OECD MULTILATERAL INSTRUMENT ON TREATY-RELATED BEPS MEASURES: BENEFITS, CHALLENGES AND RECOMMENDED OPTIONS FOR SOUTH AFRICA AND OTHER DEVELOPING COUNTRIES

Annet Wanyana Oguttu*

Abstract

In 2015, the OECD issued its 15 Action Measures to curtail Base Erosion and Profit Shifting (BEPS); which is intended to ensure that profits are taxed where the economic activities generating those profits are performed and where value is created. The 15 Action Measures contained BEPS measures pertaining to double taxation agreements (DTAs). Adopting these measures would require the renegotiation of thousands of DTAs that countries have entered into. The sheer number of the DTAs countries have entered into would make updating the current tax treaty network highly burdensome, time consuming and expensive. Under Action 15, the OECD developed a multilateral instrument (MLI) as a mechanism to swiftly implement the tax treaty BEPS Measures and would have the same effects as a simultaneous renegotiation of thousands of DTAs. This article seeks to explain the procedures, administration and interpretation of the MLI. It also considers the procedural, administrative, interpretational and political challenges that could impact on the effectiveness of the MLI from a developing country perspective. The article explains the pros and cons of some of the options to the MLI and it provides general recommendations regarding the choices that developing countries might consider when signing the MLI. Finally, it concludes by providing recommendations on the matters developing countries should be cautious about as they consider whether to sign the MLI.

Keywords: Base erosion and profit shifting; double taxation agreements; OECD Multilateral Instrument; treaty-related BEPS measures; dual resident entities; treaty abuse; mutual agreement procedure; arbitration;

* LLD Tax law (UNISA), LLM with Specialisation in Tax Law (UNISA), LLB (Makerere University, Uganda), H Dip International Tax Law (University of Johannesburg). Dip in Legal Practice (Law Development Centre, Makerere); Professor, Department of Mercantile Law, College of Law, University of South Africa.

BEPS minimum standards; permanent establishments; corresponding adjustments

1 Introduction

In 2015, the OECD issued 15 Action Measures to curtail Base Erosion and Profit Shifting (BEPS), with the aim of ensuring that profits are taxed where the economic activities generating those profits are performed and where value is created.[1] The OECD BEPS Project is the most far-reaching set of reforms to international corporate taxation since the system was set up in the 1920s, and it impacts on three main areas of the international tax system. Firstly, internationally agreed guidance on international tax principles (for example OECD transfer-pricing guidelines); secondly, domestic law provisions and administrative polices; and thirdly, changes to the OECD Model Tax Treaty which will impact on current double taxation agreements (DTAs).

The DTA–BEPS measures (which are the focus of this work) are set out in Action 2 (hybrid mismatches), Action 6 (preventing treaty abuse), Action 7 (preventing artificial avoidance of permanent establishment status); and Action 14 (resolving treaty disputes through the mutual agreement procedure). Adopting the measures in these Actions Measures would normally have required the renegotiation of thousands of DTAs that countries have entered into. However, the sheer number of these DTAs would make updating the current DTA network highly burdensome, time consuming and expensive.[2] Thus, governments explored the feasibility of a multilateral instrument whose purpose would be to implement tax treaty-related BEPS measures in a swift, coordinated and consistent manner across the network of existing DTAs, and would have the effect of a simultaneous renegotiation of thousands of DTAs without the need to bilaterally renegotiate each treaty.

Under Action 15 of the OECD BEPS Project, an Ad Hoc Group G20 endorsed by the G20 Finance Ministers and Central Bank Governors was mandated to develop the multilateral instrument.[3] Ninety-nine states (22 of which were African countries)[4] participated in the Ad Hoc Group,

1 OECD 'Addressing Base Erosion and Profit Shifting' (2013) 7–8.

2 OECD 'Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting' (2016) para 4.

3 Id (n 2 above) para 6.

4 Countries that participated were (African countries italicised): Andorra, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belgium, *Benin*, Bhutan, Brazil, Bulgaria, *Burkina Faso*, *Cameroon*, Canada, Chile, China (People's Republic of), Colombia, Costa Rica, *Côte d'Ivoire*, Croatia, Cyprus, Czech Republic, *Democratic Republic of the Congo*, Denmark, Dominican Republic, *Egypt*, Estonia, Fiji, Finland, France, *Gabon*, Georgia, Germany, Greece, Guatemala, Guernsey, Haiti, Hong Kong

as well as four non-state jurisdictions and seven international or regional organisations as observers (among which were African regional tax organisations like the African Tax Administration Forum and *Centre de rencontres et d'études des dirigeants des administrations fiscales*).[5] On 24 November 2016 the OECD concluded the text of the multilateral instrument referred to as 'Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting' (Multilateral Instrument or MLI),[6] as well as an Explanatory Statement.[7] On 31 December 2016, the MLI was opened for signature for all interested countries to join, including, developing countries that were not part of the OECD BEPS Project.[8] A signing ceremony was held on 17 August 2017 where 71 jurisdictions (11 of which were African countries) signed the MLI.[9] Other jurisdictions expressed the intention to sign but the United States of America did not sign the MLI.[10]

(China), Hungary, Iceland, India, Indonesia, Ireland, Isle of Man, Israel, Italy, Jamaica, Japan, Jersey, Jordan, Kazakhstan, *Kenya*, Korea, Latvia, Lebanon, *Lesotho*, *Liberia*, Liechtenstein, Lithuania, Luxembourg, Malaysia, Malta, Marshall Islands, *Mauritania*, *Mauritius*, Mexico, Moldova, Mongolia, *Morocco*, Netherlands, New Zealand, *Nigeria*, Norway, Pakistan, Philippines, Poland, Portugal, Qatar, Romania, Russia, San Marino, Saudi Arabia, *Senegal*, Serbia, Singapore, Slovak Republic, Slovenia, *South Africa*, Spain, Sri Lanka, *Sudan*, *Swaziland*, Sweden, Switzerland, *Tanzania*, Thailand, *Tunisia*, Turkey, Ukraine, United Kingdom, United States, Uruguay, Viet Nam, *Zambia* and *Zimbabwe*. See OECD (n 2 above) para 6.

5 See OECD (n 2 above) para 6.

6 OECD *Multilateral Convention to Implement Tax Related Measures to prevent Base Erosion and Profit Shifting* (MLI) (2017).

7 OECD (n 2 above).

8 Id para 7.

9 See OECD 'Signatories and Parties to the Multilateral Convention to implement Tax Treaty related measures to prevent Base erosions and profit shifting' as at 22 March 2018 with links to each of their MLI Positions. Countries that signed are (African countries italicised): Andorra, Argentina, Armenia, Australia, Austria, Belgium, Bulgaria, *Burkina Faso*, *Cameroon*, Canada, Chile, China (People's Republic of), Colombia, Costa Rica, *Côte d'Ivoire*, Croatia, Cyprus, Czech Republic, Denmark, *Egypt*, Fiji, Finland, France, *Gabon*, Georgia, Germany, Greece, Guernsey, Hong Kong (China), Hungary, Iceland, India, Indonesia, Ireland, Isle of Man, Israel, Italy, Japan, Jersey, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, *Mauritius*, Mexico, Monaco, Netherlands, New Zealand, *Nigeria*, Norway, Pakistan, Poland, Portugal, Romania, Russia, San Marino, *Senegal*, Serbia, *Seychelles*, Singapore, Slovak Republic, Slovenia, *South Africa*, Spain, Sweden, Switzerland, Turkey, *Tunisia*, United Kingdom and Uruguay. Note that in Africa, Algeria and Swaziland expressed intent to sign.

