provide an appropriate mutual agreement procedure to resolve disputes, similar to what is currently provided in Article 25 of the OECD Model. The Competent Authorities (“CA”) of bilateral treaty partners, particularly those 20 that have signed up to mandatory binding arbitration, should be required to agree the details of the form of the process bilaterally.

The MLI should further ensure that taxpayers find the MAP process transparent, predictable, efficient and that they have an appropriate role. As well as ensuring taxpayers are informed of any MAP
negotiations affecting them, countries should also be transparent to the wider public in respect of their approach to MAP (discussed further below).

The Final Action Report further notes that 20 countries have already committed to amending their bilateral tax treaties to provide for mandatory binding arbitration between governments to guarantee the resolution of disputes within a set timeframe. A commitment to time-bound mandatory binding arbitration is the only way to make these minimum requirements work in practice and to support the critical mass of countries that have already made this commitment.

As we have done previously, we ask all countries involved in the BEPS project (of which of course there are an ever-increasing number) to recognize that adopting a binding arbitration framework should be an integral part of the BEPS deliverables. The MLI provides a unique opportunity to make such a framework a reality.

Arbitration is the most effective method to resolve disputes and would mitigate some of business’ concerns regarding double taxation which discourages overseas trade and investment.

A commitment to arbitration is additionally beneficial to governments, as it promotes a more impartial view towards disputed issues and contributes to capacity building. In our view this is likely to be of particular importance to the governments of countries that were not part of the initial BEPS consensus-making process and who may join the project through the inclusive framework, as they will need assurance that they will have recourse to a fair and predictable process to protect their own tax base.

In order to support bilateral CA discussions, we suggest that supplementary examples are provided within the MLI guidance of forms of arbitration that the resolution process could take (e.g. “last-best-offer”, or “long form” arbitration).

We do not propose that any particular form is mandated specifically in the MLI or itself or in the associated guidance as this could risk a reduction in the number of countries willing to participate. We ask the OECD to encourage countries to be flexible in the form of arbitration that they are willing to proceed with. It would be disappointing if a prescriptive form of arbitration was offered and it diminished the number of other countries willing to participate at all.

By integrating the Action 14 MAP process into the MLI, and promoting significant adoption of mandatory binding arbitration, we can empower countries to resolve disputes where previously no adequate mechanism has been in place within bilateral treaties or where it has been felt that the mechanisms in place were not fair or impartial.

In order to ensure mandatory binding arbitration is a realistic and attractive option for governments, it is important that it is anchored within the countries that are party to the dispute. It is not necessary or desirable to have a new (or existing) “world tax body” or similar institution proposed in the MLI. If such a solution were proposed, we expect it would strongly discourage certain countries from signing up to the MLI at all.
Among all of the provisions of the MLI, we would like to particularly highlight our desire that the provisions to deliver mandatory binding arbitration (which will involve new Model language rather than negotiation departing from it between countries) should be subject to the same degree of public consultation as the rest of the BEPS project deliverables.

**FTA MAP Forum and Public Transparency**

The guidance associated with the MLI should ensure that countries that sign up to the MLI are required to commit to working on improving their competent authority relationships, including to becoming members of the FTA MAP Forum, providing MAP statistics and undergoing peer reviews, so that they can be held accountable for ensuring the mechanism functions.

As previously noted, we recommend that tax administrations should be required to publish a standardized annual report that outlines several criteria relevant to measuring progress in meeting the Action 14 objectives. Transparency in this area would certainly help to encourage countries to dedicate sufficient resources, and to follow appropriate policies in their MAP efforts.

The criteria in such a report should include, in addition to the MAP statistics items OECD countries have already committed to report annually, the number of officials dedicated to the Competent Authority ("CA") division, a description of performance evaluation criteria for CA officials, the number of cases submitted to the CA in the past year, the number of cases refused by the CA (through joint country CA consideration, as well as unilaterally), high, low and average times to CA resolution, number of CA waivers sought (and obtained) in the course of local tax audits, and a listing of best practices from MEMAP used in the local country’s CA process.
Annex 1

BIAC MAP Questionnaire
Summary of BIAC members’ responses

In October 2014, in advance of the OECD Discussion Draft on BEPS Action 14: Making Dispute Resolution Mechanisms More Effective, BIAC released a questionnaire asking its members for feedback on their first-hand experiences with MAP proceedings. The BIAC survey result provides useful and insightful information on issues encountered by MNEs with the MAP process and gives examples of where the MAP process does and does not work as intended. We have provided below a summary of the written responses received from the international business community in response to the BIAC MAP questionnaire (and referenced to the OECD Discussion Draft on BEPS Action 14: Dispute Resolution).

**Question 1:**
Please give examples of where you have experienced “best practices” with the MAP process, along with a description of these practices.

<table>
<thead>
<tr>
<th>“Best Practices” experienced in the MAP process (and referenced to OECD MEMAP’s best practices)</th>
<th>Description of these best practices</th>
<th>Referenced to the OECD Discussion Draft on BEPS Action 14: Dispute Resolution</th>
</tr>
</thead>
</table>
| **Mandatory, binding arbitration** | • Existence of mandatory, arbitration clauses in treaties helps create an incentive for competent authorities to settle the case.  
• Binding arbitration provides taxpayers with a mechanism to obtain resolutions and certainty in tax disputes expeditiously.  
• Mandatory arbitration is available for cases that have gone on for 2 years or more without resolution.  
• Taxpayers can choose to reject the arbitration board recommendations and pursue their challenge of the issues in the domestic courts. | OECD Discussion Draft, section 4T: Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases |
### Guidance for assessing and using MAP
- **Transparency and simplicity of procedures for accessing and using the MAP** (MEMAP Best Practice No. 4)

- Guidelines issued to provide guidance and clarification regarding application of MAP process and remedies available to taxpayers within the framework.

### Cooperation and transparency with taxpayers
- **Taxpayer presentations to competent authorities** (MEMAP Best Practice No 13)
- **Cooperation and transparency** (MEMAP Best Practice No 14)
- **Decision summaries** (MEMAP Best Practice No 17)

- Well-developed consistent submission from the taxpayer to both countries competent authorities is crucial.
- Anecdotal examples shared by BIAC members:
  - Communication with taxpayer: CA gave solid feedback to taxpayer regarding possible changes in positions.
  - Open-minded and willing to thoughtfully consider the taxpayer’s position in developing positions.
  - Cooperation with taxpayer: Both taxpayer and CAs were well-prepared in advance of the MAP process, which allowed a conclusion to be agreed in a short time-frame.
  - Regularly scheduled meetings, both between the taxpayers and the governments, and between governments helpful.

### Interaction between Competent Authorities
- **Face-to-face meetings between**

- MAP works best where there is reciprocity of trade. Trust between the treaty partners is critical.
- Anecdotal examples shared by BIAC members:
  - Proactive steps undertaken by CAs to try and narrow the differences in

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OECD Discussion Draft, section 3J: *Complexity and lack of transparency of the procedures to access and use the MAP*

OECD Discussion Draft, section 4R: *Lack of a principled approach to the resolution of MAP cases;* and section 4S: *Lack of co-operation, transparency or good competent authority working relationships*
- **competent authorities** (MEMAP Best Practice No 15)  
- **Bilateral process improvements** (MEMAP Best Practice No 16)  
- **Recommendation for MAP cases beyond two years** (MEMAP Best Practice No 18)

| competency authorities (MEMAP Best Practice No 15) | their opinions, resulting in more efficient processes.  
| - Bilateral process improvements (MEMAP Best Practice No 16) | • Regularly scheduled meetings, both between the taxpayers and the governments, and between governments helpful.  
| - Recommendation for MAP cases beyond two years (MEMAP Best Practice No 18) |  

| Suspension of collections during MAP (MEMAP Best Practice No 21) | • Suspension of collection during MAP proceedings.  
| | • Partial relief may be provided by some other countries but it tends to be limited.  
| |  

| Roll-forward application of MAP treatment | • Taxpayers may request for assistance for subsequent tax years on the same issue as long as the underlying facts and circumstances are not materially different. This allows taxpayers to gain certainty on issues for all open tax years for which tax returns have been filed.  
| | • MAP resolutions have been transferred into APA discussions further enhancing the value of the MAP process.  
| |  

| Multilateral MAP proceedings | • Openness to multilateral MAP proceedings  
| |  

**Question 2:**  
Please give examples of where you have experienced obstacles with the MAP process, along with details of what went wrong (or could have been better).
<table>
<thead>
<tr>
<th>Obstacles encountered with the MAP process (and referenced to OECD MEMAP’s best practices)</th>
<th>Description of these best practices</th>
<th>Referenced to the OECD Discussion Draft on BEPS Action 14: Dispute Resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Limited use of CA function authority to relieve double taxation</strong>&lt;br&gt;- Robust use of Article 25(3) power to relieve double taxation (MEMAP Best Practice No. 2)</td>
<td>• Limited commitment to the avoidance of double taxation.&lt;br&gt;• Competent authorities demonstrate little willingness to compromise, undertake proactive negotiations and discussions to reach a mutually agreed outcome.&lt;br&gt;• Anecdotal examples shared by BIAC members:&lt;br&gt; - CA is not interested in considering taxpayer’s position much less those of other governments involved forcing taxpayers to seek resolution in the domestic courts.&lt;br&gt;• No compulsory participation of countries which impedes the starting of the MAP process.&lt;br&gt;• No time limit to MAP procedure if there is no arbitration clause specified in the treaty.&lt;br&gt;• No compulsory result if there is no arbitration clause specified in the treaty. Cases may conclude without reaching an agreement.</td>
<td>OECD Discussion Draft, section 1A: Absence of an obligation to resolve MAP cases presented under Article 25(1); and section 2F: Insufficient use of paragraph 3 of Article 25</td>
</tr>
<tr>
<td><strong>Exclusion from MAP process</strong>&lt;br&gt;- Avoiding exclusion from MAP relief due to late adjustments or late notification (MEMAP Best Practice No 10)&lt;br&gt;- Consideration of MAP assistance for cases described as “tax avoidance” (MEMAP)</td>
<td>• Adjustments are proposed by CA after expiration of a time limitation for notifying or filing a MAP request specified in the treaty.&lt;br&gt;• Unilateral rejection of cases based on avoidance arguments with allegations of law abuse or administrative penalties used to justify a denial to access MAP.&lt;br&gt;• Countries reserve the right to exclude from MAP consideration any case in which auditors assert the existence of “tax avoidance” even on a secondary basis without legal determination.&lt;br&gt;• Anecdotal examples shared by BIAC members:</td>
<td>OECD Discussion Draft, section 3L: Right to access MAP may be unclear where domestic or treaty-based anti-abuse rules have been applied</td>
</tr>
</tbody>
</table>
### Best Practice No 11

- **Countries eliminate or minimize “exceptions” to MAP** (MEMAP Best Practice No 12)

### Bilateral APA application unilaterally terminated two years into the process with CA citing BEPS as the reason. No reason was provided to the treaty partner, and no attempt to justify the decision to the taxpayer.

- Repeated requests over a 3 year period for negotiations with a treaty partner on a transfer pricing case was not acknowledged by the competent authority.

- Transfer pricing adjustments are recharacterized as “non-deductibles” under domestic law in an effort to deny the taxpayer access to MAP.

- CA excludes selected issues from MAP consideration without agreed limitation and notice in treaty.

### Cooperation and transparency with taxpayers

- **Taxpayer presentations to competent authorities** (MEMAP Best Practice No 13)

- **Cooperation and transparency** (MEMAP Best Practice No 14)

- **Decision summaries** (MEMAP Best Practice No 17)

- Limited taxpayer’s involvement in the MAP procedure.

- Lack of transparency and communication between CAs and taxpayers makes it difficult for taxpayers to assess the status of the case during the course of the proceedings.

- The lack of information and regular updates from tax authorities once receipt of the documentation set has been acknowledged can be frustrating for business.

- Taxpayers may not have the opportunity to meet with the CAs to discuss the case. Given the magnitude of the numbers involved, a meeting can, at times, be helpful to ensure that both CAs understand the facts, and the reasons for the claim for relief from double taxation.

### Interaction between Competent Authorities

- **Face-to-face meetings between**

- Lack of preparation in advance of the MAP process. This makes it difficult for both CAs to have any effective discussions or negotiations during their meetings and creates further delay.

- Unprincipled approach to the resolution of cases.

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OECD Discussion Draft, section 4R: **Lack of a principled approach to the resolution of MAP cases**; and section 4S: **Lack of co-operation, transparency or good competent authority working relationships**
<table>
<thead>
<tr>
<th><strong>competent authorities</strong> (MEMAP Best Practice No 15)</th>
<th><strong>Bilateral process improvements</strong> (MEMAP Best Practice No 16)</th>
<th><strong>Recommendation for MAP cases beyond two years</strong> (MEMAP Best Practice No 18)</th>
</tr>
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<tr>
<td>- Anecdotal examples shared by BIAC members:</td>
<td>- structuring agreements based on specified percentages of revenue;</td>
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<td>- insisting on the right to tax at least 50 percent of the income at issue;</td>
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<td>- taking a position that taxpayers have a permanent establishment in their jurisdiction solely because it has customers there or has registered for VAT purposes; and</td>
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<td>- unilateral view that absent a contract, no transaction should be deemed to have been entered into regardless of economic realities and clear need for remediation of an error or unforeseen extraordinary event.</td>
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<td>- Length of MAP procedure is also a source of complaint. The MAP process is too long a procedure as compared to the rhythm of business life. MAP procedures takes at least 4 years on average for resolution. Some countries have also allowed MAP cases to remain pending for 8 to 10 years with no obvious prospect of resolution in the near term.</td>
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<td>- Anecdotal examples shared by BIAC members:</td>
<td>- CA took more than a year to begin a dialogue with its treaty partner;</td>
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<td>- Lack of clear timetable with MAP process likely to extend beyond 2 years; and</td>
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<tr>
<td>- CA failed to reach an agreement within a reasonable time period.</td>
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**MAP access blocked in audit settlements**

- Avoid blocking MAP access via audit settlements or unilateral APAs (MEMAP Best Practice No 19)

<table>
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<tr>
<th><strong>MAP access blocked in audit settlements</strong></th>
<th><strong>Competent authority offers a lower assessment to settle a case if MAP is waived, including in some cases contrary to stated policy.</strong></th>
<th><strong>OECD Discussion Draft, section 2G: Audit settlements as an obstacle to MAP process</strong></th>
</tr>
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</table>

**transparency or good competent authority working relationships**
| Interest relief (MEMAP Best Practice No 20) | • Failure to address interest relief as part of the MAP resolution. | OECD Discussion Draft, section 4V: Issues related to consideration of interest and penalties in the mutual agreement procedure |
| “Pay to play” requirements to access MAP | • “Pay to play” requirements to access MAP. Taxpayers are often required to pay all taxes owing in full to both tax jurisdictions until the matter is resolved. This is a significant period of time to have large amounts of cash tied up that could otherwise be used in the taxpayer’s normal business. | OECD Discussion Draft, section 3O: Issues connected with the collection of taxes |
| Objectivity and resources of Competent Authorities | • Lack of qualified MAP staff is a consistent issue.  
  • Lack of impartiality and independence.  
  • Anecdotal examples shared by BIAC members:  
      - MAP cases are reviewed by the same economists and audit staff that were involved in the original assessment;  
      - Local tax authorities participate in the MAP process. Conflicts in approach or opinions between the central and local tax authorities’ acts as a barrier in reaching a reasonable outcome for the MAP process;  
      - Competent authorities required to approve all tax adjustments involving international transactions in advance. This gives the competent authorities an investment in the position that makes it extremely hard to negotiate a settlement; and  
      - No clear authority in cross-border matters. Tax authorities do not view the competent authority as a decision maker in the process, fails to communicate with the competent authority and cooperate | OECD Discussion Draft, section 2C: Lack of independence of the competent authority and inappropriate influence of considerations related to the negotiation of possible treaty changes; and section 2D: Lack of resources of a competent authority |
| Roll-forward application of MAP treatment | Limited or no ability, in practice, to roll-forward the application of MAP treatment to future filed years. Taxpayers should be allowed to request for assistance for subsequent tax years on the same issue as long as the underlying facts and circumstances are not materially different. This allows taxpayers to gain certainty on issues for all open tax years for which tax returns have been filed. | OECD Discussion Draft, section 2H: Lack of APA programmes; and section 4U: Issues related to multilateral MAPs and APAs |
| Confidentiality of sensitive information | Politicization of MAP process, often with public comments regarding particular cases or threats of press leaks. In an anecdotal example shared by BIAC members, tax authorities leaked facts of MAP cases to the press. | OECD Discussion Draft, section 4T: Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases (see option 28: Confidentiality and communications) |
| Multilateral MAP proceedings | MAP proceedings are generally limited to cases involving direct transactions with a party in the treaty partner jurisdiction, with no participation in discussions of indirect transactions. CAs typically refuses to engage in trilateral discussions. | OECD Discussion Draft, section 4U: Issues related to multilateral MAPs and APAs |
| General comments | MAP can be a heavy process not suitable for small amounts as it can trigger a tax audit in the other state. | |

**Question 3:**
How do you think the MAP process could be further improved?
### Suggestions for improvement

<table>
<thead>
<tr>
<th>Obligation to reach an agreement</th>
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<tr>
<td>• An agreement should be made mandatory with outcomes that are binding on tax authorities.</td>
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<tr>
<th>Mandatory, binding arbitration</th>
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<tr>
<td>• Introduction of mandatory arbitration clauses can help to speed up the MAP process and ensure the resolution of double taxation. In cases where the competent authorities cannot come to an agreement, taxpayers should have the ability to initiate process for an independent, binding arbitration.</td>
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<tr>
<td>• Arbitration can help developing countries obtain a neutral, external view to the issues disputed.</td>
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<td>• The form of arbitration should be consistent.</td>
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<tr>
<td>• Suggested periods on when arbitration should be enforced ranges from 0 to 2 years - the presumption is that the audit work has been completed and the tax authorities’ files are in a state to support the position. Generally, transfer pricing issues have a 7 year statute barred date - adding an additional 4 years or more to the issue means that we are dealing with issues that are potentially 11 years old. Documentation and people are very difficult to obtain as issues get this old.</td>
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<tr>
<td>• An international permanent court of arbitration (e.g. the WTO panel) could be established.</td>
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<tr>
<th>Peer reviews of MAP</th>
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<tr>
<td>• Conduct peer reviews of country conduct of MAP (measured against OECD MEMAP’s best</td>
</tr>
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**Referenced to the OECD Discussion Draft on BEPS Action 14: Dispute Resolution**

- OECD Discussion Draft, section 1A: *Absence of an obligation to resolve MAP cases presented under Article 25(1); and section 2F: Insufficient use of paragraph 3 of Article 25*
- OECD Discussion Draft, section 4T: *Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases*
- OECD Discussion Draft, section 2E: *Performance indicators for the competent authority function and staff*
- Monitor exclusions from MAP process: Track how many cases are lodged and refused.
- Exchange of best practices between countries and tax administrations
- KPIs: tax assessments should be raised based on fundamental transfer pricing principles (instead of tax revenue targets).

### Guidance for assessing and using MAP

- More guidance on MAP. Develop processes to resolve inter jurisdictional disputes quickly and provide certainty for the conduct of international business.
- Document MAP process such that it is clear to all parties (i.e. taxpayers and tax authorities) what can be expected of each, why and when at all stages.
- Create a model MAP request document to prepare a single submission. Standardized information requests can help to expedite the MAP process and also assure countries that the same information is being received.
- Provide guidance on interaction between MAP and domestic handling of other audit issues.

### Cooperation and transparency with taxpayers

- Joint fact-finding. Pre-filing discussions should be encouraged e.g. joint presentations to competent authorities. Taxpayer involvement in joint meetings can help ensure that there is mutual understanding of the facts at an early stage.
- Focus on transparency and relationship building between taxpayers and tax authorities. Regular updates should be provided to taxpayers involved in MAP proceedings.
- Promote consistent case law. Publicize anonymised MAP agreements that could be relied on by other taxpayers or countries.
- Countries could also develop a “fast track” MAP for commonly disputed issues thereby alleviating work load and resources, both for taxpayers and tax administrations.
- Countries should accept all cases regardless of the value of the transaction, particularly if it

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OECD Discussion Draft, section 3J: Complexity and lack of transparency of the procedures to access and use the MAP; section 3K: Excessive of unduly onerous documentation requirements; and section 3N: The use of domestic law remedies may have an impact on the use of the MAP

OECD Discussion Draft, section 4R: Lack of a principled approach to the resolution of MAP cases; and section 4S: Lack of co-operation, transparency or good competent authority working relationships
pertains to commonly disputed issues.

### Interactions between Competent Authorities
- Strict and short time-table with agreed timeframes for discussion.
- More frequent meetings between competent authorities.

OECD Discussion Draft, section 4S: Lack of co-operation, transparency or good competent authority working relationships

### Suspension of collections during MAP
- Taxpayers should not be required to pay any assessment once the MAP process is initiated.
- An escrow account could be established with the monies made available to either tax authorities as full and final settlement of the taxes when the dispute is ultimately resolved.

OECD Discussion Draft, section 3O: Issues connected with the collection of taxes

### Independence and resources of a competent authority
- Adequate staffing for competent authority function both in terms of headcount and skilled resources.
- Training for CA staff on the purposes and conduct of the CA function.
- CA experts with a clear, consistent understanding of the MAP process should be made available and identified in each territory as decision makers.

OECD Discussion Draft, section 2C: Lack of independence of a competent authority; and section 2D: Lack of resources of a competent authority

### Roll-forward application of MAP treatment
- Expand “roll-forward” application of agreed MAP treatment to future filed years.
- Linkage of MAP to APA should be encouraged, and accelerated CA combined with a domestic appeals process should be encouraged.
- Automatic application of the solution to future years (and to other countries if the case is similar).

OECD Discussion Draft, section 2I: Failure to consider the implications of a taxpayer’s MAP or APA case for other tax years
- More flexible approach to adjustments to closed years.
- Adopt multi-year analysis in MAP.

**Multilateral MAPs and APAs**

- Trilateral MAP and APA proceedings. Provisions for triangular cases.
- Improved treaty network for developing countries.
- Multilateral agreement for MAP process.
- Agreement between governments, as part of the treaty conclusion process, to commit to following the OECD MEMAP best practices.

**Confidentiality of sensitive information**

- Information obtained in a MAP process should be fully protected by confidentiality provisions.

**Costs and administration of MAP proceedings**

- The fees for access to MAP and/or during the MAP proceedings should not be dissuasive.

OECD Discussion Draft, section 2H: *Lack of APA programmes*; and section 4U: *Issues related to multilateral MAPs and APAs*

OECD Discussion Draft, section 4T: *Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases*

(see option 28: Confidentiality and communications)

OECD Discussion Draft, section 4T: *Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases*

(see option 32: Costs and administration)
• Make an effective MAP process a pre-condition for countries to obtain TP documentation packages (i.e. country-by-country report and master file).
BusinessEurope

Through its members, BusinessEurope represents 20 million European small, medium and large companies. BusinessEurope’s members are 41 leading industrial and employers’ federations from 35 European countries, working together since 1958 to achieve growth and competitiveness in Europe.

BusinessEurope is pleased to provide comments prepared by the members of its Tax Policy Group, chaired by Krister Andersson, on the OECD Discussion Draft entitled “BEPS Action 15: Development of a Multilateral Instrument to Implement the Tax treaty related BEPS Measures” (hereinafter referred to as the Draft).

BusinessEurope fully supports fair tax competition and the objective to fight fraud and evasion as it creates strong competitive distortions at the expense of the vast majority of businesses who pay their taxes in full. We recognise the need to ensure that the international corporate tax system remains fit for purpose in light of challenges from increasing globalisation and particularly increasing digitalisation. For this reason, many BusinessEurope members have actively contributed to discussion at the OECD on the Base Erosion and Profit Sharing (BEPS) project through the BIAC.

In the context of the BEPS Project, the goal of a multilateral instrument is to expedite and streamline the implementation of the measures developed to address BEPS by modifying bilateral tax treaties. The number of bilateral tax treaties worldwide would mean that updating the treaty network one treaty at a time would take a substantial amount of time. This would not only mean that the implementation of certain BEPS measures would not be completed in a reasonable timeframe, but – more importantly – it would create a prisoner’s dilemma for countries that could very easily result in further distortion of the global level playing field.

Therefore, BusinessEurope supports the development of a multilateral instrument to modify existing bilateral tax treaties in order to swiftly implement the tax treaty measures developed in the course of the OECD-G20 BEPS Project. There is a clear need to coordinate the implementation of BEPS measures globally to prevent further distortion of the global level playing field. In this respect, we applaud the fact that the Ad Hoc Group now includes 96 countries all participating on an equal footing, as well as a number of international organisations participating as Observers to develop the multilateral instrument.

However, much more important than the function of the multilateral instrument as a carrier for the modifications to the global treaty network, is the precise content of the modifications that follow from the BEPS output that the multilateral instrument means to implement.

The initial and prime objective with tax treaties is and should continue to be to facilitate cross-border trade through the allocation of taxing rights between countries and to provide for mechanisms to eliminate double-taxation. This objective must also be safeguarded in the scope of the provisions of the multilateral instrument.

In addition to preventing double taxation there is a clear need for better and more efficient means of
dispute resolution. Business expects that the implementation of BEPS measures will inevitably lead to more cases of double taxation. There need to be ways to resolve these if we are to foster cross border trade and investments and enhance a well-functioning and flourishing global economy.

BusinessEurope is therefore of the opinion that mandatory binding arbitration should be the norm. However, given the fact that some countries are still reluctant to adopt mandatory binding arbitration, an optional provision in the multilateral instrument would be the next best thing.

As to the approach to be taken in developing this optional provision BusinessEurope first of all is of the opinion that any form of mandatory binding arbitration in tax treaties is better than no provision at all. The possibility of mandatory arbitration will be tremendously helpful in better achieving a resolution in MAP procedures in the allotted time.

In so far cases would have to be settled using mandatory binding arbitration BusinessEurope would say that as a rule business would have a preference for ‘last-best-offer’ or ‘baseball arbitration’ as this potentially would prove most effective in preventing drawn-out procedures. However, BusinessEurope is aware that not all countries would subscribe to this form of arbitration and therefore the optional provision should not exclude other forms of arbitration.

BusinessEurope finds it difficult to accept that the draft text of the multilateral instrument is to be kept confidential. Surely, there is a fundamental difference between other bilateral and multilateral treaty negotiations between governments and the design of the multilateral instrument under BEPS Action 15. Besides, even though business is not at the table at the other bilateral and multilateral treaty negotiations themselves, does not mean that governments do not seek the council of business in the run-up to these negotiations.

Exactly because this multilateral instrument must navigate between modifying existing bilateral treaties and respecting national sovereignty, more transparency regarding the draft texts and the scope of the provisions would enable business to make a much more meaningful contribution to help develop the multilateral instrument to be effective and efficient in realizing its objective.

BusinessEurope believes the existing bilateral treaty network should be considered as much as possible as start for the implementation especially when multiple options are made available. In those cases, some kind of bilateral agreement should underlie the multilateral instruments. As many bilateral treaties already address treaty abuse with clauses and implementation guidance along the lines of the BEPS Treaty Abuse recommendations, keeping compatible existing clauses in place would contribute to a swift implementation.

Obviously, in developing a multilateral instrument there is an inherent need to ensure that the provisions covered in the multilateral instrument are implemented and applied consistently and coherently throughout the world. For this purpose the technical instruments of compatibility clauses, commentary or
explanatory notes and standardized translations all can serve a very useful role. Also other types of guidance or practical tools could be useful.

In any case, it is very difficult to speak to as to how these instruments could be best deployed without knowing the exact context in which they should be applied.

Certain details for implementation and interpretation can and should be found in the BEPS reports from October 2015, which were the result of an inclusive approach. More inclusive work would be required by OECD to develop positions needed to ensure an implementation of the BEPS recommendations. Specific examples include the work on the mandatory binding arbitration but also allocation of profits to PE. There is some clarity on how the expanded PEs would look like but no alignment on what that means on actual profit allocation and tax base determination.

BusinessEurope would urge the OECD therefore to reconsider and provide an opportunity for business to give input and make suggestions as to how the provisions of the multilateral instrument should be drafted to be best applicable in practice. It is then, of course, up to the Ad Hoc Group to decide whether or not they find the suggestions of business worthwhile to include in the final text of the multilateral instrument.

Such an approach would add to the spirit of openness and transparency of the process and should not interfere with the confidentiality of the ultimate intergovernmental discussions on the subject.
CBI RESPONSE TO THE OECD PUBLIC DISCUSSION DRAFT: DEVELOPMENT OF A MULTILATERAL INSTRUMENT TO IMPLEMENT THE TAX TREATY RELATED BEPS MEASURES

As the UK’s leading business organisation, the CBI speaks for some 190,000 businesses that together employ around a third of the private sector workforce, covering the full spectrum of business interests both by sector and by size.

The CBI has supported the OECD BEPS project since its inception and recognises the need to update international tax rules to address base eroding and profit shifting activity. The Multilateral Instrument has the potential to expedite the implementation of the OECD’s recommendations in the Final Reports released in October 2015 and to ensure a swift and co-ordinated execution of the agreed BEPS measures. Consistent application of the BEPS outputs would be welcomed by the CBI and the UK business community.

We have reviewed the response prepared by BIAC in respect of the OECD discussion draft on the “Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measure” and agree with the key points and conclusions submitted in that response.
Dear Sirs

We refer to the Public Discussion Draft on BEPS Action 15 (Development of a Multilateral Instrument to implement the tax treaty related BEPS Measures) published by the OECD on 31 May and are pleased to respond to the request for input.

The Chartered Institute of Taxation has consistently supported the BEPS project. We recognise that the tax treaty-related BEPS measures are an important step to improving public trust in the international tax system by reducing the incidence of double non-taxation arising from the use of treaties in ways that were not envisaged when they were agreed. Furthermore, it is clear that the multilateral agreement will allow the tax treaty measures developed in the course of the OECD/G20 BEPS project to be implemented far more swiftly than bilateral treaty renegotiations.

It is important that the multilateral instrument achieves such implementation accurately and effectively and without unintended consequences, and leads to certainty of outcomes for taxpayers.

Given the unique nature of this instrument and the significance of the changes proposed, we consider that draft text should be made available to facilitate consultation, so that the multilateral instrument can achieve implementation of the BEPS tax treaty measures accurately and effectively.

We understand the aim of the OECD is to open the multilateral instrument (MI) for signature by 31 December 2016. We have provided some generalized comments as requested below, although you will appreciate that it is difficult to provide fully considered comments without seeing a draft of the MI itself. Given the short time now available for consultation, we suggest that the draft text is made available as soon as possible.

We appreciate that the MI is probably in the course of being drafted, but recommend that draft text is released in stages if necessary to facilitate proper consultation. For our part we would commit to providing speedy comment at that point.

Technical issues

We would strongly recommend there should be an agreed prospective date on which the MI has effect. This date should be chosen to ensure that most countries have sufficient time to ratify the MI before it, the intention being that the MI takes effect for the majority of signatories on the same date. This will level the playing field to the greatest extent possible and reduce the complexity for taxpayers who may otherwise struggle to be able to determine when the MI has effect for each state. In this regard it is noted that not all countries will adopt the MI, choosing instead to give effect to the BEPS minimum standards through their bilateral treaties. As a result different start dates for the various provisions of the MI will be unavoidable, but we suggest, this should be reduced as much as possible.
We understand that there may need to be a number of options for the various provisions in the MI, but would recommend that the fewer options the better. For example, if possible we would suggest that the EU variant of the PPT should be used, or at least that countries using it try to use it for as many of their treaties as possible.

However, we understand that there will be flexibility in which specific provisions that each country chooses to adopt, such that countries will not have to sign up to the MI as a whole. We understand that this will be the case even in respect of those provisions of the MI which are part of the minimum standards. We agree with this approach to ensure that the take up of the MI is as wide as possible.

However, the resulting matrix of provisions applying between all the countries that do adopt the MI to a greater or lesser extent will inevitably be very complicated. Thus it should be incumbent on the OECD, as well as fiscal authorities around the world, to ensure that a register is readily available and is maintained so that taxpayers are able to easily identify where the MI, and which provisions of it, effectively amend a bilateral treaty between any two particular countries.

We would recommend that the MI explicitly states that where two countries have a Double Taxation Treaty which is amended by the MI and then renegotiate a new Double Taxation Treaty the MI should cease to have effect as between those states (as a result of the new bilateral treaty provisions superseding the MI provisions).

We would also recommend that consideration is given to providing that the MI exists for a limited period of time, which would encourage states to renegotiate their treaties and thus take complexity out of the system. We appreciate that these treaties take time to negotiate – but a period of say 20 years might make this a viable prospect. In this context consideration needs to be given to how any amendments to provisions in the MI would be made in the meantime.

If the concept of having a MI is considered to be a useful approach, we can see that particular articles of treaties would lend themselves to being the subject of an ongoing MI, thus assisting countries in relation to the renegotiation of treaties.

**Mandatory binding MAP arbitration**

We recommend that the timetable for agreement needs to be as short as possible in all bar the most complex cases. Resolving as many cases as quickly as possible will assist taxpayers and tax authorities alike, minimizing backlog and aiding efficiency.

However, we note that the issue here is not what the arbitration provisions in the MI will say, but that so few countries have so far said that they will agree to it. Therefore we suggest that there should be incentives for agreeing or disincentives for not agreeing to arbitration, otherwise it will be of limited value and much conflict and double taxation is likely.
The preferred type of arbitration should be that known as ‘baseball’ arbitration where each party submits its considered position and the arbitral panel are left only to choose between the two submissions without needing to consider the merits of each case.

Such a process has the advantages of speed and simplicity and also encouraging each side to focus more quickly on what they believe to be a reasonable outcome. The parties would always be free to choose an alternative type of arbitration such as evaluative arbitration where the merits of the case are addressed by the arbitral panel.

We also recommend that the arbitration mechanism should be flexible enough to encourage the parties to choose its application to some but not all of the issues in the dispute. This can be particularly helpful in resolving a way forward where an impasse in resolution has been caused by the combination of multifaceted aspects in the case; for example dispute as to fact and/or technical issues, but the parties are not comfortable submitting all the issues to mandatory binding arbitration.

In this respect, we recommend the MI recognise the importance in the arbitration process of the use of alternative dispute resolution (ADR) mechanisms (for example mediation) the benefit of which the OECD has already noted in their 2007 MEMAP Report (at paragraph 3.5.2) and reflected in the introduction in July 2008 in the OECD Commentary to the Model Convention of paragraphs 86 and 87 to Article 25 (MAP).

These paragraphs recommend that in the process of managing a dispute and considering arbitration as a step in that process, the parties could consider recourse to supplementary dispute resolution mechanisms (including mediation) leading up to and complementing, but not as an alternative to, arbitration. Those strategies can facilitate the process and make the prospect of mandatory binding arbitration more acceptable to the parties who otherwise might be concerned that the range of issues in dispute are too extensive or sensitive to submit to arbitration.

We are also of the view that taxpayers should be given more involvement in their MAP case as well as Article 25(3) cases which have a direct impact on them.

Finally in relation to arbitration, we note the OECD Model Tax Convention contains in its annex a sample mutual agreement on arbitration and we recommend this form of agreement is reviewed with a view to bringing it up to date and expanding its terms to include and deal with some of the concerns identified in relation to BEPS Action 14.

**Guidance and practical Tools**

We appreciate that it will be hard to produce clear, explicit and accurate text for the instrument itself, and therefore consider that some guidance is likely to be needed. We consider that any guidance in relation to the MI should aid the interpretation of the actual provisions of the MI, and should not be used as a tool to expand on those provisions.
Some commentary has already been provided in the various BEPS reports but it would be helpful to have a clear understanding of the status of those reports in interpreting the MI, both in the short term and the longer term when the Commentary has been revised.

Assuming that there will be an updated MTC and Commentary reflecting the provisions dealt with under the MI, we would suggest that this is the appropriate place to include guidance on what the new provisions mean. In this regard proposed commentary has already been provided in the BEPS final reports. This should be sufficient. Understanding is not aided by excessive guidance and guidance should not be used to make rules that will not be legally sanctioned by state legislators in ratifying the MI.

**Mechanisms to ensure consistent application and interpretation**

The Vienna Convention on the Law of Treaties sets out the law on interpreting treaties in clear terms. However, some countries may become party to the MI, who are not signatories to this Convention. We appreciate that those countries may not wish to sign the Vienna Convention itself, but would at least recommend that the MI states that it will be interpreted in accordance with the provisions of articles 31 to 33 of the Vienna Convention, or better that those paragraphs (see Appendix below) are included within the MI itself.

Yours faithfully

Joy Svasti-Salee

Chair, International Taxes Sub-Committee
CII - Confederation of Indian Industry

Background

On 31 May 2016 the Organization for Economic Co-operation and Development (‘OECD’), as part of its work on the Action Plan to address Base Erosion and Profit Shifting (‘BEPS’), released a Discussion Draft (Action Item 15) in relation to the development of a Multilateral Instrument (‘MLI’) to implement the tax treaty related measures.

The request for input outlines the background and purpose of the MLI and describes briefly the technical issues arising from its development, including the issues to be considered in the context of the optional provision on MAP arbitration.

Comments are invited to respond to the specific questions included in the request for input, as well as other technical issues that may arise from implementing the treaty-related BEPS measures in the context of the network of existing bilateral tax treaties.

We recognize the efforts of OECD towards development of MLI to implement the tax treaty related BEPS measures. In view of the existing Indian tax system and the legal and economic environment in India, we foresee certain practical challenges with regard to the drafting of these MLI. Accordingly, we wish to bring to notice the concerns and recommendations for your kind consideration.

General Comment

The countries across the world have negotiated their tax treaties based on either OECD or UN Model Convention. The BEPS measures would have an impact on all the countries in the world – whether the tax treaties of those countries are based on OECD or UN Model Convention. Therefore, while drafting MLI, it is extremely critical that adequate guidelines should be provided for interpretation of tax treaties based on UN Model Convention.

Specific Comments

Digital Economy as mentioned in Action 1

Action item 1 addresses the Tax Challenges of the Digital Economy. The e-commerce industry has been evolving and there is limited clarity on taxing income from e-commerce business. The tax treaties drafted previously were based on the physical movement of goods; or economic utilization; or presence in that state, which lack to address the ecommerce transactions.

Recommendations

Clarity should be provided in the MLI as to how the tax sovereignty will be determined in the case of e-commerce transactions.
MLI should also clearly provide that it shall override amendment in the existing domestic tax law of the signatory countries or introducing new taxes to curb base erosion in various scenarios as covered under BEPS Action Plans.

**Hybrid Mismatch arrangements as mentioned in Action 2**

Hybrid mismatch arrangements may lead to “double non-taxation” that may not be intended by either country, or to unintended long-term tax deferral. It is difficult to determine unequivocally which individual country has lost tax revenue under such arrangements. In case, such arrangements also lead to a situation of double taxation, the same also needs to be avoided.

Example:

Co A, resident of country A funds its subsidiary Co B in country B through issue of Compulsory Convertible Debentures (CCD). Country A treats CCD as debt and country B treats CCD as equity. This scenario can give rise to a situation of double taxation. Any interest paid by Co B would be treated as dividend under the tax laws of country B, thus denying deduction of interest from taxable income of Co B. Similarly, as country A treats the income received from CCD as interest, it would be taxable in the hands of Co A. So while Co B is denied the deduction of interest, Co A is denied the exemption of dividend resulting in double taxation.

**Recommendations**

Rules/guidelines need to be incorporated in the multilateral instruments to govern such arrangements.

Scope of Limitation of Benefit (LOB) clause as mentioned in Action 6 (Preventing the granting of treaty benefits in inappropriate circumstances)

Action 6 of BEPS is conceptualized to address the menace of treaty abuse and treaty shopping. It recommends measures to combat treaty shopping and treaty abuse through agreed minimum standard, with some flexibility in the implementation of this standard, in order to allow adaptation based on each country’s specific circumstances and negotiated bilateral tax treaties. The Limitation of Benefit (LOB) rule plus a mechanism to deal with conduit financing arrangements have been provided in Action 6.

In this regard, it is crucial that MLI should specify a quantitative threshold rule for the application of LOB. A blanket/ generic standard may pose a challenge and lead to ambiguity while interpreting the provisions. For instance – India has entered into a tax treaty with Singapore which provides for a threshold of total annual expenditure less than S$200,000 or INR 5 million to construe a company as shell/conduit.

**Recommendations**
The Group may consider providing quantitative threshold limits in MLI as to when will a company be held as conduit/ shell in a tax jurisdiction.

Guidelines/ threshold may be provided region wise like – Asian region, European region, Americas etc.

The above specified clarity is important to minimize litigation and have a clear understanding of the tax treaty applicability.

**Preventing artificial avoidance of PE status in Action item 7**

In the current arrangement of treaties, PE determination is generally based on physical presence in the source country. The rules for determination of PE in source country and also the scope of taxability in case of PE in source state shall be established.

**Recommendations**

Alternative income allocation system including formula based systems should be agreed upon laying down the details of the new system consistently across all countries who are signing the instruments.

Proper guidance should be provided for triangular cases, wherein income of a tax treaty resident is attributed by the country of residence to a PE in a third State and exempt from tax in the Residence State, often together with low taxation in the State of the PE. Bilateral treaties can provide rules that partially address such cases, but comprehensively addressing the problem requires incorporating a solution into the multilateral instrument itself.

**Make dispute-resolution mechanisms more effective in Action item 14**

The action item aims at reducing the uncertainty and unintended double taxation of businesses that might occur as a result of the BEPS Action Item.

**Recommendations**

With respect to the MAP proceedings, MLI should incorporate a clause that if a matter is agreed between two countries and similar terms and conditions of the matter exist with third country, the agreed position shall be applicable.

Additional efforts on negotiation shall be minimized and timelines for resolution should be enforced.

**General Comments**

**Capital Gains tax**

Clarity should be provided as to how to deal with a layer structure’s indirect transfer of share. Tax sovereignty should be driven from the value creation, clarity should be extended in this regard. The
A multilateral instrument may provide for a threshold shareholding above which indirect sale of shares may be taxed. Further, definition of ‘beneficial owner’ of shares, method of valuation of shares in question etc. must also be clearly laid down in the multilateral instrument.

**Foreign tax credit**

Bilateral tax treaties have the provisions dealing with availability of credit to a taxpayer in respect of tax paid on income earned by him in source state in the country of his residence. Under the BEPS regime, the income of a taxpayer may be taxable in different countries. Bilateral tax treaties do not recognize availability of tax credit in a country other than those who are parties to the treaty. The multilateral instrument should contain provisions dealing with allowability of tax credit for income which may be taxable in more than two countries.

Further, the multilateral instrument should also provide a mechanism for the grant of underlying tax credit so as to avoid a situation of double taxation. The underlying tax credit would be of particular importance in cases where countries may disregard intermediary holding companies on the ground that these are shell companies. Credit of any tax paid by these intermediate holding companies in their resident countries should be duly allowed as underlying credit in the hands of shareholders/ultimate holding companies.

