OECD publishes multilateral instrument for implementing BEPS in double tax treaties

5 December 2016

In brief

On 24 November 2016, the Organisation for Economic Cooperation and Development (OECD) published the 49-page Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS and its accompanying 86-page Explanatory Statement. The Convention (MLI) has two main aims:

- to transpose a series of tax treaty measures from the OECD/G20 Base Erosion and Profit Shifting Project (BEPS) into existing bilateral and multilateral tax agreements, and
- to set a new standard for mandatory binding arbitration in relation to resolving double tax disputes.

The OECD's aspiration was that having over 100 states, territories and jurisdictions indicating their interest in the work of the ad hoc group negotiating the MLI would facilitate the process of implementing the treaty-based aspects of the October 2015 BEPS report recommendations - the 'minimum standards' (treaty abuse and basic dispute resolution/ compensating adjustment rules) which are mandatory (albeit with some optionality), and all other changes (including arbitration) which are essentially optional. One could reasonably expect that the 27 countries that have apparently been involved in developing the arbitration standard will generally adopt it. This, in turn, may bring swifter relief for many cross-border business tax disputes.

The MLI could enable the signatory parties to make a large number of the changes to their existing treaties, whether based on the OECD or UN model convention. However, the flexibility included in the MLI suggests that some of the parties do not intend to implement or fully implement some of those recommendations. While some options were included in the recommendations and the MLI needs to reflect them, part of the flexibility is designed to enable parties to opt out of particular recommendations altogether or to disapply them for individual treaties ("to accommodate specific tax treaty policies" per the OECD press release). Unfortunately the OECD could not ensure a greater level of application thus giving rise to greater uncertainty. The parties' provisional notifications of their intentions to sign the MLI next year will better indicate the level of consistency in applying the BEPS measures and whether the MLI will effectively achieve its goals.

Matching of counterparty responses, ratification by the parties and the stated lag before the measures become effective mean that taxable periods beginning in 2019 most likely will be the first affected, although periods beginning in 2018 remain possible.

In detail

Background to the MLI

Implementation of the October 2015 Final BEPS Package requires changes to the OECD and UN model tax conventions, as well as to the bilateral tax treaties based on those model conventions. The OECD has determined that there are more than 3,000 bilateral treaties, making separate updates burdensome and time-consuming, and thus limiting the effectiveness of multilateral efforts to restrain BEPS.

The Action 15 Report "Developing a Multilateral Instrument to Modify Bilateral Tax Treaties" concluded that a multilateral instrument (MLI) to enable countries to swiftly modify their bilateral tax treaties was desirable and feasible, and that negotiations for such an instrument should be convened quickly. The Action 15 Report was developed with the assistance of a group of experts in public international law and international tax law. The procedural questions to be addressed given that the substantive content was already addressed in Action Steps (and 'model outcomes') relate to:

- Action 2 on hybrid transactions
- Action 6 on treaty abuse
- Action 7 on permanent establishments (PEs), and
- Action 14 on dispute resolution and the mutual agreement procedure (MAP).

An ad hoc group of interested states was quickly established. The OECD states that, in a period spanning little more than 12 months, 99 countries participated as members (plus, as observers, four non-State jurisdictions that are covered by another jurisdiction's bilateral treaty that extends to the non-State jurisdiction, and seven international or regional organisations).

The Action 14 Report "Making Dispute Resolution Mechanisms More Effective" also provided that a mandatory binding arbitration provision would be developed as part of negotiating the MLI. Accordingly, the ad hoc group established a sub-group in which the OECD says 27 countries participated as members. Unlike the other BEPS measures that the MLI covers, negotiating the mandatory binding arbitration provision related both to developing the substance of the provisions and establishing how to implement them in bilateral or regional tax agreements.