10 Danone and Salome News Letter 'The signature of the Multilateral BEPS Convention: A first critical look and overview around the globe' (14 June 2017) 1.

Treaty-related BEPS issues are a priority concern for developing countries since they are predominately capital-importing countries that rely largely on the source basis of taxation; and yet tax treaty rules generally restrict source countries' rights to tax income, in favour of the residence countries of taxpayers (predominately developed capital-exporting countries).[11] Although the OECD Model Tax Convention on Income and on Capital (OECD MTC), on which most DTAs are based, recognises the importance of sharing revenue between source and residence countries, it embodies rules and proposals by developed countries and favours capital-exporting countries over capital-importing countries. Developing countries have generally preferred the United Nation's Double Taxation Convention between Developed and Developing Countries (UN MTC), which favours capital-importing countries over capital-exporting countries, in that it generally imposes fewer restrictions on the tax jurisdiction of source countries.[12] Even though the MLI is formulated so that it can apply to all DTAs, whether based on the OECD MTC or the UN MTC,[13] developing countries may feel reluctant to accept the MLI. This is owing to the fact that many had little or no involvement in the BEPS Project, which is criticised for falling short of providing a comprehensive approach to reforming international tax rules.[14] Nevertheless, as an initiative whose purpose to is to ensure that profits are taxed where the economic activities generating those profits are performed and where value is created, the MLI may offer source countries some protection from treaty-related BEPS schemes. Indeed, the MLI is considered, arguably, the most significant event in terms of tax treaties since their early creation in the 1920s and it seems to be the pinnacle upon which one could judge if the OECD BEPS Project will succeed or fail.

The question though, is whether the MLI will be instrumental in ensuring that the tax treaty-related BEPS measures that are pertinent to developing countries will be attained. This scepticism arises from the fact that when signing the MLI some states were very cautious and have opted out of many provisions of the MLI. The complexity of the MLI and the various uncertainties regarding the practical application and interpretation of the MLI are also major concerns for developing countries.

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11 B Arnold & MJ McIntyre *International Tax Primer* (2002) 108.

12 Id 109.

13 OECD (n 2) para 15.

14 The BEPS Monitoring Group 'Explanation and Analysis of The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MC-BEPS)' (2016) 1 https://bepsmonitoringgroup.files.wordpress.com/.../explanation-and-analysis-of-mc-b (accessed 23 May 2018).

This article seeks to explain the procedures, administration and interpretation of the MLI. Furthermore, it explains the provisions of the MLI drawing from the background of treaty-based measures in the BEPS Project and Explanatory Statement to the MLI. It explains the options available to countries and provides examples of options adopted by some countries on the various provisions of the MLI. Specific reference is made to the options adopted taken by South Africa – one of the developing countries that signed the MLI on 7 June 2017.[15] The article explains the pros and cons of some of the options to the MLI and it provides general recommendations regarding the choices that developing countries might consider when signing the MLI. The article also analyses some administrative, interpretational, positional and political challenges that could have an impact on the effectiveness of the MLI from a developing country perspective. Finally, it concludes by providing recommendations on the matters developing countries should be cautious about as they consider whether or not to sign the MLI.

2 The Operation of the MLI

2.1 Important Terms used in the MLI

A country participating in the MLI is referred to as a Party.[16] The DTAs to which the MLI applies are referred to as Covered Tax Agreements (CTAs).[17] The parties to those CTAs are referred to as Contracting Jurisdictions.[18]

2.2 Treaties Impacted on by the MLI and Applicable Flexibilities

The MLI operates to modify CTAs, ie existing double tax treaties, which are concluded between parties to the MLI and for which both parties have made a notification that they wish to modify the agreement using the MLI.[19] Although the parties joining the MLI are expected to be bound by all the articles to the MLI to ensure consistency, the MLI allows some flexibility to accommodate the positions of different countries. The MLI provides four kinds of flexibility for the parties.

(i) List of treaties to be modified: Countries that sign the MLI must first decide which of their DTAs they would like the MLI to modify, and

15 National Treasury, The Republic of South Africa 'Status of List of Reservations and Notifications at the Time of Signature' (6 June 2017) www.oecd.org/tax/treaties/beps-MLI-position-south-africa.pdf (accessed 12 November 2017).
16 Article 2 MLI (n 6 above).
17 Id art 2(1)(a).
18 Id art 2(1).
19 Id art 2(1).

must provide a list of them to the Secretary-General of the OECD.[20] Thus, even though the intention is that the MLI should apply to the maximum number of DTAs, a party may choose to exclude a specific DTA, for example, if a treaty was recently renegotiated or is under renegotiation to implement the BEPS measures.[21] When South Africa signed the MLI, it listed 76 DTAs to which the MLI would apply.[22]

The MLI will apply to a DTA only if both parties to that DTA have adopted the MLI.[23] To facilitate the matching of choices between parties, the list of CTAs to which the MLI would apply can be a provisional list, which must be confirmed if and when a country ratifies the MLI.[24] This provisional list provides an opportunity for parties to discuss and negotiate the changes they might wish to make and if necessary correct them before the list is confirmed on ratification.

(ii) Reservations: In accordance with article 18 of the Vienna Convention on the Law of Treaties and general international law, states can exclude the application of certain provisions of the MLI from their DTAs.[25] This is done by making certain reservations, which imply that the country may opt out completely or partially of certain provisions with respect to all or some of its CTAs. Indeed, all the substantive articles of the MLI allow a reservation to exclude the whole article. The MLI acknowledges that even where a party intends to apply a particular provision of the MLI to its treaty network, it may have policy reasons for preserving the application of specific types of existing provisions.[26] Each article of the MLI will apply if neither of the contracting states has made a reservation to it.[27] Thus, making a reservation to a particular provision of the MLI excludes the possibility of applying that provision in the dealings with treaty partners of the CTAs. Except as otherwise provided, such reservations are not mutually exclusive.[28] Thus, as a rule, a reservation shall modify the provisions of the MLI for the reserving party to the same extent as for all other parties to the MLI. A reservation can be subsequently withdrawn or be replaced with a more limited reservation.[29] However, once a party has ratified the MLI, it cannot add a further reservation. When South Africa