**Mechanism for consistency**

The manner in which a particular matter is to be treated in one country should be consistent in the manner it should be treated in another country.

**Vienna convention**

The principles laid out under Vienna convention on the law of treaty may be applied while entering into multilateral instruments by the contracting states which should govern the interpretation of such multilateral instruments along with DTAA.

**Principal Purpose Test**

Action 6 of BEPS provides for Principal Purpose Test (PPT) as a mechanism to deal with the risk of treaty abuse. This is akin to the main purpose test as proposed under the Indian GAAR. This aspect without any measurable threshold would grant wide powers to the revenue authorities to go deeper into the transactions and / or arrangements. Accordingly MLI should provide a measurable threshold limit in MLI to substantiate/fulfil PPT.
Confederation of Swedish Enterprise

The Confederation of Swedish Enterprise is Sweden’s largest business federation representing 50 member organizations and some 60 000 member companies in Sweden, equivalent to more than 90 per cent of the private sector.

The Confederation of Swedish Enterprise is pleased to provide comments on the OECD Discussion Draft entitled “BEPS Action 15: Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures” 31 May 2016 – 30 June 2016 (hereinafter referred to as the Draft).

The Confederation of Swedish Enterprise appreciates the efforts by the OECD and the Ad Hoc Group to develop a multilateral instrument to implement the tax treaty related BEPS measures. A swift and uniform implementation of the BEPS project are important to ensure certainty for business. Without swift implementation there is a clear risk of an increasing number of disputes, with double-taxation as a potential outcome.

The development of the multilateral instrument is without a doubt a delicate matter that is key for the BEPS project to be successful. We believe that the business community can be of great assistance in the development of the multilateral instrument through the consultation process. However, it would be much easier to leave comments on the draft text of the multilateral instrument rather than on certain technical questions such as in this consultation. We therefore encourage the Ad Hoc Group to release the draft text for public consultation. There is clearly a difference between other treaty negotiations and the negotiation of the multilateral instrument. As stated in the Draft the Ad Hoc group does not have the mandate to change the substance of the BEPS outputs (except MAP arbitration). The fact that the content basically already is public knowledge makes it even more difficult to understand the need for confidentiality. In addition, also in other bi- and multilateral treaty negotiations it is not uncommon to have an ongoing dialogue between the government and business during the process, even though the treaty draft itself is confidential. We understand that there is a very tight time schedule for the development of the multilateral instrument, but hope that the Ad Hoc group will give business and others the possibility to leave comments on the draft text of the multilateral instrument.

Comments are requested on the technical issues that may arise from implementing the treaty-related BEPS measures in the context of the network of existing bilateral tax treaties. In the following we focus our comments according to this request.

The Confederation of Swedish Enterprise would like to highlight the need for mandatory binding MAP arbitration. From a business perspective, it is a very important provision that is key in avoiding double taxation. At the moment 20 countries have agreed to include such a provision. Although this is a good start, it is of utmost importance to get more countries on board. As far as an optional provision on mandatory binding MAP arbitration is concerned, we believe that “last best offer”/ “baseball arbitration” should be considered since this type of arbitration provides a quick an efficient way of resolving disputes. However, any type of mandatory binding arbitration is better than none at all. Therefore the optional provision should not exclude any other forms of arbitration. Giving flexibility to countries in the optional
provision is probably needed to increase the number of countries to commit to mandatory binding arbitration.

In relation to “compatibility clauses”, we are not convinced that such clauses are a possible way forward. There are thousands of treaties that will be affected by the multilateral instrument if all 96 countries agree to sign it. To design a clause applicable to all of them will most likely lead to uncertainty regarding how different provisions in different treaties are affected.

An issue in developing the multilateral instrument (perhaps the most important issue) is what level of flexibility countries should be granted. Should every country have the possibility to “cherry pick”, i.e. choose freely what parts of the multilateral agreement they wish to adopt? This would no doubt facilitate more countries to sign the agreement. At the same time, it would make it more difficult to overview what has been agreed between countries. Alternatively, should the agreement be more of an all or nothing product leading to fewer signatories but at the same time a more uniform implementation. Although not an easy question to answer, we lean towards the first-mentioned alternative, i.e. a more flexible approach.

One way forward in designing the multilateral instrument could be to make the parts of the BEPS project that constitute minimum standards mandatory and the rest optional. This would mean that the minimum standards in Action 6 (treaty abuse) and Action 14 (Dispute resolution) would be mandatory, while Action 2 (hybrid mismatch arrangements) and Action 7 (Preventing artificial avoidance of PE status) would be optional. Since all countries taking part in the BEPS project have agreed on the minimum standards, it should not be associated with too much hesitation to get countries to sign up to this also in the multilateral instrument. Action 2 and 7 are only recommendations and may be more difficult to get an agreement on.

However, if not enough countries are willing even to sign up to a minimum standard, even more flexibility should be carefully considered, including letting countries chose exactly what parts of the multilateral instrument they wish to adopt.

Another request for input is on tools, such as an explanatory statement or commentary, to ensure consistent applications of the provisions included in the multilateral instrument. Such tools will be of great importance, especially given the fact that the multilateral instrument will be negotiated in English and French. To ensure consistent application also after translation to other languages, clear guidance is of utmost importance. However, we find it difficult to elaborate on what types of tools that could be most useful, without knowing the context of their application.

One thing that must be clearly stated in the multilateral instrument is how the new guiding tools relates to older ones. Preferably, this could be done by stating that the old commentary is replaced by the new one. After all, we do not want a situation where it is unclear which commentary that should be consulted to interpret the provisions from the multilateral instrument.

On behalf of the Confederation of Swedish Enterprise
Dear Mike

Request for input on the development of a Multilateral Instrument to implement the tax treaty-related BEPS measures.

We are glad to comment on the ‘Development of a Multilateral Instrument to implement the tax treaty related BEPS measures: Public Discussion Draft’ published on 31 May 2016 (the ‘Discussion Draft’). Our comments are made from the perspective of the UK.

The multilateral instrument will play an essential role in achieving the adoption of BEPS through the swift and consistent implementation of a number of the BEPS actions. We suggest that it is preferable to offer greater rather than less flexibility in the design of the instrument to maximise the number of treaties that can be updated through its ratification. We thus favour a pragmatic approach, recognising that not all countries may yet be in a position to commit to all elements of relevant Actions. However, offering choice between two options may be best avoided – as opposed to choosing whether or not to adopt drafting for a specific area. There will remain a number of treaties for which it is not possible to reconcile all of the existing terms with those to be included within the multilateral instrument.

The complexity of the instrument and the number of possible treaties altered means that it will be essential that beneficiaries of a bilateral tax treaty can easily determine which clauses have been adopted and when any changes enter into force. We acknowledge that some countries will publish consolidated tax treaties, which will be very helpful. However, we hope that The OECD will commit to collating, publishing and updating this information. It would be helpful if states could be required to deposit copies of ratification instruments with the OECD, as well as authorised translations from the two official languages. It would be helpful for the OECD to publish a matrix in respect of the various clauses adopted between different states.

Tax treaties play an important role in supporting cross-border trade and investment through determining where income should be taxed and in ensuring that income is not subject to double-taxation. The scale and pace of change triggered by the BEPS project increases the pressure on tax treaties and it is therefore essential that adequate resource is available to ensure that any disputes are resolved as quickly and efficiently as possible. The development of a Mutual Agreement Procedure (”MAP”) arbitration provision will be valuable in reducing the occasions when double taxation could arise. We support mandatory binding arbitration for all disputes arising under a bilateral tax treaty. However, we acknowledge that some countries may wish to provide for mandatory binding arbitration limited to key areas. Permitting this would still offer an improvement in resolving tax disputes.

We have set out our responses to the questions raised in the Discussion Draft in the appendix to this letter.

We should be happy to address any of the points raised in this letter at the public meeting on 7 July, where we have applied for places for Bill Dodwell and Alison Lobb.
Appendix I

Technical issues that should be taken into account in adapting the BEPS measures to modify or supersede existing provisions of bilateral tax treaties that may vary from the OECD model, including:

Existing provision or types of provisions that serve the same purpose as the BEPS measures that would need to be replaced;

Existing provisions or types of provisions that are similar to BEPS measures but that would need to be retained.

Scope

Maximising the number of bilateral tax treaties included within the multilateral instrument will represent a significant benefit both in terms of reductions in costs and administrative burden for tax authorities and for business. It is clear that promoting the widespread adoption of the BEPS Actions will be helpful through reducing inconsistent taxation of similar activities.

In order to maximise the number of treaties updated through the multilateral instrument, we think flexibility will be required. However, we doubt that it would be feasible for states to use the instrument to agree different alternatives with different treaty partners (perhaps to reflect differences in circumstances). Instead, we prefer asking countries to list the treaties they would be prepared to amend as part of signing or ratifying the multilateral instrument.

Each individual treaty should be internally consistent with the same provision applied both ways. This will leave some treaties to be modified through a protocol. It would be interesting though if countries might be prepared to use this instrument to adopt the limitation on benefits article used by the United States in relation to the US alone.

There are likely to be some bilateral tax treaties where it is not possible to reconcile the existing provisions with those of the multilateral instrument without reducing internal coherence, and consequently increasing uncertainty as to the correct application of the treaty. This could be the case in respect of some elements of treaties based on the United Nations Model Double Taxation Convention.
The parties to existing bilateral treaties which will not form part of the multilateral instrument should take forward renegotiation of the necessary clauses on a bilateral basis. In order to ensure swift implementation, states should commit to limiting renegotiations to the terms necessary to implement the BEPS actions and defer any other renegotiations to a later point (unless such renegotiations are already underway). Maximising the number of treaties included within the multilateral instrument should free up resources to focus on bilateral renegotiation of excluded treaties.

For each bilateral tax treaty included within the multilateral instrument, states should be permitted to select which of the BEPS changes should be implemented and which should be excluded. For example, a state should be able to implement mandatory binding arbitration through the multilateral instrument even if it chooses to implement the minimum standards through bilateral renegotiation. This approach should facilitate the swift and efficient implementation of as many BEPS actions as possible. States should however commit to bilateral negotiations as soon as possible in respect of any minimum standard clauses excluded from the multilateral instrument.

The multilateral instrument should reference each of the existing bilateral tax treaties, and the underlying clauses, which will be amended. This approach, rather than specifying a list of excluded treaties, will provide more certainty to ensure the correct treaty clauses are applied.

To the extent that relevant clauses (e.g. in respect of dispute resolution) will apply to ‘short form’ treaties such as Shipping and Air Transport treaties, this should also be specifically listed in the multilateral instrument.

**Ratification process/Entering into force**

Given the scale of change required by the BEPS project, clarity as to what changes have been made and when the changes apply from is essential. Signatories to the multilateral instrument should provide the OECD with details of their ratification instruments.

Implementing changes in line with the tax year or calendar year (depending on what is most appropriate in the relevant states) reduces complexity. However, as a minimum, a notice period should be provided between ratification and the effective date of the treaty in order to allow time for the new rules to be applied. A minimum period of 3 months is needed.

The multilateral instrument should contain clauses to confirm that its purpose is purely to modify existing bilateral treaties. The function of the multilateral instrument will be completed once the relevant states have ratified the multilateral instrument such that the relevant bilateral treaty has been updated. Any subsequent new treaty or protocol should supersede changes made by the multilateral instrument and the multilateral instrument should cease to have effect in relation to the treaty between those states.

We think that the multilateral instrument should make it clear that the commentary to the OECD Model Treaty applies to the articles added to bilateral treaties through the instrument. Ideally, the instrument should cover the position as additional commentary is added, as it seems unlikely that full
commentary to the new articles will be available at the time the multilateral instrument is first available for signature.

Referencing

The multilateral instrument should not refer to any article numbers as this is likely to cause confusion in respect of the many treaties which include deviation from the OECD Model Tax Convention. Reference will instead need to be made to the topic and care should be taken to ensure no uncertainty is introduced.

Most favoured nation clause

Provision should be made within the multilateral instrument to confirm the interaction between the multilateral instrument and any ‘most favoured nation’ or ‘drag along’ clauses included in existing bilateral treaties.

The approach to be taken in developing the optional provision on mandatory binding MAP arbitration, taking into account that it would need to serve the needs of the states that have already committed to implement mandatory binding arbitration, as well as states that are considering committing in the future.

Scope

The most appropriate and important resolution mechanism under MAP remains the inclusion in double tax treaties of mandatory binding arbitration. Binding arbitration provides taxpayers with a mechanism to obtain resolutions and certainty in tax disputes expeditiously. This is the only outcome that will ensure that a business is not taxed twice on the same profits. It is also notable that the presence of a mandatory binding arbitration clause in a double tax treaty acts as a deterrent, such that cases may be settled by tax authorities under MAP without the need for the arbitration process to be invoked. This is in itself a useful safeguard. Mandatory binding arbitration should therefore be available in respect of any dispute arising under a relevant bilateral tax treaty.

In order to encourage the wider adoption of mandatory binding arbitration provisions, it may be necessary to provide for the adoption of partial mandatory binding arbitration limited to disputes on areas where wider consensus can be reached. To the extent that this approach is taken, the options available should be adoption of full mandatory binding arbitration on all disputes, partial adoption on a minimum package of areas of dispute or no adoption. This provides flexibility while limiting the complexity arising from multiple variations.

As a minimum, it is essential that mandatory binding arbitration is available in respect of disputes in respect of transfer pricing and the attribution of profits to permanent establishments. Consideration should also be given to including disputes in respect of the threshold at which a permanent establishment is triggered and secondary adjustments as part of a partial adoption package. It is likely to be more difficult to obtain consensus to include disputes in respect of whether a treaty abuse clause applies or to
determine the country of residence and therefore these areas should be excluded from the partial adoption package at this stage. There should be a commitment to review any partial adoption package in 3 years’ time with the intention of moving towards full coverage.

**Default form of decision-making in MAP arbitration**

The ‘last best offer’ approach should be used for resolution of MAP disputes. By the time a case reaches arbitration the facts and issues will have been considered by the business, commonly also by professional advisers, by one tax authority under audit, and by the second tax authority under MAP. There may be limited additional expertise that arbitrators can bring to this process under the ‘independent opinion’ approach. ‘Last best offer’ arbitration has the advantage that it encourages competent authorities to focus on the issues involved and potentially adopt a more reasonable approach (rather than a starting point for negotiations) at an earlier stage. It may also assist with questions about the need for directly relevant expertise in the appointment of arbitrators.

**Appointment of arbitrators**

Impartial arbitrators with sufficient seniority and experience are required. There are likely to be some cases where there are limited individuals with the necessary expertise. Selection may be best left to the common sense of the relevant competent authorities.

**Confidentiality and communications**

The arbitrator and the taxpayer should be made parties to the arbitration agreement to provide a contractual basis for dealing with confidentiality. Normal e-mail communication (possibly with additional safeguards) should be possible. The arbitration process should be transparent and taxpayers should be fully involved and kept informed in respect of the arbitration process.

**Evidence**

The arbitrators may need facts from the business (whether or not previously considered by the competent authorities) and a mechanism should be put in place to allow the arbitrators to have access to the business on request.

**Costs and administration**

Costs can be minimised through the provision of written submissions with a maximum length. The arbitrators should conduct discussions in video or telephone conference calls, and only meet in person on an exceptional basis. A clear timetable for agreement will also minimise costs.

**Timeframe**

A period of 6 months should be sufficient to resolve the majority of cases, and an extension beyond this should require the agreement of the arbitrators.
The types of guidance and practical tools that would be most useful to taxpayers in understanding the application of the multilateral instrument to existing tax treaties.

The OECD Model Tax Convention and Commentary should be updated to reflect the provisions in the multilateral instrument and the relevant excerpts from the various OECD/G20 BEPS Final Reports published in October 2015. The updated texts should be published alongside the multilateral instrument.

In order to operate effectively, it must be beyond doubt that the updated Commentary to the OECD Model Tax Convention applies in respect of the BEPS changes. This is of particular importance in ensuring the uniform interpretation of changes to the rules in respect of permanent establishment and treaty abuse. Consideration will therefore need to be given as to how confirmation can be provide that an ambulatory approach is necessitated for any treaty clauses amended by the multilateral instrument (irrespective of whether an ambulatory or static approach is taken by individual states in respect of other treaty clauses). It may be necessary to replicate the relevant sections from the Commentary on the OECD Model Tax Convention within the multilateral instrument along with details of targeted reservations made by states.

Mechanisms that could be used to ensure consistent application and interpretation of the provisions of the multilateral instrument.

Publication of information

Consideration is needed in respect of how best to publish information about which states have ratified the multilateral instrument and when changes enter into force. The OECD should undertake to publish and update this information on a publicly accessible central database to facilitate the correct application of bilateral treaties. This is in line with the role undertaken by the OECD in respect of publishing and updating the signatories and first date of exchange in respect of the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account information.

It would be helpful for the OECD to publish a matrix in respect of the various clauses adopted between different states for ease of reference. This is of particular importance in light of the variations expected to be required within the multilateral instrument. States should also be encouraged to deposit a consolidated version of each of their treaties for publication on an OECD website.
We welcome the opportunity to respond to the OECD’s discussion draft on BEPS Action 15: “Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures”. Our comments are focused on technical issues of implementation with particular reference to bilateral tax treaties that vary from the OECD model.

**Bilateral tax treaties varying from the OECD model**

We take as the basis of our comments an old-style tax treaty, our example being the 1952 UK-Jersey DTA, which does not adhere to the modern OECD standard for the most part, subsequent revisions notwithstanding.21 The UK still has some fifteen other DTAs based on a similar pattern.

For the purpose of illustrating the issues involved in the overlay of the multilateral instrument on an older-style treaty, we take as our example the proposal to modify model Article 4(3), on Residence (resulting from Action 2, on Dual Resident Entities). Nonetheless, comments of a similar nature will be applicable, for example, to the changes proposed to the definition of PE resulting from Action 7, where it would be necessary to interpose changes based on concepts established in the existing OECD model convention into a treaty that does not adhere to the same basic framework.

The texts of Article 4 of the existing Model Tax Convention, the proposed change to Article 4(3) and the equivalent provisions of the UK-Jersey DTA are included as Appendices I, II and III for reference.

Technical issues to be taken into account in adapting BEPS measures to modify or supersede existing provisions of bilateral tax treaties differing from the OECD model

Clearly, with reference to the above example, the newly proposed paragraph can neatly replace the wording of the existing Article 4(3) without any trouble. How though can it be applied in the case of a treaty along the lines of the existing UK-Jersey treaty?

There is no exact equivalent in the UK-Jersey DTA of Article 4(2). Under the terms of the UK-Jersey DTA an individual resident in both jurisdictions would fall outside of the scope of the DTA.

Similarly, under the UK-Jersey DTA, a company (equivalent to “a person other than an individual” in the model wording of Article 4(3)) would fall outside of the scope of the DTA if it were managed and controlled in both the UK and Jersey.

The new wording of Article 4(3) effectively is aimed at replacing the wording of the last clause of paragraph 2(1)(f) of the UK-Jersey DTA, yet it makes for an awkward fit without additional tailoring of the language. There is no “paragraph 1” in the UK-Jersey DTA, while the preliminary text of paragraph 2(1)(f) that may be considered its equivalent is not phrased in a manner that is entirely compatible.

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21 Arrangement Between Her Majesty’s Government And The States Of Jersey For The Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect To Taxes On Income
As a consequence an outcome “by reason of the provisions of paragraph 1” is not necessarily going to produce the same result as the existing provision of paragraph 2(1)(f). The basis therefore to which the provision of the revised Article 4(3) will apply is potentially different: substituting “the preceding sentence” for “paragraph 1” may produce unanticipated results.

Historic interpretation of the final sentence of paragraph 2(1)(f) (on whether it served as a “tie-breaker” for corporate residence purposes) has in recent years been subject to challenge and in October 2015 HMRC announced a change in its interpretation of the paragraph, indicating the level of complexity in interpreting the meaning of the existing wording even before any external overlay.\(^{22}\)

It is impossible to foresee with any degree of certainty therefore what the effects on interpretation may be of overlaying wording intended for use in the Model Convention into an agreement that employs substantially different wording. In short, it appears to us that only the replacement of the entirety of the existing paragraphs 2(1)(f) and 2(1)(g) by the whole of the model Article 4 is likely to result in a satisfactory result, in terms of consistency in application and interpretation.

It will not be sufficient therefore that the multilateral instrument merely substitutes one modified paragraph for the equivalent model treaty paragraph. For the modified paragraph to make sense in context it must be compatible with the framework into which it is being introduced. In the case of an old style of DTA such as that between the UK and Jersey, replacement of the respective paragraph(s) by the whole relevant model Article will be necessary.

Whether this will be a satisfactory solution from the perspective of the users of the DTA is another matter. It should be noted that such changes may well have the effect of changing fundamentally the existing characteristics of the double tax arrangements, with unpredictable effects. It is hard to see how jurisdictions could sign up to a multilateral instrument effecting changes of this type without a detailed analysis of the effect that it might produce under each and every one of the DTAs to which it is signatory. Inevitably there would need to be bilateral discussions prior to adoption of the multilateral instrument, where the changes could be foreseen to produce negative results for a jurisdiction.

The idea of introducing compatibility clauses to determine the circumstances in which existing provisions should be replaced or supplemented by new clauses is therefore of questionable value, as it opens up a new layer of interpretation, whether or not to make changes. An all-or-nothing approach is preferred. If two parties adopt the multilateral instrument, then the proposed revisions of the instrument should be deemed to apply in toto per Article. The alternative (partial modification.Supplementary text/no change at all) risks inconsistency in application and interpretation, as parties question whether existing provisions really represent the same intent as the provisions of the instrument or how new provisions interact with existing provisions.

**Mechanisms to ensure consistent application and interpretation of the multilateral instrument**

\(^{22}\) Change of view on the interpretation of the residence articles in sixteen Double Taxation Agreements, HMRC, October 2015
Model Tax Convention

It appears to us that the only way to ensure consistent application and interpretation of the provisions of the multilateral instrument is to set a single version of the relevant articles and commentary in stone to which all signatories would adhere. This is no more and no less than a new, revised edition of the OECD Model Tax Convention.

It is impossible for us to see how anything other than a single standard can achieve consistency in application and interpretation. As we have described with reference to an older treaty, such as the UK-Jersey DTA, interpretation has been subject to challenge and change, even before any external overlay. It will be impossible to provide guidance that will ensure consistent application and interpretation unless all parties are working to the same standard.

To ensure this, the revised sections cannot be taken out of their model context in their incorporation into older tax treaties. If they are to work consistently, they must incorporate substantially the whole of the model Article to which they pertain. Only then can the Model commentary be held to be consistently applicable.

Consolidated bilateral tax treaties

It is often extremely difficult, sometimes impossible, to identify up-to-date texts of DTAs incorporating all subsequent revisions and protocols. It is common to find that reference is necessary to numerous discrete documents to gain an understanding of the current version. An analogue to this is the current state of the OECD Transfer Pricing Guidelines, which do not exist in a homogenous up-to-date form incorporating all the changes since 2010.

Introducing changes globally to an international network of double tax agreements through a separate instrument is going to create a period ripe for confusion, as it will be necessary for both tax administrations and taxpayers to keep track of which jurisdictions are party to the instrument and which are not, as well as which jurisdictions have opted out of certain provisions, in order to know what the current interpretation of any DTA is.

To avoid confusion and misunderstandings, it should be mandated on signatories to the multilateral instrument that consolidated versions of all underlying bilateral tax treaties affected by the multilateral instrument are produced by the jurisdictions party to them, as soon as both parties have indicated their assent to adoption.

Appendices

Appendix I: Old Article 4 of the Model Treaty

The existing text of the relevant Article of the Model Treaty reads as follows:
1. For the purposes of this Convention, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

   he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);

   if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;

   if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;

   if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated.

**Appendix II: Proposed Change to Article 4(3)**

The proposed change to Article 4(3) reads:

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Convention except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting States.

**Appendix III: The text of the UK-Jersey DTA**

Residence is addressed in the definitions section of the UK-Jersey DTA (Paragraphs 2(1)(f) and 2(1)(g)), rather than in a separate Article 4:
f) The terms “resident of the United Kingdom” and “resident of Jersey” mean respectively any person who is resident in the United Kingdom for the purposes of United Kingdom tax and not resident in Jersey for the purposes of Jersey tax and any person who is resident in Jersey for the purposes of Jersey tax and not resident in the United Kingdom for the purposes of United Kingdom tax; and a company shall be regarded as resident in the United Kingdom if its business is managed and controlled in the United Kingdom and as resident in Jersey if its business is managed and controlled in Jersey.

g) The terms “resident of one of the territories” and “resident of the other territory” mean a person who is a resident of the United Kingdom or a person who is a resident of Jersey, as the context requires.
Dear Mr. Saint-Amans:

EY appreciates the opportunity to submit these comments to the OECD on its request for input on the BEPS Action 15: Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures (Discussion Draft).

Action 15 mandates the development of a multilateral instrument (MLI) to implement measures developed in the course of the work on BEPS and to modify existing bilateral tax treaties. Tax treaties are necessary to facilitate cross-border investment and provide a stable investment environment. A relatively abrupt change in a multitude of treaties in a short period of time could jeopardize current operating models of multinational corporations that rely on the existing tax treaty network. Therefore, it will be critical to find a way of ensuring that the development of the MLI, that proposes to modify existing bilateral tax treaties, preserves the continued reliability of the international tax treaty network and provides reasonable transition periods.

This will require effective implementation by tax administrations of the respective countries. In this regard, it will be important to develop a robust mechanism to ensure that a treaty that has been modified through the use of an MLI, itself a generally untested procedure, may produce clear and precise rules that are understood and agreed to on a bilateral basis.

Moreover, changes in the international tax environment as a result of the implementation of BEPS recommendations by an increasing number of countries will likely give rise to more cross-border disputes. Thus, now more than ever, effective dispute resolution mechanisms will be required. We welcome the recommendations in the final report on Action 14, Making Dispute Resolution Mechanisms More Effective, both the minimum standard agreed therein and the commitment of an increased number of countries to mandatory binding MAP arbitration. It is also critical that a mechanism be put in place to oversee the implementation of the recommendations under Action 14 to ensure that current and future disputes are resolved efficiently and effectively.

We understand that the negotiation of bilateral treaties or a multilateral treaty is confidential, but the use of the MLI to modify tax treaties is unprecedented and will undoubtedly impact stakeholders across the globe. We recommend that the discussion around the MLI be more inclusive. We believe that the development of the MLI could benefit from continued input from taxpayers, practitioners, and academic scholars. Therefore, we would encourage the OECD to release the specific draft MLI and any accompanying commentary for further input from stakeholders before finalization.

We thank you once more for the opportunity to comment on this Discussion Draft.

If you have questions or would like further information regarding any of the points discussed above, please contact Arlene Fitzpatrick (arlene.fitzpatrick@ey.com), Jose Antonio Bustos...
Yours sincerely

On behalf of EY

Alex Postma

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Technical issues

Modification of the treaties and compatibility

The design and creation of the MLI to implement the BEPS recommendations is very important, but the process whereby bilateral treaties are modified as a result of the application of the MLI is equally important. We understand the desire to modify existing tax treaties in a swift manner, but such swift implementation should not be at the expense of clear and precise rules that must be understood by taxpayers and governments alike to avoid unnecessary cross-border disputes. In addition, in order to preserve a stable environment for cross-border investment, any change to the tax treaty network as a result of the application of the MLI must have a reasonable transition period.

It is of great concern that some of the outstanding work of the BEPS project that has a direct impact on the MLI is not yet finalized. For example, there is the outstanding work on treaty entitlement of non-CIV funds, the definition of pension funds, as well as under Action 6, treaty abuse. In addition, the work on PE profit attribution could be relevant to any consideration of the PE recommendations under Action 7. Some of the guidance that will be included in those outstanding reports would be important for the suggested interpretative commentary of the MLI.

Categorization, minimum standards and flexibility

The final outcome of the BEPS project can be categorized into minimum standards, reinforced international standards, common approaches and best practices. Those provisions that have been designated as minimum standards could be implemented by all signatories of the MLI thereby avoiding re-negotiation by treaty partners that could delay the implementation process of the MLI. For example, a provision in the MLI that identifies the particular treaty provision that is being superseded by a specific new treaty provision that has been agreed to as part of the BEPS project would be more effective than a single and all-encompassing compatibility clause. Such compatibility clauses could create uncertainty as it
may be unclear exactly which treaty provisions are being superseded. If a compatibility clause would be used, the compatibility clause should be detailed, defining its relationship with the existing bilateral treaty so that there is a clear understanding of the exact modification being made.

There are however, many differences in the bilateral treaty network that the MLI will need to take into account. In addition, beyond the minimum standards, parties may not be ready to accept the same level of commitment vis-à-vis all other parties, so that we would expect that the MLI includes a mechanism to allow countries to modulate their level of commitment depending on the jurisdiction in question (i.e., a system of notifications as to the level of commitment vis-à-vis different parties). Moreover, some of the minimum standards contain optional elements, i.e., the policymaker may choose among different recommended approaches rather than completely replacing existing tax treaty articles with new articles. Thus, some level of flexibility will be necessary in order for the MLI to be effective. In these circumstances, to avoid any uncertainty, exact changes to the texts of treaties should be identified on a bilateral basis and agreement should be reached with respect to the actual textual changes that need to be made.

Whether a detailed compatibility clause is used or specific textual changes are agreed to, consolidated versions of bilateral treaties containing the revisions made as a result of committing to the MLI should be produced by bilateral treaty partners. This would eliminate inconsistencies or ambiguity by reflecting exactly which changes are being made to the existing bilateral treaty.

Changes to existing bilateral treaties enter into force only after the completion of the normal ratification procedures in each country. Thus, we recommend that there is a clear understanding of the ratification process of the MLI and how this affects existing bilateral treaties, as well as the applicable transition period necessary.

The Discussion Draft indicates that the MLI is being negotiated in English and French and that it is expected that those two languages will be the official languages of the MLI. As noted above however, to ensure consistency and a clear understanding of the rules that are being modified under the MLI, we recommend that a consolidated draft of bilateral treaties containing the revisions made be produced. Treaty partners could follow their specific country’s ratification procedures, including translating the consolidated draft into the language that may be required or permitted under that country’s law. We also recommend that an express provision in the consolidated draft indicating the official language be required. This would help the smooth ratification and interpretation of the changes made.

**Consistent application and interpretation**

To ensure consistent application and interpretation of the MLI, an interpretative commentary that has been agreed among participating countries should accompany the MLI. This would be a practical tool to enhance interpretation and ensure a common understanding (precedent with the commentary to the OECD Model Treaty, technical explanations that accompany treaties in some countries).
The commentary should provide background information and guidance as to the meaning of provisions and its relationship to the OECD Model Treaty commentary.

Input from stakeholders is also important. Thus we encourage that the accompanying commentary and/or any other explanatory document should be opened for comments and input from any interested party.

**Developing the optional provision on mandatory binding arbitration**

As we have stated in prior comment letters, having a dispute resolution mechanism such as mandatory binding MAP arbitration would significantly improve the effectiveness of the MAP. This measure has proven extremely useful in practice for resolving disputes when negotiations do not lead to resolution. It also encourages a more disciplined approach to the dispute resolution process as a whole as there is an incentive to resolve the dispute without the need to proceed to arbitration.

A number of countries have already committed to this mandatory binding MAP arbitration in dispute resolution and a broader discussion of mandatory binding arbitration should be facilitated by the OECD so that the process may be fully understood by those hesitant to undertake this approach. It would also be an opportunity for countries that have already implemented this measure to share their experiences about the process as well as the legal hurdles that had to be overcome.

Although mandatory binding MAP arbitration is the ultimate tool for ensuring resolution of MAP cases and should be promoted as such by the OECD, policy or practical concerns have been raised by certain countries with respect to this particular approach. To the extent that those concerns might preclude the use of mandatory binding arbitration, further consideration of alternative arbitration mechanisms should be undertaken by the OECD so that as many countries as possible supplement existing dispute resolution mechanisms in their tax treaties with a commitment to arbitration.

To ensure some level of consistency in the approach, it will be important to ensure that certain design elements, including the following, are preserved in any alternative arbitration provision:

- A commitment by countries to adhere to a defined timeline by which cases would move to the arbitration procedure if there is no resolution under MAP (e.g., if the MAP case has not been resolved after two years)

- Agreement among countries with respect to the scope of cases to go to arbitration

- A commitment by the signatories of the MLI to peer reviews whereby the process and time to resolve MAP cases could be evaluated as recommended under Action 14

It is recommended that a peer review process would: i) track how many MAP cases there are and the length of time that the cases go unresolved; ii) develop and maintain a platform for reporting unresolved MAP cases or bad administrative practices; and iii) make findings public. Consideration should also be given to establishing a forum within the OECD to permit oversight (e.g., Ombudsman) whereby
taxpayers may provide direct feedback on MAP (especially the MAP acceptance process) and MLI interpretation matters. This process could be valuable for the peer review process mentioned above. This mechanism could also provide important insights on the continued improvement of the MLI and the global tax treaty network.
La Fédération Bancaire Française (FBF), organisme professionnel regroupant l’ensemble des établissements de crédit en France, est heureuse de l’opportunité qui lui est offerte de présenter ses observations dans le cadre de la consultation organisée par l’Organisation de Coopération et de Développement Economiques (OCDE) sur l’instrument multilatéral (action 15 du plan « BEPS »).

Nous avons fait un certain nombre d’observations que vous trouverez dans la note ci-jointe, établie en anglais afin d’en faciliter la diffusion auprès des différents membres de l’OCDE et parties intéressées.

Nous restons à votre entière disposition pour tout renseignement complémentaire dont vous auriez besoin. Vous pouvez me joindre au 33 1 48 00 50 73.

Je vous prie d’agréer, Madame, Monsieur, l’expression de mes salutations distinguées.

Blandine LEPORCQ

Directrice du département fiscal

Appendix

Comments from the French Banking Federation on the development of a multilateral instrument to be implement the tax treaty related beps measures

We would like to thank you for the opportunity to comment on the implementation of the Action Plan 15 BEPS. It is important for us that a close dialogue be maintained with companies, including on the practical implementation of the measures decided by the states within the OECD. We first wish to underline that the foreseen multilateral instrument is an interesting idea and that harmonized implementation of the BEPS measures is a key feature for business as fragmentation should be avoided at all cost.

As a preliminary remark, it is difficult to make detailed comments in the absence of a draft of the agreement. The few working assumptions provided in the BEPS Action 15 report and in the consultation document indeed do not allow us to understand concretely how the multilateral instrument would work. Our comments below are therefore general and stress the need for further consultation as soon as a draft text is sufficiently advanced and published.

Another difficulty in our view is that of the foreseen calendar, which seems particularly ambitious given the difficulties to resolve.

Our general comments are the following:
The stated objective is notably the synchronization of the implementation of BEPS measures but no thorough legal analysis is made in this regard. If the various national law ratification process are mentioned in the BEPS Action 15 report, it is not explained how this synchronization will be ensured while bilateral negotiations will nevertheless be necessary (e.g. when each State will choose what type of clause to retain in its relations with such or such other State, or where clauses will be negotiated only with certain partner States). In such a context, it would be difficult for each one of the existing bilateral tax treaties to be “modified automatically by the multilateral instrument” as mentioned in Action 15 Report (§A.1.1.) in the absence of a clear hierarchy of standards.

To the extent that (i) a choice is left in such clauses for certain BEPS actions (e.g. under Action 6 : PPT or LOB), (ii) that States are free to retain certain clauses with some States but other clauses with other States and (iii ) States can even choose who they will change their conventional network (for e.g. with the “opt-in” and “opt-out” clauses), we believe that the pitfall of fragmentation is not prevented by the existence of a multilateral instrument.

Two illustrations raise questions about the ability of the multilateral instrument to achieve the objectives:

- the difficulties of Member States of the European Union (EU) to find a consensus in the context of the so-called “ATAD” (anti- tax avoidance Directive): only a reduced common-base of measures was finally adopted, while the text is the subject of much criticism from Business, but was also not satisfactory for some EU Member States (despite the agreement reached , some States indicated their reluctance on some measures e.g. the deductibility limitation of financial expense);

- the " Common Reporting Standard" ( CRS) developed by the OECD, which led to the « Berlin multilateral agreement » in October 2014, has not prevented some fragmentation due to the implementation by the various States (various approaches of the perimeter due to various appreciations of the "big bang" ; specific definitions used in the EU in Directive 2014/107 so-called "DAC2 " etc.). However, unlike the CRS, the BEPS Plan present many more measures (mainly corresponding to the various actions of the Plan), each of which presents different options, sometimes exclusive of each other.

Therefore, we can only fear a fragmentation of approaches in implementation despite the multilateral instrument.

Beyond these general comments, we wish to emphasize that it is difficult to comment on technical issues mentioned in the consultation document since there is no draft text or example presented. In these circumstances, it would be helpful that a further consultation be held on a multilateral instrument draft text (or at least an example) on which more targeted comments could be made by companies.

Finally, an important point for us should be highlighted: the multilateral instrument should be the opportunity to establish a real effective MAP arbitration: for this, it should be made compulsory – and not
only optional – whenever any company which suffers double taxation requires so: there should be an obligation for States to negotiate between them - and ideally an obligation to reach a solution. Taking into account the considerable impact that certain measures of the BEPS Plan could have for business, with increased risks of double taxation according to the different approaches taken by States, such a binding MAP arbitration is absolutely necessary from our point of view.
Grant Thornton UK

Dear Sir or Madam


Grant Thornton UK LLP welcomes the opportunity to comment from a UK tax perspective on the above OECD Public Discussion Draft (Discussion Draft) issued on 31 May 2016. Our general observations and detailed comments are set out below.

General observations

We welcome the efforts that have been made to create the multilateral instrument and recognise the fact that, if it meets its objectives, it will have truncated and otherwise lengthy process.

We encourage the OECD to publish a draft of the multilateral instrument itself as soon as possible. This will allow sufficient opportunity for more detailed comments to be submitted to the OECD and time to address these appropriately before the proposed date of 31 December 2016 for the multilateral instrument to be ready for signature. In this respect, it would also be helpful for a final draft of the multilateral instrument to be published for additional comment before completion.

We note the OECD’s comment on page 1 of the Discussion Draft that, whilst the development of the multilateral instrument is in full progress, the draft text of this is the subject of confidential inter-governmental discussions. We appreciate the need to maintain a degree of confidentiality but it would be helpful to have more information about the progress of these discussions so that insightful comments can be provided.

Detailed comments

Some existing UK double tax treaties (specifically with the US and Japan) already contain limitation on benefits (LoB) provisions. It will be essential to ensure that the multilateral instrument is worded so that it is clear the BEPS LoB measures included in Action 6 take priority over existing LoB treaty provisions to prevent confusion in the future.

It is also unclear at this stage, for example, how the multilateral instrument will provide for individual contracting states to adopt either the detailed or simplified version of the LoB provisions, without having to agree this bilaterally, which could be a very long process in practice. This will also be the case where other BEP measures allow for one or more alternate rules to be adopted at the discretion of contracting states. Practical measures for simplifying this process should therefore be considered by the OECD.

In terms of types of guidance and practical tools that would be useful to taxpayers, worked examples of situations where new rules are intended to apply would be welcomed by taxpayers and their advisers.
On a practical level, it may also be useful for taxpayers and tax administrations alike if the OECD were to establish a dedicated technical team (perhaps supported by its member countries) to provide impartial non-binding guidance on the interpretation and application of double tax treaty issues including BEPS related measures, where these are not already covered by existing published guidance and commentaries. This should also help ensure consistent application of treaty principles across all relevant jurisdictions, particularly if technical questions and the OECD’s responses to these are published on its website on an anonymous basis.

In the light of "Brexit", many UK businesses and other categories of taxpayer have increased concerns about the BEPS initiative as it relates to double tax treaty measures. Specifically, it is currently uncertain whether the UK will retain access to EU directives and other tax-related EU measures such as the EU arbitration convention in a transfer pricing context.

This uncertain political climate means it is essential that there are sufficient mechanisms to ensure consistent application and interpretation of the multilateral instrument. In this respect, it is regrettable that the mandatory binding MAP arbitration provision remains only optional and further consideration should therefore be given by the OECD to making the binding MAP arbitration provision compulsory.

We appreciate the opportunity to contribute our comments.

Yours faithfully

Grant Thornton UK LLP
IAPT - International Alliance for Principled Taxation

Dear Jesse,

This letter is submitted on behalf of the International Alliance for Principled Taxation (IAPT or Alliance) to provide you with the IAPT’s comments on the May 31, 2016 Discussion Draft on BEPS Action 15 (Development of a Multilateral Instrument to Implement the Tax Treaty-related BEPS Measures). We appreciate the opportunity to comment on the Discussion Draft.

The IAPT is a group of major multinational corporations based both within and outside the EU, and representing business sectors as diverse as consumer products, media, telecommunications, oilfield services, computer technology, energy, health care, beverages, software, IT systems, publishing, management consulting, and electronics.23 The group’s purpose is to promote the development and application of international tax rules and policies based on principles designed to prevent double taxation and to provide predictable treatment to businesses operating internationally. The group participated actively as a stakeholder in the discussions leading to the October 2015 final reports from the OECD/G20 BEPS Project.

As we indicated in comments we submitted to the OECD in October 2013, the IAPT welcomes the OECD initiative to develop a streamlined procedure for introducing widely agreed changes in treaty policy to countries’ existing bilateral treaties, as the ability to introduce such changes broadly and simultaneously across many or most existing treaties promotes consistency and a level playing field.

The group’s comments are set forth in the Annex to this letter. We very much appreciate the willingness of the members of the Ad Hoc Group to consider them as they continue their deliberations on the design of the multilateral instrument. I look forward to discussing these comments with the Group at the consultation to be held on July 7th.

Sincerely yours on behalf of the Alliance,

Mary C. Bennett

Baker & McKenzie LLP

23 The current membership of the IAPT is made up of the following companies: Accenture plc; Adobe Systems, Inc.; Anheuser-Busch InBev NV/SA; Cisco Systems, Inc.; The Coca-Cola Company; ExxonMobil Corporation; Hewlett Packard Enterprise Company; Johnson & Johnson; Microsoft Corporation; Procter & Gamble Co.; REXL Group plc; TE Connectivity Ltd.; Thomson Reuters Corporation; Transocean Ltd.; Tupperware Brands Corporation; Vodafone Group plc; and Yum! Brands, Inc.
Counsel to the Alliance

ANNEX

IAPT Comments on the May 31, 2016 Discussion Draft on BEPS Action 15 (Development of a Multilateral Instrument to Implement the Tax Treaty-related BEPS Measures)

Introductory Comments

The IAPT appreciates the opportunity to provide comments on the discussion draft on the development of a multilateral instrument (MLI) to implement the tax treaty-related recommendations arising from the OECD/G20 BEPS Project. The work being done by the Ad Hoc Group to develop the MLI is important and could, if successful, contribute significantly to the consistency and legal certainty by which the treaty-related BEPS measures are implemented across bilateral treaty networks on a global basis.