Nature of the MLI

The MLI is 49 pages long and comprises seven parts:

Part I. Scope and Interpretation of Terms (Articles 1-2)

Part II. Hybrid Mismatches (Articles 3-5)

Part III. Treaty Abuse (Articles 6-11)

Part IV. Avoidance of Permanent Establishment Status (Articles 12-15)

Part V. Improving Dispute Resolution (Articles 16-17)

Part VI. Arbitration (Articles 18-26)

Part VII. Final Provisions (Articles 27-39)

The MLI does not have a detailed table of contents, but an appendix to this bulletin provides an informal breakdown.

Articles 3-17 contain most of the substantive rules and should be interpreted in accordance with the ordinary principle of treaty interpretation. According to this principle, a treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in light of its object and purpose (compatibility clauses in individual articles also seek to explain how the MLI provisions interact with existing treaty terms). Articles 18-26 are intended to operate as a single cohesive arbitration provision - rules for compatibility with arbitration provisions in existing agreements are consolidated in Article 26 – but parties are also permitted to formulate their own reservations with respect to the scope of cases that will be eligible for arbitration (subject to acceptance by the other Parties).

To guide interpretation, there is an Explanatory Statement which is 86 pages long. That, in turn, refers to the commentary material that was developed during the course of the BEPS Project and reflected in the Final BEPS Package as having particular relevance in interpreting the measures. It is ambulatory, insofar as any term not defined shall, unless the context otherwise requires, have the meaning it has at the time the Covered Tax Agreement is being applied under the domestic law of the Contracting Jurisdiction applying that Agreement.

Broadly, the MLI uses descriptive language to identify provisions rather than, say, referencing specific article and paragraph numbers in the OECD or UN model conventions, and the provisions are to be applied appropriately in the context of agreements that depart from those

models (an example quoted is in relation to the criteria for entitlement to a reduced tax rate on dividends from a subsidiary).

The MLI does not override, nor substitute for, existing bilateral or multilateral tax conventions that signatories have in place and now wish to have covered by the MLI (Covered Tax Agreements: Articles 1-2). Instead, the MLI supplements and 'modifies' those agreements with a series of BEPS-related provisions, most of which each signatory can opt in or out of, in whole or in part. Nevertheless, certain core provisions are obligatory as they were agreed by consensus and reflected in the BEPS report as minimum standards – notably on treaty abuse and dispute resolution (but not binding arbitration that becomes mandatory where states agree to it, nor hybrids or PEs, which are optional inclusions). Whether a Covered Tax Agreement (and any existing protocol, etc.) meets the minimum standard would be determined in the course of the overall review and monitoring process by the Inclusive Framework on BEPS (i.e., the countries now signed up to the BEPS Project, expanded to take into account developing countries participating on an equal footing).

A lot of the length and complexity of the MLI relates to the procedures for signatories to opt in or out of particular provisions, compatibility provisions for each rule addressing how the rule interacts with provisions in the existing agreements that the MLI will modify and requirements that each signatory identify (by way of notifications) the relevant provisions in each of their existing agreements that are impacted by the MLI options the signatory chooses to accept.

The OECD is the Depositary, receiving notifications and providing matching services as well as reporting events and making a lot of information publicly available as set out in the instrument (Article 39).

Timing of events

- **Signature** from 31 December 2016 - The MLI will be open for signature imminently (Article 27), although there will be one formal signing ceremony in June 2017 (and parties will need to provide a provisional list of notifications and reservations at the time of signature: Articles 28-29). It is, at present, unclear whether the US will be a signatory, this being complicated by the forthcoming change in Administration, the need for Senate approval, and the potential to implement the mandatory binding arbitration provisions in other ways.

- **Entry into force** – The MLI will enter into force for each party, three-to-four months after each party has ratified the MLI. However, for the first five parties that period is determined by reference to the fifth ratification (Article 34). Notifications finalising the provisional list submitted on signature are required at ratification (and a party can withdraw at any time on notification: Article 37). Countries will need to decide whether they also have to ratify the changes in their Covered Tax Agreements.