20 Id art 2(1)(a)(i)(B).
21 OECD (n 2 above) para 14; A Lewis 'Multilateral Instrument Faces Challenges on Way to Success, OECD Official Says' *Tax Notes* (2016) 1.
22 National Treasury (n 15 above) 2–16.
23 OECD (n 2 above) para 13.
24 Id para 14.
25 OECD (n 2 above) para 14.
26 OECD (n 2 above) para 14.
27 Lewis (n 21 above) 1.
28 Article 28(1) & 28(8) MLI (n 6 above); OECD (n 2 above) para 14.
29 Article 28(9) MLI (n 6 above).

signed the MLI, it submitted a list of its reservations, which are pointed out further in the discussion.[30]

(iii) Alternative ways to meet the treaty-related minimum standards of the BEPS Project: It should be noted that the extent of the reservations in the MLI depends on whether the relevant measure is a 'minimum standard' or a 'best practice' in terms of the OECD BEPS Project. 'Minimum standards' were agreed upon by the OECD countries and the OECD associate countries as a means to tackle BEPS issues in cases where no action by some countries would create negative spillovers on other countries.[31] The treaty-related minimum standards are in Action 6 (prevent treaty abuse) and in Action 14 (improvement of dispute resolution). Ideally, the minimum standards must be implemented by all countries that are part of the OECD Inclusive Framework, under which various countries and jurisdictions committed to implement the minimum standards in the OECD BEPS Reports.[32] The members of the Inclusive Framework agreed to undergo a review process to monitor the implementation of the minimum standards, with the understanding that review mechanisms will take into account countries' specific circumstances.[33] The mechanism for the application of the minimum standards in the MLI provides a certain level of flexibility on how the minimum standards will be implemented by states, with limited ability to opt out of some provisions, for example where a party's CTAs already meet that minimum standard.[34] This flexibility was found necessary due to irreconcilable views between governments.[35]

The best practices in terms of the BEPS Project are expected to result in convergence of national practices for interested countries to enable such measures to become minimum standards in the future. Thus, for purposes of the MLI, the best practice measures are merely recommendations, which states may reserve not to apply.[36] The MLI covers best practices that are set out in BEPS Action 2 (Neutralise the Effects of Hybrid Mismatch Arrangements); Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances) and Action 7 (Preventing the Artificial Avoidance of PE Status). Parties can make

30 National Treasury (n 14 above).

31 OECD/G20 Base Erosion and Profit Shifting Project Explanatory Statement (2015) para 11.

32 OECD 'Background Brief: Inclusive Framework on BEPS' (January 2017) http://www.oecd.org/tax/background-brief-inclusive-framework-for-beps-implementation.pdf (accessed 11 November 2017).

33 Id para 3.1.

34 OECD (n 2 above) para 14.

35 C Silberztein & J Tristram 'OECD: Multilateral Instrument to Implement BEPS' *International Transfer Pricing Journal* September/October (2016) 351.

36 Danone and Salome (n 10 above) 1.

reservations for treaty-related best practices, to apply partially or not at all.

(iv) Ability to apply a provision or to apply an alternative provision: States may in general reserve the right not to apply a provision of the MLI to their double tax treaties that contain a clause having a similar content or one that goes beyond it.[37] Thus, countries may choose not to adopt an article of the MLI, or not to apply it to their CTAs which already have the relevant provision in place.[38] A country may opt out of certain provisions if it accepts an alternative in its CTAs.[39]

2.3 Notifications

Parties are also required to make notifications to the OECD, which acts as the Depository,[40] along with their list of reservations, which reflect their choice of optional provisions (which a party may opt in or out of), and to specify the relevant provisions in those CTAs which would be affected. In this regard, there are several types of compatibility clauses, each of which describes a different effect.[41] For example, the effect may be that the notification

a) applies in place of an existing provision of a CTA, ie to replace it (if one exists);
b) applies to, or modifies, an existing provision;
c) applies in the absence of an existing provision;
d) applies in place of an existing provision; here the provision of the MLI will always apply, with the effect described by the compatibility clause; this will occur regardless of the notifications.[42] The approach in paragraph (iv) under part 2.2 above reflects the rule concerning successive treaties, as reflected in article 30(3) of the Vienna Convention on the Law of Treaties, under which an earlier treaty between parties that are also parties to a later treaty will apply only to the extent that its provisions are compatible with those of the later treaty. [43]

Additions, but not retractions, can also be made to the list of agreements notified.[44] Under article 29(6) of the MLI, it is possible to make a later

37 Ibid.
38 OECD (n 2 above) para 54.
39 Article 16(5)(c)(ii) MLI (n 6 above).
40 Article 29 MLI (n 6 above).
41 OECD (n 2 above) 6.
42 Id para 15.
43 Ibid para 15.
44 Article 29(5) (n 6 above).

notification. Subsequent disagreements may be resolved through the mutual agreement procedure.

2.4 The Depository of the MLI

The OECD is the depository of the MLI, which has the responsibility to collect and make public notifications about the effect of the MLI on existing DTAs. As the Depository, the OECD will track the ratification procedures completed by the signatories of the MLI, and then carry out a matching exercise and publish information on which clauses in which DTAs have actually been modified. The signatories have to inform the OECD of the completion of the ratification process.[45] PWC has also come up with a tracker of MLI, and its observations of the options countries have chosen are referred to in this article.[46]

2.5 Entry into Force

After signing the MLI, states are required to ratify the MLI for it to come into effect.[47] Ratification will be a serious step towards implementing the measures envisaged in the BEPS Project. The MLI was intended to come into force three months after five states have ratified it, and thereafter, for each state three months after it ratifies. For other signatories, the MLI will enter into force after the lapse of the same period, starting from the submission of ratification, acceptance or approval.[48] On 1 July 2018, the OECD announced the entry into force of the MLI, after five countries (Austria, Isle of Man, Jersey, Poland and Slovenia) had deposited their instruments of ratification.[49] It is thus expected that a significant number of the signatories to the MLI will lodge their instruments of ratification with the OECD in time to be effective from 1 January 2019.[50] Thus, the entry into force of the modifications will be linked to completion of the ratification procedures in the states that are parties to the covered treaty.[51] In terms of article 37(1) any party may withdraw from the MLI at

45 OECD (n 2 above) 5.

46 PWC 'Multilateral Instruments Coming into Force to Change Many Tax Treaties from 1 January 2019' (14 May 2018) 1 https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-multilateral-instrument-coming-into-force-changes-treaties.pdf (accessed 31 May 2018).

47 Article 27(2) MLI (n 6 above).

48 Id art 34(1).

49 OECD 'Milestone in BEPS implementation: Multilateral BEPS Convention will enter into force on 1 July following Slovenia's ratification' http://www.oecd.org/tax/milestone-in-beps-implementation-multilateral-beps-convention-will-enter-into-force-on-1-july-following-slovenia-s-ratification.htm (accessed 31 May 2018).