The IAPT understands that the purpose of the present consultation is not to address the substantive content of the BEPS measures eligible for inclusion in the MLI, but instead to address technical and design issues relating to the MLI.

We recognize the unprecedented challenge of trying to incorporate numerous new provisions into the text of bilateral treaties of parties to the MLI that may vary significantly both between and within the networks of those parties.

From the perspective of the taxpayer community, two principal concerns arise with respect to the MLI.

The first concern is to ensure that the legal effect of the MLI is very clear, so that taxpayers know exactly which bilateral treaty provisions are being amended, how they are being amended, what the effective date of the amendments will be, and how those amendments will be interpreted in practice by the countries making them.

The second concern is to ensure that the MLI will be an effective vehicle for introducing, as quickly and as widely as possible, marked improvements to the way tax disputes are resolved internationally, including in particular the introduction of mandatory binding arbitration provisions.

We will comment in detail on each of these concerns further below in response to the specific issues raised in the discussion draft, but we would first like to take the opportunity to comment on a few issues not specifically raised in the discussion draft.

Flexibility
One issue which is raised in the Action 15 Final Report but is not discussed in the discussion draft has to do with the amount of flexibility afforded to parties to the MLI to tailor their acceptance of MLI provisions to the characteristics of their particular treaty networks. Each party to the MLI will face choices about which of the MLI provisions it wishes to introduce into its treaty network and whether an MLI provision it favors is needed or appropriate for every treaty in its network. Countries’ treaty networks have typically developed over decades, and it may rarely be the case that any particular MLI provision (or option) will be appropriate or needed for every treaty in a country’s network. Countries may also be willing to adopt different positions with respect to a particular MLI provision depending on the preferences of their bilateral treaty partner with respect to that provision.

For these reasons, the IAPT believes it may be appropriate for the MLI to allow parties to decide on the application of MLI provisions on a treaty-by-treaty basis, rather than having to make a uniform choice applicable to their entire treaty network. We understand that it may be possible to enforce some uniformity, while still preserving flexibility for MLI parties by allowing them to make targeted, circumscribed reservations with respect to individual MLI provisions.

Of course, we do not mean by this request for flexibility that parties to the MLI should have the option not to achieve or confirm their satisfaction of the BEPS Project’s “minimum standards”. Any country that participates in the MLI should be required to adopt a provision to implement each of the treaty-related minimum standards (or otherwise to confirm their satisfaction of each standard). As discussed further below, however, we believe it may be desirable to provide countries some treaty-by-treaty flexibility on the manner in which they satisfy the minimum standards.

The IAPT understands that there are potential downsides to allowing MLI parties the full flexibility to make decisions on whether to adopt particular MLI provisions on a bilateral-treaty-by-bilateral-treaty basis. Granting that degree of flexibility could certainly make implementation of the MLI more time-consuming and could introduce more of a flavor of individual negotiations to the exercise.

On the other hand, there are potential advantages to such an approach, possibly including greater clarity about which bilateral treaties are intended to be amended by an MLI party’s decisions on whether or not to accept specific MLI provisions. Such an approach would also reduce the risk that an alternative system of circumscribed reservations by categories could fail to take into account all the policy or technical issues that might be raised by an MLI party’s potential introduction of MLI provisions into each of the bilateral treaties in that party’s network.

Without an opportunity to review the draft MLI text before it is finalized, it is impossible for the business community to give specific input on whether an approach that denies full treaty-by-treaty, provision-by-provision flexibility to MLI parties can operate well in practice, without causing either undesirable legal uncertainty for taxpayers or undesirable decisional dilemmas for MLI parties. For these reasons, we urge the Ad Hoc Group to give serious consideration to a “full flexibility” approach to the MLI and/or to the release of the draft text of the MLI for review and comment by the public.

**Release of a discussion draft of the MLI text**
Like most stakeholders, the IAPT members were disappointed that the current discussion draft did not contain the draft text of the MLI, which has been described by OECD officials in recent public appearances as well advanced. The Action 15 Final Report describes a wide spectrum of approaches that could be taken to drafting an instrument like the MLI, and a serious technical analysis of the implications of every one of them could be a massive exercise for the stakeholder community, and one that would be largely pointless if the Ad Hoc Group has already narrowed its choices about which approach to take. Accordingly, by not releasing a discussion draft of the MLI text itself, the Group has effectively crippled the ability of the stakeholder community to give input that could be of real value to the drafters, particularly in light of the tight deadlines those drafters face.

We have heard some delegates comment that the decision not to release a discussion draft of the MLI text was considered justified on the grounds that bilateral treaty partners do not typically release drafts of their tax treaties during the negotiation stage. We respectfully suggest that this analogy is inapt, and that the circumstances of the development of the MLI present a much stronger case for releasing the text in draft form.

First, bilateral treaty negotiations are typically based on well-known model treaty provisions or country precedents, with the result that the negotiation largely centers much more around the selection of particular well-known options rather than the design of new provisions. By contrast, the MLI is an avowedly unique exercise of developing operating language that will perform the unprecedented task of incorporating new provisions into a wide variety of existing treaties. Putting aside completely the text of the new provisions themselves, which have already been agreed during the BEPS Project, the drafting of that operating language is a wholly new exercise and will inevitably raise technical issues that have never been seen or solved before.

Second, when technical issues are identified with respect to a bilateral treaty after it is signed and published, there is typically an opportunity to address those before ratification by mutually agreed clarifications by the two treaty partners. Such cases occur frequently and are the basis for a number of pre-ratification Protocols, exchange of notes, and similar mechanisms. Where, however, technical problems are identified with respect to newly published text that has been finally agreed by 96 or more parties, the process for addressing those problems is likely to be much more cumbersome, if indeed any such process will exist.

Accordingly, to maximize the possibility that technical problems can be caught and addressed before the text of the MLI is finalized for signature, we strongly urge the Ad Hoc Group to consider sharing the draft text with the stakeholder community for their comment, much as the OECD routinely does before it finalizes the text of any amendments to the OECD Model Tax Convention.

Prospectivity

We anticipate that the MLI will include provisions specifying the effective date of the particular MLI provisions being introduced into parties’ bilateral treaties. We are hopeful, of course, that such effective date provisions will clearly spell out workable effective dates for the different types of taxes affected by
the MLI provisions (e.g., with respect to withholding taxes, for payments made or credited on or after a date certain, and for other taxes, for taxable periods beginning on or after a date certain).

The IAPT also anticipates that the MLI’s effective date provisions will be prospective. We very much encourage the Ad Hoc Group to clarify in the Commentary accompanying the MLI that its provisions are in fact intended to be prospective only in application, and that they do not provide a legal basis for applying their substantive content to income derived before their effective date. Such a clarification is particularly warranted in light of the significant number of instances where taxpayers are finding that some tax administrations are applying existing bilateral treaties as if they already incorporated the changes to be introduced by the MLI. Such cases clearly undermine the legal certainty and consistency which the BEPS Project as a whole and the MLI in particular are intended to provide, so it is wholly appropriate to emphasize this point in the MLI’s accompanying guidance.

**Consideration of ratification requirements**

The Action 15 Final Report is light on any discussion of the specific ratification issues that arise in the context of a multilateral agreement such as the MLI, and the discussion draft does not include any discussion of that topic. In practice, however, the ratification requirements that governments are likely to face with respect to an MLI could significantly influence the design of the MLI itself. For example, if an MLI requires or authorizes a party to make certain declarations, notifications, or deposits of documents, must those be made prior to a domestic ratification procedure? Will a consolidated text of the amended version of every bilateral treaty to be amended by the MLI have to be prepared and submitted to the legislature as part of the ratification procedure for the MLI?

The resolution of questions like these could affect whether particular steps that may be helpful to providing certainty to the taxpayer community will actually slow down the implementation of the MLI or will be in any event necessary steps of the ratification process. The IAPT therefore urges the Ad Hoc Group to analyze the ratification requirements of parties to the MLI before making final decisions on design features of the MLI. To the extent that steps can be taken to maximize legal certainty for taxpayers without lengthening the otherwise required ratification procedures, the IAPT strongly encourages the Ad Hoc Group to take those steps.

**Scope of the MLI – pension funds**

The discussion draft clearly states that the MLI is not supposed to include “new measures that were not developed during the BEPS Project”. The IAPT considers that the provision developed to address the treaty residency of pension funds, which was the subject of a February 2016 discussion draft and which was specifically called for by the Action 6 Final Report, should be considered a measure developed during the BEPS Project and should therefore be eligible for inclusion in the MLI.

**Technical issues that should be taken into account in adapting specific BEPS recommendations**

The following paragraphs set forth our comments on the technical issues that should be taken into account in adapting specific BEPS recommendations for inclusion in the MLI. As indicated above, it is
extremely challenging for public stakeholders to try to identify such issues and provide useful input to the Ad Hoc Group without seeing the draft text of the MLI under consideration by the Group. Nevertheless, we have done our best to try to identify such issues and to provide constructive input which we hope will be of use to the Group. Our discussion first touches upon the “minimum standard” provisions and then the other treaty-related BEPS measures.

**Minimum standard provisions**

Given the status of particular provisions as “minimum standards” under the BEPS Project, we anticipate that the MLI will effectively require parties to adopt the minimum standard provisions or otherwise demonstrate that they have satisfied the minimum standards. Also, given the fact that the BEPS Final Reports authorize countries, at least with respect to some of the minimum standards, to choose among different options for satisfying the minimum standards, we anticipate that the MLI will have to provide some sort of default rule to determine how the minimum standards will be satisfied in any bilateral treaty relationship where the two parties to the bilateral treaty prefer different options for satisfying the minimum standard.

Some countries may be more flexible than others in their approach to satisfying the minimum standards and may be willing to tailor their approach to satisfying the minimum standard under a particular bilateral treaty to the treaty partner’s preferred approach. This solution could be preferable to forcing a default solution when the initial preferences of the two treaty partners differ.

**Action 6: Treaty abuse – Preamble text**

The Final Report on Action 6 indicates that it will be a minimum standard for countries to have in their treaties the title and preamble language set out at Section B of that Report, which will clarify that by entering into treaties States do not intend to create “opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of residents of third States)”. The preamble language set forth in Section B of the Report prefaces that clarification with recitals concerning the Contracting States’ “desir[e] to further develop their economic relationship and to enhance their cooperation in tax matters” and “inten[tion] to conclude a Convention for the elimination of double taxation with respect to taxes on income and on capital”.

Section B of the Final Report on Action 6 emphasizes that the proposed language will be important in interpreting the treaty “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”, in accordance with the Vienna Convention on the Law of Treaties. The language proposed in Section B is an integrated text, and in order to have a full understanding of the “object and purpose” of the treaty, it will be necessary to include the full text proposed there.

Because there are many situations where treaties intentionally produce non-taxation or reduced taxation outcomes that are fully in line with their object and purpose (e.g., exemptions for
parent-subsidiary dividends, for investment income paid to governments, pension funds, and non-profit organizations, etc.), any new language required by Section B that requires an assessment of whether such outcomes constitute “tax evasion or avoidance” will necessarily involve an understanding of the context in which and the underlying purpose for which the treaty was concluded. That context and purpose cannot be understood by a bare reference to a desire to conclude a treaty for the elimination of double taxation but must be grounded in an understanding of the Contracting States’ intention to further develop their economic relationship. Thus, while a bare reference to a desire to conclude a treaty for the elimination of double taxation could potentially serve as an adequate preamble standing alone, if joined with language referring to non-taxation or reduced taxation through “tax evasion or avoidance”, it needs the mooring reference to the Contracting States’ underlying desire to further develop their economic relationship to be properly understood.

**Action 6: Treaty abuse – Treaty shopping alternatives**

The Final Report on Action 6 also specifies that BEPS participating countries agreed, as a minimum standard, to ensure that their treaties include anti-treaty shopping measures in any of the following forms: (i) the combined approach of a detailed or simplified Limitation on Benefits (LOB) provision plus a Principal Purpose Test (PPT) provision; (ii) the PPT rule alone; or (iii) a detailed LOB rule supplemented by a mechanism that would deal with conduit financing arrangements not already dealt with in tax treaties.

As of this writing, no agreed version of either a detailed or simplified LOB provision has been produced by the OECD. Similarly, the Final Report on Action 6 indicated that some countries “may have constitutional restrictions or concerns based on EU law that prevent them from adopting the exact wording of the model provisions that are recommended in this report”. In the meantime, the European Commission has published a recommendation that EU Member States use a variation on the OECD’s PPT language, in order to comply with EU law requirements. In addition, the Action 6 Final Report acknowledged that special, tailored provisions might be needed to properly address the issues relating to collective investment vehicles (CIVs) and non-CIV funds.

In light of all this, we anticipate that any effort to implement the BEPS recommendations on treaty shopping through the MLI will require a significant amount of flexibility for MLI parties to accommodate their own policy needs and desires and to adjust those as necessary to align with policy needs and desires of their bilateral treaty partners. In other words, this may be an area where it will be particularly critical to give MLI parties the ability to vary their position on the treaty shopping alternatives on a treaty-by-treaty basis. A failure to give sufficient flexibility to MLI parties, and a requirement that all MLI parties comply with one of a limited number of avenues for meeting the Action 6 minimum standard, could operate to unnecessarily prevent countries from joining the MLI.

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Consideration will also need to be given to how countries whose existing treaties and laws may be deemed to satisfy the Action 6 minimum standard will establish that. Since it may well be the case that such countries will be able to establish that they meet the Action 6 minimum standard for only a subset of their existing treaties, it will be important here, too, to provide countries with the flexibility to reflect the different features of the treaties in their network.

Will countries be able to avoid MLI changes to their bilateral treaties based on the existence of a domestic law GAAR? If so, will their application of that GAAR be influenced or restrained in any way by the OECD Commentary on the PPT?

What might be the effect of replacing an existing treaty’s anti-treaty shopping provision with new text if the existing provision is cross-referenced in other parts of the treaty (e.g., in connection with special conditions for qualifying for a zero rate on parent-subsidiary dividends)?

What might be the effect of replacing an existing treaty’s anti-treaty shopping provision with new language on the continuing validity of rulings taxpayers may have obtained under the prior language?

**Action 14: Mutual agreement procedure**

The Final Report on Action 14 provides that as a minimum standard, countries should include paragraphs 1 through 3 of Article 25 in their tax treaties, subject to two possible variations. One variation would allow countries that are not prepared to amend Article 25(1) to permit a request for MAP assistance to be filed with either competent authority to instead implement a bilateral notification or consultation process for cases in which the competent authority to which the MAP case was presented does not consider the taxpayer’s objection to be justified. The second variation would require countries that cannot commit to implement any competent authority agreement notwithstanding any time limits in their domestic law to instead be willing to accept alternative treaty provisions that limit the time during which a Contracting State may make an adjustment pursuant to Article 9(1) or Article 7(2), in order to avoid late adjustments with respect to which MAP relief will not be available.

Questions may arise as to how the requirement of including Article 25(1) in treaties will interact with existing treaty versions of Article 25(1) that: (i) are less permissive than the new language because they do not allow the request to be submitted to either competent authority; and (ii) are more permissive than the new language because they allow the case to be presented within a period longer than 3 years from the first notification of the action resulting in taxation not in accordance with the treaty. States should be allowed to introduce the more permissive aspects of the new language, while preserving the more permissive aspects of their existing text.

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26 See, e.g., clause a of the Memorandum of Understanding accompanying the 2013 Argentina-Spain Treaty.
27 See, e.g., Article 10(3) of the 2001 United Kingdom-United States Treaty, as amended; Article 10(3) of the 2012 Japan-New Zealand Treaty.
28 See, e.g., Article 26(1) of the 1990 Spain-United States Treaty, as amended (case may be brought within 5 years of first notification).
If a State is not prepared to permit the request for MAP assistance to be filed with either competent authority, the MLI should instead require the State to introduce language through the MLI into its bilateral treaties that obligates the State to notify or consult with the other competent authority for cases in which the first competent authority to which the MAP case was presented does not consider the taxpayer’s objection to be justified.

Similarly, if a State is not prepared to accept the second sentence of Article 25(2) (regarding the obligation to implement agreements reached notwithstanding time limits in domestic law), the MLI should require the State to introduce language through the MLI into its bilateral treaties that would limit the time during which a Contracting State may make an adjustment pursuant to Article 9(1) or Article 7(2), in order to avoid late adjustments with respect to which MAP relief will not be available. The relevant language is set forth at paragraph 39 of the Action 14 Final Report. The IAPT notes, of course, that one State’s inability or refusal to waive domestic time limits for implementing agreements may not be viewed, by the other State, as a legitimate basis for that second State to limit the time period within which it can make an adjustment, so that it may not be possible to achieve a bilateral agreement on that point. At the very least, therefore, the first State should be required to accept such a unilateral limitation on the time period within which it can make such adjustments itself under Article 7(2) or 9(1), and that unilateral limitation should be introduced through the MLI. While such a unilateral limitation on adjustments by the first State is a poor substitute for a truly effective MAP provision (i.e., one that would ensure the avoidance of double taxation in the case of adjustments made by the other State), it is the least that should be required of the first State in order to fulfill this aspect of the minimum standard.

Non-minimum standard provisions

As in the case of the minimum standards, the Final Reports tend to give countries a number of options about how to implement the non-minimum standard recommendations, including the option not to implement them at all. While no party to the MLI can be required to adopt a non-minimum standard provision, the Ad Hoc Group may wish to consider whether a specified default must be applied in each case where both parties indicate they want to adopt the BEPS recommendation but they prefer different options for doing so, whether in such a case neither country will be considered to have adopted the provision, or whether the parties will be allowed to reach a decision between themselves as to which option to use in adopting the provision.

Action 2: Hybrid mismatches – transparent entities

We anticipate that the MLI will include a provision intended to introduce the proposed new version of Article 1(2) of the OECD Model, which deals with income derived “by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State”. Questions are likely to arise as to how such language may interact with existing provisions of bilateral tax treaties that may relate to similar concepts but do not use the same language.
For example, would this MLI provision be deemed to replace treaty language relating to “income derived through a partnership, estate, or trust”? \(^{29}\) How would it interact with treaty language relating to “income derived or paid by a partnership, estate, or trust”? \(^{30}\)

Would it be deemed to replace treaty language relating to income derived by a “collective investment vehicle”, such as that contemplated by paragraphs 6.17 \textit{et seq.} of the Commentary on Article 1 of the OECD Model? \(^{31}\)

How would the provision affect competent authority agreements or other guidance that may have been published under existing treaties that address the treatment of income paid to fiscally transparent entities in situations where the existing treaties do not contain language substantially identical to new Article 1(2) of the OECD Model? \(^{32}\)

\textbf{Action 2: Hybrid mismatches – methods for elimination of double taxation}

The Final Report on Action 2 suggests that countries may wish to consider any of three different solutions to the double non-taxation problem that could arise where a treaty obligates a residence State to exempt dividends that are exempt from tax (or deductible to the payor) in the source State: (i) inclusion of the switch-over clause found in Article 23A(4) of the OECD Model, which provides that the residence State shall apply the credit rather than the exemption method where the source State applies the treaty so as to exempt or reduce the rate of tax on income; (ii) inclusion of a provision that would allow the residence State to apply the credit method, rather than the exemption method, for dividends that are deductible in the source State; and (iii) inclusion of a provision that would apply the credit method, rather than the exemption method, across the board.

Consideration will need to be given to how these options, especially the first and third options, interact with treaties that provide for a zero rate of withholding on parent-subsidiary dividends. Many such treaties intentionally combine that source State exemption with an exemption for such dividends at the parent level in the residence State, in order to avoid double corporate level taxation on earnings so distributed. \(^{33}\) A new provision that would replace a residence State exemption with a residence State credit purely on the grounds of a source State exemption would undermine the policy reflected in such treaties.

Moreover, where a treaty provides for a zero rate of withholding on parent-subsidiary dividends, a residence State that has agreed to provide double taxation relief only through the credit mechanism

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\(^{29}\) See, e.g., Article 3(1) of the 1971 Norway-United States Treaty, as amended.

\(^{30}\) See, e.g., Article 4(1)(b) of the 1993 India-United Kingdom Treaty, as amended.

\(^{31}\) See, e.g., various provisions of the 2015 Australia-Germany Treaty, or the 2014 Croatia-Luxembourg Treaty and Protocol.

\(^{32}\) See, e.g., ATO ID 2013/58 (1 November 2013), regarding the Australian Tax Office’s position on whether interest paid to a single-owner U.S. limited liability company disregarded as an entity separate from its U.S.-resident owner was eligible for the exemption provided in Article 11(3)(b) of the Australia-United States Treaty.

\(^{33}\) See, e.g., Article 23(2)(a) of the 1991 Germany-Norway Treaty, as amended.
frequently agrees to give a so-called “indirect” credit for the source State tax imposed on the earnings out of which the dividend is paid. The balance of benefits reflected in the treaty could be disturbed if a new provision was introduced to allow a residence State to switch from an exemption to a credit method without imposing a reciprocal obligation to give such an indirect credit.

Given the increasing number of treaties that have provided for source State exemption of parent-subsidiary dividends in recent years, careful thought will need to be given to ensuring that the MLI’s implementation of the double tax relief options under Action 2 does not inadvertently undermine the policies reflected in such treaties to avoid multiple levels of corporate tax on earnings distributed by subsidiaries to parents.

**Action 6: Dividend transfer transactions**

The Final Report on Action 6 recommends the addition of language to Article 10(2)(a) of the OECD Model to impose a 365-day holding requirement on companies seeking the benefit of a treaty’s direct investment withholding tax rate on dividends paid by their subsidiaries (i.e., typically a rate of 5 percent or zero). Due to the many different ways in which treaties formulate their direct investment dividend rate provisions, a number of technical issues will be faced in trying to describe the existing provisions that are being affected by the MLI provision implementing this change.

For example, treaties may refer to the recipient of the dividend as the “beneficial owner” or the “recipient”.

They may require that the recipient be a person who “holds”, “holds directly”, “owns”, “owns directly”, or “owns directly or indirectly” the requisite amount of stock. These words may have different implications under the national law of the treaty partners concerned.

They differ significantly in the percentage of stock that must be owned to qualify for the reduced rate, and they may prescribe different percentages depending on whether the rate is reduced to zero or to a positive rate.

They may describe the stock that must be owned as a certain percentage of the “voting power” in the company paying the dividend, as a certain percentage of the “voting stock”, as a certain percentage of “the outstanding shares of the voting stock”, as a certain percentage of the “share capital”, etc.

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34 See, e.g., Article 22(1)(b) of the 2006 Poland-United Kingdom Treaty.
35 See, e.g., Article 10(2)(a) of the 2004 Bangladesh-United States Treaty, Article 10(3)(a) of the 2006 Belgium-United States Treaty.
36 See, e.g., Article 10 of the 1982 Australia-United States Treaty, as amended.
37 See, e.g., Article 10 of the 1996 Austria-United States Treaty, as amended.
38 See, e.g., Article 12(2) of the 1984 Cyprus-United States Treaty.
39 See, e.g., Article 10(2) of the 1999 Denmark-United States Treaty, as amended.
They may contain conditions relating to whether or not the earnings out of which the dividends are paid are from active business operations.\footnote{See, e.g., Article 11(2)(b) of the 1980 Egypt-United States Treaty.}

They may already include holding period requirements that were bilaterally negotiated between the treaty partners, and those requirements may differ depending on whether the relief provided is a full exemption or merely a reduced withholding rate. Where a dividend fails to qualify for a full exemption because the existing treaty’s holding period has not been satisfied, the result will often be application of a 5% or other reduced rate for which no holding period has been required. If the existing zero rate holding period is less than the proposed new 365-day holding period, it could be an odd result to deny the 5% or 15% benefit as well based on failure to meet the new longer holding period.

They may already be subject to a provision that would deny the benefits of the withholding tax relief if the stock was acquired for the main purpose or a main purpose of obtaining the benefit in question.

The language proposed for introducing the new holding period requirement in Article 10(2)(a) of the OECD Model includes a parenthetical which reads: “for the purpose of computing that period, no account shall be taken of changes of ownership that would directly result from a corporate reorganisation, such as a merger or divisive reorganization of the company that holds the shares or that pays the dividend”. The Final Report on Action 6 does not explain this parenthetical, and the drafting is not entirely clear. Under various existing provisions that include holding periods, certain types of corporate actions (e.g., liquidations of intermediary companies into the parent, reorganizations that involve “tacked” holding periods under domestic law) have been taken into account in combining pre- and post-action holding periods to satisfy the existing treaty’s holding period requirement, so questions may arise as to whether the new language is intended to alter those results.

Consideration will have to be given as to how countries interested in introducing the MLI’s new holding period requirement will be able to take into account the implications of all these different aspects of their existing bilateral treaty provisions.

**Action 6: Avoidance of Article 13(4)**

The Final Report on Action 6 includes a recommendation that language be added to Article 13(4) of the OECD Model to: (i) prevent the contribution of non-immovable property assets to an entity shortly before the sale of interests in that entity from avoiding the application of Article 13(4): and (ii) to expand the application of Article 13(4) beyond the sale of shares in a company to the sale of interests in other entities.

With respect to the first part of the Action 6 recommendation, questions could arise about how the proposal interacts with existing treaty provisions that already include a testing period for determining whether an entity, interests in which are alienated, derives more than a threshold amount of its value
from real property situated in the source State.\textsuperscript{41} States having agreed on such a testing period may wish to keep such a previously negotiated provision in place.

With respect to the second part of the Action 6 recommendation, questions could arise about how the proposal interacts with existing treaty provisions that allow a resident of the treaty partner to be taxed by the source State on the alienation of “an interest in a partnership or trust to the extent that the assets of the partnership or trust consist of real property situated in” the source State.\textsuperscript{42} States having treaties that adopt that approach may not wish to replace those provisions with the second part of the Action 6 recommendation (even if such a State might otherwise prefer to adopt the new language for those of its treaties that do not have such a “aggregate” approach to determining whether interests in a non-corporate entity represent real property interests).

**Action 6: Dual resident entities**

The new version of Article 4(3), calling for competent authority agreements to resolve dual residence cases involving persons other than individuals and providing for denial of all treaty benefits to an entity in the absence of an agreement, will presumably replace existing tie-breaker provisions to address those situations. Questions will arise on issues such as whether the new language will be deemed to replace comparable treaty provisions that may differ from new Article 4(3) in that they do not specify how the treaty is to be applied in the absence of a competent authority agreement,\textsuperscript{43} or they specify particular benefits that will be available to the dual resident entity in the absence of a competent authority agreement.\textsuperscript{44} Questions may also arise as to the effect of competent authority agreements that have already been reached under pre-existing treaty provisions, if those provisions are deemed to be superseded by the new language. Thought may also need to be given to the effective date of this provision, if its introduction will lead to potential loss of treaty benefits in the absence of a timely and successful application for competent authority resolution, as there may be a number of non-abusive cases where entities will need to seek competent authority agreements in order to continue to receive benefits that have been available under the existing version of Article 4(3).

**Action 6: Anti-abuse rule for permanent establishments situated in third States**

The Final Report on Action 6 contained a bracketed provision which source States could consider using to deny benefits to income attributable to a permanent establishment in a third State, if the residence State exempts that income or taxes it at low rates. The Report indicated that the text of the proposed provision was to be reviewed by Working Party 1 after the United States published the final version of its corresponding provision as part of the 2016 United States Model Income Tax Treaty.

\textsuperscript{41} See, e.g., Article 13(4) of the 2013 China-France Treaty.


\textsuperscript{43} See, e.g., Article 4(3) of 1999 Denmark-United States Treaty.

\textsuperscript{44} See, e.g., Article 4(5) of 2006 Belgium-United States Treaty.
Until the final version of the proposed provision is published, it is difficult for stakeholders to identify exactly what technical issues might arise from an effort to implement the provision through the MLI. However, based on the draft in the Action 6 Final Report and the version included in the 2016 U.S. Model, it appears that issues may arise as to whether the new language will or should be deemed to replace existing provisions that may differ from it in terms of factors such as: (i) whether it applies only to PEs in third jurisdictions or also to PEs in the source State; (ii) whether it applies to all forms of income attributable to the PE or only to particular categories; (iii) whether it allows the source State to impose its full statutory tax on the affected income or requires a reduced withholding rate to apply; (iv) whether it provides exceptions for cases where the income is derived in connection with or incidental to a business conducted through the PE (and if so, what the requirements of that exception are) or for cases where the income consists of royalties for the use of intangibles developed by the PE; (v) whether the trigger for application is exclusively based on the tax imposed on the PE’s profits by the PE State and/or the residence State (and if so, how that tax test is drafted) or whether there may be an independent trigger based on the existence of a treaty between the source State and the PE State; and (vi) whether the possibility exists for the competent authority of the source State to grant relief from the provision (and, if so, on what terms).

**Action 6: Saving clause / Application of tax treaties to restrict a Contracting State’s right to tax its own residents**

The Final Report on Action 6 recommends inclusion of a so-called “saving clause” in treaties to ensure that a treaty does not restrict a State’s right to tax its own residents, subject to specified exceptions for benefits the State intends the treaty to confer on its residents. The specified exceptions in the Final Report relate to access to correlative or corresponding adjustments under Article 7(3) or 9(2), income from government service under Article 19, payments to students and business apprentices under Article 20, double taxation relief under Article 23, non-discrimination protection under Article 24, mutual agreement procedure under Article 25, and fiscal privileges for members of diplomatic posts and consular missions under Article 28.  

The Report notes that it may be necessary to expand the list of exceptions in cases where the residence State has intentionally provided other treaty benefits to its own residents, such as benefits applicable to pensions and other payments under the social security legislation of the other State (under a variation on Article 18). In fact, U.S. treaty practice, where saving clauses are common, shows that the clauses must be very carefully crafted to reflect the variety of benefits that may be intentionally provided by a State to its own residents. Examples of other benefits that have been protected by exceptions to the saving clause include: (i) provisions allowing for the withdrawal of transfer pricing adjustments where they have been made too late to achieve a correlative adjustment from the other State; 46 (ii) provisions that grant a stepped up basis to assets that may have been subjected to an exit tax by the other State; and (iii) provisions that grant a stepped up basis to assets that may have been subjected to an exit tax by the other State; 47

45 Article references here are to the Articles of the OECD Model Tax Convention.
46 See, e.g., 1980 Canada-United States Treaty, Article XXIX(3)(a), as amended.
47 Id.
(iii) provisions providing exemptions for certain pensions or annuities arising in the other State;\(^{48}\) 
(iv) provisions providing exemptions for certain alimony and child support payments arising in the other State;\(^{49}\) 
(v) provisions allowing deductions of contributions to, or tax-free build-up of income in, pension plans set up in the other State;\(^{50}\) 
(vi) provisions relating to the treatment of estate or inheritance taxes where those are covered by the treaty;\(^{51}\) 
(vii) provisions that may provide transitional relief from the termination of benefits available under a prior treaty or with respect to the entry into effect of provisions under the current treaty;\(^{52}\) 
(viii) provisions that may allow deductions for charitable contributions to organizations established in the other State;\(^{53}\) 
(ix) provisions that may provide benefits to teachers or researchers;\(^{54}\) 
(x) provisions that may grant benefits for grants from the other State;\(^{55}\) etc.

Thus, States considering the introduction of a saving clause along the lines of that proposed in the Action 6 Final Report will want to consider carefully whether the language adequately protects benefits they may have intentionally agreed to provide to their own residents under particular provisions of treaties in their network. States that already have saving clauses in their treaties will likely want to preserve those previously negotiated clauses even if they otherwise wish to incorporate the new MLI version of the clause into other treaties. Clarity will be needed to deal with the case where two bilateral treaty partners make conflicting choices.

Many existing saving clauses also preserve residence State taxing jurisdiction over the residence States’ former residents, citizens, or former citizens in particular cases. The MLI will likely have to indicate how its new provision may interact with such existing provisions, and to consider whether similarly extended application of a saving clause will be allowed as an MLI option.

**Action 7: Artificial avoidance of PE status through commissionnaire arrangements and similar strategies**

The Final Report on Action 7 proposes amendments to Article 5(5) and 5(6) of the OECD Model Tax Convention to address the application of the so-called “dependent agent PE” provisions to commissionnaire arrangements and similar strategies.

Any effort to introduce the new version of Article 5(5) into existing treaties will have to take into account that the text cross-references other provisions of the treaty (i.e., Article 5(1) and (2) concerning the basic definition of PE, Article 5(6) on independent agents, and Article 5(4) on the exceptions for

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\(^{48}\) Id.
\(^{49}\) Id.
\(^{50}\) Id.
\(^{51}\) Id.
\(^{52}\) Id.
\(^{53}\) Id.
\(^{54}\) See, e.g., Article 22(3) of the 1971 Norway-United States Treaty.
\(^{55}\) See, e.g., Article 6(4) of the 1975 Israel-United States Treaty, as amended.
specific activities), so that the text will have to be adjusted to make those cross-references generic rather than specific.

Some States have indicated a hesitancy to adopt the new Article 5(5) without having confidence about their treaty partners intend to apply the rules on attribution of profits to PEs, so it may be worthwhile to allow States to introduce the new language only with respect to those treaty partners that commit to apply the Authorized OECD Approach (AOA) to PE profit attribution.

The dependent agent PE definitions found in treaties exhibit quite a variety of forms, and questions will arise as to whether the new language will or should replace those existing provisions.56

Similarly, the so-called “independent agent” definition of Article 5(6) is present in a number of different variations in existing treaties, and States will want to consider whether the new language will or should replace those existing provisions.

**Action 7: Artificial avoidance of PE status through the specific activity exemptions**

The Final Report on Action 7 suggests new text for Article 5(4) of the OECD Model which subjects all the activities covered by Article 5(4) to a “preparatory or auxiliary” condition. The Commentary contained in the Final Report suggests that States that share the view that some or all of the activities listed in current Article 5(4)(a) through (d) are intrinsically preparatory or auxiliary are free to include a slightly modified version of the current Article 5(4) in their treaties, which would make it clear that the activities so listed do not need to be subjected to a preparatory or auxiliary condition.

Existing treaties exhibit a number of variations in the drafting and scope of provisions corresponding to Article 5(4), and States may wish to consider whether they wish to preserve those provisions. Consideration will also need to be given as to whether or how the MLI provides countries with the flexibility of approach reflected in the new Commentary relating to the proposed new version of Article 5(4). Consideration may also need to be given to whether some clarity can be given as to the effect of States keeping their existing provisions in place but not wishing to create any negative inference about whether the activities specifically listed there are intrinsically preparatory or auxiliary.

In its prior comments on this issue under Action 7, the IAPT noted that the removal of a specific activity exception from PE status for the activities listed in existing Article 5(4) would not necessarily mean that the place where such activities are conducted constitutes a PE. The removal of the exception simply shifts the inquiry to whether that place constitutes a fixed place of business of the foreign

56 See, e.g., Article 2(k) of the 1950 Brunei-United Kingdom Treaty, as amended (includes an agent who has a stock of merchandise from which he regularly fills orders on the enterprise’s behalf); Article 5(4) of the 1978 Canada-United Kingdom Treaty, as amended (excludes agents whose activities are limited to the purchase of goods or merchandise for the enterprise); Article 5(4)(c) of the 1993 India-United Kingdom Treaty, as amended (includes an agent who habitually secures orders in the PE State, wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises controlling, controlled by, or subject to the same common control, as that enterprise).
enterprise under Article 5(1), including an inquiry as to whether that place is “at the disposal” of the foreign enterprise. We would simply urge the Ad Hoc Group to ensure that any drafting it may undertake to introduce Article 5(4) changes through the MLI will not have the effect of diluting the need to conduct that important step of the analysis. This is particularly important in light of the tendency companies are seeing on the part of some revenue agents around the world to jump to the conclusion that all activities that are no longer protected by a specific activity exception under Action 5(4) necessarily constitute permanent establishments.

Action 7: Fragmentation of activities between closely related parties

The Final Report on Action 7 proposes a new Article 5(4.1) which denies the availability of the Article 5(4) “specific activity” exceptions where an enterprise or two or more closely related enterprises carry on business activities at one or more places in the PE State, provided one of those places is otherwise a PE or the overall character of the combined activities is not of a preparatory or auxiliary character, and the activities constitute “complementary functions that are part of a cohesive business operation”.

As this addition would be new text for all (or virtually all) existing treaties, technical issues will not arise in identifying the text it would be replacing and will instead be limited to identifying the existing text it is intended to modify (i.e., the existing provisions corresponding to Article 5(4) of the OECD Model). States may wish to adopt one or another of the proposed modifications to Article 5(4) without adopting this anti-fragmentation rule from Article 5(4.1) or vice versa, and consideration will probably need to be given to whether and how States could do that.

In the comments the IAPT submitted on Action 7 on June 12, 2015, we noted the possibility that application of the anti-fragmentation rule could mean that two related enterprises from separate treaty partners of a PE State could be found to have PEs in the PE State through a combination of their activities at one or more locations in that State. We also noted that issues could arise in such cases as to: (i) how much profit is attributed to each PE created by the aggregation; (ii) what guarantee the MNE group (and treaty partners) will have that the host State will not tax more than 100% of total profit; and (iii) whether there is a mechanism for resolving the potential disputes with multi-country implications that could arise. States considering adoption of the anti-fragmentation rule through the MLI should consider whether that adoption should be conditioned on satisfactory resolution of those issues.

Action 7: Avoiding PE status – splitting up of contracts

The Final Report on Action 7 gave States the option of addressing concerns they might have about the avoidance of PE time thresholds through the splitting up of contracts either by adopting the PPT rule recommended under Action 6 or by introducing a specific alternative provision as set in the new Commentary to Article 5(3).

The alternative provision included in the new Commentary on Article 5(3) is drafted with specific reference to the 12-month period for building site and construction or installation project PEs. Existing
treaties include a number of variations of PE time thresholds, so questions will arise as to whether the new language will or should apply to those time thresholds as well.

In addition, a number of existing treaties already contain language relating to the combination of time periods on activities relating to connected projects, so questions will arise as to whether the new language will or should replace those bilaterally negotiated provisions. Questions may arise as to how the new language would interact with existing PE provisions which themselves have a 30-day trigger, in light of the language in the new provisions suggesting that time periods of activity by related enterprises can be aggregated only if each exceeds 30 days.

**Action 14: Article 9(2)**

The Final Report on Action 14 says that States should, as a best practice, include Article 9(2) in their treaties. We therefore anticipate that the MLI will provide for States to do so in order to meet that best practice, if their treaties do not already include Article 9(2).

The Report indicates that because element 1.1 of the minimum standard requires countries to provide access to MAP in transfer pricing cases, countries will be obligated to endeavor to resolve such cases by mutual agreement even without Article 9(2) being present in their treaties, but that having Article 9(2) would allow countries to make corresponding adjustments unilaterally if they believe the taxpayer’s objection is justified. If a country does not agree to use the MLI to introduce Article 9(2) into its treaties that lack such a provision, it should at the very least be required to confirm through the MLI that it accepts the obligation of its competent authority to endeavor to resolve transfer pricing cases under Article 25.

**Approach to be taken in drafting the optional provision on mandatory binding MAP arbitration**

The IAPT strongly supports the addition of a mandatory binding arbitration provision to the MLI, in order to allow as many countries as are willing to do so to implement that provision as quickly and broadly as possible across their treaty networks. Mandatory binding arbitrations have been included in well over 100 tax treaties in the last decade or so, involving dozens of countries, and the experience has been that these provisions are very useful in helping to get disputes resolved, mainly by encouraging the competent authorities to come to agreement before the arbitration phase is triggered. The alarmingly rapid increase in the MAP case inventories of those governments that report statistics to the OECD clearly demonstrates the need for a major step forward in the methods for resolving disputes.

From the perspective of the IAPT, the principal design considerations for a mandatory binding arbitration provision are that: (i) it be effective, and (ii) it be acceptable to the largest possible number of

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57 See, e.g., Article 5(3)(b) of the UN Model (relating to a 183-day threshold for a PE from the furnishing of services for the same or connected projects); Article 5(2)(j) of the 1975 Israel-United States Treaty, as amended (relating to the maintenance of substantial equipment or machinery within a Contracting State for a period of more than 6 months); Article 5(2) of the 1992 France-India Treaty (relating to installations or structures used for the exploration of natural resources).
parties. When the OECD developed the Model Tax Convention’s arbitration provision almost a decade ago, it made a few decisions that were responsive to those considerations.

First, it recognized that some countries prefer one form of arbitration (e.g., so-called “long-form” or “reasoned opinion”) while other countries preferred another (e.g., so called “last best offer” or “baseball” arbitration). In order to accommodate both groups of countries, the OECD decided to keep the text of the arbitration provision in the Model itself generic and fairly short, and then to provide guidance in the form of a sample mutual agreement as to the details of how the various forms of arbitration could be implemented between the parties. The overwhelming majority of arbitration provisions included in treaties within the past decade, involving dozens of countries, have closely followed the OECD text, which seems to have worked quite well.

While the IAPT members tend to prefer “last best offer” arbitration because of its relatively low cost and its tendency to drive the competent authorities toward realistic solutions, they are more interested in seeing any form of effective arbitration provision spread than they are in insisting on a particular form. It is also worth noting that using generic treaty language such as that found in Article 25(S) of the OECD Model Tax Convention allows treaty partners to modify or refine the form of the arbitration they may use based on experience gained.

Another decision the OECD made was to analyze the features of pre-existing arbitration provisions (e.g., the EU Arbitration Convention) that seemed to detract from the effectiveness of those provisions and to attempt to systematically address those shortcomings in the guidance it prepared for countries to consider using in establishing their own arbitration agreements with treaty partners. Thus, for example, the OECD’s guidance contains a number of recommended default steps that will be triggered if one treaty partner or the other tries to block the organization of the arbitration proceeding through inaction. We recommend that the Ad Hoc Group bear these innovations in mind when considering what guidance to provide under the MLI with respect to the mandatory binding arbitration provision.

Equally important as the procedural effectiveness of the arbitration mechanism is its availability for resolving the widest possible range of disputes. We therefore do not favor approaches theoretically aimed at increasing countries’ willingness to accept arbitration provisions by narrowing the scope of the issues that will be eligible for arbitration. For example, we understand that some countries have suggested that arbitration should only be available where there is “double taxation”, or that it should not be available where the taxpayer has, in the eyes of one tax authority, engaged in “abuse”. There is enough potential room for disagreement about whether a particular situation poses a risk of double taxation or whether it involves abuse that such standards are likely to serve as an unnecessary block to arbitration, particularly when issues of that type can be taken into consideration by the arbitrators themselves.

Types of guidance and practical tools that would be most useful in understanding application of MLI to existing treaties
In terms of clarifying how the MLI will apply to existing treaties, there is probably no substitute for the early publication of consolidated texts showing exactly how the MLI will amend the existing treaties. Any approach that leaves both governments and taxpayers in the position of having to interpret compatibility clauses, which will inevitably give rise to some ambiguities no matter how elegantly drafted, to try to determine whether or how a particular bilateral provision is amended by the MLI will be unsatisfactory.