- **Entry into effect** – The MLI comes into effect for Mutual Agreement Procedure (MAP) and Arbitration cases generally from the date of entry into force for both contracting states, but otherwise generally thereafter, according to the following (Articles 35-36):

    - Withholding tax (WHT) - on amounts due from the next 1 January (or at the start of the tax year if a state so elects, even if the other doesn't), and
    - Other taxes - unless both contracting states elect for a shorter delay, in respect of taxable periods beginning on or after six months (or the following 1 January if a state elects even if the other doesn't).

Where an existing treaty is later added to a state's list of applicable treaties, these dates apply with respect to the Depositary's acceptance of the addition, extended by an extra 30 days for WHT, or from six-to-nine months otherwise. Where a state reserves its position, to allow for internal procedures, the provisions come into effect 30 days after the Depositary has been notified the procedures have been completed. A party may reserve the right to have the Arbitration provision apply earlier if both states agree in any particular case.

Any disagreement between the Contracting Jurisdictions as to whether existing provisions are within the scope of a compatibility clause could be settled through the mutual agreement procedure provided for in the Covered Tax Agreement or, if necessary, through a Conference of the Parties.

Contracting Jurisdictions can agree subsequently to modifications to their Covered Tax Agreement that differs from those foreseen in the MLI (Article 30). It is unclear how this will be identified in relation to the list held by the Depositary of Covered Tax Agreements, reservations and notifications since any new agreement or protocol will not itself be a Covered Tax Agreement.

Subsequent amendments to the MLI by protocol may be rare as they would bind only those who also become a party to the protocol – a significant burden (Article 38).

Hybrid mismatches (Articles 3-5)

The MLI deals with treaty provisions that relate to transparent entities, dual resident entities and the application of an exemption, deduction or credit relief method to eliminate double taxation. However, the MLI provides reservations to preserve existing provisions.

- On **transparency**, income derived by, or through, an entity or arrangement that is treated as wholly or partly fiscally transparent in either state may be treated as income of a resident only to the extent that it is taxed as income of a resident of that state. But criteria that allow treaty relief from double taxation in one state solely according to whether the treaty allows the other to tax the same income will be ineffective. The right of a treaty party to tax its own residents also needs clarification.

- If an agreement is silent about **dual resident entities** on the matter, the Competent Authorities must agree. Otherwise, except where an agreement specifically addresses the residence of companies participating in dual-listed company arrangements, a treaty should specify that a taxpayer will be deemed to be resident for the treaty "having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors".

- On **eliminating double taxation**, states may choose to apply Option A, Option B, Option C, or none of those Options. If the parties choose different methods, then the Option that each chooses will apply to its own residents. Option A applies a tax credit instead of an income/ capital exemption to the extent that the other state applies an exemption or reduced rate of tax under that treaty. Option B applies a tax credit instead of exempting a dividend to the extent that the other state allows a deduction for the dividend under that treaty. Option C applies a tax credit rather than an exemption to the extent that the other state may tax the income/ capital under that treaty (note that one party may reserve the right not to permit the other to apply Option C).

Principal purpose test, limitation on benefits, etc. (Article 7)

Action 6 on Treaty Abuse recommended that parties choose from three alternative approaches -- a Principal Purpose Test (PPT), a Simplified Limitation on Benefits (LOB) article combined with a PPT, or a more complex LOB accompanied by either an anti-conduit rule or a PPT. The Final Report on Action 6 left open the content of the complex LOB, awaiting final issuance of the controversial new US Model Income Tax Convention. However, the MLI does not provide a complex LOB but rather, for the third option, allows countries to negotiate a complex LOB on a bilateral basis (but it is suggested that a complex LOB will be further developed in the course of the follow-up work on BEPS). Parties preferring a detailed LOB provision may accept the PPT as an interim measure and express the intent to change in a notification.