50 PWC (n 46 above) 1.

51 Article 34(2) MLI (n 6 above).

any time, but this would not affect the modifications already made to its CTAs. It will affect only prior DTAs, and does not prevent countries from revising them subsequently,[52] or entering into new ones that diverge from their provisions. When South Africa signed the MLI, it submitted a list of notifications, which will be confirmed upon deposit of South Africa's instrument of ratification.[53]

Subject to diverging election by states, the MLI was intended to come into effect with respect to specific provisions as follows:

- Withholding taxes: for taxes levied where the event giving rise to such tax occurs on or after 1 January of the next calendar year that begins on or after the latest of the date on which the MLI enters into force for each contracting state of a CTA.[54]
- Other taxes: for taxes levied with respect to tax years starting at least six calendar months from the latest of the dates on which the MLI enters into force for each contracting state of a CTA.[55]
- Mutual agreement procedure and mandatory arbitration: for cases submitted from the latest of the dates on which the MLI enters into force for each contracting state of a CTA.[56]

With the coming into effect of the MLI on 1 July 2018, withholding taxes events will become effective from 1 January 2019, where the parties have both ratified the MLI before 1 October 2018. Other taxes will become effective for the accounting period beginning or after 1 January 2019, where the parties have both ratified the MLI before 1 October 2018. Mutual agreement procedure may become effective earlier than 1 January 2019, where the last party to ratify has done so by 1 September 2018. Mandatory arbitration may become effective earlier than 1 January 2019 where both parties opt in and ratify before 1 September 2018.[57]

KPMG noted that, at the initial signing of the MLI, some countries include only a small number of their double tax treaties as CTAs, but they indicated that they would add more double tax treaties to their list of CTAs after bilateral discussions. This implies that important changes to the provisions ultimately adopted by particular countries may occur before ratification.[58]

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52 Id art 30 MLI (n 6 above).
53 National Treasury (n 15 above) 17–28.
54 Article 35(1)(a) MLI (n 6 above).
55 Id art 35(1)(b) MLI (n 6 above).
56 Id arts 35(4) and 36(1)(a).
57 PWC (n 46 above) 1.
58 KPMG 'Analysis: Multilateral instrument implementing the treaty-related BEPS provisions' (10 June 2017), available at https://home.kpmg.com/xx/en/home/insights/2017/06/tnf-kpmg-analysis-MLI-implementing-treaty-related-beps.html (accessed 12 November 2017).

2.6 Impact of the MLI on CTAs

Where a provision of the MLI applies, it will override the provisions of a pre-existing CTA to the extent that they are incompatible.[59] It is therefore important for all intending parties to look closely at the relevant provisions of their existing DTAs, and consider carefully the wording of the compatibility clause, to clarify the effect of the corresponding provision of the MLI.

2.7 Status of the MLI

The MLI is a self-standing convention, which will operate alongside existing DTAs. The MLI is not a protocol, ie an instrument subsidiary to a treaty, drawn up by the contracting parties to deal with inter alia ancillary matters to the treaty.[60]

2.8 Interpretation of the MLI

The MLI does not contain a commentary, as is the case with the OECD or UN MTC. The OECD issued an Explanatory Statement to the MLI that is intended to clarify how the MLI operates to modify CTAs.[61] The Explanatory Statement is not intended to address the interpretation of the underlying BEPS measures, with the exception of the mandatory binding arbitration provision, which is interpreted in articles 18 through 26 of the MLI.[62] Under article 31(2) of the Vienna Convention of the Law of Treaties, Explanatory Statements are part of the 'context' for the purpose of interpreting a treaty.

Article 32(1) clarifies the mechanism for determining the interpretation and implementation of CTAs, as opposed to the interpretation of the MLI itself. Thus, the interpretation of the provisions of a CTA shall be in accordance with the usual mechanisms applied in interpreting DTAs. The Explanatory Statement clarifies that articles 3 to 17 of the MLI should be interpreted in accordance with general rule of treaty interpretation set out it in Vienna Convention on the Law of Treaties,[63] which states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.[64] The Final BEPS Package, developed in the

59 OECD (n 2 above) 6–7.
60 BJ Arnold 'The Proposed OECD Multilateral Instrument Amending Tax Treaties' 70(12) *Bulletin for International Taxation* (2016) 685.
61 OECD (n 2 above) para 12.
62 Ibid.
63 OECD (n 2 above) para 12.
64 United Nations 'Vienna Convention on the Law of Treaties' (1969) art 31.

course of BEPS Project, contains important indicators of the object and purpose of the MLI. Thus, in the interpretation of the MLI, it should be consulted in the search for the object and purpose of the MLI.[65]

Article 32(2) provides that questions regarding the interpretation of the MLI itself may also be addressed by a Conference of the Parties convened in accordance with the procedure set out in article 31(3) of the MLI. Other means to address questions of interpretation of the Convention include the competent authorities agreeing between themselves on how the Convention will operate in relation to a particular CTA.

It should also be noted that the MLI does not function as an amending treaty that directly revises the wording of a single bilateral treaty. Rather, it has to be applied alongside existing tax DTAs, modifying their application in order to implement the BEPS measures.[66] This is an application of the 'later in time rule' of article 30 of the Vienna Convention on the Law of Treaties, which provides that if there are two treaties on the same subject matter with the same parties, the provisions of the later treaty will prevail. While consolidated versions of DTAs may be produced as modified by the MLI, they are not required for the MLI to apply.[67]

2.9 Compatibility Clauses

With respect to the interaction between the MLI and existing treaties, the MLI provides for compatibility clauses.[68] Since the provisions of the MLI may overlap with provisions found in CTAs, this may conflict with existing provisions covering the same subject matter. This conflict is addressed through one or more compatibility clauses, which may, for example, describe the existing provisions which the MLI is intended to supersede, as well as the effect on CTAs that do not contain a provision of the same type.[69]

65 OECD (n 2 above) para 12.
66 Id para 13.
67 Lewis (n 21 above).
68 OECD (n 2 above) 5.
69 Ibid.

2.10 To what Extent are DTAs Affected by the MLI?

The MLI modifies DTAs depending on the options made by states.[70] The extent to which DTAs will be affected by the MLI will depend first, on the wording of existing provisions. Newer double tax treaties may be less impacted if they were based on the newer versions of the OECD MTC, that contain measures to curtail some BEPS concerns, which have been introduced over the last few years. Furthermore, it will largely depend on the opt-in and opt-outs as well as the reservations made by each state.

3 Should Developing Countries Sign up to the MLI?

As explained above, DTAs generally restrict taxing rights of source countries in favour of the residence countries of taxpayers. Thus, most developing countries prefer to sign DTAs based on the UN MTC, which has less restriction on source countries' rights to tax income. However, the fact that developing countries have DTAs based on the UN MTC should not hamper signing the MLI since it has been worded so that it can modify any DTA, whether it is based on the OECD or on the UN Model Tax Conventions. The overarching approach of the MLI should therefore encourage all countries to consider signing the MLI irrespective of the model on which their DTAs are based.