The IAPT does not have strong views on where such texts should be published (e.g., on the website of an MLI Depositary or on the websites of the relevant treaty partner ministries of finance), provided that they are reliably available on one website or the other. If the texts are not deposited with the central Depositary, it would at least be useful to have the Depositary’s website contain up-to-date links to the specific webpages on the individual ministry of finance websites where the relevant documents can found.

Mechanisms that could be used to ensure consistent application and interpretation of MLI provisions

The Commentary developed as part of the BEPS Project in connection with the various BEPS treaty recommendations should serve as a prime source of guidance for the application and interpretation of the MLI provisions, once they become operative by being effectively incorporated into bilateral tax treaties. For OECD member countries, the status of the Commentary as a prime source of interpretive guidance has long benefitted from the fact that those countries have agreed to an OECD Council Recommendation pursuant to which they have made a political commitment that “their tax administrations follow the Commentaries on the Articles of the Model Tax Convention, as modified from time to time, when applying and interpreting the provisions of their bilateral tax conventions that are based on these Articles”.

A similar mechanism should be found to associate the parties to the MLI that are not OECD members to that Commentary, so that they can publicly make the same form of political commitment to follow the Commentary in interpreting the MLI provisions that they introduce into their bilateral treaties. If they do not intend to follow the Commentary in interpreting the MLI provisions, they should be obliged, just as OECD member countries, to publicly lodge their “observations” on the Commentary, so that taxpayers and treaty partners alike will better understand the manner in which those parties intend to apply the MLI provisions.

We understand that some thought is being given to identifying portions of the Commentary that apply exclusively to the BEPS treaty recommendations and distinguishing those from the other portions of the OECD Commentary, so that non-OECD members will need to associate themselves only with the former. We note that this could cause the BEPS provisions to have very different implications in practice if treaty partners do not agree to follow the same interpretation of treaty language that pre-dates, but is closely related to, the BEPS change. For example, the elimination of the preparatory or auxiliary activity exception under Article 5(4) will potentially result in the finding of a permanent establishment only if the foreign enterprise is found to be carrying on business at a fixed place of business in the host State. The
latter determination will depend upon what it means for the foreign enterprise to be “carrying on business” at a location and whether that location is the foreign enterprise’s “fixed place of business”. Issues like that are likely to be addressed under portions of the Article 5 Commentary that are not directly tied to the BEPS recommendations, but it will be critical for taxpayers and treaty partners to know how non-OECD countries will interpret those treaty terms and whether their interpretation will be consistent with the OECD Commentary. Indeed, having that knowledge may even be relevant to an MLI party’s decision as to whether it wishes to incorporate an MLI provision into its bilateral treaty with another MLI party, which may be another factor that should influence the amount of flexibility given to MLI parties as discussed above.

At the very least, therefore, parties to the MLI should be required to declare publicly their “positions” on any parts of the OECD Commentary that are potentially relevant to the interpretation of the provisions affected by the MLI amendments (i.e., in much the same way as many non-OECD member countries now provide their positions on the OECD Model and its Commentary for publication as part of the Model itself). Ideally, parties to the MLI should also be required or at least encouraged to commit to follow those parts of the OECD Commentary unless they declare conflicting “positions” thereon.

One very important part of the MLI package will be the guidance that is being developed on how the Authorised OECD Approach to the Attribution of Profits to Permanent Establishments (the AOA) will apply to the types of permanent establishments that are likely to be created by the Article 5 changes introduced by the MLI. In order for countries to evaluate the implications of adopting the Article 5 changes included within the MLI into their treaty networks, they will very likely want to have an understanding of how their various treaty partners would attribute profits to those permanent establishments. This will require knowledge of whether the treaty partner accepts the AOA and whether it intends to apply the new AOA guidance to the attribution of profits to these permanent establishments.

The IAPT suggests that any party to the MLI that wishes to include in any of its treaties the Action 7 changes to the definition of permanent establishment should make a political commitment, similar to that made by OECD member countries through their Council Recommendation on application of the AOA guidance, to apply the OECD’s AOA guidance in attributing profits to those PEs. Because the AOA is an integrated system, that commitment should apply not only to the slice of guidance that might be developed under Action 7 but also to the entirety of the AOA.

Finally, as indicated in the comments we submitted in 2013, care should be taken to consider how amendments to one part of a bilateral treaty through the MLI may affect other parts of the treaty, including such questions as:

Whether the common treaty language on how to interpret terms not defined in the treaty would apply to terms used in the amending MLI;

Whether treaty definitions which apply “for purposes of this Convention” also apply for purposes of the amending the MLI;
Whether the ability to invoke MAP in cases of taxation “not in accordance with this Convention” would apply equally to taxation not in accordance with the amending MLI;

How new provisions such as limitation on benefits rules would interact with anti-abuse rules that might already exist in a bilateral treaty or vice versa.
ICA EW Tax Faculty

Internationally recognised as a source of expertise, ICA EW Tax Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICA EW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world. Appendix 1 sets out the ICA EW Tax Faculty’s Ten Tenets for a Better Tax System, by which we benchmark proposals for changes to the tax system.

ICA EW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICA EW’s regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 146,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICA EW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

We welcome the opportunity to comment on the issues raised in the OECD public discussion draft BEPS Action 15: Development of a Multilateral Instrument (MLI) to Implement the Tax Treaty related BEPS Measures published on 31 May for comment by 30 June 2016.

We understand that the sole purpose of the MLI is to transpose, into existing double tax treaties, the tax treaty related BEPS measures which, with the exception of the mandatory binding MAP arbitration measures, are all contained in the final reports published in October 2015 and endorsed by the G20 countries when they met in Turkey in November 2015.

It is therefore somewhat disappointing that the questions in the discussion draft are all of a purely technical nature and none of the actual provisions themselves have been published. In their absence we have not been able to comment on some of the more technical issues.

We also understand that the MLI will be, in effect, a one-off “upgrading” of the content of existing bilateral treaties. There will then, in practice, only be an upgrading to the extent the contracting parties to any particular double tax treaty sign up to a particular provision of the MLI which allows a new provision to be introduced, or an existing provision to be modified, in relation to the particular treaty.

The discussion draft has a “request for input” in section 4 and we have reproduced the requests below with our comments to the extent we are able to provide them.

Technical issues that should be taken into account in adapting the BEPS measures to modify or supersede existing provisions of bilateral tax treaties that may vary from the OECD model, including:
Existing provision or types of provisions that serve the same purpose as the BEPS measures and that would need to be replaced

Existing provisions or types of provisions that are similar to BEPS measures but that would need to be retained

It is difficult to comment on this without seeing a draft of the MLI detailed provisions. Given the unique nature of the MLI, and its far reaching effect, there seems no reason why a draft should not be made available to facilitate the current consultation.

We would urge OECD to release a further public discussion draft before the end of the year so that we, and others, can provide input to the more detailed provisions before the MLI is finalised.

The approach to be taken in developing the optional provision on mandatory binding MAP arbitration, taking into account that it would need to serve the needs of the countries that have already committed to implement mandatory binding arbitration, as well as countries that are considering committing in the future.

Incentives for agreeing to this should be included or disincentives for not agreeing.

One possibility would be to only provide Country by Country Reporting information to States who agree to this.

We believe that a sensible approach might be for the taxpayer to be able to elect the form of arbitration i.e. baseball (formally called "last best offer" or principled) at the time they invoke the procedure.

Baseball arbitration is best suited to cases where quantification is the issue, mainly Article 7 (PE profit attribution) Article 9 (transfer pricing) and Articles 11 and 12 (interest and royalty special relationships). It is less suitable for cases that involve other issues.

The types of guidance and practical tools that would be most useful to taxpayers in understanding the application of the multilateral instrument to existing tax treaties.

Clear and explicit drafting of the MLI itself is critical, as this will allow the provisions to “speak for themselves”. Proposed commentary has already been provided in the various BEPS final reports. This should be sufficient. Understanding is not aided by excessive guidance, and guidance should not be used to make rules that will not be legally sanctioned by state legislators in ratifying the MLI.

We believe it would also be very helpful if contracting parties, that have amended their existing treaties via the MLI, publish a “consolidated” version of the treaty so that the revised provisions are clear to all. We understand that the MLI is only going to be produced in English and French so that it will be even more important for such treaties to have consolidated versions available in other languages for the benefit of potential users.
Mechanisms that could be used to ensure consistent application and interpretation of the provisions of the multilateral instrument

All states which have not yet signed and ratified the Vienna Convention on the Law of Treaties should be encouraged to do so before, or at least at the same time as, they sign the MLI.

States should also be precluded from treaty override by domestic law: they should not be able to benefit from MLI or the Mutual Assistance Convention while they have legislation in place that purports to, or has the effect of, overriding tax treaty obligations.

Other comments

If the MLI is to be in effect a one off exercise to upgrade existing treaties it would still be helpful to either keep the OECD Ad Hoc Group in existence, or maintain a dedicated resource in OECD, to act as a clearing house for practical tips and best practice in introducing new, and amended, provisions to existing treaties in a way which achieves the intended purpose.

APPENDIX

ICAEW TAX FACULTY’S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.

2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.

3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.

4. Easy to collect and to calculate: a person’s tax liability should be easy to calculate and straightforward and cheap to collect.

5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.

6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.

8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.

9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.

10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

ICC- International Chamber of Commerce

General Comments

The International Chamber of Commerce (ICC) speaks with authority on behalf of enterprises from all sectors in every part of the world and is a well-established arbitral institution through its International Court of Arbitration, and provides other valued dispute resolution mechanisms through its International Center for ADR.

Therefore, ICC would like to focus on the issues related to dispute resolution mechanisms to avoid double taxation. Regarding the technical issues described in the consultation document of the OECD we agree that these issues are difficult to resolve. In theory, the implementation of the results BEPS project via the Multilateral Instrument may appear to be an opportunity to swiftly and uniformly introduce the treaty related action points. On the other hand, there are substantial practical obstacles which include especially the multitude of different treaties with heterogeneous and divergent provisions. ICC therefore comes to the conclusion that the provisions should be adopted by countries via the Multilateral Instrument as a first step and should then be adjusted in a second step to the respective double tax treaty, in order to fit the concrete legal context. This might take longer and thus be not as efficient as an automatic implementation, but would serve the interest of both tax payers and tax administrations in having a higher degree of legal clarity and certainty.

Comments on dispute resolution

ICC strongly believes that more effective dispute resolution – providing much needed increased legal certainty and predictability for companies – is of utmost importance for enhancing cross-border trade, foreign direct investment and economic growth. The business community is confronted with increasing instances of dispute and a greater risk of double taxation. Improved dispute resolution mechanisms are, therefore, more pressing than ever. This reality is underscored by the many changes in process as a result of the Base Erosion and Profit Shifting (BEPS) process itself.

Mandatory Binding Arbitration (MBA)

As noted previously ICC considers that the arbitration procedure should be mandatory. Furthermore, ICC considers that a time-based requirement to resolve a dispute by way of MBA should be introduced to ensure that when a dispute has been on-going for a certain period of time, the dispute is referred to arbitration for a swift resolution.

Ensuring Compliance with the MBA

ICC notes that the OECD intends to introduce a peer to peer review procedure to act as a deterrent to prevent contracting states from failing to comply with their requirements under the MBA procedure.

ICC welcomes the OECD’s recognition of the need for compliance of contracting states' obligations under the MBA procedure to be monitored. However, ICC is concerned that monitoring compliance by
way of a peer to peer review procedure will not act as an effective deterrent to prevent contracting states from failing to comply with the MBA process.

Our members have experienced that some countries are, in daily tax practice, not in favour of MAP and MBA. Several countries that have committed to MBA were cited as being particularly obstructive when resolving international tax disputes and imposing barriers to prevent, or delay taxpayers from using the MAP to resolve a dispute.

Our members mentioned complex interactions between domestic processes and the MAP, whereby they were prevented from invoking the MAP until domestic processes for dispute resolution had been exhausted, but once domestic processes had been completed they were then prevented from invoking the MAP on the basis that a decision made in the domestic courts should be considered final and therefore, the MAP could no longer be pursued.

MAP/EU Arbitration Convention settlements in some countries also appear to attract higher penalties than those that would apply to a dispute resolved in domestic administrative processes. The risk of higher penalties discourages corporates from invoking the MAP.

Other countries discourage use of the MAP by informing taxpayers that their final tax position is likely to be worse if they go through the MAP.

In contrast, the experiences of our members are more positive in other countries, which are more receptive to MAP applications and domestic processes and do not use them as a barrier to invoking the MAP; rather, domestic processes are paused when the MAP is invoked and are not resumed until the MAP has been completed.

Given these experiences, we recommend an introduction of sanctions, when countries do not comply with the MBA process (see also below).

**Taxpayer involvement in the MBA Procedure**

ICC contends that the taxpayer should be able to call for a dispute to be resolved through arbitration. Ultimately, the ability to refer a dispute to arbitration should lie with either contracting state or the taxpayer. The taxpayer’s ability to refer a dispute to arbitration should not be restricted where the two contracting states have agreed the issue between themselves.

ICC members support taxpayers having greater involvement in the arbitration process. We consider that either the contracting states or the taxpayer should be able to call for a dispute to be resolved through arbitration and also that taxpayers should have a right to participate formally in the arbitration process, including the hearing before the arbitrator.
Ultimately, we recommend that taxpayers have an independent right to participate formally in the arbitration process, including the right to refer a case to arbitration even where the two Contracting States have agreed the issue between themselves but not to the satisfaction of the taxpayer, for instance because double taxation has not been resolved by the States’ agreement.

The Minimum Standards

ICC welcomes the introduction of Minimum Standards – that should be adopted and followed by contracting states when resolving disputes through the MAP. ICC notes that the proposed Minimum Standard 1.3 will require "countries to commit to a timely resolution of MAP cases" and those countries should "seek to resolve MAP cases within an average timeframe of 24 months".

We consider that in relation to the MAP, there are often unreasonable delays in reaching a resolution, or making progress in resolving international tax disputes. ICC therefore welcomes a commitment to resolve MAP cases in a timely manner and considers that the imposition of a deadline of 24 months would be an improvement on the status quo where many MAP disputes take significantly longer than 24 months to be resolved.

Our members have provided us with a number of examples where countries had actively delayed the process of resolving a dispute through the MAP. Some countries take unreasonably long to resolve MAP disputes and are very slow in providing the relevant information needed to progress the MAP.

We find it concerning that in some countries using the MAP takes longer to resolve a dispute than in other counties. Indeed, in one case, two very similar tax disputes arising in two different countries, took 2 and 1/2 years longer to resolve in one country than in the other country.

ICC notes that the OECD intends for a peer to peer review process to apply to monitor countries' compliance with the Minimum Standards. ICC recognises that the proposed Minimum Standard 1.6 will require countries to "commit" to having their "compliance with the minimum standard reviewed by their peers in the context of the Forum on Tax Administration MAP Forum".

However, ICC remains concerned that a peer to peer review will not constitute an effective sanction where countries fail to comply with the Minimum Standards. ICC contends that without effective penalties for delaying the resolution of a dispute through the MAP without a justifiable reason, the Minimum Standards will be ineffective in ensuring that disputes are resolved through MAP in a timely manner.

ICC therefore contends that the OECD should consider whether tax administrations should be required to publish an annual report, analysing the progress regarding the MBA process. This report should contain the number of cases submitted to the Competent Authority and the number that has been refused, the number of officials employed for MAP/MBA processes, the time for a resolution of the case. Also, a range of sanctions could be introduced that would apply depending on the severity of the breach of the MAP process. For example, where a contracting state denies a taxpayer access to MAP a heavier sanction may be required, as opposed to when there is simply a delay in the MAP process being
commenced. In these severe cases, sanctions could go as far as to consider whether financial penalties could be imposed and indeed enforced in certain circumstances.

ICC recognises the difficulties and limitations in imposing sanctions on sovereign territories. However, ICC maintains that imposing effective safeguards is important to ensure compliance with a MAP procedure and submits that the MAP procedure is likely to be ineffective without appropriate enforcement mechanisms. ICC would be willing to work with the OECD to determine appropriate measures where contracting states fail to comply with the MAP procedure.

For ease of reference please see Annex 1 below on:

Comments to the OECD Discussion Draft on BEPS Action 14: “Make dispute resolution mechanisms more effective”

Comments to the OECD Discussion Draft on BEPS Action 14: “Make dispute resolution mechanisms more effective”

General Comment

The International Chamber of Commerce (ICC) speaks with authority on behalf of enterprises from all sectors in every part of the world and is a well-established arbitral institution through its International Court of Arbitration, and provides other valued dispute resolution mechanisms through its International Center for ADR.

ICC appreciates the time and effort invested by the OECD in developing potential options to address deficiencies in existing dispute resolution mechanisms, including the failure of member and non-member countries alike to broadly endorse utilization of binding mandatory arbitration in the Mutual Agreement Procedure (MAP) context. ICC encourages the OECD to honor its objective to contribute to the expansion of world trade by eliminating double taxation as a major obstacle to cross border trade. In this context, ICC is concerned that while the released Discussion Draft on Action 14 provides a number of options for improving the dispute resolution process, it misses the opportunity of taking mandatory and binding arbitration and certain other measures further forward to eliminate double taxation. Furthermore, ICC is troubled that – taking into consideration that a strong deliverable on Action 14 is fundamental for the successful outcome of the OECD/BEPS project and the buy-in of stakeholders – a consultation of less than a month over the holiday season is unconstructive for the “inclusive consultation process” the OECD aims to value.

ICC strongly believes that more effective dispute resolution – providing much needed increased legal certainty and predictability for companies – is of utmost importance for enhancing cross-border trade,

58 From here forward referred to as ‘arbitration’.
foreign direct investment and economic growth. The business community is confronted with increasing instances of dispute and a greater risk of double taxation. Improved dispute resolution mechanisms are, therefore, more pressing than ever. This reality is underscored by the many changes in process as a result of the Base Erosion and Profit Shifting (BEPS) process itself.\(^5^9\)

As noted by the OECD, actions to counter BEPS are likely to give rise to new rules. The interpretation and implementation of which will introduce further uncertainty and inevitably lead to a higher risk of double taxation and consequently an increasing number of taxation disputes. A solid dispute resolution mechanism with mandatory agreements should remain a corner stone of the BEPS outcome. If the G20 and OECD fail to establish such a mechanism, this should be acknowledged in the outcome of the BEPS-project by avoiding such tax rules that foreseeably lead to increased double taxation and consequently stifle international trade.

ICC finds that while the Discussion Draft addresses a number of obstacles contributing to the cumbersome nature of the dispute resolution process, it does not fully take advantage of the capacity of the OECD/BEPS forum to identify foundational obstacles preventing the resolution of disputes and propose game changing measures that could serve to fundamentally safeguard

- enhanced cross-border trade, increased foreign direct investment and continued economic growth. The Discussion Draft states that it reflects the results of preliminary work done to

- identify “the obstacles that prevent” from resolving disputes through the MAP and develops possible measures to address these obstacles. ICC is disappointed that the Discussion Draft merely lists 34 potential incremental revisions that could be made to the Model Treaty MAP procedures. More ambitious progress on this critical issue was expected.

While the Discussion Draft reflects little support from a political perspective for a mandatory arbitration clause, ICC believes that the OECD should strongly recommend the arbitration solution already implemented by several of its Members. For example, Canada, France, Germany, Switzerland, the United Kingdom and the United States have all accepted arbitration in their taxation treaties, which has been implemented in certain cases. This underlines arbitration clauses are possible. Accordingly, it is difficult to understand why the OECD refrains from recommending arbitration. OECD Member states should be obliged to suggest solutions for arbitration that meet constitutional requirements in specific countries.

ICC strongly believes that if the obstacles to develop a broadly embraced arbitration mechanism are to be overcome, there needs to be frank recognition of their nature followed by a process to identify means of eliminating them. For example, the most common objection to arbitration is the perceived loss of “sovereignty” of the country in question. This term can have different connotations, though in the present context it most likely means that countries would surrender their ability to say “no” to a potential resolution.

\(^{59}\) ICC notes the OECD Statistics on Mutual Agreement Procedures for 2013 (released on 25 Nov 2014) that the inventory of pending MAP cases has almost doubled since 2006 through 2013. This does not include data of non-OECD Member countries.
International arbitration in a variety of contexts has grown significantly since it was initially addressed in 1923 with the establishment of the ICC International Court of Arbitration. ICC notes that many of the same obstacles cited in the taxation context have existed with respect to arbitration in non-taxation areas.

ICC proposes to undertake a comprehensive study as to how the hurdles facing arbitration in the tax field can be overcome taking into account ICC’s vast experience as the world’s leading arbitral institution in non-taxation areas (also involving state and state entities). The consideration of lessons learned may provide useful guidance for forging a path by which countries embrace international taxation arbitration, as well as establishing and administering other dispute resolution mechanisms such as mediation and the administration of expert proceedings.

Based on ICC’s experience in arbitration in non-taxation areas, ICC identifies the following elements as key for developing successful arbitration programmes:

- Develop a thorough understanding of the obstacles to be overcome;
- Identify the common objectives of the parties involved;
- Study the experience of successful alternative dispute resolution mechanisms in other areas;
- Outline a proposed approach that deals with the obstacles to the use of arbitration for the resolution of tax disputes, e.g. transparency versus confidentiality.
- Develop an approach that supports and strengthens broader accessible, effective and efficient dispute resolution mechanisms in which countries are encouraged to reach a mutually acceptable agreement where arbitration is the exception rather than the rule;
- Develop broad consensus for the proposed approach;
- Implement with an institution that has broad experience in administering cases through dispute resolution mechanisms in other contexts.

**Specific Comments**

**Identification of obstacles to more effective dispute resolution**

ICC observes that several countries have raised concerns with regards to mandatory arbitration for international taxation disputes and that the options listed in the OECD Discussion Draft attempt to address them to a certain extent. The obstacles raised by those countries include:
• The perception of a loss of sovereignty, i.e. the ability of a tax authority to say “no” to a proposed resolution;

• The expectation that independent arbitrators, perceived by all countries as being acknowledged experts and truly independent, may be difficult to identify;

• Possible high and unforeseen cost;

• Loss of control to participate in crafting solutions for cases deemed important to specific countries;

• Additional time for cases to achieve resolution;

• Expansion of the scope of the process (“scope creep”);

• Confidentiality of results of the process;

• Skepticism of viability of the process in the absence of broad embrace of such procedures.

The listing above is intended to be merely illustrative. ICC underlines that such obstacles have existed in all non-tax contexts in which effective, and broadly embraced alternative dispute resolutions (including mandatory arbitration) have been developed by ICC and other arbitration bodies. Everything suggests that this can be done in the area of taxation.

Comments on the options as identified in the Discussion Draft

OPTION 1 – Clarify in the commentary the importance of resolving cases presented under Article 25(1)

Comment: ICC observes that with respect to the importance of resolving MAP cases, it is not evident that the mere substitution of the phrase “obliged to seek to resolve” for “shall endeavor” will effectively address the circumstances in which a resolution may not be reached. Would it not be more demonstrative of the need of all parties, tax authorities and multinational enterprises (“MNEs”) alike to use the declarative “shall resolve?”. In the latter, countries could further clarify instances in which states “shall not endeavor”, for example in the instance of willful neglect or perhaps in the instance in which the determination of the court cannot be further varied.

ICC further believes the OECD should at least combine adoption of those BEPS initiatives where interpretation is subjective and outcomes are potentially highly divergent, with an obligation for the participating country to adopt rules that ensure effective dispute resolution. Several of the BEPS deliverables may also imply a legal obligation to adopt new local legislation (e.g., country-by-country reporting). Such requirements are likely to expand the level of tax disputes. Accordingly, it is crucial that action be taken to ensure more effective dispute resolution. In a multilateral instrument, states could be
committed to combine certain BEPS actions items with an obligation to adopt rules that ensure an effective dispute resolution, such as arbitration or the use of language such as “shall resolve”.

**OPTION 2 – Ensure that paragraph 2 of Article 9 is included in tax treaties**

Comment: If the intention is to eliminate the ambiguity of not having Art. 9.2 in specific treaties, which is to be implemented by a multilateral agreement, it seems preferable to mandate the inclusion of Art. 9.2 in all treaties. This would remove an apparent obstacle to effective resolution.

**OPTION 3 – Ensure the independence of a competent authority**

Comment: ICC agrees with this option but raises the question – which applies to all of the options – why the option is framed in the permissive “could” as opposed to making the language an element of the model? In any event, in a multilateral instrument ICC presumes that the Manual on Effective Mutual Agreement Procedures (MEMAP) would be included and independence would be an agreed upon requirement (“independence” is identified above as obstacle 2).

**OPTION 4 – Provide sufficient resources to a competent authority**

Comment: Same as comment to option 3 above. If there are not adequate resources provided, then the process will not function (“cost” is identified above as obstacle 3 above). ICC believes that the development of OECD MAP trainings may be helpful.

**OPTION 5 – Use of appropriate performance indicators**

Comment: Same as comment to option 3 above.

 ICC believes that performance indicators may prejudice the impartiality of competent authorities and should be used carefully if they are set. ICC notes that a number of the options include monitoring performance/behavior of contracting states as it pertains to various aspects of the dispute resolution process. However, no measures are proposed to remedy the circumstance in the advent of suboptimal outcomes. In the case of information exchange, OECD implemented peer reviews. A similar peer or independent review process could be mandated, perhaps in the context of the multilateral instrument, in appropriate circumstances as a first measure to effect change.

**OPTION 6 – Better use of paragraph 3 of Article 25**

Comment: ICC welcomes the suggestion that agreement between competent authorities on general matters of interpretation and application of treaty matters be made available publically. ICC would also suggest that such matters of interpretation and application are incorporated in any best practice audit guidance developed under the Forum on Tax Administration (FTA) MAP Forum Strategic Plan.

Same comment as option 3 above regarding MEMAP reference.
OPTION 7 – Ensure that audit settlements do not block access to the mutual agreement procedure

Comment: ICC believes that more direct language to discourage this practice should be considered, such as replacing ‘could commit to take appropriate steps’ with ‘are obligated to take appropriate steps’.

Similarly ICC believes that there should be a mandatory requirement to notify the competent authority of the other contracting state where details of such an audit settlement are discovered and there is a pending MAP matter.

OPTION 8 – Implement bilateral APA programs

Comment: ICC fully supports the commitment that participating countries implement bilateral Advance Pricing Agreement (APA) programmes. ICC further suggests that as part of the political monitoring mechanism commitment envisaged within Action 14 that data on the number of implemented bilateral or multilateral APAs be shared publically by participating countries (as is done in the OECD MAP statistics).

Beyond bilateral or multilateral processes, ICC recommends that as an important means of reducing disputes and increasing efficiency, an effective dispute resolution mechanism would include the adoption of effective unilateral processes enabling taxpayers to obtain different types of unilateral rulings from its tax authorities to clarify the tax consequences of a specific transaction where the uncertainty is primarily singular in nature (e.g. binding ruling, APA or similar procedures with respect to a specific cross-border transaction).

ICC believes that the OECD should also encourage countries to implement other alternative dispute resolution mechanisms (e.g. domestic arbitration, ombudsman, advanced tax agreements).

OPTION 9 – Implement administrative procedures to permit taxpayer requests for MAP assistance with respect to recurring (multi-year) issues and the roll-back of APAs

Comment: ICC supports the implementation of an appropriate procedure in these cases. It is important for the procedure to be simple and quick in order to be effective. The procedure could be based on the grouping together of disputes; for example, in cases of multi-year depreciation or amortization of an asset. It is also positive that the countries commit to provide the roll-back of APA in appropriate cases. It could be useful to have consensus guidance with respect to when roll-back is possible.

OPTION 10 – Improve the transparency and simplicity of the procedures to access and use the MAP

Comment: ICC supports this option but raises again the question why this option is also preceded by the verb “could”. ICC considers that the transparency and simplicity of the procedure must be improved in order for it to work.
OPTION 11 – Provide additional guidance on the minimum contents of a request for MAP assistance

Comment: ICC supports this option and strongly believes that countries “should” commit to adopt the best practices included in the MEMAP. Commentators are requested to point out other obstacles related to the documentation and information requirements. The business community has experienced that critical issues can often be identified with relative succinctness. On the other hand, MAP processes often seem to generate an excessive amount of documentation which requires time to analyse and resource commitments of both taxpayers and tax administrations. In ICC’s understanding, there should be two different approaches in terms of documentation: (i) “basic” information and documentation provided by the taxpayer or the administration to assess access to MAP; and (ii) “comprehensive” information requested by both tax administrations when the procedure is ongoing. The information should focus on the specific problem to be resolved.

Another obstacle is the language in which the information or/and documentation is provided. Therefore, there should be mechanisms to minimize the burden of translation. It is a good practice to have clear guidelines as to the relevant information and documentation in the language the administration is familiar with.

OPTION 12 – Clarify the availability of MAP access where an anti-abuse provision is applied

Comment: ICC welcomes this option, especially considering that as a result of the BEPS discussion the notion of what is perceived to be abusive appears likely to be very much broadened. In ICC’s view, a preliminary assessment by the resident state of perceived abuse should not mean denial of MAP-access as an immediate consequence. On the contrary, a taxpayer should be enabled, via MAP, to involve the other contracting state because the abuse assessment in itself can be ‘not in accordance with the provisions of the Convention’ and lead to double taxation issues. According to ICC, therefore, the default should be that there is MAP access in cases of alleged abuse. In order to ensure effective MAP access in such cases, ICC would welcome amendment of article 25(1) to permit a request for MAP assistance to be made to the competent authority of either contracting state (see option 15).

OPTION 13 – Ensure that whether the taxpayer’s objection is justified is evaluated prima facie by both competent authorities

Comment: ICC sincerely doubts that this would be an efficient way to address the issue at hand, i.e. unilateral power in both contracting states to deny access to the MAP. It seems difficult from a procedural point of view and the power to deny MAP access still seems to fully remain with the resident country. Also, there can be debate with the other contracting state whether a taxpayer’s objection appears to be justified without entering into discussions about the case and its merits and, thus, how to potentially resolve the case.

OPTION 14 – Clarify the meaning of “if the taxpayer’s objection appears to it to be justified”
Comment: A clarification would be welcomed as it may curb the power of the resident state to unilaterally deny MAP access. However, ICC feels that a better way to address the issue at hand, i.e. unilateral power to deny access to the MAP, would be to amend Article 25.1 to permit a request for MAP assistance to be made to the competent authority of either contracting state (see option 15).

**OPTION 15 – Amend Article 25(1) to permit a request for MAP assistance to be made to the competent authority of either contracting state**

Comment: ICC welcomes this option because the possibility to permit a request for MAP to the competent authority of either contracting state increases the flexibility for the taxpayer. Most notably in cases in which one of the two competent authorities is more experienced and has access to more qualified staff than the other. Nevertheless, the crucial point is to obligate all contracting states to ensure that their competent authorities have sufficient resources and that access to them is adequate and well-functioning.

Furthermore, the comments above with regards to options 12-14 also apply.

**OPTION 16 – Clarify the relationship between the MAP and domestic law remedies**

Comment: ICC strongly believes that MAP and domestic law remedies should not exclude each other and it should be made clear that the taxpayer is free to choose either of them or proceed with both alternatives simultaneously. If a cross border issue is assessed by one contracting state, it is inherent that either: (i) the assessment (or portion thereof) is correct and, therefore, a counter adjustment in the other contracting state needs to follow, or (ii) the assessment itself is incorrect and no counter adjustment applies. It should not be burdened onto the taxpayers to limit themselves to only one of the applicable remedies and risk losing access to the other or risk a delay in effective relief.

Furthermore, the comments above with regards to option 7 also apply.

**OPTION 17 – Clarify issues connected with the collection of taxes and the mutual agreement procedure**

Comment: In the case of local remedies, often the payment of the tax assessed can be deferred until a decision upon the remedy is reached. In ICC’s view, such a deferral should also be available in the case of a MAP. Taxpayers are often forced to settle cross border related disputes since a settlement offers a reduction in the tax payable and thus this might for many taxpayers be the only chance to afford the payment of any additional tax due. ICC thinks it is peculiar that in cross border related cases – which should safeguard a counter adjustment and therefore related relief if the assessment is correct – often no such deferral is available. ICC recommends each contracting state to provide for a deferral of the amount of double taxation until such time as resolution is achieved (except in circumstances of jeopardy).
OPTION 18 – Clarify issues connected with time limits to access the mutual agreement procedure

Comment: ICC supports this option as improvement to MAP access is provided by removing obstacles due to timing issues. It is in the interest of all parties to have clarity on time limits (“time” is identified above as obstacle 5 above).

ICC particularly supports the second bullet point as it ensures access to MAP relief even though domestic law might prevent it according to time limits.

ICC recommends, ensuring better implementation of the whole option, strengthening the wording of “could commit” to “should commit”.

OPTION 19 – Clarify issues related to self-initiated foreign adjustments and the mutual agreement procedure

Comment: ICC supports this option. Self-initiated adjustments seem to inevitably make bilateral disputes more difficult to resolve. Today, most countries resist self-initiated adjustments that are negative to their own revenue results. Accordingly, such clarification would be a materially positive element, including coordination with the ME MAP.

Unfortunately, no indication is given on how clarification to articles 7, 9 and 25 could be made. One possibility would be to extend Art.25.1 (which provides for the resolution of double tax issues following action of one or both States; but excluding the action of the taxpayer such as by self-initiated adjustment) to the action of the taxpayer in specified circumstances. An example of such a circumstance could be “if the action is made in accordance, in the taxpayer’s opinion, with the arm’s length principle”.

OPTION 20 – Ensure a principled approach to the resolution of MAP cases

Comment: ICC supports this option. Fair and objective negotiations should be the corner stone of MAP. ICC recommends that the wording be strengthened from “could commit” to “should commit.”

The second bullet point suggests using Art. 25.3 to resolve interpretive issues: in this case, Art. 25.3 should be reworded, as “shall endeavour” is simply not strong enough to achieve the goal mentioned in this option.

ICC notes that many complex MAP proceedings are resolved via profit split methodologies that are, often, much simpler in approach than the literal provisions of the guidelines. Accordingly, the work being done in other BEPS Actions can facilitate achieving this option.

OPTION 21 – Improve competent authority co-operation, transparency and working relationships

Comment: ICC supports the proposals set forth in option 21. However, ICC again highlights that countries “should” commit to these obligations. In particular, ICC very strongly supports the notion that
taxpayers be permitted to make presentations to competent authorities to clarify and facilitate the shared understanding of the relevant facts and issues. Taxpayers are uniquely positioned to provide this information and taking advantage of their expertise should improve dispute resolution. Presentations to the competent authorities may also speed up the resolution of disputes. As noted in the Discussion Draft, face-to-face meetings may allow for more open discussion to trigger bilateral focus and preparation. These advantages would also result from taxpayer presentations to competent authorities.

**OPTION 22 – Policy issues: Increase transparency with respect to MAP arbitration**

**Comment:** ICC supports this option which proposes deleting footnote 1 in Art. 25 and modifying paragraph 65 of the corresponding commentary. It is useful for countries to set forth their positions on such an important topic. Eliminating the footnote would require countries to enter an explicit reservation (or observation) which would explain their views more clearly.

The experiences in arbitration in other areas would provide useful guidance on how this can best be achieved.

**OPTION 23 – Policy issues: Tailor the scope of MAP arbitration**

**Comment:** ICC strongly supports arbitration while understanding that some countries are not willing to accept this at this time (due in part to the obstacles). In the absence of broadly applicable arbitration, ICC encourages countries to take incremental steps to move in the direction of arbitration. Therefore, ICC would support all of the options mentioned as possible steps towards broader mandatory dispute resolution. ICC agrees that it would be especially important that any limits on arbitration should be expressly defined in the ratified treaty document.

**OPTION 24 – Policy issues: Facilitate the adoption of MAP arbitration following a change in treaty policy**

**Comment:** ICC strongly supports the rapid proliferation of MAP arbitration. Therefore the use of most favored nation clauses would be highly appreciated.

**OPTION 25 – Policy issues: Clarify the co-ordination of MAP arbitration and domestic legal remedies**

**Comment:** ICC supports the idea of clarifying the co-ordination between MAP arbitration and national legal remedies. For taxpayers it is crucial to have legal certainty. Therefore it must be predictable under which precise circumstances the decision of an arbitration tribunal can or cannot be enforced in national law. In international arbitration, such certainty is achieved through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), behind which ICC was a key driving force.

Similar arguments apply as to our comments regarding option 16.
OPTION 26 – Practical issues: Amend Article 25(5) to permit the deferral of MAP arbitration in appropriate circumstances

Comment: ICC believes that the period of two years determined in Art.25.5 of the OECD-MA is a sufficient period to give the contracting states a possibility for reaching consensus (reflecting the most recent OECD statistics on time for resolution of MAP proceedings). If in some specific cases, the contracting states desire an extension of this period, they already have the possibility to approach the taxpayer and explain why this extension is necessary or reasonable. Once the taxpayer is convinced of the reasons, it might refrain from initiating the arbitration procedure. In any case, this decision should remain with the taxpayer who is being taxed twice (absent the deferral proposed in the Comment to option 17).

OPTION 27 – Practical issues: Appointment of arbitrators

Comment: ICC believes that more direct language to deal with the practical issues is required and suggests replacing ‘could agree to develop’ with ‘should agree to develop’. ICC agrees that arbitrators’ independence is critical from the standpoint of all parties – public and private – and such independence has been safeguarded by arbitration institutions.

For example, ICC has developed institutional safeguards through the supervision of the International Court of Arbitration as well as working standards on arbitrator’s independence. The ICC International Court of Arbitration’s vast experience with ensuring such independence, will be a reliable source for the research to be conducted in the area of taxation.

ICC underlines that a well-established and worldwide network of experts in developed and developing countries is crucial and notes that it has such a network in place to propose and nominate experts as potential arbitrators through its International Centre for ADR.

OPTION 28 – Practical issues: Confidentiality and communications

Comment: ICC reiterates the comment to option 27 above with respect to the use of direct rather than permissive language. Furthermore, the experience of ICC as the world’s leading arbitral institution - routinely addressing issues of confidentiality and transparency – may provide helpful guidance in this regard.

OPTION 29 – Practical issues: Default form of decision-making in MAP arbitration

Comment: ICC notes that in its initial treaty formulation of dispute resolution issued in 1924 (prior to the process being taken over by the League of Nations), it suggested that in the absence of bilateral agreement, the taxable income should simply be split – leaving both disputing countries with half of it to

tax – if no other settlement could be achieved. Certainly this suggestion has to be viewed in the light of the process it was made in but it still illustrates very well the existing potential for alternative solutions. Other potential alternative dispute resolution should be studied, taking into account the experience and lessons learned in non-taxation areas.

**OPTION 30 – Practical issues: Evidence**

**Comment:** ICC agrees with these comments, which it also contemplates analysing as an element of the comprehensive study in the general comment above.

**OPTION 31 – Practical issues: Multiple, contingent and integrated issues**

**Comment:** ICC concurs.

**OPTION 32 – Practical issues: Costs and administration**

**Comment:** ICC notes that arbitration is not necessarily more expensive than a MAP procedure. Having an arbitration administered by a recognized arbitral institution does not only provide guarantees for a due process and fair trail, it can save costs considering the costs are predictable and manageable (e.g. cost schedules are applied and available). ICC concurs that the fees paid to the legal representatives followed by the arbitrators tend to be the most significant share of the costs of the arbitration.

**OPTION 33 – Address issues related to multilateral MAPs and advance pricing arrangements (APAs)**

**Comment:** ICC concurs.

**OPTION 34 – Provide guidance on consideration of interest and penalties in the mutual agreement procedure**

**Comment:** ICC concurs.

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**The International Chamber of Commerce (ICC)**

**Commission on Taxation**

ICC is the world business organization, whose mission is to promote open trade and investment and help business meet the challenges and opportunities of an increasingly integrated world economy.

Founded in 1919, and with interests spanning every sector of private enterprise, ICC’s global network comprises over 6 million companies, chambers of commerce and business associations in more
than 130 countries. ICC members work through national committees in their countries to address business concerns and convey ICC views to their respective governments. ICC also provides essential dispute resolution services, foremost among them the ICC International Court of Arbitration, the world’s leading arbitral institution, and through its International Center for ADR.

The fundamental mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization. ICC conveys international business views and priorities through active engagement with the United Nations, the World Trade Organization, the Organisation for Economic Co-Operation and Development (OECD), the G20 and other intergovernmental forums.

The ICC Commission on Taxation promotes transparent and non-discriminatory treatment of foreign investment and earnings that eliminates tax obstacles to cross-border trade and investment. The Commission is composed of more than 150 tax experts from companies and business associations in approximately 40 countries from different regions of the world and all economic sectors. It analyses developments in international fiscal policy and legislation and puts forward business views on government and intergovernmental projects affecting taxation. Observers include representatives of the International Fiscal Association (IFA), International Bar Association (IBA), Business and Industry Advisory Committee to the OECD (BIAC), Business Europe and the United Nations Committee of Experts on International Cooperation in Tax Matters.
ICC - International Chamber of Commerce, United Kingdom

About ICC UK

The International Chamber of Commerce (ICC) is the world’s largest business organization with a network of over 6.5 million members in over 130 countries.

The ICC United Kingdom Tax Committee (ICC UK) promotes the transparent and non-discriminatory treatment of foreign investment and earnings that eliminates tax obstacles to cross-border trade and investment.’

This document constitutes ICC UK’s submission on the provisions in the OECD’s Multilateral Draft Instrument (the “Draft Instrument”), which relate to proposals to amend Article 25 of the OECD Model Tax Convention to introduce minimum standards (the “Minimum Standards”) and best practices for the resolution of international tax disputes using the MAP. This submission also contains proposals relating to the introduction of mandatory binding MAP arbitration (MBA), which we maintain is essential to the dispute resolution process.

Recommendations

The Minimum Standards

We welcome the introduction of the Minimum Standards. We maintain that it is crucial that the Minimum Standards effectively address barriers to entry and prevailing uncertainty that currently exists for taxpayers attempting to invoke the MAP. The Minimum Standards should also act to ensure that MAP disputes are resolved in timely fashion.

We consider that the effect of the Minimum Standards will be limited if they are not enforced by contracting states and therefore it is crucial that compliance with the Minimum Standards is regularly reviewed and where necessary measures are taken to improve compliance.

We submit that the Minimum Standards should be extended to cover MBA in addition to the MAP.

MBA and Taxpayer Participation

We welcome the introduction of MBA. To improve the accessibility of the MAP and MBA, we consider that taxpayers should be able to participate independently in both the MAP and MBA processes.

Ultimately, taxpayers should have an independent right to call for a dispute to be resolved through MBA, whilst also being able to participate formally in the arbitration process.

Background to ICC UK’s Submission

In drafting this submission, we have used information and data collected from a survey of large UK based international corporates conducted between April and June 2016 (the “Survey”). The Survey was
initiated to collect a fact base regarding the resolution of international tax disputes with a view to responding to the BEPS Action 14 agenda.