While it is premature to predict what options countries will select, most non-US jurisdictions likely will opt for the PPT (which is included as the default), making shortcomings in the Simplified LOB academic in those cases. Also if the US becomes a signatory, it likely will opt for the separately negotiated complex LOB. So, it seems unlikely that the Simplified LOB will apply to many treaties.

Since the MLI uses what is in effect the same language, as a reminder, the PPT 'model outcome' for any Double Tax Convention, expressed in Action 6 is:

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

The Simplified LOB provides alternative tests for a treaty resident to claim the benefits of the treaty:

- Ownership by qualified persons - individuals, recognised pension funds, agreed non-profit organisations, public bodies, etc., or persons owned (for at least half of a 12-month period including the test date) at least 50% by residents that are qualifying persons or 75% by equivalent beneficiaries

- Ownership as above by a company (or companies) whose principal class of shares is regularly traded on one or more recognised stock exchanges, i.e., subsidiary of a publicly-traded company,

- Involvement in the active conduct of business, similar to the US trade or business test (not investment management or treasury functions, etc.)

- A discretionary grant of benefits agreed by the Competent Authority of the source jurisdiction.

As noted, the Simplified LOB, unlike the version in the Final Report on Action 6, picks up on some of the new restrictions found in the new US Model, including restricting income eligible for treaty benefits under the trade or business test to income that 'emanates from' from the trade or business in the residence country as contrasted with the rule currently in US tax treaties that covers income 'connected with' the trade or business conducted in the residence country. In addition, for the ownership/base erosion test (although the base erosion element is only relevant to the complex LOB), and the subsidiary of a publicly traded company test, the Simplified LOB requires the owner to be resident in the same country as the country of residence of the tested subsidiary. This therefore, excludes as qualified owners, companies resident in the source country.

Issues left open in the Action Steps generally are not addressed in the MLI. Most notably for asset managers, the MLI does not cover how to address access to treaty benefits for CIVs and 'non-CIVs'. Also potentially difficult is the exception to availability of the trade or business test for making or managing investments. Most US tax treaties use the phrase "making or managing investments *for its own account*." The phrase "for its own account" is missing in the MLI's Simplified LOB, implying that an asset manager that manages investments for others is not eligible for the trade or business test. On the other hand, the Simplified LOB does address concerns raised by pension funds, clarifying the eligibility for pension funds that are 'arrangements' that may not have 'entity' status but are recognized as 'persons', and for entities established and operated exclusively, or almost exclusively, to invest the monies of qualified pension funds.

If one counterparty chooses a PPT only and the other party to a bilateral agreement chooses a Simplified LOB, the PPT will apply unless:

- the Simplified LOB party opts out altogether (but then must endeavour with the other party to get to a mutually satisfactory way of satisfying the minimum standard), or
- the PPT party chooses to allow a symmetrical Simplified LOB (both parties apply a Simplified LOB in addition to first including PPT) or asymmetrical (one party includes a PPT alone and the other party opts for a Simplified LOB together with the PPT).

The MLI uses terms similar to the PPT model outcome above. Where an existing PPT covers a specific article such as dividends, interest, royalties, income from employment, other income and elimination of double taxation, that will be replaced with the broader provision set out in the MLI. Existing PPTs that use similar terms, such as 'main purpose' or 'primary purpose' are also intended to be covered by the phrase 'principal purpose' here. The PPT is not intended to restrict the scope or application of other existing anti-abuse rules in treaties. A compatibility clause here would replace existing PPTs to maintain procedural requirements such as notification or consultation between the competent authorities.

A taxpayer can request that the Competent Authorities apply a treaty benefit, or different benefits, to a specific item of income or capital, notwithstanding failing the PPT. The European Commission's January 2016 recommendation on measures against tax treaty abuse stated that "with a view to ensuring compliance with EU law, the GAAR based on a PPT as suggested in the final report on Action 6 needs to be aligned with the case law of the CJEU as regards the abuse of law". This meant essentially that where the PPT might have otherwise been in point, but where there was also 'genuine economic activity' it would not apply. The PPT in the MLI does not follow the EU in offering a 'genuine economic activity' let-out. It is not clear whether the OECD thinks this alignment issue has been resolved or whether such an instance perhaps falls within the ambit of the Competent Authorities agreeing treaty benefits under the discretion provided to them.