The tax treaty-related BEPS measures as set out in the MLI have the potential to reduce the tax-planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low- or no-tax locations where there is little or no corresponding economic activity, resulting in little or no overall corporate taxation being paid. The treaty-based BEPS measures set out in the MLI have the potential to strengthen source taxation, especially by addressing treaty shopping, and abuse of the taxable presence requirement in the definition of a 'permanent establishment' (PE) as explained in part 4.3 below. The provisions can preserve source taxation by ensuring that profits are taxed where the economic activities generating those profits are performed and where value is created.[71]

Considering the costs and time involved in renegotiating DTA, which are quite prohibitive for developing countries, the MLI provides the easiest and less costly method of ensuring that their DTAs are updated quickly and coherently. The MLI has the potential to improve existing tax treaty rules, especially if the MLI is adopted uniformly. Reliance on bilateral negotiations to introduce the BEPS measures would cause uncertainties, delays and enormous expenses and would disadvantage

70 BEPS Monitoring Group (n 14 above) 1.
71 OECD (n 1 above) 7–8.

developing countries. It is thus important that developing countries sign the MLI to benefit from improvements in existing tax treaty rules.[72]

Most of the double tax treaties that developing countries have signed, which are based on newer versions of the OECD MTC, may not have to be modified by the MLI, if they contain the relevant BEPS measures. The DTAs that will mainly be affected are the older ones that do not contain recent developments relevant to curtailing BEPS. The MLI has great potential to significantly impact on the content of future DTAs concluded by jurisdictions, as they would most likely contain BEPS measures to curtail treaty abuse.[73] Multinational enterprises (MNEs) are now being forced to review their business models in the light of the BEPS measures being implemented through the MLI.[74]

If developing countries choose to sign the MLI, the following is an exposition of the salient provisions of the MLI and some recommendations as to which provisions developing countries should opt in or out of as they gauge the approaches being taken other states.

4 The Provisions of the MLI and Matters Developing Countries should Take into Consideration

The BEPS measure that form the basis of the MLI, are found in Articles 3 to 17 of the MLI, which are divided in different parts as explained below.

4.1 Part II of the MLI – Hybrid Mismatches

This part of the MLI evolves from the treaty aspects of Action 2 of the BEPS Project, which deals with 'neutralising the effects of hybrid mismatch arrangements'.

4.1.1 Article 3 – Transparent Entities

One of the hybrid mismatches dealt with in Action 2 of the BEPS Report is 'hybrid entity mismatches'. A hybrid entity is a legal relationship that is treated as a taxable corporation in one jurisdiction and as a transparent (non-taxable) entity in another.[75] Where such an entity is treated as 'fiscally transparent', income can 'pass through' and be taxed at source. The most common hybrids involve partnerships and trusts.[76] If an entity is

72 BEPS Monitoring Group (n 14 above) 4.
73 D Jantjies '5 Questions on the Multilateral Treaty Instrument Answered' *Taxtalk* 66 September/October (2017) 4.
74 Ibid.
75 Arnold & McIntyre (n 11 above) 114; L Olivier & M Honiball *International Tax: A South African Perspective* (2011) 554.
76 AW Oguttu *International Tax Law: Offshore Tax Avoidance in South Africa* (2015) 325.

afforded varying tax treatment in different jurisdictions, double taxation or double non-taxation may arise. Article 3(4) of the MLI embodies the recommendations in Action 2,[77] which provides that the income of a transparent entity would be considered as income of a resident (and hence entitled to treaty benefits such as reduced withholding tax at source) only to the extent that it is treated as taxable income of a resident.[78] In terms of article 3(5), under certain circumstances a party may make a reservation to this article by, for instance, reserving to the entirety of the article not to apply to its CTAs, or for it not to apply to those CTAs that already contain the provision. South Africa made a reservation for the article not to apply to its DTAs with Chile, Mexico, and the United States of America, since they contain a provision described in article 3(4) of the MLI.[79]

Although some developing countries may consider that the use of hybrid entities is not a high priority BEPS concern for them, due to the complexity involved, it is important that they protect their taxation rights as source states, by adopting this provision.[80] Despite the complexities involved, adoption of these provisions would provide more protection against the erosion of source taxation by using schemes involving hybrid entities.[81] It is recommended that this article be adopted by all countries, to ensure coherence of the treaty system.

Action 2 of the BEPS Project also came up with recommendations to modify rules relating to the methods for the elimination of double taxation, by using a tax credit or exemption as set out in articles 23A and 23B of the OECD and UN MTCs; in particular, matters pertaining to the interpretation of article 23.[82] Article 3(2) of the MLI embodies those recommendations to ensure that relief from double taxation is not granted to income taxable only on the basis of residence of the taxpayer but also to income subject to source-state taxation. Thus, relief can be granted for taxes levied on the basis of source, or attributable to a PE, in accordance with the convention.[83]

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77 OECD/G20 BEPS Project 'Neutralise the Effects of Hybrid Mismatch Arrangements: Action 2' (2015).

78 OECD (n 2 above) 44.

79 National Treasury (n 15 above) 17.

80 AW Oguttu 'Tax Base Erosion and Profit Shifting in Africa – part 1: what should Africa's Response be to the OECD BEPS Action Plan?' XLVIII (3) *The Comparative and International Law Journal of Southern Africa* (2015) 551–552.

81 BEPS Monitoring Group (n 14 above) 9–10.

82 OECD/G20 BEPS Project 'Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances' (2015) para 64.

83 OECD (n 2 above) 42.

4.1.2 Article 4 – Dual Resident Entities

DTAs can be abused when entities claim residence of both treaty countries to gain a tax advantage. The tie-breaker test in article 4(3) of both the OECD and the UN MTCs which provides that dual resident entities shall be deemed to be resident only of the state where its place of effective management is situated was, however, easily manipulated for tax avoidance purposes. Action 2 of the BEPS Project came up with recommendations which are now embodied in article 4(1) of the MLI. The place of effective management 'tie-breaker' test is replaced with the requirement that the competent authorities of the two contracting states have to reach a mutual agreement on the country of residence of the entity, having regard not only to the place of effective management, but also the place where it is incorporated, or any other relevant factor.[84] If the competent authorities fail to agree, the taxpayer shall lose entitlement to tax relief, except as may be agreed by the competent authorities.[85]

The concern about this new approach is that there are now no clear dual residence tie-breaker rules. Article 4(1) merely provides that the competent authorities shall endeavour to determine by mutual agreement the jurisdiction of which the person shall be deemed resident. The decision is left to sheer administrative discretion of the competent authorities, who can have regard to the POEM, place of incorporation, and any other relevant factors. No hierarchy is provided in use of factors and the competent authorities are not bound to follow any of the factors. The concern though is that the factors they have to consider test different matters. For example, the place of effective management is in principle a test of substance presence while incorporation is a test for legal formulation, which will end up producing different results. Since companies cannot self-assess under the new rules until the competent authorities agree, they will stay resident in both states. This state of affairs will increase tax disputes. Most concerning is that article 4(1) applies to everybody, not just to abuse cases.