The Survey focused on UK corporates' practical experiences of the current MAP and arbitration processes in the OECD Model Tax Convention and the EU Arbitration Convention (EUAC) in relation to disputes between the 20 countries that have agreed to commit to mandatory arbitration. The Survey sought respondents' views on the OECD's proposals to introduce an optional provision for a mandatory binding arbitration procedure as part of the MAP and for minimum standards to be introduced for disputes resolved through the MAP. In total, the Survey collected data on 58 international tax disputes.

We acknowledge that many of the Minimum Standards focus on the commitment by contracting states to behavioural changes when dealing with MAP disputes (e.g. commitment to timely resolution, ensuring Competent Authorities (CAs) have requisite authority and sufficient resources etc.). On this basis, we accept that the proposed Minimum Standards may not be appropriate for inclusion in the commentary of the OECD Model Tax Convention and will be taken into account in the terms of reference and assessment methodology as envisaged under Annex A of the BEPS Action 14 Final Report.

Summary of ICC UK's Survey Results

The Survey highlighted that for UK corporates, corporation tax was by far the most commonly disputed tax, while transfer pricing was overwhelmingly the most frequent issue in dispute. Disputes about liability for tax (residence/permanent establishment issues) also regularly arose.

UK corporates consider that a MBA procedure is an essential safeguard and that either one of the contracting states, or the taxpayer should be able to call for a dispute to be resolved through arbitration.

On balance, there did not seem to be a noticeable difference in how tax authorities in different contracting states use the MAP and the bilateral investment treaty does not seem to be a route commonly adopted when resolving international tax disputes.

The survey underlined that UK corporates are concerned that the current process to resolve international tax disputes is too lengthy. They welcome the introduction of the Minimum Standards but remain concerned that the effect of new robust Minimum Standards will be limited without effective enforcement mechanisms to ensure compliance by all contracting states.

The Survey highlighted that current compliance with MAP obligations and application of the Manual on Effective Mutual Agreement Procedures (MEMAP) is variable. Whilst examples of good practice were found in some states, we also found a number of specific examples of barriers to entry to or the effective utilisation of existing MAP processes in a number of contracting states.

Consequently, whilst ICC UK welcomes the introduction of a peer review mechanism we ask the OECD to carefully consider whether the peer review mechanism alone will be sufficient to ensure compliance with the Minimum Standards and proper application of the MAP.
We also strongly recommend that the framework for implementation of mandatory arbitration under BEPS Action 14 includes measures to ensure that barriers to entry and effective utilization do not arise.

**ICC UK’s Submission on the Draft Instrument**

We have detailed below the various submissions that we wish to make in the context of dispute resolution and the Draft Instrument.

**Mandatory Binding Arbitration (MBA)**

We consider that the arbitration procedure should be mandatory. Furthermore, we maintain that there must be a requirement to resolve a dispute by way of discussion within a certain period, after which the dispute should be referred for arbitration. This is in accordance with para 5 of Article 25 of the OECD Model Tax Convention. This needs to be mandatory subject only to agreement by the parties, including the taxpayer(s) that a delay should be allowed (e.g. when the contracting states are nearing agreement).

The Survey highlighted clear support for a MBA procedure, with 100% of respondents considering that the introduction of a MBA procedure is either "necessary" or "desirable".

Arrangements for proceeding to binding arbitration will also need to cover those cases where a contracting state has failed to submit a position paper in defence of adjustments that it has proposed.

In our view, it is crucial that a dispute can proceed to MBA notwithstanding that a position paper has not been provided by one of the contracting states. This is particularly important where a contracting state has assessed a taxpayer for additional tax that is then disputed by the taxpayer but the contracting state fails to progress discussions by delaying the production of a position paper. Under the current dispute resolution framework, in such circumstances, the taxpayer could be left with having to pay the disputed tax, without being able to independently call for the dispute to be resolved. A contracting state should not be able to frustrate progress towards the resolution of a dispute by its failure to engage with the process.

Consequently, we suggest that taxpayers should have the right to call for a dispute to be resolved by MBA if a position paper has not been provided within a certain time-period. In such circumstances, we consider that the arbitrator should be able to determine the dispute without receiving the position paper. We believe that furnishing taxpayers with these rights will encourage contracting states to provide position papers and attempt to resolve tax disputes in a timely-manner.

**Ensuring Compliance with the MBA**

We note that the OECD intends to introduce a peer to peer review procedure (see 1.6 of the Final Report) to act as a deterrent to prevent contracting states failing to comply with the Minimum Standards.
The proposed peer review procedure does not currently extend to MBA. We recommend that the OECD considers extending the peer review mechanism to cover the MBA procedure.

Once implemented, we consider that it is essential that contracting states comply with both MBA and the revised MAP. We recognise that compliance with the existing dispute resolution procedures currently varies amongst contracting states.

The Survey highlighted that UK corporates have found both Spain and the Netherlands receptive to MAP applications and barriers to entry are not imposed to prevent the MAP being invoked. Notably, in Spain, domestic processes are not used as a barrier to invoking the MAP; rather, domestic processes are paused when the MAP is invoked and are not resumed until the MAP has been completed.

However, the Survey also identified several countries which actively seek to discourage resolution of international tax disputes through the MAP, by imposing barriers to prevent, or delay its effective use.

For example, several corporates cited issues invoking the MAP or the EUAC in Italy. Corporates mentioned complex interactions between Italian domestic processes and the MAP, whereby corporates were prevented from invoking the MAP until domestic processes for dispute resolution had been exhausted, but once domestic processes had been completed they were then prevented from invoking the MAP on the basis that a decision made in the Italian courts should be considered final and therefore, the MAP could no longer be pursued.

In Italy, MAP/EUAC settlements also appear to attract significantly higher penalties than those that would apply to a dispute resolved through administrative processes. The risk of higher penalties discourages corporates from invoking the MAP.

Instances were also cited of German tax authorities discouraging the use of the MAP by informing taxpayers that the adjustment being sought would be considerably greater if a claim to the MAP were made and letters were signed under which those rights were then forgone by way of contractual waiver. This is also the case in relation to EUAC claims, despite such positions being forbidden in the EUAC Code of Conduct.

Italy and Germany are not the only territories to deter access to the MAP and all of this leads ICC UK to conclude that it is vital that compliance with MBA procedures and the MAP is effectively monitored. We recognise that the survey work we have carried out to date does not provide a fully comprehensive picture of the position in contracting states, but believe it is a clear indication that further work in this area is needed.

We are concerned that monitoring compliance by way of a peer to peer review procedure alone may not be adequate to incentivise contracting states to implement and fully comply with effective MAP/MBA process and we seek reassurance from the OECD that the peer review mechanism will be sufficiently robust to safeguard compliance.
Further, we seek clarity from the OECD as to how the peer review panel is intended to operate. We suggest that taxpayers (and representative bodies such as ICC UK) should be afforded the right to submit evidence to the review panel about contracting states that have imposed barriers to entry or effective use of the MAP/MBA process. Given that taxpayers may be unwilling to disclose information directly to the review panel, we recommend that the OECD considers whether information could be disclosed to an intermediary, who then reports to the review panel on an anonymised basis. This process could be combined with the introduction of procedures enabling taxpayers to "whistle-blow" where MAP/MBA procedures are not being followed.

We would be willing to work with the OECD to explore further options in this regard, to ensure that taxpayers are able to submit evidence to the review panel, without prejudicing their future negotiating position with contracting states.

Given the results obtained by the Survey, we ask the OECD to carefully consider whether a peer review mechanism alone will be sufficient to monitor compliance with the MAP/MBA procedures.

We suggest that additional mechanisms may be needed to incentivise contracting states to comply; for example, the OECD could record and monitor any instances where contracting states refuse to allow the MAP to be invoked. Records where MAP applications have been refused could then be made publicly available. We believe that the risk of negative publicity may incentivise contracting states to comply with the requirements of the new dispute resolution process.

We would be willing to work with the OECD to develop these mechanisms and ensure that contracting states are properly incentivised to fulfil their obligations under the MAP/MBA procedure.

**Taxpayer involvement in the MBA Procedure**

We consider that the taxpayer should be able to call for a dispute to be resolved through arbitration. Ultimately, the ability to refer a dispute to arbitration should lie with either contracting state or the taxpayer. Large corporates would generally prefer that the taxpayer's ability to refer a dispute to arbitration should not be restricted where the two contracting states have agreed the issue between themselves.

The Survey highlighted clear support from UK corporates for taxpayers having greater involvement in the arbitration process. 100% of respondents considered that either the contracting states or the taxpayer should be able to call for a dispute to be resolved through arbitration, whilst over 90% of respondents considered that taxpayers should have a right to participate formally in the arbitration process, including the hearing before the arbitrator.

Ultimately, UK corporates want taxpayers to have an independent right to participate formally in the arbitration process, preferably including the right to refer a case to arbitration even where the two contracting states have agreed the issue between themselves but not to the satisfaction of the taxpayer. On this basis, we submit that when devising the MBA procedure, taxpayers should be afforded an independent right to participate formally in at least certain aspects of the process.
**The Minimum Standards**

We welcome the introduction of Minimum Standards that should be adopted and followed by contracting states when resolving disputes through the MAP.

We note that the proposed Minimum Standard 1.3 will require "countries to commit to a timely resolution of MAP cases" and those countries should "seek to resolve MAP cases within an average timeframe of 24 months".

We welcome a commitment to resolve MAP cases in a timely manner and consider that the imposition of a deadline of 24 months would be an improvement on the status quo, where many MAP disputes take significantly longer than 24 months to be resolved. We were also told of cases where there is a failure to agree a clear starting date for the commencement of the 24 month period.

The Survey underlined that UK corporates consider that there are often unreasonable delays in reaching a resolution, or making progress in resolving international tax disputes through MAP. There was consensus amongst the respondents that the time taken to resolve disputes needs to be addressed in the Minimum Standards. Indeed, many respondents suggested that an actual deadline for resolving tax disputes should be introduced. This is clearly easier where there is MBA as the matter can be referred to arbitration.

The Survey provided a number of examples where contracting states had seemingly engaged in delaying tactics when resolving a dispute through MAP. Belgium, Ireland and Italy were cited as countries that had been slow to resolve MAP disputes. Indeed, in one case, a similar tax dispute arising in both Belgium and the Netherlands, took two and a half years longer to resolve in Belgium than in the Netherlands. We consider such delays to be unacceptable.

We welcome the introduction of a peer to peer review process to monitor countries' compliance with the Minimum Standards. We recognise that the proposed Minimum Standard 1.6 will require countries to "commit" to having their "compliance with the minimum standard reviewed by their peers in the context of the Forum on Tax Administration MAP Forum".

However, as noted above in relation to MBA procedures, we remain concerned that a peer to peer review may not sufficiently incentivise contracting states to comply with the Minimum Standards. We question what the consequences will be if a contracting state fails to resolve a dispute in a timely manner. We contend that unless effective compliance incentives exist, the Minimum Standards will be ineffective in ensuring that disputes are resolved through the MAP in a timely manner. Therefore, as noted above, we ask the OECD to consider introducing additional mechanisms to ensure that the effectiveness of the Minimum Standards is not curtailed.

The Survey indicates that UK corporates remain sceptical about the effectiveness of the Minimum Standards on the basis that there is concern that they will not be followed in all participating states.
We also consider that the Minimum Standards do not operate to reduce barriers to entry or effective use that exist in different countries in relation to invoking the MAP. As indicated above the Survey highlighted various specific barriers; it is likely that there are more.

Therefore, we further ask the OECD to consider extending the Minimum Standards to ensure that they operate to reduce barriers that may exist in different contracting states to prevent taxpayers invoking the MAP.

**Conclusion**

We welcome the introduction of both the Minimum Standards and MBA. However, we maintain that it is vital that the Minimum Standards are extended to address barriers to entry and effective utilization and the prevailing uncertainty that currently exists for taxpayers attempting to invoke the MAP. We also submit that the Minimum Standards should cover the new MBA procedure.

We consider that safeguarding compliance with both the Minimum Standards and the MBA procedure is essential to ensure that international tax disputes are resolved effectively and to the satisfaction of both contracting states and the taxpayer. We welcome the introduction of the peer to peer review mechanism and encourage the OECD to carefully consider whether it will adequately incentivise contracting states to comply with fully effective MAP/MBA procedures, or whether additional compliance mechanisms may be required.

We consider that taxpayers should be able to participate independently in both the MAP and MBA processes. Ultimately, taxpayers should have an independent right to call for a dispute to be resolved through MBA, whilst also being able to participate formally in the arbitration process.
Dear Secretariat,


Technical issues that should be taken into account in adapting the BEPS measures to modify or supersede existing provisions of bilateral tax treaties that may vary from the OECD model, including:

a) Existing provision or types of provisions that serve the same purpose as the BEPS measures and that would need to be replaced

b) Existing provisions or types of provisions that are similar to BEPS measures but that would need to be retained

One of the fundamental characteristics of a multilateral instrument is the need to cover a substantial breadth of topics, a situation that makes fragmentation an issue to consider during the implementation of such instrument.

The improbability of contriving a homogenous document because of the plurality of criteria that derives from the number of parties involved, generates an atmosphere of uncertainty to the Contracting States when internally adopting the provisions convened therein, given the ambiguity of the effects that the corresponding modifications will have on the bilateral negotiations already established between countries.

The alterations, adjustments and modifications of existing provisions contained in bilateral tax treaties previously negotiated by Mexico, as a consequence of the internal adoption of BEPS measures incorporated in the multilateral instrument, would not bear major technical issues in its implementation, since Mexican law follows the general principle’s maxim of lex posterior derogat priori, or, in other words, that recent law prevails over an inconsistent, earlier law.

Notwithstanding, we believe a particular method or system should be enforced in order to distinctly specify which provisions are to be superseded by more recent BEPS measures and which are to be overruled, abrogated or derogated.

Contracting States must have detailed agendas or templates of the agreed multilateral and bilateral provisions of similar nature, in order to address the complexity involved in the process of internally approving vaguely-defined clauses compared to those previously negotiated with different countries through the bilateral tax treaties; i.e., Mexico’s Senate may have an arduous task in determining which provisions are to be superseded, overlapped or derogated, e.g., which concept of “permanent establishment” to adopt between the multilateral instrument agreed notion and the extent of interpretations previously convened in bilateral negotiations in that aspect.
The problem increases with the fragmentation of the content of said multilateral instrument, wherein its content will be in constant confrontation with the multiplicity of concepts and clauses that have been previously and bilaterally convened.

Another issue that arises with fragmentation is that of gathering signatures of plenipotentiaries for treaty purposes. Should the Senate gather an overall signature of the plenipotentiaries for the Contracting States for the totality of the multilateral instrument although some of them would not agree on certain provisions? Hence, should the Senate collect signatures depending on the fragments of the multilateral instrument that the parties agree upon?

The approach to be taken in developing the optional provision on mandatory binding MAP arbitration, taking into account that it would need to serve the needs of the countries that have already committed to implement mandatory binding arbitration, as well as countries that are considering committing in the future.

An important problematic that may arise at the moment of implementing the MAP arbitration provisions of the multilateral instrument is that several Contracting States, which had already executed a bilateral tax treaty between each other and did not agree, at the moment, on a criterion regarding MAP arbitration, may decide that they do not want to include MAP arbitration provisions with interested signatories with whom they do not share the same criteria over such subject matter.

The abovementioned issue aggravates for those Contracting States that are not already involved in the development of the multilateral instrument and decide to adopt it afterwards, since some of these Contracting States may have never discussed or negotiated with each other their specific standpoints on MAP arbitration, a problem that would provoke even further fragmentation.

Likewise, as previously mentioned, the variety of criteria derived from the number of parties involved creates uncertainty to the Contracting States; specifically, this will take place at the moment that the Contracting States internally adopt the multilateral instrument and the MAP arbitration provisions agreed upon.

This uncertainty could be avoided by establishing in the multilateral instrument, specific clauses to provide the scope of the MAP arbitration provisions and to confer the possibility for the Contracting States to decide with which signatories (jurisdictions) they would agree to implement such provisions and with which they would prefer not to, based on the criteria that each has regarding MAP arbitration. As an example, Section 8 of the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports establishes that the Competent Authorities must provide notification to the Coordinating Body Secretariat, at the time of signature of the Agreement, that includes, among others, a list of the jurisdictions of the Competent Authorities with respect to which it intends to have the Agreement in effect.

The types of guidance and practical tools that would be most useful to taxpayers in understanding the application of the multilateral instrument to existing tax treaties.
We believe that the addition of a practical guide or manual to the full-length version of the OECD Model Tax Convention on Income and on Capital would be extremely convenient so as to provide means to resolve, on a systematic basis, the most common problems faced by the international community when approaching confrontations with previously-agreed bilateral tax treaties caused by the application and interpretation of the content of the multilateral instrument.

Likewise, an effective mechanism in order to guide the taxpayers in implementing the multilateral instrument would be periodical online publications—previously discussed and agreed by its members—on the OECD webpage, along with specific explanations on case to case analysis of a public, non-monetary nature, to be shared among its users.

**Mechanisms that could be used to ensure consistent application and interpretation of the provisions of the multilateral instrument.**

We believe that one mechanism that would be feasible and desirable to ensure the application and interpretation of the provisions of the multilateral instrument would be that a specific Group integrated by different members of the OECD as it is the Working Party 1, or even the same Ad Hoc Group that is already developing the multilateral, should have the empowerment and faculties to observe and resolve doubts and problems of interpretation that may rise during the implementation of the provisions of the multilateral and that may be raised by a taxpayer from one of the Contracting States.

These questions could be resolved through the same website of the OECD, or else, through a specific website that the Ad Hoc Group establishes, in order to resolve such problems. As an example, the Working Party 10 in charge of the Global Forum for Automatic Exchange of Information already has this kind of mechanism through which it resolves several problems related with the standard of exchange of information, and issues several documents related with this subject matter, but always consulting first with Working Party 1 in order to avoid contradictions.

**Other Considerations**

i) **Entry into force**

Another major concern regarding the implementation of the multilateral instrument is the “timing” to enforce its application. Once again, because of the plurality of subjects (Contracting States) involved in its genesis and consequent application, the dates of commencement will be inevitably stretched and delayed as a consequence of the internal process of authorization and adoption of the multilateral that according to its sovereignty the Contracting States have to attend.

The stalling of its entry into force could be aggravated by Contracting States, whose internal procedures of adoption are characteristically stagnant and complex, which may take between five and seven years to approve the tax treaties entered into by their administrations.
Also, as a consequence of the abovementioned factors, a myriad of interpretations and negotiations between Contracting States of highly country-populated continents, such as Europe, would give way to tax spheres of restricted benefits created by the atomized negotiations of bilateral tax treaties and, therefore, to strategic planning by the tax administrations involved, consisting in conveniently delaying the entry into force of the multilateral instruments with the simple objective to restrict the benefits contained therein.

In other words, tax administrations would hope to delay the commencement of the multilateral instrument so as to grant lesser benefits because of the constricted conception of limitation of benefits foreseen in their bilateral treaties, as opposed to the extensive conception that could be included when signing such multilateral instrument.

* * *

The participation of IFA Grupo Mexicano, A.C. is made on its own behalf exclusively as an IFA branch and in no case in the name, or on behalf, of Central IFA or IFA as whole.

We hope you find these comments interesting and useful. We remain yours for any questions or comments you may have.

Sincerely,

IFC Grupo Mexicano, A.C.
ICI Global

Dear Jesse:

ICI Global\(^6\) welcomes the opportunity to provide input on the Public Discussion Draft\(^6\) regarding the multilateral instrument (MLI) to implement BEPS Action 15\(^5\) and in particular on how the minimum standards will be applied to collective investment vehicles (CIVs).\(^6\) Most specifically, as we discussed recently, ICI Global suggests that countries be permitted to specify in a memorandum how they believe the BEPS Action 6\(^5\) minimum standards for treaty eligibility should be applied to CIVs resident in their jurisdictions. This information would be posted on the OECD’s website similarly to how country-specific tax residency guidance is provided on the OECD’s automatic exchange of information (AEOI) website.\(^6\)

We recognize that the application of BEPS Action 6 to CIVs is not raised directly by the Public Discussion Draft. Input is requested, however, on the “types of guidance and practical tools that would be most useful to taxpayers in understanding the application of the multilateral instrument to existing tax treaties.”

The minimum standards of BEPS Action 6, and specifically the Limitation on Benefits (LOB) clause and/or the Principal Purpose Test (PPT), will be key provisions of the MLI. Additional guidance regarding

\(^6\) The international arm of the Investment Company Institute, ICI Global serves a fund membership that includes regulated funds publicly offered to investors in jurisdictions worldwide, with combined assets of US$19.3 trillion. ICI Global seeks to advance the common interests and promote public understanding of regulated investment funds, their managers, and investors. Its policy agenda focuses on issues of significance to funds in the areas of financial stability, cross-border regulation, market structure, and pension provision. ICI Global has offices in London, Hong Kong, and Washington, DC.


\(^6\) A CIV is defined for this purpose consistently with the OECD’s 2010 Report entitled “The Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles” (the “CIV Report”). Specifically, CIVs are defined as “funds that are widely-held, hold a diversified portfolio of securities and are subject to investor-protection regulation in the country in which they are established.” CIV Report, page 3, paragraph 4. Funds that are not treated as CIVs in the CIV Report include “investments through private equity funds, hedge funds or trust or other entities that do not fall within the [Report’s] definition of CIV.” Id.


how these provisions will be applied by each source country to CIVs with different features\(^{67}\) will be of paramount importance for withholding agents and the CIV industry. Consequently, guidance on these provisions will need to be coordinated under the MLI – with, of course, the necessary degree of jurisdictional flexibility.

Guidance also will be needed, we expect, on many other MLI-related issues. This MLI guidance, like the guidance we request on how the MLI will apply BEPS Action 6 to CIVs, will need to address coordination while providing a level of jurisdictional flexibility. Some well-understood procedures will be needed, we submit, for jurisdictions to issue the needed guidance and for the OECD to coordinate that guidance and make it publicly available.

**Prior OECD Consideration of CIVs and Treaty Eligibility**

The OECD, beginning with a Working Party 1 consultation with industry representatives in 2005, spent five years studying extensively the extent to which CIVs should be entitled to treaty relief. The outputs of this effort included: (1) the report prepared in 2009 by the Informal Consultative Group (ICG) in which the ICI participated actively;\(^ {68}\) (2) the CIV Report approved by the OECD’s Committee on Fiscal Affairs (CFA) in 2010 (“which adopt[ed] the ICG’s report with some modifications”); and (3) the inclusion of the CIV Report’s conclusions in the 2010 Update to the OECD Model Tax Convention Article 1 Commentary.\(^ {69}\)

The CIVs that were the subject of the CIV Report are widely-held, diversified, and subject to investor-protection regulation in the country in which the CIV is established. In general, these CIVs have many thousands, sometimes hundreds of thousands, of investors; most of these investors have relatively small accounts. These investors, as the CIV Report explained, lack the financial incentive individually to incur the substantial costs to claim the treaty benefits attributable to the small amounts they have invested. For the CIV, however, it typically is cost effective to make appropriate claims for investor treaty relief.

The benefits provided by CIVs, as the CIV Report noted, include: “allow[ing] small investors to gain the benefits of economies of scale;” “provid[ing] access to a number of markets that might be closed to the small investor;” providing a “highly liquid” investment; and allowing for “highly efficient reinvestment of income.”\(^ {70}\) CIV investors also “benefit from the market expertise and insights of professional money managers” and receive “the benefits of diversification that otherwise would require much greater

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\(^{67}\) As acknowledged in the Commentary to Article 1 of the OECD Model Tax Convention, there are several different models for granting treaty access to CIVs. See OECD (2014), Model Tax Convention on Income and on Capital: Condensed Version 2014, OECD Publishing. DOI: http://dx.doi.org/10.1787/mtc_cond-2014-en.


\(^{70}\) All quotes in this sentence are from CIV Report, page 4, paragraph 8.
investment.” Consequently, the CIV Report noted, “Governments have long recognized the importance of CIVs as a complement to other savings vehicles in terms of facilitating retirement security.”

Special consideration was given by the OECD to CIV treaty eligibility issues for several reasons. First, some source-country Governments were concerned that clear rules were needed to determine when CIVs could claim treaty relief (either in their own right or on behalf of their investors); potential treaty shopping considerations were an element of this concern. Second, some CIVs that are treaty entitled in their own right were concerned that they effectively could not receive treaty relief. Third, CIVs that are not treaty entitled in their own right were concerned that they could not satisfy requirements for proving the treaty eligibility of their investors given the highly intermediated nature of most CIVs’ distribution networks. Finally, some residence-country Governments were concerned that, if CIV investors were not receiving treaty relief to which they are entitled, these investors would claim credits against their residence-country tax for both the foreign taxes that should have been withheld as well as those that should have been recovered; the effect of claiming credits for these excess foreign taxes would be to transfer tax revenues from the investors’ residence countries to a source country. All of these potentially competing concerns were addressed by the ICG’s Report that was approved in 2009 on a consensus basis by the Government delegates and the business representatives and by the CIV Report approved by the CFA in 2010.

The CIV Report effectively acknowledged that Governments may take different approaches to CIV treaty eligibility, and the procedures for establishing the tax residence of a CIV’s investors, depending on the structure of the CIV and the manner in which it is distributed. Some CIVs can be treated as treaty eligible in their own right, the CIV Report stated, because — under the relevant long-standing legal standard — they are persons, residents, and the beneficial owners of their income. The only constraint on treaty eligibility for these CIVs might be the need to satisfy an LOB clause. Other CIVs, the CIV Report stated, can be treated as treaty eligible only to the extent that their underlying investors are treaty eligible — either directly or as equivalent beneficiaries under a treaty between the investor’s residence country (which may not be the residence country of the CIV itself) and the source country. Finally, other CIVs can be treated as transparent, the CIV Report stated, so that their investors (such as pension funds) can claim treaty relief (including treaty exemptions) in their own right.

**The Need for MLI Guidance**

Our overriding concern is that, without clear guidance regarding the extent to which Governments treat CIVs as satisfying the BEPS 6 minimum standard, withholding agents may not provide treaty relief to

71 The quotes in this sentence are from CIV Report, page 4, paragraph 9.

72 CIV Report, page 4, paragraph 10

73 See, e.g., paragraph 6.27 of the Commentary to Article 1 which explains that “the purely proportionate approach set out in paragraphs 6.21 through 6.26 protects against treaty shopping.”
eligible CIVs. These withholding agents could be concerned that they will face substantial liability should a Government conclude later that particular types of CIVs do not satisfy the applicable minimum standard. At a minimum, potential liability concerns almost surely would prevent withholding agents from utilizing any applicable at-source relief mechanism. Such a result is thoroughly inconsistent with the approach advanced by the OECD in the Treaty Relief and Compliance Enhancement (TRACE) implementation package.74

The issue is thus a practical one. While the Commentary to the PPT includes an example regarding the application of the PPT to CIVs,75 general multilateral guidance cannot provide certainty in the bilateral context, given the many different ways in which CIVs are organized and taxed. In other words, if definitive knowledge that a CIV qualifies for treaty relief becomes the standard for treaty relief, it is essential that such knowledge be provided by source countries to withholding agents. Source countries, however, generally cannot make accurate determinations of treaty eligibility without clear understandings of how each country’s CIVs are organized, operated, and taxed. While CIVs, global custodians, and their industry associations can provide this information to source countries, establishing Government-to-Government agreement is more effective.

Residence country Governments with developed CIV markets, therefore, should have a strong incentive to provide source countries with clear explanations of why their CIVs are treaty eligible. These residence country Governments likewise should have a strong incentive to seek agreement from source countries that their CIVs are treaty eligible and satisfy the BEPS 6 minimum standard.

Proposal

As the MLI is designed to accelerate BEPS implementation and adoption of treaty-related minimum standards, the MLI is a logical vehicle for advancing certainty regarding CIV treaty eligibility. Our proposal has two components.

First, residence country Governments should provide memoranda regarding the treatment of their CIVs, and the OECD should maintain a publicly available repository of the memoranda. Similar information is collected and maintained today by the OECD, as noted above, on its AEOI website. For maximum efficiency, these memoranda should be standardized. Each memorandum would state whether a residence country believes its CIVs are persons, residents, and treated as beneficial owners under their domestic laws.76 Explanations supporting these positions also should be provided. Finally,


75 Action 6 Report, pg. 60, Example D.

76 While we recognize that beneficial ownership generally is determined under the law of the source country, a residence country’s views (with an accompanying explanation) may be helpful in identifying areas for which a Government-to-Government memorandum of understanding (MOU) might be useful.
the memoranda would describe how each residence country believes the minimum standards should be applied to its CIVs. National associations or others interested in ensuring that CIV investors receive the treaty relief to which they are entitled surely would assist residence countries in crafting these memoranda.

The advantage of this first component of our proposal is that every source country and every withholding agent would have access to the same information. Everyone would know how a particular country’s CIVs are organized, operated, and taxed, as well as whether or not a residence country Government believes that its CIVs are treaty eligible. Everyone also would know how a residence country believes the minimum standards should be applied to its CIVs.

For example, if a residence country’s CIVs are sold only domestically, the Government might state that its CIVs generally should be treated as satisfying both an LOB and a PPT without additional documentation; the memorandum also could explain why this treatment is appropriate. Of course, any generally-applicable rules for providing treaty relief, such as mechanisms to prevent dividend stripping, would apply equally to CIVs and other investors.

Second, the OECD should provide a mechanism by which a source country, based upon the information provided, can agree that particular types of CIVs resident in other jurisdictions are treaty eligible and meet the minimum standard. Specifically, the OECD should include on its website a section in which each source country could list relevant residence countries and identify those vehicles that it treats as treaty eligible under the MLI; this guidance would be caveated, as noted above, so that any generally-applicable rules designed to prevent inappropriate activities (such as dividend stripping) still would apply. A source country’s documentation procedures (in general or for specific types of CIVs) also should be provided.

The advantage of this second component of our proposal is the certainty provided. Source countries will have confirmed publicly and in a readily-accessible format that specific types of CIVs are treaty eligible and meet the minimum standard. Withholding agents will be able to rely upon this information without a risk of being assessed penalties and claw backs for previously provided relief. CIVs and their investors will receive the treaty relief to which they are entitled. Finally, residence countries will not be providing tax relief (such as foreign tax credits) for amounts withheld that should have been eligible for treaty relief.

The uncertainty created by the lack of bilateral guidance regarding how countries will apply the minimum standards threatens all of the excellent work done by the OECD over the past ten years (including in the BEPS Action 6 Final Report) to improve treaty access for CIVs and their investors. Moreover, as the MLI will apply minimum standards to substantially more countries, many of which do not have substantial experience with these minimum standards, treaty-related uncertainties likely will become even more pronounced.

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We appreciate your consideration of the many benefits that would arise from adopting our proposal. Please feel free to contact me (at lawson@ici.org or 001-202-326-5832) at your convenience if you would like to discuss this issue further or if we can provide you with any additional information.

Sincerely,

[Signature]

Keith Lawson
Deputy General Counsel – Tax Law
These comments are submitted by the “International Tax Group”, an organization that since 1970 has dedicated itself to advancing the study of international tax law with a significant focus on tax treaties, and the publication of co-authored tax articles in respect thereto. The comments are submitted in response to the Public Discussion Draft issued on 31st May 2016. Details of the members of the International Tax Group who took part in the preparation of these comments are included at the end of this document.

The Public Discussion Draft requests comments on points raised under four bullet points set out on page 3 of the Draft. Before commenting on those issues, we would like to make two preliminary comments.

**Preliminary Comments**

This is a public consultation without a draft document in the public domain on which one may comment. We find this surprising and regrettable.

The Public Discussion Draft states that the multilateral instrument (“MLI”) is “the subject of intergovernmental discussions in a confidential setting”: we take that to mean that the draft is not yet ready to be released for proper public consultation. We assume that this is a temporary situation and we strongly encourage that the same degree of transparency that has characterized the BEPS initiative more generally be brought to bear on this important aspect of the process.

The purpose of the MLI is to implement the tax treaty-related BEPS measures. The content of those measures is already in the public domain: the proposed wording of the measures to insert into bilateral tax treaties has already been made public, and any additional or finalised wording (for example, the wording in relation to arbitration) is being developed separately from the main work on the MLI. Essentially, as we understand it, the work of the Ad Hoc Group is to draft the operative provisions of the MLI which give effect to the insertion of the already-published, substantive provisions. The drafting relates, therefore, primarily to issues such as: compatibility clauses, reservations, entry into force of the MLI, language versions and similar procedural matters. We find it hard to understand the need for confidentiality in those discussions. On the contrary, the publication of a draft of the MLI for public comment has the potential to identify in advance technical difficulties or problems with the MLI by exposing it to public comment and thereby gaining the benefit of a broader range of expert perspectives.

We express the hope that the Ad Hoc Group reconsiders its position and releases a copy of the draft MLI for public comment as soon as possible.

Our second general comment relates to the way in which the MLI is intended to operate, and derives in a sense from the fact that no draft has been made public. Surprisingly, we find it is still not clear how the MLI is intended to operate in practice. What are the function and the content of the MLI?
There are, as we see it, at least two ways in which the MLI might operate.

First, it might modify existing bilateral conventions\(^{77}\) by inserting the substantive provisions that have been developed during the BEPS Process. Having inserted those provisions, the MLI would, in a sense, then fall away, and attention in practice would focus exclusively on the existing bilateral conventions, now modified in their wording by the MLI.

Secondly, the alternative way in which the MLI might operate would be by bringing an element of multilateralism into the world of bilateral conventions. That is, where a bilateral convention had been modified by the MLI, it would be necessary to turn to the MLI for the wording of the modifying provision, and read the bilateral convention along with, and as modified by, the multilateral instrument. Thus, rather than seeking to delete and replace wording in existing bilateral conventions, within the scope of matters covered by the MLI one would turn from the bilateral convention to the multilateral instrument for the relevant wording.

This is an important distinction, particularly when one considers issues such as the commentary/explanatory statements to the new wording contained in the MLI. It is also important as part of any future move towards further multilateralization of the international tax rules or further, similar multilateral instruments.

To the extent that we have heard comments at public conferences from officials involved in the work of the Ad Hoc Group, we understand that the approach appears to be leaning towards the first of these options. That is, the MLI would modify existing bilateral conventions, and then its function would have been completed.

To a degree, we think that taking that approach is a pity. First, it misses an opportunity to move towards common, internationally-agreed wording on provisions relating to double taxation. Second, we consider that this approach may create inherent practical difficulties. It requires consolidated versions of all existing bilateral treaties as modified by the MLI. To achieve these consolidated versions, it will be necessary to identify precisely the wording that is modified by the provisions in the MLI: that task is relatively easy where the bilateral convention is based upon the OECD or UN Model, but a far harder task where the wording departs from either of those Models (which we take to be one of the problems raised by the first bullet point). We can see that there is a practical attraction in having a consolidated version of bilateral treaties, as amended by the MLI, rather than having to read each bilateral treaty side-by-side with the MLI. However, this assumes that all states are able to produce and maintain accessible consolidated versions. As explained below, this approach also raises a practical issue over the commentary/explanatory statements to the wording contained in the provisions inserted by the MLI.

\(^{77}\) In these comments we refer to bilateral conventions though we are mindful of the fact that there may be some multilateral conventions that are modified by the MLI; for example, the convention between the Nordic Pact countries.
To the extent that the direction of travel has not already become fixed by the Ad Hoc Group, we would express the hope that the route of multilateralization might be reconsidered.

We turn now to the specific matters on which the request for input was made.

Comments on the First Two Bullet Points

It is not entirely clear what issues are being raised by these two bullet points.

The first bullet point refers to existing provisions of bilateral tax treaties that vary from the OECD Model, including those that serve the same purpose or that are similar to BEPS measures. Perhaps we could illustrate our understanding of this by an example. The wording developed through BEPS Action 7 (Preventing the Artificial Avoidance of Permanent Establishment Status) includes new wording for the equivalent of Article 5(5) and 5(6) of the OECD Model. It is relatively easy to implement this modification where the bilateral convention is based upon the OECD Model. However, there is a significant number of treaties where, for example, the definition of permanent establishment is contained in the definitions article (often Article 3) and does not follow the content and structure of the OECD Model provision. An example of this is Article 2(a)(k) of the UK-Greece convention of 1953 (which is still in force). This illustrates the difficulty in an approach which seeks to delete and replace wording in an existing convention where that existing convention may not contain the wording which it is intended to delete and replace.

In part this problem is generated by the approach to the operation of the MLI which is discussed in our preliminary comments. If, rather than seeking to delete and replace existing provisions, the MLI seeks instead to modify the convention by applying the overlay of a multilateral rule, we wonder if the problem raised by the first bullet point is alleviated.

We have great difficulty understanding the issue raised by the second bullet point. We will content ourselves by expressing the view that it is highly desirable that a provision on mandatory binding arbitration is widely adopted by parties to the MLI.

Third Bullet Point: Guidance and Practical Tools

The third bullet point requests input on “the types of guidance and practical tools that would be most useful to taxpayers in understanding the application of the multilateral instrument to existing tax treaties”.

We are tempted to provide a short answer: the guidance and practical tools that would be most useful are: a clear commentary/explanatory statements, with a clear legal status, together with specific examples of how the modifications made by the MLI are intended to work in practice. This is particularly
relevant in light of the comment in the Public Discussion Draft that, “because the multilateral instrument
must modify a large network of existing treaties, it cannot provide the level of detail that a bilateral
protocol can.”

We feel, however, that a more detailed and nuanced answer is required.

If one stands back for a moment, the MLI will contain two types of provision.

First, it will contain the text of the substantive provisions that have been developed through the
BEPS Process and that are intended to be inserted or that will otherwise modify existing bilateral
treaties. For example, paragraph 435 of the final report on Action 2 (Neutralising the Effects of Hybrid Mismatch Arrangements) contains the wording of proposed Article 1(2), dealing with income derived through a hybrid entity or arrangement, together with a draft commentary on that provision.

Secondly, the MLI will contain operative provisions which deal with the mechanism by which the
MLI modifies existing bilateral conventions. These provisions will deal with matters such as compatibility clauses, reservations, date of entry into force of the MLI, etc.

These two different types of provisions in the MLI require different guidance and practical tools.

Guidance on, and explanation of, the Substantive Provisions

So far as the first type – the substantive provisions – is concerned, in most cases a draft commentary
has already been developed during the BEPS Process and has been made public in the BEPS Final Reports. There is, however, a number of specific points raised by these draft commentaries.

As a starting point, it is not clear to us at present whether these draft commentaries will be included
in, and given effect by, the MLI or not.

If these draft commentaries are included in the MLI, there is an important distinction that needs to
be made between them and the existing Commentaries to the OECD Model.

The existing Commentaries to the OECD Model are not legally binding, are not part of a legally
binding instrument, and are at least one or two steps removed from a legally binding instrument. That is, they are Commentaries to a Model, which is used to prepare negotiating texts, on the basis of which a specific bilateral convention (which is a binding legal instrument) is concluded. This has given rise to debates and disagreements on the status of the Commentaries, and differences in approach between

78 Unless national law explicitly makes them binding.
countries as to the legal status of these Commentaries as an aid to the interpretation of existing bilateral conventions. 79

By contrast, if the draft commentaries are contained in the MLI, or given effect by the MLI, they will be part of a binding legal instrument and will relate directly to wording that modifies an existing, binding bilateral convention. Such commentaries/explanatory statements included in the MLI are, therefore, much more clearly “context” within the scope of Article 31(2) of the Vienna Convention on the Law of Treaties. 80 This gives a definite legal status to those commentaries/explanatory statements.

Secondly, if the draft commentaries contained in the BEPS Final Reports are adopted as part of the MLI, they will clearly be adopted by a much larger number of countries than the smaller group of OECD Member Countries that formally adopt the Commentaries to the OECD Model.

If the draft commentaries/explanatory statements are contained in the MLI, if they are adopted by a larger number of countries, and if they have the different legal status explained above, then we think it would be helpful if a different term is used for the draft commentaries to distinguish them from the OECD Commentaries. We would suggest that the term “Explanatory Statements” is used in place of the term “Commentary”.

An issue then arises as to how these Explanatory Statements will be updated. If the draft commentaries became simply part of the OECD Commentaries, then they would be updated by the OECD Member Countries, operating through Working Party 1. If, however, these Explanatory Statements are included as part of the MLI, then clearly a much larger group of countries could and should participate in updating these Explanatory Statements.

As a general comment, the draft commentaries have been developed through the BEPS Process by a wider group of countries than had previously been involved in the work of the OECD. We consider that it is desirable that a wider group of countries is involved in adopting and updating the Explanatory Statements to the new substantive provisions given effect by the MLI.

79 There is, for example, a wide variation of approach taken in the courts of the countries represented by the members of the International Tax Group towards the OECD Commentaries. In Australia, for example, courts have taken divergent views as to the weight to be afforded the Commentaries. In Germany the Bundesfinanzhof has regularly stated that the Commentaries are not legally binding upon German courts, but they may be regarded as expressing a learned and important opinion on how to interpret the Model and identical bilateral German agreements. Indian courts often rely on the Commentaries, provided the language of the treaty is similar to the OECD Model. In Italy some Supreme Court decisions recognise expressly the relevance of the Commentaries, though only one isolated decision states it is binding. In Japan the Commentaries are a widely accepted guide to the interpretation and application of provisions of bilateral conventions. In the United States there is a line of cases that has referred to the Commentaries as a source of guidance. Similarly, in the United Kingdom courts have on a number of occasions referred to the Commentaries as an aid to interpretation, though the effect of subsequent changes to the Commentaries is less clear. The same is true in Canada.

80 An interpretation given in an Explanatory Report made by all the parties is “context” for the purposes of the Vienna Convention – see Gardiner, Treaty Interpretation (2nd ed., pp 118-121).
To take an example, we think it is particularly important that an Explanatory Statement on the proposed Principal Purpose Test is adopted and maintained by as wide a group of countries as possible. If, as seems likely, a large number of countries will adopt the PPT, a single agreed Explanatory Statement, with clear examples, adopted, maintained and applied by as wide a group of countries as possible, could be the very best outcome in terms of providing useful guidance and practical tools for taxpayers. We cannot over-emphasise this point.

We understand from comments made by some officials involved in the Ad Hoc Group at public conferences that it is possible that the draft commentaries published in the BEPS Final Reports might simply be adopted and maintained through the Commentaries to the OECD Model. We think that would be a less desirable outcome. It would mean that the guidance provided would only be formally adopted and maintained by the OECD Member Countries. Unless some special mechanism is introduced, only the OECD countries (and not the 90+ countries involved in the development of the MLI) would be involved in updating this guidance. Perhaps most crucial, the draft commentaries would assume the same status as the existing Commentaries to the OECD Model (which, as we have shown above, varies from country to country and is less than satisfactory).

Given the importance attached to guidance and practical tools that will be useful to taxpayers, we consider that every effort should be made to ensure that the Explanatory Statements are widely adopted and applied by countries, have a clear legal status, and that all countries who adopt the wording of the substantive provisions are able to participate in updating those Explanatory Statements.