Dividend transfer transactions (Article 8)

The model outcome here under Action 6 was for an optional minimum holding requirement for dividends:

> "5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends throughout a 365 day period that includes the day of the payment of the dividend (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 reorganisation, of the company that holds the shares or that pays the dividend)"

In the MLI, similar descriptive terms are used but there is particular reference to the inclusion of "capital, shares, stock, voting power, voting rights or similar ownership interests". The term 'holds' also covers similar existing wording referring to ownership or control.

Recognising that the purpose of this provision is solely to introduce a minimum shareholding period and not to change the substantive allocation of taxation rights between the parties to an agreement, language relating to the specific tax rate and ownership threshold provided in the model provision have been deleted. This leaves each bilateral agreement's rate reduction and ownership threshold intact.

Gains from alienation of shares in a company, partnership, or trust predominately holding real estate (Article 9)

The model outcome in Action 6 was optional and parties can opt out, adjust or apply with some flexibility as necessary:

> "Gains derived by a resident of a Contracting State from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting State if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property, as defined in Article 6, situated in that other State."

In the MLI, the requirements have essentially been divided into two subparagraphs. Subparagraph a) reflects the introduction of the testing period, and subparagraph b) reflects the expansion of the interests covered. Signatories can opt for either or both.

The term 'comparable interests' has been replaced in the MLI with 'other rights of participation in an entity' better to reflect the range of wording often applied.

Anti-abuse rule for income allocable to a PE in a third jurisdiction (Article 10)

The optional model provision under Action 6 includes a reference to a tax rate to be determined bilaterally. This relates to the conditions for denial of tax treaty benefits, and provides that the treaty benefits will not apply to any item of income on which the tax rate in the third jurisdiction in which an exempt PE is located is less than "the lower of [rate to be determined bilaterally] and 60 percent of the tax that would be imposed in" the residence jurisdiction of the enterprise.

In the MLI, to avoid requiring bilateral negotiation of a tax rate, the provision relies solely on the 60% test and compares the tax actually paid in the PE jurisdiction to the tax that would have been imposed in the residence jurisdiction if the income had not been exempted.

Saving clause allowing countries to tax their own residents under domestic law (Article 11)

The optional model outcome under Action 6 specified the particular numbered paragraphs under the OECD Model Convention.

In the MLI, these references are replaced with descriptive language based on the Commentary of the OECD Model Tax Convention in the Action 6 Report. Also reference to 'relief of double taxation' has been replaced with 'tax credit or tax exemption'.

Permanent establishment (Article 12-14)

For commissionaire arrangements or similar 'strategies' (undefined), the optional BEPS measure is by reference to a PE's existence where an agent, other than an agent of independent status, habitually concludes contracts that are binding on the principal or habitually plays the role leading to the conclusion of contracts that are 'rubber-stamped' and those contracts are: in the name of enterprise or for the transfer of ownership of, or for the granting of the rights to use, property owned by the enterprise or that the enterprise has the right to use, or for the provision of services by the enterprise. In this regard the MLI clarifies that it does not apply to a provision modelled after Article 5(5)(b) of the 2011 version of the UN Model Tax Convention or a provision that otherwise provides that a person shall be deemed to have a PE where the person secures orders for the enterprise.

Conversely, in relation to the optional exclusion for independent agents, a person that acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related will not be treated as an independent agent. Here, the MLI states that this would include those modelled after, for example, Article 5(6) of the 2014 version of the OECD Model Tax Convention or Article 5(7) of the 2011 version of the UN Model Tax Convention, as well as bilaterally negotiated provisions of the same type.