The MLI provides that countries may choose not to adopt article 4, or not to apply it to CTAs, which already have one of the specified tie-breaker rules.[86] For example, South Africa issued a notification listing 76 double tax treaties that contain a similar provision, thus reserving the right not to adopt the provision.[87] The UN subcommittee on BEPS recommended

84 OECD/G20 BEPS Project Action 6 (n 82 above) para 48.
85 OECD (n 2 above) 52.
86 Id 54.
87 National Treasury (n 15 above) 18–19.

that developing countries adopt this provision, with an option for states that wish to do so, to keep the POEM as the sole criterion.[88]

4.1.3 Article 5 – Application of Methods for Elimination of Double Taxation

Article 5 of the MLI covers issues pertaining to applications of methods to eliminate double taxation as recommended in Action 2 of the BEPS Project with respect to hybrid instruments.[89] A hybrid instrument is one that is treated as debt in one country and as equity in another, which may result in deductions under the rules of the payer jurisdiction and are not included in the ordinary income of the payee (deduction/no inclusion outcome) or two deductions in respect of the same payment (double deduction outcomes). To prevent abuses that may arise, Action 2 recommends linking rules that align the tax treatment of an instrument with the tax treatment in the counterparty jurisdiction.[90] As a primary rule, the jurisdiction from which a payment is made on a financial instrument should deny a deduction of that amount to the extent that it is not treated as taxable in the destination jurisdiction.[91] Action 2 also recommends a secondary 'defensive' rule, under which, if the payer (source) jurisdiction does not neutralise the mismatch (by denying deductibility), the payee jurisdiction should require such payment to be included in taxable income.[92] Ending double non-taxation is important in ensuring tax sovereignty, which is hampered where the allocation of a right to tax under a treaty, allows the state concerned to decide not to tax. This was abused by both MNEs and residence countries offering generous exemption of foreign source income, which was a major BEPS concern. For countries that relieve double taxation by exempting foreign income, a treaty change may be needed to implement this defensive rule. This is not necessary for countries that already include such payments as income but allow a tax credit.[93] Article 5 of the MLI embodies these recommendations and provides three options from which countries can choose:

- Option A: to deny exemption but provide a tax credit for such payments.

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88 UN, *Subcommittee on Base Erosion and Profit Shifting Issues for Developing Countries* (2016) 45 http://www.un.org/esa/ffd/tax/BEPS_note.pdf (accessed 12 November 2017).

89 OECD/G20 BEPS Project Action 2 (n 77 above) 16.

90 Ibid.

91 Id para 438.

92 Id 442–444.

93 BEPS Monitoring Group (n 14 above) 10.

- Option B: to deny exemption for dividends treated as deductible in the payer state, but allow a tax credit for any tax paid attributable to that income.
- Option C: to use the tax credit method (instead of exemption), based on the OECD model provision (for both income and capital).[94]

Article 5 of the MLI permits asymmetrical application of the options, ie if parties choose different options (or none). Each party may apply the option it chooses on its residents. A party that decides not to choose any option may reserve the right to refuse to allow any of these options to apply to one or more of its CTAs.[95] Each party that chooses to apply an option shall notify the depositary of its choice of option.[96] In line with article 5(8), South Africa reserved the right for the entirety of article 5 not to apply to all of its CTAs, presumably because it applies the credit method to relieve double taxation.[97]

Since most developing countries apply the exemption method to relieve double taxation, which method frequently facilitates tax avoidance,[98] it is recommended that they adopt the tax credit method (option C) and urge their treaty partners to allow them to do so.

4.2 Part II of the MLI – Treaty Abuse

This part of the MLI evolves from Action 6 of the BEPS Report, which deals with preventing treaty abuse.

4.2.1 Article 7– Treaty Abuse

Treaty abuse entails the use of treaty shopping schemes by residents of a non-treaty country to obtain treaty benefits that are not supposed to be available to them.[99] This is mainly done by interposing a conduit company in one of the contracting states to shift profits out of the treaty states. Action 6 of the BEPS Project sets out minimum standards to prevent treaty abuse which require that the title and preamble of DTAs should clearly state that the treaty is not intended to create opportunities

94 OECD (n 2 above) 61–68.
95 Article 5(8) (n 6 above).
96 Id art 5(10) MLI.
97 National Treasury (n 15 above) 20.
98 Arnold & McIntyre (n 11 above) 33.
99 H Becker & FJ Wurm *Treaty Shopping: An Emerging Tax Issue and its Present Status in Various Countries* (1988) 10; AW Oguttu 'OECD's Action Plan on Tax Base Erosion and Profit Shifting –Part 2: A Critique of some priority OECD Action Points from an African perspective – Addressing excessive interest deductions, treaty abuse and the Avoidance of Status of Permanent Establishments' 70 (6) *Bulletin for International Taxation* (2016) 335.

for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping.[100] Thus, article 6(1) of the MLI states that a CTA shall be modified to include preamble text, to the effect that the treaty is intended 'to eliminate double taxation with respect to the taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions)'. In addition, under article 6(3), a party may also choose to include in the preamble of its CTA reference to a desire to 'develop an economic relationship or to enhance co-operation in tax matters'. A party may reserve the right for the above preamble not to be included in its CTAs that already contain similar language. South Africa issued a notification as required in article 6(5) listing 60 agreements that it wishes to include in the preamble text in article 6(1), and in terms of article 6(6), it also listed 76 agreements that do not contain preamble language referring to a desire to develop an economic relationship or to enhance cooperation in tax matters.[101] Developing countries should adopt this preamble language.

BEPS Action 6 also recommends that countries should include in their CTA, either (i) a general anti-abuse provision, in the form of a 'principal purpose test' (PPT) rule; (ii) a combination of the PPT rule with a specific 'limitation-on-benefits' (LoB) rule; or (iii) an LoB rule supplemented by a mechanism that deals with conduit arrangements, such as a restricted PPT rule that applies to conduit financing arrangements.[102] These recommendations are now embodied in article 7 of the MLI. As explained above, the MLI provides some flexibility on how the minimum standards will be implemented by states.[103]

As the PPT is the only approach that can satisfy the minimum standard on its own, it is presented as the default option in article 7(1) of the MLI. The article states that:

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

100 OECD/G20 BEPS Project Action 6 (n 82 above) para 19.
101 National Treasury (n 15 above) 21–26.
102 OECD/G20 BEPS Project Action 6 (n 82 above) para 19.
103 OECD (n 2 above) para 14.

with the object and purpose of the relevant provisions of the Covered Tax Agreement.