Guidance on, and explanation of, the Operative Provisions

Turning then to the operative provisions which give effect to the MLI itself, it would be helpful to have some guidance on how provisions (such as those dealing with compatibility clauses, reservations, language versions) are intended to operate.

To avoid confusion, we think it would be helpful if the MLI had a separate Explanatory Report setting out how the operative provisions of the MLI are to be understood. There are precedents for such Explanatory Reports; for example, the Convention on Mutual Administrative Assistance in Tax Matters contains an Explanatory Report which “does not constitute an instrument providing an authoritative interpretation of the text of the Convention, although it may facilitate the understanding of the conventions provisions”.

Once again, some practical examples of how the MLI is to operate would be useful.

Fourth Bullet Point: Mechanisms to ensure consistent application and interpretation
In some respects, our comments on this bullet point follow from the comments on the previous point.

The best way to ensure consistent application and interpretation would be to have Explanatory Statements adopted as part of the MLI by as large a group of countries as possible, and with a clear legal status to those Explanatory Statements.

It may be helpful if a monitoring group of countries is established under the MLI, representing in some way all countries that have participated in the formulation of the MLI, to keep under review the application and interpretation of the substantive provisions inserted by the MLI. Obviously, not every country involved in formulating the MLI could be on the monitoring group, and so some form of representative structure would be needed.

In coming years there will, no doubt, be judicial decisions from different countries on the interpretation of the substantive provisions inserted by the MLI; there will be guidance issued by revenue authorities; there will be competent authority agreements; and there will be arbitration decisions interpreting this wording. It would be helpful if the monitoring group received this material from the countries involved in developing the MLI, and then undertook publication of relevant material that may be helpful in achieving a consistent application and interpretation.

No doubt the monitoring group will develop a list of issues thrown up by practical problems, and may wish to respond to those issues by updating the Explanatory Statements. This updated guidance may constitute a subsequent agreement between all parties regarding the interpretation of the provisions contained in the MLI.

It may be helpful if arbitration decisions relating to the interpretation of the substantive provisions inserted by the MLI could be published, on an anonymised basis if necessary.

If no monitoring group is established, then we assume that the process of giving effect to the draft commentaries would fall to the OECD Working Party 1, and the established process of updating the Commentaries to the OECD Model. We regard that as a less than optimal solution for obvious reasons: not all countries would be involved in discussing and updating the guidance; not all countries would therefore be inclined to follow this guidance, which increases the danger of inconsistent interpretation and application; and it extends to the new guidance the current uncertainties over the status of the OECD Commentaries. Added to this would be the uncertain legal status of subsequent amendments to the OECD Commentaries.

**Authentic texts of the MLI in languages other than English and French**
The Discussion Draft does not explicitly ask for input on the issue of authentic texts of the MLI in languages other than English and French. However, this is clearly an aspect of the consistent application and interpretation of the MLI: a starting point for consistency is that all parties are focusing on the same text in the same language(s).

The Discussion Draft states that the MLI is being negotiated in English and French and is expected to be concluded in only those two authentic languages.

Clearly there are many countries where English or French are not the national language, and where an authoritative text in the national language will need to be prepared, inter alia, for presentation to and/or enactment by the national legislature, particularly where there are constitutional requirements to this effect (for example, but not only, in dualist countries). The substantive provisions inserted by the MLI will also need to be in the same language(s) as the authoritative language(s) of the bilateral treaty which is modified. We assume that this issue can be dealt with in a relatively straightforward fashion: any country that does not have English and French as its national language would prepare a text of the MLI in its national language(s), submit it to the depository of the MLI for confirmation of its accuracy, and then presumably present that text to its national legislature.

Another interesting question – and one that is very relevant to the consistent application and interpretation of the provisions in the MLI – is the question of the language(s) to which reference may be made in accordance with Article 33 of the Vienna Convention on the Law of Treaties.

Let us assume that there is an existing bilateral treaty between State A and State B. If English or French is already the authentic language of that treaty, or one of the authentic languages, then the solution would be relatively straightforward: the English or French version of the provisions inserted by the MLI would equally be the text in an authentic language. If the treaty already provides that in cases of divergence (between the text in the language of State A and the text in the language of State B) that the version in English or French would prevail, then presumably the English or French version of the provisions inserted by the MLI would equally prevail. That is, in our experience, a relatively common situation where the negotiators from State A and the negotiators from State B do not speak each other’s language. They negotiate in English or French, and the final treaty has Language A, Language B and English/French all as authentic texts, with English/French prevailing in cases of divergence.

The further issue we foresee is if there is a treaty which does not have English or French as an authentic language at all (e.g., the A-B treaty, concluded only in Language A, or in both Language A and Language B, or even perhaps in a Language C which is other than Language A and Language B). It would seem to us logical, and in accordance with the aim of consistent application and interpretation, to then provide that, with respect to those provisions that are inserted by the MLI, the versions in Language A (and Language B or Language C) and in English/French of those provisions are all equally authoritative. In case of divergence, the English or French text (whichever language being the one with which the two states are most familiar) should prevail. This then ensures that the language that prevails is the language that was used when the provisions inserted by the MLI were negotiated (i.e. English/French).
In some senses this issue goes back to the function and scope of the MLI discussed as a preliminary observation. If the MLI modifies the existing bilateral conventions by inserting new provisions, then there must be a text in the language(s) of the original bilateral treaty, a process for approving that translation, and a rule in cases of divergence. If, however, the MLI operates as an on-going, multilateral instrument to which attention turns when looking at those provisions that modify existing bilateral treaties, then reference is primarily made with respect to those matters to the MLI (in its English and French versions), subject always to any constitutional requirements to the contrary.

This also takes us back to the transparency issue discussed as a preliminary observation. The early publication of a working draft of the MLI would provide an opportunity for interested parties to assist in the development of versions of the text (and Explanatory Statements) in a broader range of languages, thereby diminishing the likelihood of problems because of language and thereby contributing to the consistent application and interpretation of the MLI.

We look forward to elaborating on these comments at the public discussion on 7th July.

International Tax Group

Members of the International Tax Group who participated in the preparation of these comments:

Stéphane Austry (France); John Avery Jones (UK); Philip Baker QC (UK); Peter Blessing (USA); Robert Danon (Switzerland); Shefali Gorada (India); Koichi Inoue (Japan); Jürgen Lüdicke (Germany); Guglielmo Maisto (Italy); Toshio Miyatake (Japan); Angelo Nikolakakis (Canada); Kees van Raad (the Netherlands); Richard Vann (Australia); Bertil Wiman (Sweden). All members participated in their personal capacity and not as representative of any firms or institutions of which they are or have been members.
Dear Mr. VanderWolk

Submission in response to OECD Discussion Draft on Action 15: Multilateral Instrument

Please find enclosed our submission in response to the Discussion Draft on Action 15: “Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures” that was released on 31 May 2016.

We welcome the insights to be gained from the July Public Consultation and trust that our comments on this Discussion Draft contribute to the debate.

We are available for further discussion on any of the matters raised in our submission.

Yours truly,

Mary Honohan
President
Irish Tax Institute

About the Irish Tax Institute

The Irish Tax Institute is the leading representative and educational body for Ireland’s AITI Chartered Tax Advisers (CTA) and is the only professional body exclusively dedicated to tax. Our members provide tax expertise to thousands of businesses and individuals in Ireland and internationally. In addition many hold senior roles within professional service firms, global companies, Government, Revenue and state bodies.

The Institute is the leading provider of tax qualifications in Ireland, educating the finest minds in tax and business for over thirty years. Our AITI Chartered Tax Adviser (CTA) qualification is the gold standard in tax and the international mark of excellence in tax advice.

A respected body on tax policy and administration, the Institute engages at the most senior levels across Government, business and state organisations. Representing the views and expertise of its members, it plays an important role in the fiscal and tax administrative discussions and decisions in Ireland and in the EU.
Our response

The Irish Tax Institute is writing in response to the Discussion Draft on Action 15, which the OECD released on 31 May 2016. We prepared this submission with consideration and input from our members.

Overview

Action 15 of the OECD’s Base Erosion and Profit Shifting (“BEPS”) project focuses on assessing the tax and international law frameworks that affect the feasibility of a multilateral instrument (“MLI”) to be used to implement BEPS recommendations. As anticipated, several such recommendations do require amendments to the existing network of bilateral tax treaties. Hence, the MLI initiative is an important mechanism to expedite the adoption of specified BEPS recommendations, in particular:

Action 2 – Neutralising the effects of hybrid mismatch arrangements

Action 6 – Preventing the granting of treaty benefits in inappropriate circumstances

Action 7 – Preventing the artificial avoidance of PE status

Action 14 – Making dispute resolution mechanisms more effective

In structuring an MLI it is critical to balance the important aim of addressing BEPS concerns without disproportionately creating risk for the majority of transactions which are supported by adequate commercial substance. If this balance is not achieved in the implementation and ratification of the MLI the result will be increased tax disputes and cases of double taxation, resulting in overburdened taxpayers and tax authorities. We would recommend a pragmatic approach to avoid placing more pressure on an already burdened dispute resolution process and adding further uncertainty to ordinary commercial transactions.

Ireland’s Tax Treaty Network

As of June 2016, Ireland has signed comprehensive double tax treaties with 72 countries, of which 2 are coming into effect. Ireland’s tax treaty network covers direct corporation taxes as well as personal income tax, capital gains tax and social security taxes. Relative to many larger economies, Ireland conducts a huge proportion of trade with other nations and the ease with which this trade can be carried on is very important to us. The commercial decisions underpinning both foreign investment into Ireland and Irish investment abroad rely on the effective operation of our network of treaties. Hence, the Institute’s members are keen to ensure the MLI does not introduce unnecessary risk into the smooth operation of these treaties.

Timelines

The Discussion Draft has noted that the work by the Ad Hoc Group commenced in May 2015, with anticipation of having the MLI available for signature by 31 December 2016. In our view, what is more
important is that this crucial international initiative is done right, more so than is done to meet this particular deadline.

**OECD Request for Input**

Input has been sought across four matters. It is recognised that the input should solely focus on implementation of the specified BEPS outputs including a MAP arbitration provision.

Technical issues that should be taken into account in adapting the BEPS measures to modify or supersede existing provisions of bilateral tax treaties that may vary from the OECD model:

The approach to be taken in developing the optional provision on mandatory binding MAP arbitration, taking into account that it would need to serve the needs of the countries that have already committed to implement mandatory binding arbitration, as well as countries that are considering committing in the future.

The types of guidance and practical tools that would be most useful to taxpayers in understanding the application of the multilateral instrument to existing tax treaties.

Mechanisms that could be used to ensure consistent application and interpretation of the provisions of the multilateral instrument.

The Action 15 report issued in October 2015 demonstrates the lateral thinking already undertaken within the BEPS project. This report addresses issues and proposes high-level solutions to: (i) compatibility of MLI with existing tax treaties (A.1.2) (ii) timeline of entry into force (A.1.4), and (iii) ensure consistency in interpretation and implementation of the MLI (A.1.5).

**Seeking Consistency, Clarity and Certainty**

The MLI is much more than an update to the OECD Model Tax Convention and associated commentary. Once fully complete, the MLI initiative will bring into force notable changes from the existing language in tax treaties. Many businesses in Ireland (as elsewhere) rely on tax treaties today for the avoidance of double taxation on the same income/gains and they will similarly be expecting future tax treaties (post-MLI) to accomplish the same outcome.

Our members are seeking three prime themes in the development, execution and rollout of the MLI process into the network of tax treaties.

**Consistency** – We are looking for the MLI to enable consistency across both tax technical issues as well as procedural matters. Consistency with respect to technical elements will help expedite the process

81 Two examples cited are: (1) existing provision or types of provisions that serve the same purpose as the BEPS measures and that would need to be replaced, (2) Existing provisions or types of provisions that are similar to BEPS measures but that would need to be retained.
for the member states to reach agreement. It is our view that greater transparency should help to achieve greater consistency.

**Clarity** – The issues addressed across the above four BEPS Actions are technically complex, and thus require sophisticated solutions by the OECD to address perceived abusive transactions and abusive tax structures in the final BEPS reports. Our members are asking for clear implementation of these specific new rules, such that business can readily determine whether or not they apply to a particular commercial structure or cross-border investment.

**Certainty** – Business reasonably expects that for transactions which do not involve any BEPS element, the future state of tax treaties will be aimed equally at preventing double taxation as well as managing ongoing efforts to curb non-taxation. Certainty is sought first on technical interpretations and second on the timing of changes coming into force. Too much uncertainty will have undue consequences in cross-border trade and investment, to the detriment of all our economies.

**Specific Comments and Suggestions**

Our Institute members have an overall interest in the outcome of the MLI, particularly with respect to the impact on bilateral tax treaties involving the Republic of Ireland and its trading partners. We provide further suggestions in this response on each of the four areas where input was sought in the OECD Discussion Draft.

1. Adapting BEPS measures into treaty law

**Consistent entry into force by country at member state discretion**

**Potential Issue** - Differences in domestic laws between countries are likely to impact on how the signed MLI transforms a multitude of bilateral treaties that could be waiting to come into effect. If treaties enter into force at a number of different dates, then the practical compliance of those treaty changes would become very burdensome for business and for tax authorities to administer. It would be preferable if the entry into force is at the same date with respect to a single member state’s network of tax treaties. For instance, under the Country by Country reporting initiative, we have observed that the differing effective dates amongst member states has created some uncertainty for businesses as regards compliance.

**Suggestion** - Given the fundamental changes to be adopted via the MLI, our members would prefer those changes to come into force on the same date. We suggest that the OECD, in leading Action 15, should recommend an effective entry into force date for all treaties to be amended by the MLI process, and that this effective date is to be no earlier than 24 months from the date that the MLI is concluded by all constituent member states.
Given the potential operational impact that these treaty changes may have for companies (particularly as regards PEs), it is important that any such effective date affords taxpayers sufficient time to transition to the new treaty rules. Where there is no global consensus on a suitable effective date, member states should be given the opportunity to agree this on a bi-lateral basis.

That said, the MLI process should permit Ireland (amongst other member states) to elect to defer the year / date where all its amended treaties are entered into force with all counterparty member states. This election could, potentially, defer the entry into force of some treaties to align with others. We suggest the deferral can only be for maximum of two years.

**Flexibility in options available to secure greater consensus**

**Potential Issue** – Treaty-based recommendations arising from Actions 2, 6, 7 and 14 can be categorised by how the MLI might structure the options available to member states as allowed for in the agreed Actions. The Institute understands that the OECD is discussing the permitted optionality to be available to member states under the MLI. This potential optionality would allow a member state to opt-in to specific Article provisions with specific treaty partners, i.e. not with respect to its entire treaty network.

These treaty-based Actions allow for flexibility on the implementation of certain provisions – if this flexibility is not built into the MLI framework, member states might disagree on some specific provisions in an Article that would then as a consequence inhibit the effectiveness of the MLI to amend treaty articles. On the other hand, too much flexibility in the available options could result in a plethora of differing treaty rules that would be cumbersome and uncertain for businesses to comply with.

**Suggestion** – The framework of the MLI selection process should afford each member state the flexibility within the various treaty-based Actions to potentially choose more than one feature for the purposes of updating its bi-lateral treaties with several other member states.

Further, as noted later, it should be incumbent on each member state to disclose on the tax authority website the consolidated versions of all updated treaties as well as treaties coming into force. This will enable businesses to understand how the existing treaty network has and is being updated.

2. Mandatory binding MAP arbitration (Action 14)

Ireland is amongst the 20 willing member states that are progressing the ability for the MLI to include a mandatory binding arbitration clause in the MAP article. This single initiative has the potential to relieve the global tax administration system of a substantial backlog in double taxation cases. It is widely known that the competent authorities of the tax administrations have become very burdened with the rising inventory of unresolved MAP cases. Over eight years (2006 to 2014), both newly initiated MAP cases and inventories amongst OECD member countries more than doubled.\(^{82}\) At a time where

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government budgets are under pressure, a wholly new mechanism such as binding arbitration is required to alleviate the burden placed on both competent authorities and business.

The Irish Tax Institute would like to see the widespread adoption by other partner member states of mandatory binding arbitration in the MAP article of Ireland’s treaties. In lieu, we would continue to seek voluntary binding arbitration, for those member states who prefer not to agree to mandatory arbitration.

The Institute recognises that both member states need to agree to such an amendment and are pleased that many of Ireland’s key trading partners are participating in this subgroup endeavour.

Encouraging arbitration through flexibility

Potential Issue – Many countries will already have adopted a mandatory binding arbitration clause in more recently negotiated bilateral treaties with a partner country. While there may be some commonality between the arbitration measures in those treaties and the Model Tax Convention (2014), there will be some discrepancies. It is possible that such countries may want to preserve aspects of current treaty language (in Article 25) rather than replace the arbitration provision wholeheartedly.

For instance, the Convention allows arbitration to be initiated for unresolved cases from two years from presentation of the case to the competent authorities. In contrast, several arbitration clauses in existence today only allow unresolved cases from two years from the commencement date – a term defined within the treaty which means “...earliest date on which the information necessary to undertake substantive consideration for a mutual agreement...” While both contain a two-year clause, they are not equivalent in practice.

If countries are only able to elect through the MLI for the mandatory binding arbitration clause using the OECD Model language, some countries may opt not to follow as this will be inconsistent with existing arbitration provisions. The potential inconsistencies may lead a country not to opt-in for mandatory binding arbitration in the MLI process, although it might have in spirit preferred an option.

Suggestion – The MLI should contain some degree of flexibility on how countries opt-in to mandatory binding arbitration. If two countries both want to contain such a clause, they should be permitted to determine the appropriate language that suits the arbitration conditions and process they so choose.

While it is important that a broad arbitration framework is agreed upfront by the working group of 20 states, the MLI should not be prescriptive as to identify mutually exclusive arbitration options that could lead to misalignment and thus no such arbitration in the treaty. We would entrust the working group are looking at a series of negotiations, bilateral or otherwise, that result in the greatest number of new arbitration provisions, irrespective of the specific terms and conditions. For instance, two countries may agree that a three-year period should lapse before arbitration is available to the taxpayer. These terms are preferable over no arbitration option.
The Irish Tax Institute would like to see the application of the Arbitration process included in the OECD’s BEPS Peer Review Framework.

**Interaction with EU Arbitration Convention**

**Potential Issue**—For disputes between competent authorities of EU member states, the existing EU Arbitration Convention provides an alternative venue for taxpayers to seek resolution to a double tax case. It remains unclear how the Action 14 elements of the MLI will work in parallel with the Convention for intra-EU disputes.

**Suggestion**—Both the EU Arbitration Convention and the proposed Mandatory Binding Arbitration in Article 25 (MAP) provide discretion to the taxpayer. On that basis, the MLI can structure the amendment to Article 25 in two ways: (1) when the treaty is between two EU member states, and (2) when the treaty involves no more than 1 EU member state. In case 1, the MLI should be phrased to afford the taxpayer the option of selecting which MAP resolution is preferable under the facts and circumstances of the case. The Convention does not apply to case 2.

**3. Guidance and Tools**

**Open and consultative process**

The Irish Tax Institute welcomes the openly transparent consultation process regarding the forthcoming MLI framework and negotiation of terms. Having public record on these developments, at key junctures, enables business and advisers to understand the potential outcomes that may occur from the individual choices member states will have with the MLI.

Many supranational bodies, including the OECD, the EU, International Accounting Standards Board and the Financial Accounting Standards Board, continue to keep the public aware of matters in process, including the deadlines when decisions are to be made and implementation is expected. Consultation throughout, at critical milestones in the process, has also been vital for adoption of fundamental changes to laws or regulations.

**Public record managed by independent body**

It was suggested that each member state could publish, on its own accord, consolidated versions of its treaties formalised with other member states as a result of the MLI process. We suggest that member states should be obligated to submit formally agreed treaties to a centralised and public record so that all interested parties can view the most up-to-date status of a particular country on its treaty network. We recommend that the OECD establishes a reporting framework and a minimum standard template, where delegates would provide (quarterly) a completed template indicating the status of provisions adopted with its treaty counterparties. Delegates would only have to update the template for developments in each quarter.
Ideally, a public record would be kept accessible via the OECD website, updated quarterly.

Alternatively, the OECD could volunteer to informally survey activity across its members and other countries on their progress to convert the MLI into treaties that are entered into force or scheduled to be entered into force. This survey may not be done as frequently as recommended above for the mandatory quarterly submission. The OECD would then publish annual status reports on what it has observed, regarding treaty amendments entered or entering into force as well as relevant tax administrations’ public policies on treaty changes.

**Member state obligation to disclose**

There will certainly be many differences in terms of the content and process of updating the treaties of a particular member state. On the assumption (mentioned earlier) that the MLI will permit a member state to opt-in to certain provisions only with certain other member states, on which we agree, more variations will arise and the MLI will be especially complex and cumbersome for taxpayers to apply. It should be incumbent on each member state to oblige the tax authority to publish consolidated versions of all their tax treaties on their websites, clarifying how their state’s network of treaties is to be / has been updated after conclusion of the MLI. The tax authority should be obliged to keep this information up to date.

**4. Mechanism for consistent application**

**Independent body to ensure member states apply new provisions fairly and consistently**

**Potential Issue**—Certain words or phrases embodied by the Article amendments and/or Commentary additions are open to significant interpretation. Some Commentary attempts to provide greater definition to the meaning of important terms in the amendments. Despite the informative commentary, our members would like to ensure that there is consistent treatment of equal facts by the tax authorities of member states. Our members believe that some tax authorities may take a more liberal interpretation to a number of subjective treaty terms in favour of an outcome that leads to double taxation. Examples of potentially subjective terms in Actions 6 and 7 include “habitually”, “principal”, “material”, “auxiliary and preparatory”.

Inconsistent interpretation by tax authorities can give rise to substantial uncertainty and hesitation for business investment, especially where the taxpayer is relying upon the treaty in a local language.

**Suggestion** – During the BEPS review period from now until 2020, we suggest the OECD establishes a review panel to facilitate the consistent implementation and application of specific Article amendments to the treaty network (those based on Actions 6, 7 and 14). This panel could serve two primary purposes: (i) to advise tax authorities of widely held interpretations on new treaty language, and (ii) to collect and disseminate views on treaty interpretation matters while publicising observed inconsistencies at a superficial level. Any findings or decisions of this panel could also be published on the OECD website.
Relative to a bilateral MAP process, a panel would represent international viewpoints on a subject matter and be permitted to assess global trends in treaty interpretation matters. Absent a legal framework, such a panel will not possess authority over a tax authority. We submit that such a legal framework is beyond the scope of the MLI.

The OECD Forum on Tax Administration ("FTA") has the broad access to personnel with the appropriate technical and administrative expertise to establish such a body. The United Nations includes the Committee of Experts on International Cooperation in Tax Matters, which comprises a delegation of experts not in government but selected by government. The FTA could similarly choose a panel of experts from the tax community to become a supervisory body to maintain consistency in interpretation and application of the treaty amendments.

Alternatively, the mandate of Tax Inspectors Without Borders ("TIWB") could be increased to include the responsibility to advise and assist tax authorities on the interpretation of treaty language instituted via the MLI. If a specific team within TIWB is given this particular mandate, those responsible will inherently have the capability to observe and share globally vetted best practices on technical matters. These efforts will help achieve greater consistency.

**Peer review over adoption and enforcement of BEPS Actions**

Peer review on a number of matters today provides a mechanism for governments and/or tax authorities to either establish rules or processes that align with the international norm. Business is strongly seeking this objective of international consistency across the implementation of BEPS. We welcome the establishment of the OECD’s BEPS Peer Review framework and, as part of this, we would suggest that the OECD conducts annual peer reviews to check how countries have adopted BEPS minimum standards including those adopted through the MLI. Where possible, the same peer review should seek to identify how tax authorities are enforcing those minimum standards in accordance with the BEPS principles and Commentary.

As with any peer review process, the confidentiality of taxpayers must be respected at all times.
The following are the comments of the Accounting & Tax Committee of the Japan Foreign Trade Council, Inc. (“JFTC”) in response to the invitation to public comments by the OECD regarding the “BEPS Action 15: Discussion Draft on Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures” released on May 31, 2016.

JFTC is a trade-industry association with Japanese trading companies and trading organizations as its core members. One of the main activities of the JFTC’s Accounting & Tax Committee is to submit specific policy proposals and requests concerning tax matters. Member companies of the JFTC Accounting & Tax Committee are listed at the end of this document.

Comments

We welcome the development of a multilateral instrument to efficiently implement the tax treaty related BEPS measures and appreciate the opportunity granted in this discussion draft to provide our comments thereon.

1. This discussion draft takes up “Ensuring consistent application and interpretation” as one of the technical issues arising from development of the multilateral instrument and invites comments on “Mechanisms that could be used to ensure consistent application and interpretation of the provisions of the multilateral instrument”.

Since the multilateral instrument is scheduled to conclude its work and open it for signature by December 2016, please expedite additional considerations among each action plan related to the tax treaty and reflect the outcome into the multilateral instrument.

In particular, having regard that provisions developed under BEPS Action 7 including measures to address commissionaire arrangements and similar strategies are to be implemented in the multilateral instrument, we would like to highlight our apprehension that there would be inconsistent application and interpretation among various countries of the provisions relating to the attribution of profits to Permanent Establishment (PE) if it only reflects the modification of Article 5 of OECD model tax treaty which deals with the definition of PE without providing any guidance in respect of Article 7 of OECD model tax treaty which prescribes the attribution of profits to PE.

Therefore, we strongly request that the additional guidance on the issue of attribution of profits to PE which was mentioned in the final report of BEPS Action 7 be developed expeditiously, and the contents thereof be appropriately reflected in the multilateral instrument or its commentary.

Please kindly be aware that, under the current situation that a consensus on a methodology of calculating income attributable to PE has not been achieved, the redefinition of PE may seriously undermine predictability for taxpayers and hold the risk of incurring double taxation. It may also substantially increase the administrative burden on tax authorities and taxpayers.
2. Regarding the way of inclusion in existing individual treaties after the signature on multilateral instrument, it would be clarified via the guidance, etc. However, for example, for the anti-abuse rule in BEPS Action 6, since it is expected that the U.S. will introduce the LOB rule unlike EU countries pursuing the PPT rule, each country will have to agree the applicable rule on a bilateral basis after all. In addition, it is not clear not only how the amendment of the tax treaties will be made for cases in which a non-participating country not signing at the inception of the multilateral instrument will sign in the future and in which a country is currently on negotiation towards agreement of a tax treaty with the other participating country signing at the inception of the multilateral instrument, but also the tax treaty as of which year will be amended. In this respect, we would encourage the Ad-hoc Group to enhance predictability of taxpayers.

3. In this discussion draft, it is stated that the language of instrument will be English and French, but, for example, we would like to request for clarification of how US-Japan tax treaty whose official text is not only English but also Japanese will be amended, so that confusion will not occur among tax payers.

4. Regarding the items related to the tax treaty in BEPS final report, since there is a possibility that an optional application and a limitation on the scope of application will be available, it is expected that there will be some countries and regions that partially attach an observation or a reservation like the commentary of OECD model tax treaty when entering into multilateral instrument. In this case, we would like the Ad-hoc Group to clearly state how it will be included in individual treaties.

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Kanematsu Corporation
Kowa Company, Ltd.
Marubeni Corporation
Mitsubishi Corporation
Mitsui & Co., Ltd.
Nagase & Co., Ltd.
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Nomura Trading Co., Ltd.
Shinyei Kaisha
Sojitz Corporation
Sumitomo Corporation
Toyota Tsusho Corporation
Yuasa Trading Co., Ltd.
MEDEF- Mouvement des Entreprises de France

MEDEF is pleased to provide comments on the Discussion Draft “Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures” issued on the 31st of May. The Multilateral instrument (“MI”) is definitely an innovative and efficient tool to ensure consistent implementation and avoid renegotiations of multiple existing tax treaties.

The MI is one of the BEPS actions on which no public consultation has been conducted before the final report was released in October 2015. As business and practitioners representatives we are therefore doubly concerned by its implementation and particularly aware that BEPS achievement largely depends on the success of the MI and the dispute resolution mechanism. In this respect, we regret having no access to the draft text of the MI.

BEPS actions 2, 6, 7 and 14 are of a different kind: some are minimum standards while others are recommendations only. When accepting the multilateral instrument, a State should not be allowed to do “provision shopping”, excluding action 14 from the scope of its implementation. In other words, the inclusion of BEPS proposals in a tax treaty should be conditioned to the inclusion of the proposals relating to dispute resolutions and the commitment by the contracting States to resolve MAP cases.

Consistent implementation is challenging because it requires translating the commitment of members and non-members in effective action. Although the goal is shared, uncoordinated actions or unilateral measures would significantly reduce the progress made and would even be counterproductive. In this respect, we are concerned by the fact that participating to the Ad hoc working group is voluntary and “does not entail any commitments to sign such instrument once it has been finalised”.

Although we agree with the need of flexibility, we are also concerned by the presence of options (opt-in and opt-out alternatives). From our perspective, these alternatives will de facto force cosignatories States to reengage in a bilateral discussion.

Consistent and coherent implementation is only possible if concepts and rules are clear and not too-open to interpretation. It will then depend on (i) how the OECD designs the guidelines/comments related to the provisions (ii) how the tax administrations apply them and (iii) how the courts interpret them.

The responsibility of the success lies undoubtedly on those three stakeholders.

Yours sincerely,

Vanessa de Saint-Blanquat

\[83 \text{ Action 15 - 2015 final report}\]
Specific comments

The relationship between the provisions of the multilateral instrument and the existing tax treaty network/ Technical issues that should be taken into account in adapting the BEPS measures to modify or supersede existing provisions

Although we acknowledge the difficulties that will arise due to the variety of the existing tax treaties, even among the ones inspired by the same model, it is critical that implementation remains feasible.

Considering that the MI should lead to an efficient and swift harmonisation of several provisions of traditional bilateral treaties, we believe careful consideration should be given to the hierarchy between bilateral and multilateral instruments.

In this respect we believe that a key factor is to have the MI superseding the existing bilateral tax treaties. This status should be reaffirmed in the MI preamble.

For example, the new anti-abuse measures should replace all the current ones having the same purpose, even if their matter is not fully similar. Otherwise the effect of the harmonisation will be limited and the interpretation and overlap difficult to handle.

We support BIAC comments that finding a balance between simplicity and flexibility is hard to achieve.

However, we believe the best solution would be to give a time limit to the MI implementation. A common date of entry into force could be imposed by the OECD in order to avoid application’s discrepancies or mismatches between co-signatories States. A list of the treaties complying with the MI would also be very welcome for taxpayers.

In case, more time is needed and a single-action solution is not feasible we agree with the two-steps solution proposed by BIAC.

The approach to be taken in developing the optional provision on mandatory binding MAP arbitration

A clear statement is made in the draft on action 14 that the number of disputes has increased and is highly likely to become even more significant due to BEPS more stringent standards.

MEDEF would like to reiterate the fact that the BEPS achievement will be largely dependent on the success of the multilateral agreement and particularly the dispute resolutions mechanism. Also, business does not have a specific interest for a technique or another (as long as it is effective), we support the mandatory binding MAP arbitration in the sense that it looks like the common accepted view for the States to come up with dispute resolution in a reasonable timeframe (as stated in § 62 action 14: “The
The business community and a number of countries consider that mandatory binding arbitration is the best way of ensuring that tax treaty disputes are effectively resolved through MAP.

Also, as the MI provides for an optional provision on mandatory binding MAP arbitration, it would be useful if the OECD was appointed to publish the list of States (i) implementing the MI (ii) having elected for the mandatory binding MAP arbitration.

Please see the annex for more details.

The types of guidance and practical tools that would be most useful to taxpayers in understanding the application of the multilateral instrument to existing tax treaties

It is more than advisable that the OECD performs the same explanatory work with the new clauses as it did with the previous ones (current guidelines). This means that detailed guidelines with examples should be issued. Some pages of the BEPS reports could be used but only the relevant paragraphs and sometimes additional practical information would be welcome. These guidelines will supersede the BEPS reports which are very long and sometimes confusing because different approaches are contemplated. In this last respect, they might be hard to manage for practitioners.

We support BIAC statement that “any country that signs up to the various provisions included in the MLI, also commits to adopting the respective OECD guidance on those treaty aspects.”

Mechanisms that could be used to ensure consistent application and interpretation of the provisions of the multilateral instrument

As a starting point, it would be useful if the OECD provides for a strict procedure to Parliaments (or equivalent institutions) of signatories States concerning the terms of negotiation, scope and details of the MI provisions (including various technical possibilities and options if any).

To improve consistency it would be useful to create an advisory body or commission with OECD members, representatives of private MNEs, academics, tax administrations, judges and practitioners to provide recommendations on recurring questions of interpretations.

This body would issue positions that will not be legally binding but hopefully will greatly influence the outcome of the proceedings. They will be published on a regular basis on the OECD website in an anonymous way.

It would also be of great help if the OECD could collect the various court cases of the different Supreme Courts on its website in order to help both tax authorities and judges in their own reading of the treaties.
Exceptions or reserve provisions should be exceptional.

Additional comments

It is highly important that the access to the protection of the treaties remain a right to the taxpayers so that the tax administrations bear the burden of proof when challenging for instance the tax residency while there is a tax residency certificate. Similarly the burden of proof lying with the taxpayers should be manageable and proportional with the objective of the measure. The OECD could encourage States to put in place a process to obtain within 6 months the opinion of the local tax administration on the application of a treaty.

ANNEX

We suggest the following considerations concerning dispute resolution.

Timeframe of dispute resolution

No certainty for business could be alleged if and when the timeframe of dispute resolution remains too extended.

Any activity conducted by businesses is a continuing process and has to be considered on a day-to-day basis. Taxpayers use tax rules/methods that they consider appropriate as long as they are not challenged by tax authorities. However, if those rules are considered inappropriate by the competent authorities after numerous years, all the period including the disputed years and the following ones have to be corrected with harmful consequences. Knowing that the intervention period can go from 3 to 10 years, double taxation resulting from the adjustment should be treated as quickly as possible.

Therefore, several kinds of measures could be examined to reduce these consequences:

The timeframe for solving disputes should be reduced by fixing a tight timeframe with clear compulsory time limits for each stage of the procedure:

Start of the MAP procedure by the taxpayer as soon as the issue has been raised in writing, by one of the tax authorities

6 months after: possibility for the taxpayer to ask for the arbitration procedure to be opened
6 months after the taxpayers’ request: the arbitration body should be agreed upon (NB: the lack of a compulsory delay to constitute the commission is very detrimental to a successful implementation of the arbitration as shown in the EU procedure)

6 months after: the arbitration body provides its opinion/decision

Failure to comply with those time limits should give rise to financial penalties.

Parallel procedure should be allowed: no need to wait for the end of one procedure (e.g. the tax audit) before starting another one (e.g. MAP). This should facilitate the production of a reasoned opinion by States. Moreover, the arbitration procedure could be triggered while MAP is still ongoing (that would ensure rapid treatment).

The MAP procedure could be differentiated according to the types of issues. A typology of these issues could be made to extract the most common ones that can be treated rapidly with specialised people within competent authorities, leading to the use of ‘fast track’ procedures. That would alleviate work load and resources, both for taxpayers and tax administrations.

**Technical content of the resolution**

Dispute resolution involves finding a common solution between two parties that satisfies both of them. In practice, it does not imply that a valid technical solution is given to the issue at stake: both States can agree to share the tax basis in a satisfying way for them without motivating their decision with technical considerations.

Yet, from a taxpayers’ point of view, such technical considerations are needed because a rule must be defined to be applied and explained for the years under examination but also for the following ones. In a nutshell: “what should we have done and what shall we do in the future to be consistent with the States views?”

A solution technically substantiated means greater legal security for the present but also for forthcoming similar cases.

We understand that States do not want the MAP decision to create precedents; however the solution of a difficult case remains a useful reference at least for the enterprise itself.

This principle should apply to both MAP and arbitration procedures.

**Arbitration**

Arbitration is a powerful way of finding a real resolution where MAP proves ineffective.
It can provide a “quality” solution to the taxpayer whether it comes from an ‘independent opinion’ or a ‘last best offer’ format and gives clarification to States that can be used in other disputes.

Unfortunately, it is often regarded as mere pressure on the MAP procedure to find a solution, so that States:

- often try to delay the conclusion of the MAP procedure,
- raise obstacles on the adoption of the arbitration clause based on a constitutional and sovereignty basis.

MEDEF would like the States to reconsider their position on this particular question and rely more confidently on the opinion of third parties, taking into account the following points:

In most cases, arbitral opinions or decisions are of a technical nature so that sovereignty is not really at stake;

- Entering into a tax treaty is by itself an act reducing sovereignty;
- The neutrality of the arbitrator does not actually threaten sovereignty;
- In the ‘independent opinion’ format arbitrators are expected to provide a balanced and technical opinion based on the work of tax authorities during the MAP: they only refer to exchanges of argumentation and documents provided by the competent authorities themselves;
- In the ‘last best offer’ format, the competent authorities build up their “position paper” in a way that is reasonable and properly explained in order to be acceptable. There is no doubt that a paper interfering with another State’s sovereignty would have no chance of succeeding;
- In the case of serious constitutional obstacle, consulting an independent expert on a non-compulsory basis should be considered. This would lead to an opinion that would help clarify the dispute and propose alternative solutions to be adopted by both States within the MAP.
Ladies and Gentlemen,

The NOB\textsuperscript{84} welcomes the opportunity to respond to the OECD’s Public Discussion Draft entitled: “BEPS Action 15, Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures”, as published 31 May 2016.

The NOB would like to express our support for the OECD’s efforts to develop a uniform application of the treaty related aspects of the BEPS Action Plans by means of the development of a Multilateral Instrument (hereafter referred to as: MLI). Nevertheless, we have some concerns about the implementation of such an instrument.

Concerns

1. The primary objective of a tax treaty is the promotion of bilateral trade and investment. This is often based on a special relationship between companies and citizens of both countries, often going back decades, sometimes centuries, and confirmed by friendly diplomatic ties. A secondary objective is the prevention of treaty abuse. There should be no objection to the introduction of additional language in the preamble to treaties via an MLI, in order to underline the importance of both objectives, as long as this hierarchy remains clear.

2. So far, none of the BEPS Action items have gone through parliamentary approval processes. The current status is, therefore, no more than OECD advisory text, just like in the cases of the OECD Model Treaty. Countries may or may not adopt the suggested language. Unlike other OECD Reports, the BEPS reports did not offer the option to list reservations by countries against certain conclusions of the Final Reports. These reservations will, however, come up during the parliamentary processes in the various countries. In order for the MLI to be effective we would, therefore, recommend striking a realistic balance between the level of detail in the MLI, the interpretation of the language contained in the MLI, the hierarchy between MLI and existing treaties, as well as the number of topics covered by the MLI as this will also impact adoption of otherwise acceptable changes.

3. As far as we are aware, an economic impact assessment of the various BEPS Action Plans has not yet been performed. We expect local legislators will, however, require such an economic impact assessment on global and local economic growth, FDI, trade, employment, shortfall in reserves of pension funds, insurance companies and banks, and all other material aspects. As the most obvious and significant entities affected by anti-treaty shopping provisions are i) medium size corporate groups from emerging market countries (non OECD member countries),

\textsuperscript{84} The Nederlandse Orde van Belastingadviseurs or NOB (in English: The Dutch Association of Tax Advisers) is the professional association of the university educated tax advisers in the Netherlands. The NOB, which was established in 1954, has 4,900 members, including 900 prospective members.
ii) pension funds from OECD countries and iii) Sovereign Wealth Funds from non OECD countries, support for the conclusions of some of the Final reports (e.g. BEPS 6) and inclusion in the MLI may be more limited than expected.

4. A particularly sensitive point is that there is still no conclusive evidence for the premise on which the BEPS project was built that MNCs do not pay their fair share of tax. A different starting question could have led to different outcomes. A more relevant comparison would have been “Are MNCs from country (or region) A, paying a fair share of tax on their income from country (or region) B, and is this comparable to the level of tax paid by MNCs from country (or region) B itself on their income from country (or region) B? And vice versa.” This would still be a difficult comparison, but the outcome would be much more informative than a comparison of MNCs and SME’s on a global scale.

5. We noticed how the conclusion in the Final Report of BEPS 11, had switched gear from trying to demonstrate that MNCs were not paying their fair share of tax to confirming that BEPS behavior was prevalent among MNCs. The latter was of course, never in doubt. A conclusion that BEPS behavior by MNCs results in substantial amounts of lost tax revenues is, therefore, an incomplete and potentially misleading conclusion. First of all, it assumes that MNCs have no alternative to their chosen structure that would also result in a reduced tax burden, albeit not as reduced as the original structure. But far more importantly, it completely fails to recognize that cross border business activities are subject to far greater tax inefficiencies than domestic business operations (due to non creditable withholding taxes, no loss compensation, non deductible expenses, unallocable expenses, one sided corrections, etc. etc.). MNCs are generally subject to effective tax rates within a bandwidth of 5% above and below their domestic statutory rate. In other words, while we are fully aware that BEPS takes place on a regular basis, we have no reason to believe that this supports the presumption that MNCs do not pay their fair share of tax.

6. The OECD’s BEPS proposals will result in a higher tax burden for MNCs than their “fair share” for as long as the tax inefficiencies associated with cross border business operations are not adequately resolved. This is especially true for MNCs from countries with unattractive tax treaties and no comprehensive rules for eliminating double taxation, i.e. emerging market countries. Due to the OECD’s BEPS proposals these emerging market MNCs will face much higher amounts of withholding taxes when entering OECD markets. The benefit of this will go to the budgets of OECD countries rather than the emerging markets. The result of this is that these emerging markets MNCs will have less funds available to invest in the development of new products and markets. As such, it aids continued dominance of OECD MNCs on global markets. For emerging market MNCs, this comes on top of the unattractive tax regimes in their home country, as there are few rules they can use to prevent double taxation.

7. Another affected group are smaller MNCs, as they do not have the ability to build the required infrastructure to benefit from the lowest treaty rates. Smaller MNCs with international operations are obviously more common in smaller countries. In larger countries, such
companies do not have to look for growth across borders; they can simply grow domestically. Since SMEs are critical for creation of new employment opportunities, the restrictive interpretation of the LOB and PPT provisions can have a serious impact. The ambition to counter any and all forms of treaty shopping impedes growth of SMEs and smaller MNCs. Again, this may very well benefit the world’s largest MNCs. Is this in line with the objective of the BEPS Action Plans?