In relation to the optional specific activity exclusions (preparatory or auxiliary, etc.), the MLI replacement would occur even where an existing agreement describes activities that are deemed not to constitute a PE in a single sentence rather than in a list. The MLI gives a signatory the option of a rule that is conditioned on the activities being preparatory or auxiliary in nature or a rule that does not generally include that condition. An anti-fragmentation is included to the effect that the specific activities exception will not apply if the enterprise or a related enterprise carries on business activities at the same place or another place and that place or other place constitutes a PE or the overall activities of the two

places in combination are not preparatory or auxiliary in nature.

However, as stated for clarity, the MLI provision would not apply in respect of specific provisions that provide that a project or activity constitutes a PE only if a time period test is met. The provisions that prevent splitting of contracts where a PE exists only if a time period test is met are relatively straightforward.

MAP (Articles 16-17)

The minimum standard under Action 14 is:

1. Where a person considers that the actions of one or both of the contracting states result, or will result, for him in taxation that is not in accordance with this Convention's provisions, he may, irrespective of the remedies provided by the domestic law of those states, present his case to the Competent Authority of either Contracting State. He must present his case within three years from the first notification of the action resulting in taxation not in accordance with the Convention's provisions.

2. The Competent Authority shall endeavour, if it believes the objection is justified, and if it is not itself able to find a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3. The Competent Authorities of the Contracting States shall endeavour to resolve, by mutual agreement, any difficulties or doubts about the Convention's interpretation or application. They may also consult together to eliminate double taxation in cases not covered by the Convention.

The MLI could adapt this with relative ease. According to a useful note, the MLI will not overturn provisions for longer time periods in existing agreements that allow parties to initiate a case with the relevant Competent Authority.

The MLI also allows for the best practice noted in Action 14 that Competent Authorities should provide for corresponding adjustments unilaterally in cases where they find that taxpayer's objection is justified.

Mandatory binding arbitration (Articles 18-26)

Mandatory binding arbitration will apply only if both contracting jurisdictions notify the Depositary that they choose to apply it. However, even then a jurisdiction may reserve on the scope of cases that are eligible for arbitration, or to preserve existing mandatory binding arbitration provisions in identified existing agreements. The Competent Authorities have flexibility to mutually agree on rules that differ from those summarised below.

Once they receive an issue, the Competent Authorities have a standard period of two years to agree before arbitration may apply. However, the parties may agree differently (longer or shorter) because of a particular case's nature and complexity. That period's start date is the date that the Competent Authorities notify the taxpayer that they have received the necessary initial or additional information (or, if the start date is earlier, three months after the taxpayer request to one Competent Authority is communicated to the other Competent Authority or when both receive the additional information requested). The period may stop and restart when there is an administrative delay, e.g., as a result of the operation of domestic law (or effectively when the taxpayer fails to supply information). There are then a series of short deadlines once arbitration has been requested.

By default, a 'final offer' arbitration process (otherwise known as 'last best offer' arbitration) will apply - after an initial submission and the opportunity to adjust given the other party's reply, the arbitration panel will choose one of the proposed resolutions submitted by the Competent Authorities. A jurisdiction that is not willing to accept this approach as a default rule may reserve the right to adopt the 'independent opinion' approach as the default (except to the extent that the Competent Authorities mutually agree on different rules).

The arbitration panel will comprise three individual members with expertise or experience in international tax matters (unless the Competent Authorities agree otherwise, there is no requirement that each member have experience as a judge or an arbitrator). Each Competent Authorities will appoint one member within 60 days of the arbitration request date. Those two members must then, within 60 days of the latter of their appointments, appoint a third member who is not a national or resident of either contracting jurisdiction to serve as the arbitration panel's Chair.

Competent Authorities can provide arbitrators with relevant information, subject to the same strict confidentiality requirements that would apply to the Competent Authorities themselves.