The PPT has been drafted much wider than domestic 'general anti-avoidance provisions' (GAAR) which are considered less effective, for example if they refer to avoidance being the 'main' rather than 'one of the principal purposes' of the entering into a given transaction.[104] Where countries apply their GAAR to deal with treaty abuses, concerns about treaty override have been raised, especially where the treaty does not contain a similar provision.[105] To overcome such concerns, it is recommended that the PPT be adopted in DTAs.[106]

Although many countries prefer the general PPT, some countries consider this provision too vague and discretionary. The objective and subjective elements of the PPT rule may prove difficult in practice and could result in numerous treaty disputes.[107] The PPT rule has also been criticised for being too broad in scope such that it does not cover classical treaty-shopping structures, for example where dividends are channelled through conduit companies or stepping stone schemes which involve claiming excessive deductible expenses.[108] Tax practitioners have also raised concerns that the potential application of withholding taxes and the extent to which they are dependent on a PPT may pose some challenges.[109] The general lack of case law and guidance for tax authorities on how the PPT would be applied also poses difficulties for the interpretation and application of the PPT in practice. One of the few cases that could be instructive is the USA case of *Starr International Company Inc v United States of America*,[110] which dealt with the PPT in the context of the United States/Swiss treaty. Where a non-European Union country has a treaty with a European Union country, the application of the PPT may also face challenges in light of *Eqiom SAS* case,[111] where the European Court of Justice held that the application of the anti-abuse rules to treaties should not infringe the fundamental freedoms

104 See for example the South African GAAR in ss 80A–80L of the Income Tax Act 58 of 1962; BT Kujinga *A Comparative Analysis of the Efficacy of the General Anti-Avoidance Rule as a Measure Against Impermissible Income Tax Avoidance in South Africa* (LLD Thesis University of Pretoria 2014); Oguttu – Part 2 (n 99 above) 431.

105 BEPS Monitoring Group (n 14 above) 12.

106 Commentary on Article 1 of the UN MTC para 37.

107 Danone and Salome (n 10 above) 16.

108 ibid.

109 PWC 'Draft MLI Positions of Different Territories reflect range of Views on BEPS Implementation' (13 June 2017) 6 https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-draft-mli-positions-of-territories-reflect-a-range-of-beps-views.pdf (accessed 31 May 2018).

110 Case No 14-cv-01593(CRC).

111 Case C-6/16, ECLI EU:C:2017:641.

of EU members, such as freedom of establishment.[112] Because of these concerns, some countries prefer a more targeted provision in the form of a limitation of benefits (LoB) provision that applies to denial treaty benefits in specific treaty abuse cases. However, LoB provisions, typically in double tax treaties entered into with the USA, tend to be very complex and difficult to apply for countries with limited administrative capacity. These provisions require countries to have access to information in order to verify that the prerequisites for qualifying for treaty benefits are met.[113] Consequently, under the BEPS Project, countries did not agree on a detailed LoB provision. Rather they came up with simplified LoB provisions (SLoB) which were included in the MLI.[114]

The MLI permits parties, to supplement the PPT with a SLoB provision.[115] The addition of a SLoB to a PPT can be unilateral, provided the other state agrees. If the other state does not agree, it may opt out of article 7 and then the states must find a solution, which meets the minimum standard.[116]

The MLI allows a state to opt out of article 7 if it intends to adopt a combination of a detailed limitation on benefits (DLoB) provision and either a specific treaty provision to address conduit financing structures or a PPT.[117] In such cases, the parties shall endeavour to reach a mutually satisfactory solution which meets the minimum standard.[118] Given that parties preferring a DLoB provision may accept the PPT in article 7(1) as an interim measure, paragraph 17(a) allows such parties to express the intent in the notification.[119]

PWC[120] and KPMG's[121] review of countries' approaches revealed that most countries that signed the MLI, including South Africa,[122] opted for

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112 *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544. See also art 1(2) of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different member states (OJ 1990 L 225, 6), as amended by Council Directive 2003/123/EC of 22 December 2003.

113 IMF 'Spillovers in International Corporate Taxation' (2014) 27; Oguttu (n 99 above) 430.

114 OECD/G20 BEPS Project Action 6 (n 82 above) 23.

115 Article 7(6) MLI (n 6 above).

116 Id art 7(16).

117 Id art 7(15)(a).

118 Id art 7(7).

119 OECD 'Multilateral Convention to Implement Tax Related Measures to prevent Base Erosion and Profit Shifting: Information Brochure' (17 August 2017) para 90.

120 PWC (n 109 above) 3.

121 KPMG (n 58 above).

122 GE Geldenhuys – (Werksmans Attorneys) 'The Implementation of The BEPS Multilateral Instrument in South Africa' (3 July 2017) https://www.werksmans.com/legal-briefs-view/the-implementation-of-the-beps-multilateral-instrument-in-south-africa/ (accessed 12 November 2017).

the PPT thus accepting the default approach to treaty abuse.[123] Some countries reserved the right not to apply the PPT to their CTA on the basis of an existing PPT. For example, South Africa reserved the right for the PPT not to apply to 13 of its CTAs as they already contain a PPT clause.[124] PWC's review of countries' approaches reveals that 12 countries, many of which are developing countries from Latin America – including Argentina, Chile, Colombia, Mexico and Uruguay – but also India and Indonesia, opted for both the PPT and the SLoB.[125] Three other countries agreed to permit application of the simplified LOB where the other country also signed up for it, and seven countries indicated that they would pursue bilateral negotiation of a DLoB.[126]

It is recommended that developing countries should adopt the PPT rule since it is the only measure which satisfies the minimum standard on its own, and it applies by default. Where it applies, the PPT rule also replaces existing (and notably those narrower) provisions of DTAs that are covered by the MLI. Tax professionals at KPMG believe the universal adoption of a PPT will have a significant impact on preventing treaty abuse.[127] It is, however, concerning for developing countries that some countries opted out of article 7 of the MLI on the basis that they intend to negotiate an alternative that meets the minimum commitments or to use the DLoB, which would be very complex for developing countries.[128]

4.2.2 Article 8 – Dividend Transfer Transactions

Treaty abuse can also result when taxpayers get involved in dividend transfer schemes to take advantage of dividend withholding tax rates in article 10 of DTAs, based on both the OECD and the UN MTCs.[129] Article 10(1) provides that dividends paid by a company which is a resident of a contracting state, to a resident of the other contracting state may be taxed in the residence state. Article 10(2) provides that such dividends may also be taxed in the source state if the beneficial owner of the dividends is a resident of the other contracting state, but that the tax so charged shall not exceed: (a) five 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

123 KPMG (n 58 above).
124 National Treasury (n 15 above).
125 PWC (n 109 above) 3.
126 KPMG (n 58 above).
127 Ibid.
128 BEPS Monitoring Group (n 14 above) 13.
129 OECD/G20 BEPS Project Action 6 (n 82 above) para 36.

paying the dividends; and (b) 15 per cent of the gross amount of the dividend in all other cases.