8. The more important consequence, however, is a reduced level of cross border investment, trade, knowledge sharing and employment creation. Many countries, and especially smaller countries, will perform an impact analysis and will consider this as undesirable. They may consider the need for anti-treaty shopping measurements warranted for cross border interest payments (if deductible in the source country), but why the same approach is necessary for dividend flows and capital gains is (at least) questionable in a world that operates under a classical system of taxation. Surely, two levels of taxation should be a sufficient level of tax on income from capital. If we have understood your motives correctly, your aim is to exclude tax havens from treaty protection. This should probably be interpreted as: tax haven companies with shareholders who do not disclose certain income, and thus escape the second level of taxation common to the classical system referenced above. We fully support the application of anti-treaty shopping measures in those situations. Under the current proposals there are, however, significant collateral damages, potentially far bigger than any gains in levying additional tax from these free riders. Again, the anticipated collateral damage and the likely negative contribution to the global economy and perhaps also to the tax receipts of OECD countries, will have adverse consequences to wide acceptance and support for the MLI, due to the concerns that will be raised during the various democratic processes to adopt the MLI.

9. The above collateral damage is especially disconcerting as there are far more efficient ways to target these “free riders”, while allowing dividend flows in normal corporate structures to continue as usual.

10. It almost goes without saying, but any change to treaty language adopted by an EU member country must obviously be in line with European Directives and case law.

11. We further expect that the Final conclusions on BEPS 6 Non-CIV can have an important impact for many countries assessing their acceptance and support for the MLI. Until BEPS 6 Non-CIV is resolved in a satisfactory way (especially for pension funds), many countries may not be prepared to move forward at all.

Recommendations

A. The launch of a MLI is a very ambitious effort to achieve a swift and consistent implementation of BEPS Action Plans. We suggest considering a fairly simple MLI as this may have the best chance of receiving wide support and acceptance. This would be vital as otherwise keeping track of which provisions are applied in a particular bilateral situation, as well as their interpretation, adds to the further
complexity of dealing in practice with cross border situations.

We further suggest to consider using an MLI in combination with a Global Tax Treaty (“GTT”), including an alternative treaty anti abuse provision and other more contentious items. The GTT would be drafted by the OECD, and could include the best of BEPS. Signatories could (also) apply the GTT in cases where otherwise no treaty would apply. GTT treaty benefits would, however, only be available to recipients who can demonstrate remittance of income up the chain to a level where the income is subject to a normal regime of tax (i.e. tax havens are excluded, but routing via a tax haven is fine as long as the income is reported at a higher level). The GTT would have to differentiate between distributions of income that have resulted in local source country deductions and those that are paid from after tax income. It would also have to consider a lower rate of WHT on royalties to take into consideration that the net income of the recipient is much lower than its gross income.

B. We recommend that an online tool is made available clearly setting out which provisions of the MLI apply in a particular bilateral situation. Should the OECD wish to have interpretational comments to the MLI, the tool should not only include these interpretational comments but also the reservations made by the countries party to the MLI. The aforementioned is especially relevant where in the particular bilateral situation a treaty is applicable that is not based on the OECD model convention and the MLI transposes provisions upon this treaty that could lead to interpretational questions. A clear hierarchy and method should be set out as to how the interpretation of the MLI, in relation to the existing treaties, needs to take place.

C. We recommend that the MLI will include a mandatory binding MAP provision that ensures a timely settlement of disputes, whereby all signatories to the MLI commit to this. As follows from our earlier recommendations, we foresee interpretational issues once the MLI enters into force and it is in the interest of both tax authorities and tax payers that these issues are solved timely and efficiently so not to add further complexities to cross border business activities.

We trust our comments are useful for your discussions. If you have any questions or would like to discuss in more detail, do not hesitate contacting us.

Yours sincerely,

The Dutch Association of Tax Advisers

mr. drs. J.H.D. Klink / drs. T.J. Noordermeer

Section of International Fiscal Affairs
Dear Sirs and Mesdames:

The National Foreign Trade Council (NFTC), organized in 1914, is an association of over 250 U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial and service activities, and our members have for many years been significant investors in many countries, including all of the OECD member countries and the G20 countries.

NFTC seeks to foster an environment in which companies can be dynamic and effective competitors in the international business arena. To achieve this goal, businesses must be able to participate fully in business activities throughout the world, through the export of goods, services, technology, and entertainment, and through direct investment in facilities abroad. As global trade grows, it is vital that companies be free from double taxation that can serve as a barrier to full participation in the international marketplace. Tax treaties provide the certainty and stability in the investment environment that is necessary to allow business to participate in the global marketplace. That is why NFTC has long supported the expansion and strengthening of the U.S. tax treaty network. BEPS Action 15 called for the development of a multilateral instrument to modify existing bilateral tax treaties in order to implement the tax treaty measures developed in the course of the BEPS work.

I am writing in response to the Public Discussion Draft released May 31, 2016 in connection with the BEPS Action 15: Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures (“Discussion Draft”). Thank you for the opportunity to comment on this Discussion Draft. The Multilateral Instrument (MLI) has the potential to expedite the implementation of the OECD recommendations released in the final OECD BEPS report in October 2015. Consistent application of the BEPS outputs would be welcome, and is necessary to ensure a coherent system that creates certainty for business.

The OECD Report set out minimum standards that all countries are encouraged to adopt, including, under Action 14 (Making dispute resolution mechanisms more effective). The NFTC strongly supports the inclusion in the multilateral instrument of a mandatory and binding arbitration provision to resolve disputes. The inclusion of appropriate arbitration provisions in the MAP process would ensure that no competent authority case goes unresolved. NFTC member companies view tax treaty arbitration as a tool to strengthen, not replace, the existing treaty dispute resolution procedures conducted by the competent authorities and advocate for the revision of Action 14 to support MAP arbitration. We believe that arbitration provisions would improve the operation and efficiency of the mutual agreement procedure and perhaps even the examination process. They would, therefore, benefit both governments and taxpayers.

The MLI development process is supposed to support the implementation of the consensus outcomes of the BEPS project. Ensuring that tax treaties are consistent with the BEPS project outcomes and their purpose of enabling the continuance of cross-border trade should be a key goal of the MLI.
We understand the difficulty in designing a system that must fit into 3000 bilateral treaties and with governments and tax administrators who have very specific requirements on how their treaties must be drafted. We also understand that it is difficult to design a system that cannot cross-reference existing rules. The OECD Model Treaty contains dispute resolution language and binding arbitration language that is already included in many OECD member countries tax treaties. The language in the OECD Model is relatively generic and has been vetted and accepted by the OECD and its member countries. Rather than start the drafting process on dispute resolution from scratch, the NFTC recommends that the OECD Model be used as the starting point for the drafting of the arbitration provisions. We understand that a number of the countries participating in the BEPS project are not OECD members and do not use the OECD Model as a basis for negotiating their bilateral tax treaties. However, finding a comparable starting dispute resolution mechanism used by a majority of countries could prove illusive. The NFTC strongly supports the mandatory binding arbitration provisions included in the U.S. Model Tax Treaty, but we understand that those provisions go into more detail than many countries are comfortable with. The MLI should provide an appropriate mutual agreement procedure to resolve disputes, similar to what is currently provided in Article 25 of the OECD Model. The Competent Authorities (CA) of bilateral treaty partners, particularly those 20 that have signed up to support mandatory binding arbitration, should be required to agree to the details of the form of the process bilaterally to minimize disputes. The NFTC hopes that the MLI will serve as a vehicle to allow as many countries as possible to adopt mandatory binding arbitration in the near term. Thus, while we support guidance to help countries ensure that their preferred form of arbitration is effective in resolving disputes on a timely basis, the NFTC believes, in view of the differing opinions countries have as to the preferred form, that the MLI should not mandate the exclusive use of any specific form of arbitration (e.g., whether “long-form” or “last best offer”).

Rules and principles for determining the rights of taxing jurisdictions vis-a-vis international business activities are almost meaningless if they cannot be administered properly through country audit processes, combined with intergovernmental dispute processes that are predictable, accessible, objective and principled. NFTC member companies are currently experiencing country audit practices that have been adopted in the name of BEPS but do not follow the final BEPS report recommendations. The current MAP process is already strained by the rapidly growing caseloads, and it is very difficult for companies to access with any level of confidence its application. The new rules and principles envisioned by the BEPS report promise to exacerbate this situation if a substantial amount of attention and resources are not made available to support and enhance the MAP programs around the world. The MLI should ensure that taxpayers find the MAP process transparent, predictable, and efficient. Taxpayers should be informed of any MAP negotiations affecting them, and countries should be transparent in their MAP procedures. The guidance associated with the MLI should ensure that countries that sign up to the MLI are required to commit to working on improving their competent authority relationships, including becoming a member of the FTA MAP Forum. They should also be subjected to peer reviews so that they can be held accountable for their MAP functions. For those peer reviews to be truly effective, they need to include a mechanism by which input is obtained from taxpayers regarding countries’ application of the minimum standard in practice. The NFTC recommends that the FTA MAP Forum be given a central role in ensuring that the ultimate recommendations are driven forward on a strict timetable, and that the
competent authorities, with the full support of their respective commissioners, are held accountable for the program of work.

The MAP provisions are of key importance to ensure both the success of the MLI, and the entire BEPS project. Effective dispute resolution provides the necessary framework to ensure mismatches in interpretation of the international tax rules are adequately dealt with.

Sincerely,

Catherine G. Schultz
Vice President for Tax Policy
National Foreign Trade Council
cschultz@nftc.org
202-887-0278
Dear Sir/Madam,

Discussion Draft: multilateral instrument to implement the tax-treaty related BEPS measures

PricewaterhouseCoopers International Limited on behalf of its network of member firms (PwC) welcomes the opportunity to comment on the OECD’s Public Discussion Draft on the multilateral instrument to implement the tax-treaty related BEPS measures.

While some of the concerns expressed in our previous comments regarding several of the BEPS recommendations have not been addressed, we commend the Ad Hoc Group for its ongoing efforts to develop a multilateral instrument (MLI) to modify existing bilateral tax treaties in order to swiftly implement the tax treaty measures developed in the course of the OECD-G20 BEPS Project. Consistent application and interpretation of the provisions under the MLI is generally desirable in order to avoid double taxation, limit controversy as much as possible and increase taxpayer certainty, so consultation with stakeholders is vital. Ultimately, however, it should be made clear that any difficulty or doubt regarding the application of a double tax agreement, after modification by the MLI (and with the aid of any guidance or tools), should be resolved by the treaty partners, taking into account the bilateral considerations that led to the conclusion of the bilateral agreement.

We recognise that various decisions will have been made about the form of wording to be included in the MLI to deal with the variations and alternatives set out in the relevant BEPS actions with the ability for countries to opt-in and/or opt-out of particular elements. We also respect the privacy of the negotiations between potential signatories to the MLI as to their desire or ability to agree to particular wording. There are many complex legal issues that can be raised and that eventually need to be addressed. As there is no draft yet to comment on, we refrained from listing those issues.

Having also seen the draft submissions of certain collective bodies, we have limited our comments in this response to matters we think are still to be finally agreed and where we have particular comments on their effectiveness. We would be happy to comment on these or broader issues at the public hearing.

Timing

While there is an intention to have the MLI ready for signature by 31 December 2016 and that may be difficult to defer, the Discussion Draft alludes to the fact that if it is kept relatively simple detailed guidance rules and helpful tools will be required to enable effective implementation. It would make sense to take time to get all of that right rather than rushing to meet an artificial deadline early in 2017, even if it were one tentatively indicated to the G20.

The MLI is a ground-breaking initiative and one that could set a precedent for international law in the future. It will still be far quicker than the process of amending thousands of treaties.
Amending the MLI once it is in effect will be a difficult, time-consuming process and subject to each signatory’s ratification of any changes.

Getting it done right is of far greater importance than getting it done quickly.

**Consultation**

Given the technical difficulties which are the subject of the Discussion Draft, it would seem imperative that a period of consultation is allowed for review of the important outcomes.

Having said we respect the privacy of the negotiations in the same way as if this were a bilateral treaty, which would be concluded without a draft being made public, the equivalent issues of scope for the MLI have already been determined in the BEPS recommendations. The work being carried out now on the MLI would seem to be one of form rather than scope, which is more akin to the final stages of publishing a model tax convention of the type produced by the OECD, UN or US on which public comment has rightly been sought. Further, the MLI is a unique instrument required to support the implementation of key elements of BEPS recommendations achieved as a result of OECD-driven consultation. Because of its broad application and the challenges of amending it, we believe it is of critical importance that stakeholders have an opportunity to provide input on the exact wording before it is finalised for signature.

However, if the MLI is relatively straightforward, consultation on the proposed guidelines and tools to facilitate implementation may be the more important matter.

A consultation period of two to three months would seem appropriate.

**Disputes and the MLI**

The MLI may give rise to disputes between signatories. The process for agreeing those disputes would likely be something similar to MAP. A minimum standard for MAP was agreed in BEPS Action 14. We suggest that including the minimum standard on MAP in the MLI would be an appropriate means of addressing consistency in resolution of such disputes.

**Mandatory binding arbitration**

Detailed implementation rules are required if mandatory binding arbitration is to work effectively. Depending on the form of the MLI, those implementation rules ought to be part of the MLI or part of the ancillary documentation such as in a memorandum of understanding (MOU). We draw your attention to the arbitration MOUs between Japan and the Netherlands or Hong Kong and between the US and Canada or Germany as specific examples in this regard.
We would be very keen to discuss with you any questions you have on the points we raise above or on other specific matters raised by respondents to the Discussion Draft and would be keen to speak at the public hearing via our registrant Edwin Visser.

Yours faithfully,

Stef van Weeghel, Global Tax Policy Leader
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RSM

Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures

We welcome the opportunity to respond to the consultation document on the proposals for the Multilateral Instrument.

RSM

The UK group of companies and LLPs trading as RSM (RSM) is a leading mid-tier provider of accountancy and business services. We provide our clients with audit, accountancy, personal and corporate taxation, VAT, management consultancy, corporate finance, IT advisory, restructuring and recovery and forensic services. The firm has national coverage through its network of offices and is represented internationally through its independent membership of the RSM network.

Our client base includes many mid-market international and multinational companies that are likely to be affected by the proposals.

General comments

We are providing comments on aspects of the consultation that seem most relevant to our client base. Many of our comments on the instrument fall within the general theme that more clarity should be provided.

The resulting instrument will affect the tax affairs of large and small businesses alike. Many of these in the mid to lower end of the size range do not have dedicated in-house tax specialists and yet the businesses will be required to understand the position under the treaties, as modified by the instrument, in order to comply with their tax obligations. We believe that it is important that there is clarity over what text is in force.

In particular, we would request that the OECD requires that existing treaties are consolidated to include the amendments arising. We would also request the translation of the text into languages other than English and French.

We believe there is scope for confusion if countries individually produce guidance on how they interpret the changes brought about by the Multilateral Instrument. Therefore we would propose that OECD commentary be provided, describing how the provisions of the Multilateral Instrument are expected to be interpreted (a purposeful approach) and providing scope for countries to indicate where, by exception, they disagree or diverge.

In addition, we propose that the text should be clear on a hierarchy for resolution of conflicts between the text of the Multilateral Instrument and pre-existing treaties, especially where, in the past, there have been departures from the OECD model. We propose further that it would be rational, from
implementation of the Multilateral Instrument, for any conflicts to be resolved in favour of OECD principles.

In relation to the provisions relating to arbitration, our experience of the existing Mutual Agreement Procedure (MAP) is that our clients often are reluctant to submit cases on the grounds of cost and timescale.

We therefore propose that when a country makes a commitment to adopt the binding arbitration provisions, then their adopted process of MAP leading to arbitration must be well defined and enforceable. We would propose perhaps even a presumption in favour of the taxpayer if a state does not properly deal with its procedural obligations under the MAP.

In addition, we believe there should be clarity over the timing of when a dispute may be referred for arbitration, particularly in relation to any obligation to attempt to clarify or reach resolution locally. Where such efforts locally include reference to a local tribunal, there should be clarity over whether the outcome of binding arbitration is capable of over-ruling the tribunal, or whether any tribunal proceedings must be stayed pending binding arbitration. We also propose that domestic provisions designed to exert pressure on taxpayers to settle rather than enter into MAP (for example geared penalties that encourage informal settlement but multiply in value in order if an appeal is lodged) should be discouraged.

We trust you will find the above comments helpful. However, should you wish to discuss this response further, please feel free to contact Andrew Seidler on 020 3201 8615.

Yours faithfully

A Seidler

RSM UK Tax and Accounting Limited
Dear Sirs,

Thank you for the opportunity to provide inputs on the development of a multinational instrument to implement the tax treaty BEPS related issues.

We understand that inputs are requested on technical issues to be considered in adapting the BEPS measures through the multilateral instruments, as well as the approach to be taken into account in developing a mandatory binding MAP arbitration clause. In the following, our comments will therefore be mainly focused on potential issues regarding mandatory binding MAP arbitration, which however should be considered as they are strictly linked and may also generally affect the application and interpretation of all dispute resolution systems.

We also note that the majority of the States presently involved in MAP cases have committed to provide for mandatory MAP arbitration by adopting the option to be drafted in the multilateral instrument, and appreciate that such relevant achievement will contribute to improve resolution procedures in a large number of cases where existing treaties do not grant that a solution is reached to solve tax disputes. Improvements are nevertheless mostly needed in countries showing a lower number of MAP cases (or no cases at all), as this may not only derive from the size of their cross border trades, but also by the timing and efficiency of the procedures in place to solve disputes according to administrative agreements with other countries. The adoption of the BEPS outputs, besides all efforts to make the application the more simple and clear, will increase the challenges to achieve a fair distribution of profits across jurisdictions, and more than before settlement procedures will be required to solve disagreements between governments and taxpayers. However, consensus has not yet been reached among all BEPS participating countries on the adoption of the mandatory binding MAP arbitration due to a number of reasons, including the fact that the State sovereignty in administering and collecting its own taxes would be affected. Possible concerns of countries that are still considering committing to adopt arbitration, or are reluctant to implement such procedure, may nonetheless be addressed in designing such provision, which may ensure full independency and high level professional expertise of the deciding body members, as well as transparency in the decision process. Involvement of non OECD member representatives, such as UN or other international organization, may also help to satisfy the needs and particular features of the developing countries tax systems.

1. Introduction

While the BEPS package is mainly aimed at addressing tax avoidance and ensuring that profits are taxed where value is created, tax treaties (including the modifications that may be adopted by way of a multilateral instrument implementing BEPS) should on the other hand ensure that activities carried on in different jurisdiction do not lead to double taxation.

The 2015 action 14 final report - making dispute resolution mechanism more effective – therefore recognizes that BEPS measures must be complemented with actions to ensure certainty and predictability
for business. The BEPS Action plan is therefore an opportunity to implement effective procedures to resolve disputes between Contracting States regarding the interpretation or application of the tax treaties, including the new provisions arising from BEPS actions.

As for the development of a multilateral instruments that would modify or complement existing treaties, the Public Discussion Draft on Action 15 is therefore envisaging measures (i.e. a single MAP clause in line with article 25 of the OECD Model) that, once and if agreed, should at least allow Mutual Agreement Procedures in a wide and consistent way across all BEPS project participating States (including non OECD Members States). In addition, the multilateral instrument would provide for a mandatory binding arbitration clause, thus requiring coordination with the existing arbitration procedures already in place under some existing tax treaties (i.e. US-Italy) as well with the EU arbitration convention.

2. MAP access

2.a. Element 1.1. of the minimum standard set in Action 14 final report requires that access to MAP shall be granted in transfer pricing cases.

Some States (i.e., Italy) may however take the view that MAP on “transfer pricing” should only cover cases where the taxpayer and the tax Authorities do not agree on the amount of the price to be charged on a given transaction, while only domestic remedies would be available where, in the view of the tax Authorities, no transaction took place, or no price should have been charged in the disputed case.

Although this may be supported by local law, as well by the possible definition of transfer pricing provisions in the domestic tax law, the outcome does not seem in accordance with purpose of tax treaties, as this may lead to disagreement between Contracting States and possible double taxation, which could not be avoided by corresponding adjustments (Article 9).

Besides the possible amendments to the OECD Commentary, the drafting of the multilateral instrument and/or the explanatory report may thus make clear that MAP access, including mandatory MAP arbitration, should be granted by all signatory States, including non OECD Members, in all cases of cross border profit adjustments.

2.b. Similar double taxation issues may also arise where treaty benefits are denied under a general domestic anti-abuse provisions which would not fall under the PPT rule to be implemented under Action 6 of the BEPS Action Plan, being different in its wording, or at least be interpreted in a different way (see Element 1.2. of the Action 14 report).

Implementation of Action 15 may therefore make clear that disputes arising on treaty’s application shall be resolved under MAP procedures in all cases of GAAR (general anti-avoidance rules), i.e. including beneficial ownership clause, alleged conduit structures, structured arrangements (see Action 2, Neutralizing the effect of hybrid mismatch arrangements) and other treaty’s or domestic anti abuse clauses.
2.c. Besides the above mentioned cases, it is generally desirable that States who will be signing the multilateral instrument including a MAP clause, whether or not providing for a mandatory binding arbitration, shall reach a common understanding and agree on minimum standards and best practices as detailed in the final report on Action 14.

In this respect, Action 14 report (par. 17) envisages possible amendments to the OECD Model Convention Commentary as further detailed under Element 3.1., although the procedures and interpretation from non OECD States may differ from such Commentary.

In the course of the discussions for the development of the multilateral instruments, contracting States – including those who have not yet declared their commitment to the mandatory binding arbitration – may however accept to implement a MAP and/or arbitration clause and express possible disagreements by way of reservations and observations to either the multilateral instrument and or the interpretation provided in the explanatory report (i.e., access to arbitration is granted in all treaty’s disputes - such as that relating to the interpretation of terms, or the new tie breaker residence rule proposed by BEPS Action 6 - other than that relating to transfer pricing only, where local transfer pricing rules differ from OECD standards).

3. Other MAP issues

3.a. As to anti-avoidance and anti-abuse measures to be adopted via a Multilateral Instrument (MLI), the topic appears to be even more critical.

The first issue in this respect is that many jurisdictions derive the definition of abuse of law from commercial law provisions: in this respect, the absence of a proper definition of abuse of law within the international law context may lead to misleading results. So far, an unavoidable starting point of such MLI shall be to find a shared definition of abuse of law relevant for (income) tax purposes with (public) international law relevance.

3.b. The second issue in this respect derives from the underlying reason for any claim raised by a Tax Authority based upon an abuse of law claim. An abuse of law claim usually is raised whenever the taxpayer (improperly) obtains a tax benefit in a tax jurisdiction for transferring the taxable income in another one (which it is unlikely willing to raise the same claim). If such abuse of law is shared also by the other jurisdiction (based upon the shared definition agreed according to paragraph 2.e. above) this means that the Multilateral Instrument shall provide for allocation criteria among the jurisdictions involved.

3.c. Any allocation criteria become increasingly difficult in cases where the jurisdictions involved are more than two. Any distinction among the (classical) division between Source State and Residence State risks to become meaningless. In addition to that, allocation criteria based upon the BEPS principles shall take into consideration that also countries where a branch is located becomes relevant. If this is true, then an MLI which considers only the jurisdictions that may apply the Treaties (i.e. other than the ones
where a branch is located) could lead to some conflicts of allocation and/or legitimacy of a country to be included in the income allocation.

3.d. In any case, where a transaction or a series of transactions is deemed to be included within the (internationally) shared abuse of law definition for all the countries involved based upon the MLI definition, a result leading to a double (or multiple) taxation for the taxpayers involved would be undesirable.

3.e. Conclusively, an MLI which desires to face the abuse of law on the international context, will need not only to gain (i) a shared definition of abuse of law; (ii) allocation criteria between the jurisdictions involved, but also shared criteria to re-characterize a transaction or a series of transactions based upon common standards. In this respect, what is provided for under U.S. Code § 368 of IRC could be of inspiration - in other words, a list of admitted reorganizations which qualifies for a specific tax treatment.

3.f. The operations of multinationals companies with associated companies are carried in multiple jurisdictions and should comply with local transfer rules. In most cases, particularly where such jurisdictions apply similar standards, comparable or identical transactions are priced in the same manner and it is desirable, to the extent possible, that all interested States may reach a common agreement on the transfer policy to be applied.

Disputes that may arise between two Contracting States may however affect transfer pricing policy applied with a third State, and taxpayers may not be willing to initiate a bilateral MAP or other arbitration procedure, as the outcome may spread over more countries and raise further disputes.

For example, assume that Country A (Italy) is adjusting the profit of company A in relation to services paid to an affiliate company B resident in country B. Country A and country B may reach an agreement under a MAP or arbitration procedure which would increase country A revenues for a given amount, but then country C may also claim the same increase in relation to comparable services rendered by company B, or possibly a larger amount which country B did not agree upon. Another and simpler example is that of company D supplying goods or services to all its affiliate companies in countries E,F,G,H, which, according to country D tax Authorities, would require an upward profit adjustment that such other countries are not willing to equally accept.

There is not a simple solution in order to settle bilateral disputes which may also directly or indirectly affect the policy (and possibly also APA) of other jurisdictions, although similar situations are becoming more frequent for headquarters and other entities supplying goods and centralized services to all group companies. In the context of a multilateral instruments, a possible step forward in the remedies to solve double taxation issues would be a “multilateral MAP” or arbitration procedure, whereby third States which are involved in similar disputes with the same taxpayer, or may be affected by the outcome of a bilateral procedure, may be called to join a resolution procedure and agree on its outcome.

Yours sincerely,
Software Coalition

The Software Coalition thanks the OECD for the opportunity to provide comments on the Public Discussion Draft on BEPS Action 15: Development of a Multilateral Instrument to Implement the Tax Treaty Related BEPS Measures (the “MLI”), which the OECD issued on May 31, 2016 (the “Discussion Draft”).

The Software Coalition is the leading software industry group dealing with U.S. domestic and international tax policy matters. The Software Coalition was formed in 1990 and now comprises 24 companies which operate in the software and e-commerce sectors. Software Coalition members account for approximately $550 billion per year in total gross revenue. Member companies employ over 1.5 million individuals around the globe.85 We respectfully submit the following comments with a view towards enhancing the policy goal of implementing BEPS-related measures on a consensus basis through a coordinated and uniform modification of existing bilateral treaties.

Introduction

The final BEPS reports recommend significant changes that reshape current international tax law.86 Several of the final reports proposed significant changes to the OECD Model Tax Convention (“MTC”) and related Commentary. As the international treaty network changes, virtually overnight, to incorporate these significant changes, tax administrations and taxpayers will need to understand clearly the consequences of the different rules to be applied after the effective date of the MLI.

The MLI provides a mechanism to allow participating countries to implement these changes in a consistent and coherent manner. The accompanying explanatory statement to the final action reports explains that it is “imperative to move quickly to try to limit the risks of countries taking uncoordinated unilateral measures which might weaken key international tax principles which form a stable framework for cross-border investments.”87 To achieve this objective, there must be a clear and precise transition

85 The Software Coalition’s current membership comprises the following companies: Adobe Systems Inc.; Amazon.com, Inc.; Autodesk, Inc.; BMC Software, Inc.; Cisco Systems, Inc.; Electronic Arts, Inc.; EMC Corporation; Facebook, Inc.; General Electric Co; IBM Corporation; Imperva, Inc.; Mentor Graphics Corporation; Microsoft Corporation; Micro Focus International plc; Nuance Communications, Inc.; Oracle Corporation; PTC Inc.; Pivotal Software, Inc.; Salesforce.com Inc.; SAP America, Inc.; Symantec Corporation; Synopsys, Inc.; Veritas Technologies; and VMWare, Inc.


87 Explanatory Statement, supra, paragraph 3.
between the old rules to which countries have been accustomed and the new BEPS-related measures. Our comments focus on technical issues that may arise during this transition phase.

**The OECD Should Reinforce the Principle of Strong Consensus Interpretations of the New Principles**

The Ad Hoc Group should take the opportunity of drafting the MLI to reinforce the intent that all treaty changes introduced as part of the OECD / G20 BEPS Project will be implemented through a consistent, and consensus based, interpretation. Many of the new provisions to be incorporated in treaties through the MLI express novel standards in the tax law, such as a person who “plays the principal role leading to the conclusion of contracts”. Others adopt as an international standard tests which may have existed in the treaty practice of some countries, but which have not benefited from consistent and coordinated interpretative guidance, such as whether obtaining a tax treaty benefit “was one of the principal purposes of any arrangement or transaction”. These new concepts introduce subjective elements to treaty law that necessarily will require close assessment of disparate factual contexts. Fair and appropriate administration of the tax law requires that the OECD / G20 countries remain insistent on a uniform and consensus based application of these rules.

In the event that a jurisdiction does not adhere to the consensus interpretation of any treaty standard to be incorporated via the MLI, we believe that the jurisdiction should lodge an Observation to the Commentary to express its different view. Due to the long tradition of the MTC and its Commentary as founded on a strong consensus of Member States, that reputation for reliability and stability will be undermined if jurisdictions do not actively seek to articulate and apply a consensus interpretation. It is more appropriate for a jurisdiction to be transparent in its interpretation of the MTC or the Commentary through filing Observations than it is to disagree with the consensus interpretation without any disclosed intent to do so.

This expectation should apply equally to states participating in the MLI which are not OECD Members, but who have been participating in the MLI process on an equal footing. The Ad Hoc Group should agree on a mechanism to allow all participating countries to make a public commitment to follow the Commentary to interpret all treaty provisions introduced by the MLI. To the extent that a jurisdiction intends to deviate from Commentary guidance, they should file an Observation. In addition, given that other parts of the Commentary will remain relevant to interpret treaty Articles that have been amended by the MLI, all non-OECD members should be required to declare publicly their “positions” on any other Commentary provision that is relevant to the interpretation of the amended provisions.

In general, we applaud the established practice of encouraging non-Member states to declare their positions on the Commentary. That practice significantly increases the transparency of legal interpretation around the world, and enhances the utility of the OECD Model Tax Convention and Commentary as the most important model for international tax treaty negotiations and interpretation. The Ad Hoc Group should build on that tradition through encouraging similar transparency in implementing the MLI.
Further, the Ad Hoc Group should take this opportunity in an explanatory statement or elsewhere to reinforce the strong OECD / G20 policy directive that jurisdictions should not propose new unilateral taxation rules that have not been approved through the OECD / G20 BEPS Project. In recent months, and even weeks, various OECD / G20 jurisdictions have proposed revised nexus standards for direct taxation that are inconsistent with the consensus reached in the OECD / G20 BEPS Project. These unilateral approaches create risks of double taxation and undermine the consensus-based approach that underlies all OECD international tax policy.

The MLI Should Make Clear that the Changes to the Treaties are Prospective in Nature

All the Proposed Revisions to the MTC Are Substantive Changes in the Law

We recommend that the Ad Hoc Group make a clear and unambiguous statement in an explanatory statement or elsewhere that all of the changes being memorialized in the MLI are significant changes in the law. We have seen in practice that some tax administrations already are suggesting that current treaty provisions can be interpreted with reference to the proposed treaty changes and even, in some cases, to concepts in discussion drafts that are not incorporated in any actual proposed treaty language. For example, the final Action 1 report presented “options” for possible further study, and expressly stated that no such option was being recommended. Nevertheless, some tax authorities have interpreted this report as an endorsement by the OECD / G20 of theories for direct tax nexus that do not exist under current tax treaties or the proposed Action 7 changes.

As a consequence, the Ad Hoc Group should include in the explanatory materials or elsewhere a statement that all changes included in the MLI may be applied prospectively only. Under customary international law and treaty principles, a treaty provision, including amendments to existing treaties, cannot apply to situations or transactions that occur before the treaty enters into force for the taxpayer. In the case of continuing transactions which begin before but continue to exist after the entry into force of the treaty, the revised treaty provisions may apply to that transaction, but only as of the date of entry into force of the treaty, or the relevant amending provisions.

88 OECD / G20 Action Plan on Base Erosion and Profit Shifting (2013), pp. 10-11, available at http://www.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting_9789264202719-en (noting that “the replacement of the current consensus-based framework by unilateral measures . . . could lead to global tax chaos marked by the massive re-emergence of double taxation” and need for consensus-based approach and multilateralism); Explanatory Statement, supra, paragraph 24; OECD/G20 Base Erosion and Profit Shifting Project, Information Brief, 2015 Final Reports, page 3, available at https://www.oecd.org/ctp/beps-reports-2015-information-brief.pdf (“Countries recognised the need to prevent the unravelling of the existing consensus-based framework and planned accordingly to ensure that globalisation did not lead to decreased international cooperation and uncoordinated unilateral actions in the tax sphere which would multiply uncertainty and unpredictability.”); Testimony of Pascal Saint-Amans, Director of the OECD Centre for Tax Policy and Administration, Before the United States Senate Committee on Finance (July 22, 2014) (noting unilateral action on an uncoordinated basis “has the potential to replace the problem of non-taxation with the proliferation of uncoordinated legislative measures that will lead to excessive compliance costs for MNEs, as well as the potential for double or multiple taxation of the same income, undermining the existing consensus-based standards and replacing them with chaos” and calling for renewed “worldwide commitment to principled, consensus-based rules”).
B. The MLI Should Provide Guidance on the Effective Date

Art. 30 of the MTC essentially leaves to the parties the determination of the date the treaty comes into force and when it will have effect for taxpayers. The Commentary reflects the point that some flexibility is necessary due to differences in domestic law, such as cases where the taxable year does not correspond to the calendar year.

In contrast, the United States Model Income Tax Convention (the “US Model”) provides specific effective dates for taxes withheld at source and other taxes, with the effective date for the latter taxes based on the taxable year of the person subject to the Convention. Art. 29(2) of the US Model provides as follows:

This Convention shall enter into force on the date of the later of the notifications referred to in paragraph 1 of this Article. The provisions of this Convention shall have effect:

a) in respect of taxes withheld at source, for amounts paid or credited on or after the first day of the second month next following the date on which this Convention enters into force;

b) in respect of other taxes, for taxable years beginning on or after the first day of January next following the date on which this Convention enters into force.

Accordingly, for calendar year taxpayers, the US Model provides that the treaty generally has effect from the January 1 after the entry into force. For fiscal year taxpayers, the treaty generally has effect from the first day of the taxable year beginning after January 1. In both cases, the treaty has effect for withholding taxes on the first day of the second month after the treaty comes into force.

Members of the Coalition believe that the US Model provides an appropriate and effective approach. Any effective date that causes a taxpayer to have two taxable periods will create administrative complications with no countervailing benefit. Accordingly, we suggest the following effective date provision for taxes other than those withheld at source:

Suggested Provision

Unless the Contracting States stipulate otherwise through a separate bilateral agreement, the amendments effected through the Multilateral Instrument shall have effect for taxable years beginning on or after the first day of January next following the date on which this Convention enters into force.


90 See Commentary, Art. 30, paragraph 4.

91 2016 United States Model Income Tax Convention, Art. 29.
C. Special Rules Will Be Necessary if Treaty Amendments Enter Into Force for a Portion of a Taxpayer’s Taxable Year

If the BEPS-related amendments enter into force on any date other than the first day of a taxable year, special rules will be necessary to deal with certain cases.

The first case is when the treaty requires a review of the taxpayer’s circumstances over a full taxable year. For example, the Action 6 Report, subparagraph 2(c)(detailed version), provides that a company must meet the limitation on benefits test for publicly traded companies “throughout the taxable period. . .”92 Similarly, subparagraph 2(e)(detailed version) requires that residents meet the ownership / base erosion test based on share ownership and gross income for the relevant taxable period.

A second case is where the treaty rule may apply on a transaction by transaction basis, such as the amendments to Art. 5. For example, if the changes to Art. 5(5) come into effect during a taxable year, the new permanent establishment (PE) standard should apply only to business activity actually conducted by the taxpayer from the date the treaty is in effect, and not to any business activity conducted before that date. Similarly, if that post-effective date business activity were to cause a deemed PE to arise under the amended provision, profits attributed to that PE could only be those profits arising from that business activity conducted after the effective date which gave rise to the PE, and not any profits arising from any activity conducted before that date.

The preferred approach to address this issue is to provide for effective dates which do not cause the amendments to apply only to portions of a taxpayer’s taxable year. If that approach is not chosen, we suggest the following provisions:

**Suggested Provisions**

(a) Where the provisions of the Convention as amended through the Multilateral Instrument enter into effect for an enterprise resident of a Contracting State on a date other than the beginning of such resident’s taxable year, such resident will have a short taxable year for the first year such provisions enter into effect for that resident.

(b) For residents subject to subparagraph (a), only income and profits attributable to activities conducted on or after the date the provisions enter into effect shall be subject to the provisions of the Convention as amended through the Multilateral Instrument.

**Consensus on Profit Attribution Should Be Reached Before the Conclusion of the MLI**

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We agree with the statement by the Ad Hoc Group that governments should cooperate to provide a more certain international tax environment.\textsuperscript{93} In addition, governments should clearly understand the consequences of entering into an international commitment such as the MLI. Until the work on profit attribution is complete, however, there is no certainty as to the effect of the revisions to Art. 5, and any government which enters into the MLI cannot know what the significance of that decision will be for its resident enterprises.

The work under Action 7 was a central part of the OECD / G20 BEPS Project. The increased prevalence of remote sales models, and the tendency of some multinational groups to centralize functions in jurisdictions other than the jurisdictions into which sales are made, led directly to proposals made under several of the Actions, including Actions 1, 7, and 8 - 10. The result of the work under Action 7 will be that many cross-border transactions will result in PEs that previously did not. But the profit attribution consequences of those new PEs are still unknown.

We find it curious that the MLI would be opened for signature prior to the completion of that important work. In order for a treaty obligation to accurately reflect the intent of the contracting States, each State must have a clear understanding of the consequences of the proposed treaty language. It is hard to see how any sovereign could have a clear understanding of the consequences of the Art. 5 changes in the absence of guidance on profit attribution.

We hope that the ongoing work on profit attribution will base its conclusions firmly on the guidance provided by the 2010 Report on the Attribution of Profits to Permanent Establishments, expressing the Authorized OECD Approach (the “AOA”).\textsuperscript{94} We believe that the AOA expresses a conceptually solid foundation for PE profit attribution, including in the context of deemed PEs created through the application of Art. 5(5). Until the working group completes the work on profit attribution, however, uncertainty will remain as to how the AOA principles will apply to the expanded scope of Art. 5.

Accordingly, we believe that the MLI should not be opened for signature until the work on profit attribution has been completed. Until that time, there is sufficient uncertainty regarding the consequences of the new PEs being created under the MLI so that neither taxpayers nor tax administrations can have a clear understanding of the intention of the contracting states.

If the MLI will be opened for signature without the profit attribution work being completed, we recommend that the MLI include an express statement that the signatories agree to apply the AOA to all applications of Art. 7 to PEs which arise due to any element of Art. 5 which has been affected by the MLI.

Since the AOA is a comprehensive system which should not be interpreted to apply different principles to pre- and post-MLI PEs, we also suggest that the Ad Hoc Group consider this moment as a unique opportunity to demonstrate the widespread commitment to the AOA by all countries who have

\textsuperscript{93} Explanatory Statement, supra, paragraph 2.

been working on the PE project on an equal footing. Despite the many years of work that went into the AOA, many jurisdictions have not fully implemented the AOA as interpretative guidance for Art. 7, at least for those treaties which predate the AOA. The MLI provides an opportunity for all participating states to adopt the AOA, in a treaty instrument that will solve the inconsistencies arising from disparate application between newer and older treaties. Exceptions would be made for any existing treaty with terms in Art. 7 which are inconsistent with the terms of the AOA. If a contracting state is not able to express support for applying the principles of the AOA to all PEs arising after the effective date of the MLI amendments, the principles of fair tax administration suggest that the jurisdiction should express its differences through an Observation on the Art. 7 Commentary.

**Mandatory Binding Arbitration Will Provide an Efficient and Equitable Framework for Dispute Resolution**

The Coalition would like to express its support for allowing jurisdictions the opportunity to adopt mandatory binding arbitration in their treaties through the MLI process. We believe that treaty mandatory arbitration provisions will provide a useful approach to resolving disputes in cases where the current Mutual Agreement Procedure (MAP) may be ineffective to relieve double taxation.

While a number of bilateral treaties now include a mandatory arbitration provision following the MTC inclusion of Art. 25(5) in 2008, not all countries have had an opportunity to amend their treaties to include a mandatory arbitration clause. Coalition members have observed that arbitration provisions have proved to be effective to encourage the agreed resolution of disputes.

We are pleased that a number of countries have demonstrated their commitment to provide for mandatory binding arbitration as a mechanism to guarantee that treaty-related disputes will be resolved within a specified time frame. We encourage the Ad Hoc Group to facilitate further discussions with those jurisdictions which are still uncertain about whether to adopt mandatory binding arbitration, in particular to remind such jurisdictions that their resident taxpayers will be the beneficiaries of these protections.

According, we believe that the MLI process generally should remove as many barriers as possible to encourage jurisdictions to include arbitration as an alternative dispute resolution mechanism. For example, we believe it is more important to encourage widespread adoption than to prescribe the form of arbitration to be used. The MLI could allow the treaty partners to choose the form of arbitration that they prefer (e.g., so-called “long form” or “last best offer” arbitration). This approach would also be consistent with the current language of Art. 25(5)—an example of a provision that has been applied and interpreted before—and minimizes countries’ potential reservations to the provisions as well as efforts in drafting and negotiating the new provisions.

On the other hand, we do not believe that narrowing the scope of the mandatory arbitration provision as an inducement to some countries which maybe wavering as to their intentions would be

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95 BEPS Action 15, supra, paragraph 8.
prudent. Imposing limits on cases that may be eligible for the provision would impair the effectiveness of the process for tax administrations and taxpayers. Without a broad scope provision, the MLI would miss an opportunity to further ensure consistent and coordinated application of the BEPS-related measures.

We appreciate the opportunity to provide these comments, and look forward to further participation in the implementation phase of the BEPS process.

Sincerely,

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cc: Members of the Software Coalition
Tribute Foundation

Dear Mr. Williams,

Re: OECD public discussion draft on the BEPS Multilateral instrument

On behalf of Tribute, I write in response to the public discussion draft on the Multilateral Instrument to implement the treaty-related BEPS measures, issued on 31 May. I note, in particular, the request in the draft for input on the approach to be taken in developing the optional provision on mandatory binding MAP arbitration.

As the 2015 Final Report on BEPS Action 14 notes, more than 90 percent of all outstanding MAP cases reported to the OECD at the end of 2013 involved countries having declared their commitment to provide for mandatory binding MAP arbitration in their tax treaties. Yet, the OECD sample mutual agreement on arbitration does not provide any conclusive procedure for the implementation of MAP arbitration (nor, for that matter, does the comparable United Nations sample mutual agreement). Such procedural rules are found only under some recent tax treaties between OECD member countries, e.g., the United States treaties with Canada, Belgium, Germany, and France, and the treaty between the Netherlands and Germany. The European Arbitration Convention, while offering a basic set of procedural rules, is commonly recognized to lack a default mechanism, enabling arbitral proceedings to be initiated through the assistance of a third party where countries fail themselves to organize one. Countries may fail to do so for reasons of disagreement on whether a case in fact qualifies for an exclusion of arbitration as provided under the Convention; or on an essential element of an arbitral procedure, such as the choice of the presiding arbitrator; or, simply, because either country fails to initiate any proceedings, whether out of inexperience or for lack of resources. It may be assumed that practical concerns of the latter kind, more generally, prevent countries from committing themselves to MAP arbitration in the first place.