A simple majority of the panel members will adopt the decision. The decision will not include any rationale or explanation. The competent authorities are generally required to

enter into a mutual agreement that reflects the outcome of the arbitration decision, except in three situations:

- if a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision (a taxpayer will be deemed to have not accepted it if it continues to pursue domestic solutions)
- if one of the Contracting Jurisdiction's courts holds that the arbitration decision is invalid, or
- if a person directly affected by the case pursues litigation in any court or administrative tribunal on the issues that were resolved in the mutual agreement implementing the arbitration decision.

Note that the decision will not set any precedent.

The arbitration standard set out in the MLI is similar to elements of the European Commission's draft directive on double taxation dispute resolution (as discussed in our Tax Policy Bulletin of 23 November).

The takeaway

The MLI's multitude of options will make its application highly complex, both for the countries that sign it and for practitioners and businesses who have to interpret it.

In some cases, a country can choose to selectively apply an option on the condition that its treaty partners have made the same option. In other cases, the application of some rules will be asymmetrical. One treaty partner could apply one rule while the other treaty partner applies a different rule.

In addition, a signatory can apply an option to selective treaties by identifying the treaties to which the option would apply. Each option requires the signatory to provide a detailed notification to the Depository (the General Secretary of the OECD) identifying which provisions in each of that country's bilateral agreements is impacted by the option.

It is, at present, unclear whether the US will be a signatory. This is further complicated by the forthcoming change in Administration and the need for Senate approval. Also unclear is how this interacts with the EU's directives, etc. for its Member States.

Each substantive rule in the MLI is accompanied by: details on the options available; the correlation of the chosen option with the existing impacted provisions in the applicable existing agreements; details that a country must include in its notification when selecting the option; and default rules.

The minimum standard for access to MAP should help businesses resolve cross-border disputes more timely and efficiently. A wide range of businesses will welcome the optional mandatory arbitration standard. In states that adopt the arbitration process, there could be a more certain route to resolving the most difficult disputes.

The range of options available under the MLI means, however, that there will be further uncertainty until states, jurisdictions and territories clarify their intentions. The capacity negotiated in the ad hoc group for states, jurisdictions and territories to opt out for particular provisions or individual existing agreements, suggests that despite the efforts, the treaty-related BEPS measures may be inconsistently applied. Frequent references in the MLI to parties 'endeavouring to resolve' different views suggest that the MLI will not be the panacea the OECD had hoped for in aligning tax measures.

There may be additional uncertainty about how to interpret the MLI provisions. Perhaps this highlights a missed opportunity, to establish a new chamber for this purpose, e.g., as part of the International Court for Arbitration in the Hague. National courts will have to consider these issues, including how to interpret the MLI in relation to the OECD and UN model conventions and other overlapping laws and agreements

Let's talk

For a deeper discussion of how these issues might affect your business, please call your usual PwC contact. If you don't have one or would otherwise prefer to speak to one of our global specialists, please contact one of the contacts below:

Stef van Weeghel, *Amsterdam*
+31 (0) 88 7926 763
stef.van.weeghel@nl.pwc.com

Phil Greenfield, *London*
+44 (0) 20 7212 6047
philip.greenfield@pwc.com

Suchi Lee, *New York*
+1 (646) 471-5315
suchi.lee@pwc.com

Michael Bersten, *Sydney*
+61 (2) 8266 6858
michael.bersten@pwc.com

Peter van Dijk, *Toronto*
+1 (416) 687-8204
peter.van.dijk@ca.pwc.com

Jeanine Daou, *Dubai*
+971 4 304 3744
jeanine.daou@pwc.com

Jürgen Lüdicke, *Hamburg*
+49 40 6378 8423
juergen.luedicke@de.pwc.com

Vijay Mathur, *Delhi*
+91 124 330 6511
vijay.mathur@in.pwc.com

Akemi Kitou, *Tokyo*
+813-5251-2461
akemi.kitou@jp.pwc.com

Aurobindo Ponniah, *Kuala Lumpur*
+60 (3) 2173 3771
aurobindo.ponniah@my.pwc.com

Peter Burnie, *Port Moresby*
+675 321 1500
peter.r.burnie@pg.pwc.com

Paul Lau, *Singapore*
+65 6236 3733
paul.st.lau@sg.pwc.com

Aamer Rafiq, *London*
+44(0)20 721 28830
aamer.rafiq@pwc.com

Edwin Visser, *Amsterdam*
+31 (0) 887923611
edwin.visser@nl.pwc.com

David Swenson, *Washington*
+1 (202) 414 4650
david.swenson@pwc.com

Ine Lejeune, *Brussels*
+32 2 710 78 05
ine.lejeune@lawsquare.be

Matthew Mui, *Beijing*
+86 10 6533 3028
matthew.mui@cn.pwc.com

Philippe Durand, *Paris*
+ 33 156574302
philippe.durand@pwcavocats.com

Mary Psylla, *Athens*
+30 210 6874543
mary.psylla@gr.pwc.com

Feargal O'Rourke, *Dublin*
+353 (0)1 7926480
feargal.orourke@ie.pwc.com

Mike Ahern, *Almaty*
+772 73303200
michael.ahern@kz.pwc.com

Pedro Carreon, *Mexico*
+(55) 52 63 60 68
pedro.carreon@mx.pwc.com

Marc Diepstraten, *Amsterdam*
+31 (0) 887926358
marc.diepstraten@nl.pwc.com

Ionut Simion, *Bucharest*
+40 212253702
ionut.simion@ro.pwc.com

Pam Olson, *Washington*
+1 (202) 414 1401
pam.olson@pwc.com

Isabel Verlinden, *Brussels*
+32 2 7104422
isabel.verlinden@be.pwc.com

Mark Schofield, *London*
+44 (0) 20 7212 2527
mark.schofield@pwc.com

Durval Portela, *São Paulo*
+55 11 3674 2522
david.portela@br.pwc.com

Peter Chrenko, *Prague*
+42 02 5115 2600
peter.chrenko@cz.pwc.com

Thierry Morgant, *Paris*
+ 33 156574988
thierry.morgant@pwcavocats.com

Tamás Lőcsei, *Budapest*
+36 14 619358
tamas.locsei@hu.pwc.com

Fabrizio Acerbis, *Rome*
+39 02 91605001
fabrizio.acerbis@it.pwc.com

Wim Piot, *Luxembourg*
+352 49 48 48 3052
wim.piot@lu.pwc.com

Brenda Garcia, *Mexico*
(52) 55 52 63 57 59
brenda.garcia@mx.pwc.com

Taiwo Oyedele, *Lagos*
(23) 412711700
taiwo.oyedele@ng.pwc.com

Andrey Kolchin, *Moscow*
+7 495 967 6197
andrey.kolchin@ru.pwc.com

José Félix Gálvez, *Madrid*
+34 915 684 530
jose.felix.galvez@es.pwc.com

Mike Danilack, *Washington*
+1 (202) 414 4504
mike.danilack@pwc.com

Stella Amiss, *London*
+44.(0)20 7212 3005
stella.c.amiss@pwc.com

Kyle Mandy, *Sunninghill*
+27 (11) 797 4977
kyle.mandy@pwc.com

Ingrid Melbi, *Stockholm*
+46 (0)10 2133788
ingrid.melbi@se.pwc.com

Slava Vlasov, *Kiev*
+380 444906777
slava.vlasov@ua.pwc.com

Alex Joong-Hyun Lee, *Seoul*
+82 (0) -2-709-0598
alex.joong-hyun.lee@kr.pwc.com

Andreas Staubli, *Zurich*
+41 (0)58 792 4472
andreas.staubli@ch.pwc.com

Katarzyna Czarnecka-Zochowska, *Warsaw*
+48 227464843
katarzyna.czarnecka-zochowska@pl.pwc.com

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