It is in this light that Tribute proposes that the BEPS Multilateral Instrument include, next to a provision for mandatory binding arbitration, a comprehensive and robust set of procedural rules. These rules should safeguard the proper functioning of the arbitration process, enable the resolution of disputes on whether countries have indeed agreed on arbitration for a particular case, and offer the services of an expert neutral facility to relieve countries and arbitral tribunals from having to administer arbitrations themselves. This would be in the interest of both the countries that have already committed to implement mandatory binding arbitration, as well as those countries that are considering committing to arbitration in the future.

Tribute does not provide arbitration services. In this regard, Tribute has approached the Permanent Court of Arbitration (PCA), based in the Peace Palace at The Hague, which subsequently has indicated its availability to administer MAP arbitrations, should interested countries agree to request its services. As you will know, the PCA is an intergovernmental organization, uniquely created and qualified to facilitate the resolution of disputes between States, and celebrating a history of over 100 years. Tribute and the PCA, in joint cooperation, have developed a model procedure especially for MAP arbitrations, which for
the time being we have named “Tribute arbitration”, as a mere working title. I refer to the summary of the proposed model and the letter of the PCA’s Secretary-General, Mr Hugo Siblesz, both as per attached. A full overview of the details of the model is currently in the process of being finalized, and I will be happy to present you with that as well as soon as it becomes available.

The proposed model provides for case administration by the PCA and proceeds subject to the PCA Arbitration Rules 201296, which offer a comprehensive and robust arbitral framework. At the same time, the model provides a flexible mechanism to implement the provisions on MAP arbitration contained in tax treaties based on the recent versions of either the OECD and United Nations model income tax treaties, the United States model income tax convention, or the European Arbitration Convention. The model is primarily designed for fast-track arbitration against a modest cost (ranging from an all-inclusive €15,000 for disputes resolved by a sole arbitrator, to €40,000 in case of a three-member arbitral tribunal), but it may be used for more conventional arbitration procedures as well, depending on countries’ preferences. It is equally suited for bilateral as well as multilateral disputes. Finally, the model may be used either as a mandatory procedure or merely as a default mechanism (i.e., in cases where countries, within a certain period of time, have failed to agree a different procedure). The latter would, of course, be for countries to negotiate by themselves.

The model may be easily fitted in the BEPS Multilateral Instrument. To this effect there is a sample clause attached, based on the PCA model arbitration clause for treaties and other agreements, which you may find of use.

I would point out that under the proposed model of ad hoc arbitrations countries remain in full control over the proceedings, notably when it comes to the determination of applicable arbitral rules and the appointment of arbitrators. This distinguishes the proposed ad hoc model from less flexible institutionalized arbitrations. The proposed model respects any procedural rules countries may already have agreed between each other under their existing tax treaties or the European Arbitration Convention. The model does not require countries to transfer any more sovereignty than they do at present in their practice of ad hoc arbitrations. Neither does the model for purposes of its operation require countries to include any additional provisions in their existing bilateral tax treaties. Some countries, however, might need a special provision to authorize the submission of confidential information to the PCA, next to the customary provision for the submission of such information to arbitrators. Such a provision might be added in the BEPS Multilateral Instrument. Finally, under the model countries may avail of the Tribute list of experts in appointing arbitrators, should they wish so. This is merely a service Tribute offers. The use of a list of experts, as a first precedent for tax treaties, was recently agreed by the United States and Germany under their treaty for purposes of the appointment of presiding arbitrators, and even on a compulsory basis. Tribute and the PCA are, of course, available to respond to any questions or comments on the proposed model you or members of the Ad Hoc Group may have, and to advise your Group on any modifications of the model or the sample clause as you may seek.

I will be sending copies of this letter to Mr. Pascal Saint-Amans, Director of the OECD Centre for Tax Policy and Administration, Mr. Michael Lennard, Secretary of the United Nations Committee of Experts on International Cooperation in Tax Matters, and Mr. Heinz Zourek, European Commission Director-General Taxation and Customs Union, for their information.

For details on Tribute, its aims and organization, I refer to the prior Tribute letter of 16 January 2015 in response to the OECD public discussion draft on BEPS Action 14. As per attached you find an updated list of international tax experts supporting the Tribute initiative.

Yours sincerely,

Hans Mooij

Chair of the Tribute Foundation
Dear Mr. Williams,

The Permanent Court of Arbitration ("PCA") is aware of the initiative, proposed in the attached letter of Mr. Hans Moolj on behalf of Tribute, to establish a "fast-track" arbitration procedure that would supplement existing, though largely unused, dispute resolution mechanisms in various bilateral taxation treaties and the European Arbitration Convention. I note, in particular, that Tribute has proposed designating the PCA as the appointing authority and administering institution for arbitrations under its proposal, which is being submitted in response to the OECD public discussion draft, issued on 31 May, on the development of a Multilateral Instrument to implement treaty-related BEPS measures.

The PCA is one of the oldest forums for the peaceful settlement of disputes and plays a leading role in international arbitration, conciliation, and other forms of dispute resolution. In 2015, the PCA administered 138 cases, including 8 inter-State arbitrations; 76 investor-State arbitrations arising under bilateral/multilateral investment treaties and national investment laws; 44 arbitrations arising under contracts involving a State, intergovernmental organisation, or other public entity; and 7 other disputes.

The PCA welcomes Tribute’s initiative to activate existing mechanisms of dispute resolution under the BEPS Multilateral Instrument. The PCA Arbitration Rules 2012, which Tribute includes in its proposal, embody a comprehensive set of procedural rules that can be customised by the parties to arbitration to suit their specific needs. Given its experience, the PCA would be ready to put its services at the disposal of States who wish to support the implementation of those mechanisms.

Should it be helpful, I would be happy to jointly explain our proposal, along with representatives of Tribute, to you or other members of the Ad Hoc Group on the PCA’s potential role in this regard.

Yours sincerely,

Hugo H. Sibbesz
Secretary-General
Summary of the fast-track tax arbitration procedure

The arbitration is conducted in accordance with the PCA Arbitration Rules 2012 subject to such modifications as the Competent Authorities mutually agree. The Secretary-General of the PCA serves as Appointing Authority and appoints an arbitrator preferably from the Tribute List of Experts. The International Bureau of the PCA serves as administrator for the arbitral proceedings.

The Competent Authorities may mutually agree an Arbitral Tribunal of either one or three persons.

In choosing an arbitrator the Competent Authorities may avail themselves of the Tribute List of Experts. The Tribute Foundation advises on the availability of the Tribute experts.

The costs of the arbitration, consisting of the fees and expenses, if any, of the Arbitral Tribunal and the PCA, may vary in accordance with the modifications agreed by the Competent Authorities, but in no case exceed a total of EUR 15,000 in case of a sole arbitrator, and of EUR 40,000 in case of three arbitrators (amounts exclusive of VAT).

The arbitration may regard a multilateral as well as a bilateral dispute.

The Tribute Foundation and the PCA are available to advise at request of either or both of the Competent Authorities on the use of preparatory or alternative mechanisms of supplementary dispute resolution (such as mediation).

The proposed arbitration is a streamlined process, with its proceedings consisting of written pleadings only and being restricted to position papers and reply submissions, both of a limited number of pages. However, a short hearing may be held by telephone or video conferencing on proposal by the Arbitral Tribunal or either of the Competent Authorities.

The arbitration may be based on either of the “independent opinion” or “last best offer” approaches (as generally outlined in the OECD sample mutual agreement on arbitration), subject to mutual agreement by the Competent Authorities.

The Arbitral Tribunal may permit the taxpayer(s) to submit in writing its analysis and views on the case only with the agreement of the Competent Authorities.

The deadlines for the submission of the written pleadings are to be determined on an individual basis by the Arbitral Tribunal in agreement with the Competent Authorities; they preferably do not exceed 30 days from [insert milestone].

The Arbitral Tribunal endeavours to deliver its award within 30 days.
The Arbitral Tribunal provides reasons for the determinations it makes in its award, unless the Competent Authorities mutually agree that no reasons are to be given in the award.

The arbitral award may be made public only with the consent of the Competent Authorities and in such form as the Competent Authorities may mutually agree.

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Sample Arbitration Clause

Any dispute between the Parties to this [BEPS Multilateral Instrument], concerning a double taxation convention concluded between them, shall be submitted upon request of either Party to binding arbitration by a tribunal constituted in accordance with the [Tribute Fast-track Procedure] and subject to the PCA Arbitration Rules 2012.

Note:

In drafting their arbitration clause, the Parties may wish to consider the following issues, which can either be incorporated into the arbitration clause directly, or agreed at a subsequent stage of the proceedings:

Number of arbitrators  
Example: The number of arbitrators shall be . . . [insert ‘one’ or ‘three’]

Place of arbitration  
Example: The place of arbitration is . . . [insert city and country]

Language of proceedings  
Example: The language(s) to be used in the arbitral proceedings shall be . . . [insert language(s)]

Reasoning in the award  
If they wish (for instance, to reduce costs), the Parties may deviate from the PCA Rules, which provide that the Tribunal “shall state the reasons upon which the award is based” and instead allow awards to be issued without reasons.

Whether to hold a hearing  
The Parties may wish to specify whether they wish for the Tribunal to schedule a hearing after the filing of written pleadings, and whether the hearing could be via teleconference instead of a physical hearing in the presence of the Tribunal.
These issues are not exhaustive. Of the above issues, the number of arbitrators, place of arbitration, and language of the proceedings may be most useful to incorporate into the arbitration clause itself. Other issues that might be considered include the number of rounds of written pleadings, and whether the taxpayer whose liabilities are in dispute should have a role in the proceedings (for instance, in appearing as a potential witness).

Finally, the Parties may also wish to specify the level of confidentiality to apply to the proceedings; more information on how the PCA Arbitration Rules 2012 safeguard confidentiality is set out on the next page.

Note on Confidentiality at the Permanent Court of Arbitration

Confidentiality is a major concern in the international exchange of tax information. Article 26(2) of the OECD Model Income Tax Convention, for instance, obligates States receiving such information to treat it “as secret in the same manner as information obtained under [its own] domestic laws.”

The PCA is able to accommodate these sensitivities. In particular:

Under the PCA Headquarters Agreement with the Netherlands, PCA offices and archives are immune from search or seizure by the Dutch authorities. The PCA has similar immunities in several other States, including Argentina, Austria, Costa Rica, Chile, the Hong Kong SAR, India, Mauritius, Singapore, South Africa, and Viet Nam. In consequence, PCA documents remain confidential vis-à-vis domestic tax authorities.

Staff within the PCA work under strict confidentiality obligations. The 1900 Rules on Organization of the PCA International Bureau oblige the PCA staff to keep all work confidential. The PCA only discloses information relating to arbitrations under its administration when the Parties so request; the publication of case-related information on the PCA website, for example, requires the agreement of the Parties. Most cases pending at the PCA are not disclosed.

The PCA Arbitration Rules 2012 provide several additional confidentiality safeguards, requiring, for instance, the consent of the parties for publication of the award or the holding of hearings in camera (rather than in public).

97 1900 Rules on Organization of the PCA International Bureau, Article V (“The Staff of the International Bureau are forbidden to communicate to persons outside the Bureau, either by word of mouth or in writing, any information concerning the business entrusted to them in the course of their work, or to allow such persons any access to the documents pertaining to the work of the Bureau.”).

98 PCA Arbitration Rules 2012, Article 34(5) (“An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.”).
If the Parties wish to conclude a general agreement on confidentiality, such as that all documents submitted, hearing transcripts, or even the existence of the case itself remain confidential, they remain free to do so in their arbitration agreement. They might consider, for example, the following option:

Any dispute between the Parties to this [BEPS Multilateral Instrument], concerning a double taxation convention concluded between them, shall be submitted upon request of either Party to binding arbitration by a tribunal constituted in accordance with the [Tribute Fast-track Procedure] and subject to the PCA Arbitration Rules 2012. [The arbitration proceedings and arbitral award, including hearing transcripts, written pleadings, and other documents, shall be maintained in strict confidence by the Parties and the PCA.]

TRIBUTE LIST OF TAX EXPERTS (as per June 2016)

In alphabetical order:

Graham Aaronson – United Kingdom

John Avery Jones – United Kingdom

Philip Baker – United Kingdom

João Francisco Bianco – Brazil

Arnaud Booij – Netherlands

Brian Cleave - United Kingdom

Joel Cooper – United Kingdom/Australia

Wei Cui – China/Canada

Kuntal Dave – India

Ricardo Escobar – Chile

Randall Fox – United Kingdom/United States

Miriam Galandová – Slovakia

Malcolm Gammie – United Kingdom

99 PCA Arbitration Rules 2012, Article 28(3) (“Hearings shall be held in camera unless the parties agree otherwise.”).
Bruno Gangemi – Italy
Charles Gustafson – United States
Monique van Herksen – Netherlands/United States
Catalina Hoyos – Colombia
Sushil Lakhani – India
Daniel Lüthi – Switzerland
Toshio Miyatake – Japan
Hans Mooij – Netherlands
Johann Müller – South Africa/Denmark
Peter Nias – United Kingdom
Howard Nowlan – United Kingdom
T. P. Ostwal – India
Jonathan Peacock – United Kingdom
Natalia Quinones Cruz – Colombia
Kees van Raad – Netherlands
Sergio André Rocha – Brazil
H. David Rosenbloom – United States
Antonio Russo – Italy/Netherlands
Luis Eduardo Schoueri – Brazil
Jonathan Schwarz – United Kingdom
Prakash Sinha – India
Rachmanto Suhramat – Indonesia
Guillermo Teijeiro - Argentina
Heleno Taveira Torres – Brazil
Manuel E. Tron – Mexico

Ana Cláudia Akie Utumi – Brazil

Edwin Visser - Netherlands

Joanna Wheeler – United Kingdom/Netherlands

Wim Wijnen - Netherlands
To Whom It May Concern:

The Organisation for Economic Co-Operation and Development (OECD) published final reports pursuant to its base erosion and profit shifting (BEPS) project on 5 October 2015. The reports were the culmination of the OECD’s Action Plan on Base Erosion and Profit Shifting (hereinafter the Plan) published in 2013. The Plan set forth 15 actions the OECD would undertake to address a series of issues that contribute to the perception of tax bases being eroded or profits shifted improperly. Included in the October 2015 final reports was the report under Action 15 of the Plan, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties. The OECD issued a public discussion draft under Action 15 (the Discussion Draft) on 31 May 2016, requesting comments on technical issues related to development of the Multilateral Instrument (the Instrument).

I am pleased to respond to the OECD’s request for comments on behalf of Tax Executives Institute, Inc. (TEI). TEI also requests the opportunity to speak in support of these comments at the public consultation to be held on 7 July 2016 in Paris.

TEI Background

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organization has 56 chapters in Europe, North and South America, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our nearly 7,000 individual members represent over 2,800 of the leading companies in the world.100

General Comments

TEI commends the OECD for providing the opportunity to comment on technical issues related to the development of the Instrument, which ordinarily would be the subject of confidential negotiations solely between potential treaty partners. In particular, TEI appreciates the OECD’s request for comments regarding “the approach to be taken in developing the optional provision on mandatory binding MAP arbitration . . . .”101 As noted in one of TEI’s first letters to the OECD regarding the BEPS project, the multilateral instrument under Action 15 and the efforts to improve the mutual agreement procedure (MAP) under Action 14 – including the possibility of mandatory binding arbitration – are the two BEPS action items most critical to multinational enterprises.102 This remains the case more than two years later

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100 TEI is a corporation organized in the United States under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the U.S. Internal Revenue Code of 1986 (as amended).

101 Discussion Draft, page 3.

and TEI urges the OECD and the 96 countries participating in the Ad Hoc Group to continue their work on a flexible Instrument promoting uniformity in international tax treaties and their underlying policy.

Regrettably, Actions 14 and 15 were left to the end of the BEPS project before they received the OECD’s and participating states’ full attention. While TEI appreciates aspects of dispute resolution under Action 14 have been determined to be minimum standards, excluding mandatory binding arbitration from the standards is a grave disappointment. Business stakeholders consistently warned throughout the BEPS project of the massive increase in MAP cases likely to arise from the substantial changes to the international tax regime resulting from the project. Significant improvements to the MAP process are needed in the business community’s view to efficiently and effectively process the anticipated increase in MAP cases in a timely manner. This would help alleviate the double-taxation sure to arise from the anti-BEPS measures and provide multilateral enterprises with certainty and finality in their cross-border business operations.

The primary key to an effective and improved MAP process was (and is) a mandatory binding arbitration procedure to motivate competent authorities to reach a decision on a MAP case and, should they fail, quickly resolving the case under arbitration. Just as important, the prospect of arbitration to settle MAP cases would likely prevent many MAP disputes from arising in the first place as tax authorities who may be tempted to make unprincipled or aggressive adjustments refrain from doing so, knowing an arbitrator would likely adopt the treaty partner’s position in arbitration. While we are encouraged by the number of countries declaring their commitment to mandatory binding MAP arbitration, it is unfortunate such arbitration will not be more widely adopted as a result of the BEPS project.

Responses to Specific Requests for Input in the Discussion Draft

The Discussion Draft requests comments on technical issues arising from implementing the treaty-related BEPS measures in the context of the existing network of bilateral tax treaties. Comments were requested in four areas, which are discussed below.

Mandatory Binding MAP Arbitration

The Discussion Draft requests input regarding

The approach to be taken in developing the optional provision on mandatory binding MAP arbitration, taking into account that it would need to serve the needs of the countries that have already committed to implement mandatory binding arbitration, as well as countries that are considering committing in the future.103

With respect to countries that have already committed to mandatory binding arbitration, TEI’s recommended flexible approach (discussed below) would permit such countries to continue their current arbitration process if it is already in place and available to taxpayers. Further, if they have committed to

103 Discussion Draft, page 3.
such arbitration but have not implemented the process, TEI recommends the OECD encourage such countries to adopt the approach reflected in the Instrument, which could include alternative forms of arbitration as options for treaty partners to select from.

TEI recommends for the arbitration provision itself the Instrument include a specific process (or processes) for mandatory binding arbitration coming into force upon ratification of the Instrument by two treaty partners. That is, the Instrument should include sufficient details regarding the arbitration process so taxpayers may avail themselves of the process without waiting for the respective competent authorities to agree on, e.g., the type of arbitration to use, the schedule, deadlines, etc. Alternatively, the arbitration provision could take effect one year after ratification of the Instrument by bilateral treaty partners to provide competent authorities time to decide upon further details while also not permitting the design process to continue indefinitely.

The Instrument in this regard should also include a specified time limit for treaty partners to reach agreement on a MAP case, after which it would be submitted to arbitration. Taxpayers in many MAP cases will have paid the assessed tax making the associated cash unavailable for regular business operations until the case is resolved. Depending on the size of the dispute at issue this may present significant cash flow and other operational issues for taxpayers. TEI recommends to the OECD the two-year time period for competent authorities in the U.S.-Canada treaty to settle a MAP case before it moves to arbitration as an appropriate time limit. Similarly, TEI recommends the Instrument include a deadline for completing the arbitration process of no more than 18 months.

With respect to a specific type of arbitration, TEI recommends the Instrument incorporate so-called “baseball” or “last best offer” arbitration. This type of arbitration is already in use by the United States and has proven to effectively motivate treaty partners to settle MAP cases before they reach arbitration. Baseball arbitration type should also be briefer and less expensive for taxpayers and competent authorities than reasoned decision/independent opinion arbitration. Nevertheless, in TEI’s view it would be preferable to have some kind of mandatory binding MAP arbitration included in a tax treaty rather than none. Thus, if there is disagreement among the states wishing to include arbitration in their treaties over the type of arbitration to use, perhaps the best approach is to provide for both baseball and reasoned decision arbitration in the Instrument and let treaty partners choose the one that fits their particular situation.

TEI recommends with respect to the scope of MAP cases eligible for arbitration all such cases be eligible. There is no reason why a particular category of MAP cases should be excluded from mandatory binding arbitration as all such cases have the potential to result in double taxation. Should it be a matter of scarce competent authority resources, then, at a minimum, all transfer pricing cases should be eligible for arbitration, and then other categories can be considered depending on the resources of the two

competent authorities. However, the OECD should state the preferred option for mandatory binding arbitration is all MAP cases shall be eligible.

Technical Issues in Modifying or Superseding Bilateral Tax Treaties and Tools to Assist Understanding Such Changes

The Discussion Draft also requests input regarding

Technical issues that should be taken into account in adapting the BEPS measures to modify or supersede existing provisions of bilateral tax treaties that may vary from the OECD model, including:

Existing provision or types of provisions that serve the same purpose as the BEPS measures and that would need to be replaced

Existing provisions or types of provisions that are similar to BEPS measures but that would need to be retained

A separate request for input asks for comments on “[t]he types of guidance and practical tools that would be most useful to taxpayers in understanding the application of the multilateral instrument to existing tax treaties.”

Many of the issues related to these two requests for input were the subject of a panel at the recent OECD International Tax Conference held in Washington, DC, on 7 June 2016 (the Panel). The Panel provided additional background and context on the Discussion Draft, including specific questions and concerns of the OECD and Ad Hoc Group. These included the degree of flexibility countries will have to adopt some provisions of the Instrument and not others, whether all countries must agree to the BEPS project’s minimum standards as a condition to signing the Instrument, how to implement specific provisions such as the saving clause, and how to account for current bilateral treaty provisions meeting or exceeding a BEPS minimum standard, among others.

The overarching theme of these concerns and questions is the need to determine to what, exactly, has each signatory agreed. Secondarily, they implicate the flexibility of the Instrument, i.e., will the Instrument look like a single protocol applicable to all bilateral treaties of all signatories, will it act as an aggregate of various amendments to individual bilateral treaties at the discretion of the original parties to those treaties, or will it fall somewhere in between?

TEI appreciates the OECD’s concern of undermining the BEPS project and possibly future OECD work if countries were permitted to sign the Instrument without also agreeing to the project’s minimum standards. However, requiring each country’s agreement to each minimum standard would likely limit participation in the Instrument. For example, it would exclude countries who wish to adopt an

105 Discussion Draft, page 3.
106 Id.
Instrument provision that is not a minimum standard (e.g., certain changes to the permanent establishment (PE) definition under BEPS Action 7) but do not want to adopt all of the minimum standards. A country agreeing to even a single aspect of the Instrument would promote one of the underlying goals of the BEPS project: to coordinate tax authority responses to base erosion and profit shifting concerns. While this might turn the Instrument into an aggregation of bilateral tax treaty amendments, this is its practical effect in any event even if the Instrument required a certain level of participation – whether adopting the minimum standards or otherwise – for countries to join the Instrument.

That said, TEI recommends all signatories to the Instrument be required to adopt the Action 14 minimum standard. In an ideal world this standard would include the adoption of mandatory binding MAP arbitration, as discussed above. The absence of an arbitration provision, however, vastly increases the importance to the business community of the minimum standards that were adopted under Action 14 under the BEPS project. Requiring signatories to the Instrument to adopt the Action 14 minimum standards would show that while the BEPS project was overwhelmingly concerned with the elimination of double non-taxation and other base erosion and profit shifting concerns, the OECD is still cognizant of, and interested in addressing, double taxation, in accord with its historical role in tax matters. Action 14 is the one action of the BEPS project that businesses can wholeheartedly support, and its inclusion as a mandatory part of the Instrument would assuage some of the business community’s concerns regarding the overall impact of the project.

Beyond the Action 14 minimum standards, TEI recommends that states signing the Instrument be permitted to choose which of the remaining treaty-related measures they are willing to adopt. This approach, in addition to promoting uniformity in the international tax arena, would also serve the purpose of the Instrument to quickly adopt the treaty-related BEPS measures without the need for countries to renegotiate several thousand bilateral tax treaties. Indeed, the BEPS project has already substantially accomplished the most difficult part of bilateral treaty negotiations by achieving consensus on the underlying treaty language (with the exception of the provision on arbitration). Thus, for example, the final report on Action 7 sets forth the modified treaty provisions regarding the definition of a PE and countries merely need to have such language replace the relevant PE article in their tax treaties without any further negotiation with its treaty partners. TEI therefore recommends countries be permitted to sign the Instrument and choose which treaty-related BEPS project measures they wish to incorporate into their bilateral tax treaties. To assist this process, TEI recommends the OECD set forth in the body of the Instrument the clear and non-negotiable language with respect to each treaty-related BEPS provision that a party could sign and implement.

In addition, TEI recommends countries signing the Instrument be permitted to choose the treaty partners and relevant tax treaties to which they would apply the BEPS provisions. That is, countries should be permitted to apply, for example, the modified PE language of Action 7 to some of their treaty partners but not others. Countries may wish to do so for a variety of reasons, including the historic relationship with the partner, the partner’s consistency in implementing the treaty, the partner’s sophistication in administering and interpreting the treaty, among other things. Again, a primary goal should be to encourage as many countries to adopt as many of the treaty-related BEPS measures as
possible in the interest in promoting uniformity in treaty policy around the world. Thus, in our view it is
better for countries to agree to modify treaty language to be consistent with the new OECD standard in
some cases even if not others, rather than refraining from signing the Instrument at all or refraining from
signing on to certain provisions of the Instrument with all treaty partners because of one or two
unreliable treaty partners.

Should the OECD find this approach too flexible, and perhaps excessively complicated or
unmanageable, an alternative would be to permit countries to sign the Instrument and then choose
which of the treaty related measures they would apply on a measure-by-measure basis. Thus, for
example, a country could choose to apply the new PE definition to all of its bilateral tax treaties, but
decide to implement another treaty measure, and still be permitted to sign the Instrument.

With respect to determining to what, exactly, countries signing the Instrument have agreed, TEI
appreciates this may be a complicated task made more difficult by the flexibility we recommend above.
That said, a way to simplify tracking which country has agreed to what provision with what treaty partner
is through the use of a matrix (or table) for each country. An individual country’s matrix could list its
treaty partners down the left side and then the BEPS treaty-related measures along the top. Assuming
the precise language of the BEPS treaty-related measures are set forth in the Instrument, in the
alternative where necessary, they could then be numbered or otherwise given a short-hand label for use
in the matrix as a cross-reference to the relevant text. Upon signing, each country could submit its matrix
listing the relevant provisions and treaties it was willing to agree to modify using the Instrument. The
same matrix could then be used to track when a particular provision is ratified (if necessary). We have
attached a simple example of such a matrix in the appendix.

We believe this approach could be helpful because, while the thousands of bilateral tax treaties are
far from uniform, they generally contain the same basic components, such as a definition of a PE and
resident, the taxation of dividends and interest, provisions for dispute resolution, among others. Treaties
based upon the U.N. and OECD models generally include these and other components. Thus, it should in
most cases be clear what provisions have been replaced or amended, even though they do not appear in
the same order or have identical language from one treaty to another. In addition, we believe this
approach can minimize or eliminate the need to cross reference the particular treaty article and
paragraph being replaced in each treaty.

This leaves some open questions. First, as noted in the OECD’s request for input, is what to do about
existing treaty provisions serving the same or similar purpose as those in the Instrument but need to be
replaced, retained or modified. The Panel stated “compatibility clauses” would be drafted to describe in
detail what approach is intended to be used in specific circumstances. Other than for existing provisions
needing to be modified, the flexible approach described above should be simple to implement for
provisions to be retained or replaced. Should provisions of a particular treaty be retained (because they
satisfy the purpose of the relevant provision in the Instrument), then the treaty partners would omit
agreeing to that portion of the Instrument. On the other hand, an existing provision needing to be
replaced would simply be removed by the two treaty partners agreeing to the relevant Instrument
provision.
The more difficult case of existing provisions needing to be modified, rather than replaced, remains. As a threshold matter it is unclear why such provisions could not simply be replaced rather than modified. In other cases, such as treaties that define a services PE, then perhaps the OECD’s suggested compatibility clause approach is necessary, although in TEI’s view the Instrument should not serve as a vehicle to introduce unique or one off treaty clauses not developed as part of the BEPS project. In any event, the flexibility of TEI’s suggested approach should reduce the need for compatibility clauses and countries could agree to append short explanations for provisions that are to be modified upon signing.

A second open question, as mentioned during the Panel, is interweaving a “saving clause” along with the exceptions thereto into existing treaties. This is admittedly a difficult task to coordinate through the Instrument because exceptions to the saving clause are typically implemented via cross reference to other provisions within a single bilateral tax treaty. Preferably in this case bilateral treaty partners could simply signal their willingness to employ a saving clause with exceptions in their treaty and then work out the specific exceptions on their own, perhaps within a time frame specified in the Instrument. Alternatively, the signatories could include their own list of cross references for each treaty to include a saving clause.

**Consistent Application and Interpretation**

The last request for input is for recommendations of “[m]echanisms that could be used to ensure consistent application and interpretation of the provisions of the multilateral instrument.” Consistent application and interpretation of the tax law is perhaps the tax administrator’s most difficult task. TEI’s members have substantial experience with personnel of the same tax authority taking varying positions with respect to the same tax provisions depending on the circumstances. Thus, persuading multiple tax authorities to agree on consistent positions with respect to treaty provisions is a monumental undertaking, even if the underlying provisions are identically worded.

The OECD has already taken one step toward this objective through the development of the detailed commentary during the BEPS project. The Instrument should make clear that such commentary is the relevant commentary to reference when interpreting the Instrument’s provisions and each signatory should agree to so use the new commentary. The Instrument should also make clear that the updated commentary supersedes the prior commentary, which is now out of date and should not be used for interpretation.

Further, the Instrument should specify that the modified provisions and relevant commentary agreed to by the signatories are effective only upon final ratification by the respective treaty partners to each bilateral tax treaty modified by the Instrument, and tax authorities should only apply the new treaty wording and commentary prospectively. Moreover, a country that has adopted a “non-standard” interpretation of common treaty language should not be permitted to continue to use such an interpretation when joining the Instrument. For example, if a country has a non-standard interpretation of the meaning of a “fixed place of business” under the current PE definition, it should not be permitted to adopt the new PE definition while maintaining the non-standard interpretation.
Finally, the OECD should facilitate a peer review process for treaty application and interpretation beyond what it has already proposed. This would provide pressure for countries to, at least, adopt sensible and firmly grounded interpretive positions, even if they are not always consistent across the board. Publishing any such peer review reports would provide additional incentive for countries to act reasonably when initiating an adjustment. Ultimately, however, consistent interpretation and application will be determined by the training and professionalism of the tax authorities administering the provisions, along with the level of resources provided to carry out their duties.

Conclusion

TEI appreciates the opportunity to comment on the Discussion Draft regarding the development of a multilateral instrument. As noted above, TEI requests the opportunity to speak in support of these comments at the Public Consultation on the Discussion Draft to be held on 7 July 2016 in Paris.

These comments were prepared under the aegis of TEI’s European Direct Tax Committee, whose Chair is Nick Hasenoehrl. If you have any questions about the submission, please contact Mr. Hasenoehrl at +41 786 88 3772, nickhasen@sbcglobal.net, or Benjamin R. Shreck of the Institute’s legal staff, at +1 202 638 5601, bshreck@tei.org.

Sincerely yours,

TAX EXECUTIVES INSTITUTE, INC.

C.N. (Sandy) Macfarlane

International President

Appendix

Illustrative example of a multilateral instrument signatory matrix.

<table>
<thead>
<tr>
<th>BEPS</th>
<th>MULTILATERAL INSTRUMENT SIGNING MATRIX: UNITED STATES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provision</td>
<td>Action 6</td>
</tr>
<tr>
<td>Alternatives</td>
<td>LOB</td>
</tr>
<tr>
<td>Decision</td>
<td>Australia</td>
</tr>
<tr>
<td>------------</td>
<td>-----------</td>
</tr>
<tr>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

**Key**

- **X** = Provision signed
- **Yellow** = Ratification pending
- **Green** = Ratified
- **Red** = Ratification rejected
- **Blue** = Current provision in compliance with minimum standard or Instrument provision

1 = Services PE provision in current Article 5 to continue in effect after ratification of the Instrument.
Dear Mr. Saint-Amans:

USCIB appreciates the opportunity to comment on this highly unusual discussion draft and requests the opportunity to present comments at the public consultation on July 7, 2016.

General Comments

We believe that the MLI represents an important opportunity to ensure that the BEPS outcomes are implemented consistently across jurisdictions. Consistent implementation will be an important aspect of ensuring that the BEPS outcomes do not increase the incidence of double taxation, which would have a negative impact on cross-border trade and investment. USCIB understands consistent implementation to mean that countries agree on the standard to be applied to determine appropriate taxation under a bi-lateral tax treaty, so that they have a standard to be applied for resolving disputes.

We are concerned, however, that the pressure to complete the MLI by the end of this year is causing the OECD to short-circuit the comment process. This discussion draft is highly unusual in that there is no draft language for stakeholders to comment on. We believe that the OECD should release a draft of the MLI in order to solicit comment on the detailed document. We understand that it is the view of both the OECD and at least some of the countries involved that this is both unnecessary and inappropriate because the process of developing the MLI is akin to the negotiation of a bilateral treaty, which is not subject to public comment. We respectfully disagree with this view. The issue is not with the substantive provisions of the MLI – which we agree have already been the subject of extensive public comment but rather the manner in which the agreed provisions are being incorporated into existing bi-lateral tax treaties. This is a novel exercise which is important to the overall success of the BEPS project. If the provisions do not work as expected that will be a major set-back for the BEPS project, delaying or even preventing consistent implementation of the BEPS outcomes, which might take years to fix. USCIB therefore strongly urges you to reconsider the decision not to issue the MLI as a discussion draft.

107 USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.

108 The OECD released a discussion draft on profit splits that did not contain draft language. In that case, however, draft language is expected to be released for comment.

109 While this is generally true we note that the Action 6 Final Report deferred the completion of the limitation on benefits provisions to take into account the proposed changes to the U.S. Model. That review was supposed to be completed by the first part of this year and the results made part of the MLI. Thus, it is possible that the LOB provisions that are included in the MLI have not been subject to public comment as part of the OECD BEPS process. USCIB might have additional comments on an LOB provision that is based on the U.S. Model and that might be, in our view, overly restrictive. Permitting comment on new LOB provisions would be another reason to release a draft of the MLI.
Technical Comments

The use of compatibility clauses to implement the BEPS outcomes creates the possibility of real confusion for both taxpayers and tax administrations in trying to identify and apply the treaties that will be modified by the MLI. Given the enormous variation in treaty language the MLI cannot propose “surgical” changes to treaty language, so a taxpayer or tax administration might not be sure whether a particular bilateral treaty is intended to be amended by the MLI nor what the amended language of the bilateral treaty they are trying to apply actually is. This will significantly increase the likelihood that taxpayers will not understand their rights and obligations under the treaty; that Competent Authorities will disagree on how the treaty applies to particular facts and circumstances; and that courts will be unable to interpret the treaty appropriately and consistently.

Possible approaches to achieving agreed treaty language

Some possible solutions to this problem would be to implement the MLI through a two-step process. The first step would be for countries to sign and ratify the MLI. The MLI would not, however, enter into force (or its provisions would not have effect) between two countries until those countries exchanged instruments of ratification or deposited declarations with a designated Depositary under the MLI. The instruments of ratification or declarations would be unique to each bilateral treaty. That is, the two countries in a bilateral relationship both of which signed and ratified the MLI would evidence the extent of their agreement on the MLI provisions they consider to be incorporated into their bilateral treaty pursuant to the compatibility clauses in the MLI. Ideally, such instruments of ratification or declarations would be accompanied or followed shortly by an agreed consolidated text of the amended bilateral treaty, which could be published by the bi-lateral partners and/or deposited with the MLI Depositary and made publicly available. Another option that is similar, but perhaps less bureaucratic, would be to have the “surgical” changes set forth in a Competent Authority agreement that would be required to be entered into between any two pairings of countries as part of the MLI.

In both cases, the “surgical” language would go through the appropriate State Department or Foreign Ministry process for approving the treaty in both country’s languages so that the treaty could be equally authentic in both languages, even if the languages are not English or French. If there is no formal process for authenticating the translations, it is difficult to see how the original English and French versions would not be perceived as being more authoritative than any other language into which the MLI would be translated.

A two-step process along these lines would certainly result in slower implementation of the MLI, but the end result would be more certainty for taxpayers and tax authorities. A two-step process would also allow the countries in a bilateral relationship to make judgment calls about retaining provisions that are similar to BEPS measures or that exceed the minimum standard to ensure that those provisions are retained.

Scope of the MLI
In order to be meaningful and create basic consistency in global taxation systems, countries that sign up to the MLI should be required to commit to the provisions relating to minimum standards. This would mean that all countries which sign up to the MLI must agree to the portions of the MLI relating to the prevention of granting treaty benefits in inappropriate circumstances\textsuperscript{110} and the elements of the dispute resolution recommendations that formed the minimum standards. If the country agreed to the minimum standards, then there should be optionality with respect to other aspects of the MLI and thus countries should be able to choose among those standards that are only recommendations. If, however, countries are permitted to make global changes to their treaty network without having to adopt the minimum standards, then it becomes very likely that the minimum standards will not, in fact, be adopted. From the business perspective, the “carrot” for many of the BEPS changes was the promise of improved dispute resolution. If countries can adopt the other treaty changes without adopting the minimum standard on dispute resolution, then there will be no leverage to achieve improved dispute resolution, which will likely lead to increased double taxation and less cross-border trade and investment.

**Commentary**

USCIB believes that the Commentary will be an essential part of the MLI. This is especially true if the OECD does not adopt some form of the suggestion above that would require countries to identify the “surgical” changes to their bilateral agreement, so that it is not clear what the words on the page are. In addition to the need for a Commentary on the provisions of the MLI, there is also the issue of the relationship of the Commentary on the MLI to the Commentary of the OECD Model more generally.

As part of the process of signing on to the MLI, countries should have to commit to the relevant portions of the broader Commentary on the OECD Model.\textsuperscript{111} The BEPS treaty changes were based on the principles contained in the OECD Model and Commentary to that model. It will be extremely difficult, if not impossible, for countries to adopt the BEPS changes while rejecting the principles underlying the OECD Model. For example, the loosening of the permanent establishment standard, particularly with respect to the requirement that all of the activities in Article 5(4) meet a preparatory or auxiliary standard, will increase pressure on the permanent establishment standard test contained in Article 5(1).

What does it mean to have a fixed place of business? What does “at the disposal of” mean? How will those pieces of the Commentary be incorporated into the MLI? USCIB believes that it is necessary to have a common interpretation of not only the MLI, but also the related treaty provisions that support the

\textsuperscript{110} The fact that the OECD has not released the final LOB language gives us some pause in suggesting that countries be required to sign onto the minimum standard. Nevertheless, we recommend this approach because it seems inappropriate to facilitate adoption of some BEPS measures will allowing countries to walk away from the minimum standards.

\textsuperscript{111} Relevant has two meanings here. The first meaning relates to the provisions of the MLI the country is opting into. That is, the permanent establishment commentary is only relevant if the country is attempting to use the MLI to modify the permanent establishment provisions of its bi-lateral treaties. So, the PE commentary would not be relevant for a country that was not opting into those provisions. The second meaning relates to the interaction between the MLI and the OECD Model. Not all of the Commentary on the OECD Model is necessarily relevant to the interaction between the MLI and the OECD Model.
The MLI Commentary should identify those provisions of the OECD Model Commentary that are relevant to the interpretation of the MLI and need to be adopted as part of the MLI Commentary.

The MLI is very different from a bilateral negotiation where if a country has a view that differs from the view reflected in the Model and the Commentary, both countries have an opportunity to understand the exact nature of the disagreement and draft language that both countries are willing to accept. If an accommodation cannot be reached; then a bilateral treaty would not be concluded. In the context of the MLI, however, if the words are acceptable but a country understands those words to mean something very different from the usual interpretation, it would be unfair to other countries, to allow the non-conforming country to sign onto the MLI without resolving the inconsistency. We see two possible resolutions. First, the non-conforming country could commit to the standard interpretation (and therefore abandon its position) for purposes of the MLI. If this route is taken, the country should be clear that it is abandoning its reservation or observation with respect to the relevant portion of the Commentary. Second, if the non-conforming country is unwilling to commit to the standard interpretation, it would not be permitted to use the MLI to modify its bilateral treaties with respect to the relevant issue unless the first country explicitly reserved its position with respect to the Commentary and other countries modifying their bilateral treaties with the first country explicitly accepted the non-conforming interpretation. Similarly, if a relevant portion of the Commentary permits more than one interpretation of a treaty provision, then countries should be required to identify which of those interpretations they will apply in their bilateral treaties. Bilateral treaties would only be modified under the MLI if the countries agree on the same interpretation.

**Mechanisms that could be used to ensure consistent application and interpretation of the MLI**

USCIB believes that the principal mechanism for ensuring consistent application and interpretation of the MLI should be agreement between the Competent Authorities of a pair of countries that have signed onto the MLI. That is, the function of the MLI is to modify an existing bilateral income tax treaty. Thus, any dispute as to how that treaty is modified is properly within the purview of the Competent Authorities of those two countries. It is not clear that broader consistency is either necessary or achievable.

USCIB believes broader consistency is not necessary because the treaty is defining the taxing jurisdiction of the parties to the bilateral treaty. For example, assume two OECD countries sign onto the MLI and include the changes that would make the exceptions in paragraph 4 of Article 5 conditional on the activities being preparatory or auxiliary. If they agree on the parameters of that rule that would limit so-called “source country” taxation, why should other countries be obligated to limit their right to tax in the same manner? There is no need for consistency across countries as long as the two treaty partners are satisfied with the division of taxing jurisdiction.

USCIB also believes broader consistency is not achievable. Broader consistency might require some supranational tax body to adjudicate the terms of the MLI. Requiring countries to agree to a supranational tax body that would issue binding decisions on the meaning of the MLI might severely limit the number of countries willing to sign onto the MLI. Many countries, including many developing
countries, argue that mandatory binding arbitration (MBA) limits their sovereignty and therefore is unacceptable. There is disagreement over whether this claim is valid with respect to MBA, but it would clearly be valid in the case of a supranational tax body. In which case, the number of countries willing to sign onto the MLI might be fewer than those willing to commit to MBA.

**Mandatory binding arbitration**

USCIB previously submitted a letter to the OECD on MBA, which is attached to this letter. Our position on MBA remains the same. We summarize the points made in the earlier letter for convenience.

USCIB strongly supports the adoption of mandatory, binding arbitration in general and would prefer the generic treaty provision to be accompanied by a sample implementing agreement which uses short-form or last-best-offer arbitration as its preferred format. Short-form arbitration would benefit not only the business community, but also the countries agreeing to it, as more certainty and efficiency in tax administration would attract and incentivize business investment. Thus, widespread adoption of a mandatory, binding arbitration provision such as that found at Article 25(5) of the OECD Model Tax Convention or Article 25(5) Alternative B of the UN Model Tax Convention, preferably accompanied by implementing agreements based upon a short-form arbitration model, would be a major step in the right direction for dispute resolution.

Sincerely,

William J. Sample
Chair, Taxation Committee