As DTAs generally impose a lower maximum withholding tax on dividends paid to direct investors than to portfolio investors, taxpayers may get involved in dividend transfer transactions, whereby a taxpayer entitled to the 1 per cent portfolio rate in article 10(2)(b) seeks to obtain the five per cent direct dividend rate in article 10(2)(a). This can be done by arranging for a temporary increase in shareholding, eg by taking up additional shares in the company in the source state (amounting to twenty five per cent), shortly before a dividend declaration (in respect of the ordinary shares) which shares are then redeemed shortly after the dividend declaration – securing a ten per cent saving.[130] The concern is that article 10(2)(a) does not require the company receiving the dividends to have owned at least 25 per cent of the capital for a relatively long time before the date of the distribution. This may encourage abuse, whereby a company with a holding of less than 25 per cent may, shortly before the dividends become payable, have increased its holding primarily for the purpose of securing the benefits of the provision, or the qualifying holding may be arranged primarily in order to obtain the reduction.[131]

Action 6 of the OECD BEPS Project recommends the inclusion of a minimum shareholding period in article 10 before the distribution of the profits to curtail such schemes. It also recommends further anti-abuse rules to deal with cases where intermediary entities are established in the state of source to take advantage of the treaty provisions that lower the source taxation of dividends.[132] Article 8 of the MLI embodies these recommendations and provides a specific anti-abuse rule, which provides that in order to benefit from the reduced rate, the minimum ownership threshold is a 365-day period including the date the dividend was paid. This provision modifies article 10(2) of both the OECD and the UN MTCs, which require the competent authorities to agree on how the limitations should apply.[133] Article 8(3) of the MLI provides that a party may reserve the right for article 8(1) not to apply to its CTAs that already contain that provision. In this regard, South Africa listed 65 agreements that contain article 8(1) and made a reservation for the article not to apply to those agreements.[134] It is recommended that developing countries that do not have this provision in their DTAs, adopt the same approach in order to

130 Oguttu (n 99 above) 337.
131 OECD/G20 BEPS Project Action 6 (n 82 above) para 35.
132 Id para 37.
133 Id paras 34–36.
134 National Treasury (n 15 above) 43.

prevent the dividend transfer schemes. This provision would be relatively easy for developing countries to administer.[135]

4.2.3 Article 9 – Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property

Treaty abuse can also result when DTAs lack sufficient anti-abuse rules to prevent accessing capital gains benefits.[136] A typical treaty-abuse scheme is one where MNEs incorporate conduit companies in low-tax jurisdictions, which are used to dispose of their shares in assets located in source countries so that the proceeds appear to be derived from such low-tax jurisdictions, thereby avoiding capital gains tax in the relevant source country.[137] To reinforce taxation of capital gains from sales of immovable property in the state where it is located, DTAs provide for an anti-abuse provision in article 13(4) of the OECD MTC, which allows the contracting state in which immovable property is situated (source state) to tax capital gains realised by a resident of the other state on shares of companies that derive more than 50 per cent of their value from such immovable property. Action 6 of the OECD Report recommends that countries include article 13(4) of the OECD MTC in their DTAs.[138] Currently, paragraph 28.5 of the commentary to article 13 provides that states may want to consider extending the provision to cover not only gains from shares but also gains from the alienation of interests in other entities, such as partnerships or trusts, which would address one form of abuse. In Action 6, the OECD noted that article 13(4) will be amended to include such wording.[139] This would cover cases where assets are contributed to an entity shortly before the sale of the shares or other interests in that entity in order to dilute the proportion of the value of these shares or interests that is derived from immovable property situated in one contracting state.[140] In Action 6, the OECD noted that article 13(4) also will be amended to refer to situations where shares or similar interests derive their value primarily from immovable property at any time during a certain period as opposed to at the time of the alienation only.[141] The recommendation also covers gains from the alienation of interests in other entities, such as partnerships or trusts.[142]

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135 BEPS Monitoring Group (n 14 above) 13.
136 Oguttu (n 99 above) 342.
137 OECD/G20 BEPS Project Action 6 (n 82 above) paras 34–36.
138 Id para 41.
139 Id para 42.
140 Oguttu (n 99 above) 342.
141 OECD/G20 BEPS Project Action 6 (n 82 above) para 43.
142 Id in para 42.

Article 9(1) of the MLI embodies these recommendations by extending it to interests in a partnership or trust and ensuring that it can apply if the threshold is met at any time in the 365 days prior to the sale. The wording has been drafted to make it applicable to DTAs based on either the OECD or the UN model.[143] In terms of article 9(6) of the MLI, a country may reserve the right for the entirety of the article not to apply to its CTA or for it not to apply to those that already contain the provision. South Africa reserved the right for article 9(1) not to apply to its CTAs.[144] It is recommended that developing countries that face BEPS challenges in this regard, adopt this article to prevent abuse of capital gains benefits.

4.2.4 Article 10 – Anti-abuse Rule for Permanent Establishments Situated in Third Jurisdictions

Action 5 of the OECD BEPS Report notes that withholding tax limits in a tax treaty can be abused if the income paid is exempt in the recipient country, because it is treated as attributable to a permanent establishment (PE) of the recipient in a third country, and is taxed at a low rate in the country of the PE.[145] Article 10 of the MLI prevents such abuses by allowing a source country to deny treaty benefits, if the PE is taxed at a rate equal to less than 60 per cent of the tax that would be payable by its enterprise in the state of residence.[146] Article 10(2) of the MLI states that article10(1) does not apply if the income paid is derived from the active conduct of a business by the PE (other than the business of managing investments for the enterprise itself, except for the business of a bank, insurance firm or registered securities dealer). In terms of article 10(5) of the MLI, a country may reserve the right for the entirety of the article not to apply to its CTAs or for it not to apply to those that already contain the provision. South Africa reserved the right for the entirety of article 10 not to apply to its CTAs.[147] It is recommended that developing countries that face BEPS challenges in this regard must adopt this article.

4.2.5 Article 11 – Application of Tax Agreements to Restrict a Party's Right to Tax its Own Residents

Since a DTA is an agreement between two states that limits the application of their domestic tax laws, it has been interpreted that the application of domestic provisions, which permit a country to tax its residents' income, for example, the taxation of the income of their controlled foreign

143 OECD (n 2 above) 128–131.
144 National Treasury (n 15 above) 30.
145 OECD/G20 BEPS Project Action 6 (n 82 above) para 52.
146 OECD (n 2 above) para 142.
147 National Treasury (n 15 above) 31.

corporations, or their partners on their share of partnership income, would be contrary to treaty provisions (as it would amount to treaty over-ride).[148] To preserve the right to tax its residents, countries often include a 'saving clause' in their DTAs that allows the country to tax its residents as if the treaty had not come into effect.[149] Action 6 of the BEPS Report recommends the use of a 'saving clause' to preserve the right of a contracting state to tax its own residents so as to defeat interpretations claiming that some domestic rules permitting taxation of own residents may be contrary to treaty provisions.[150]

Article 11 of the MLI provides for the 'savings clause' while article 11(2) lists some exceptions to entitlement of tax benefits for residents. Since a saving clause is not a minimum standard in terms of the BEPS Project, under article 11(3) a country may reserve the right for the entirety of the article not to apply to its CTA or for it not to apply to its CTAs that already contain the provision. South Africa reserved the right for the entirety of article 11 not to apply to its CTAs.[151] However, it is recommend that developing countries adopt this article, except where they have DTAs that already contain a savings clause.

4.3 Part IV of the MLI – Avoidance of Permanent Establishment Status

This part of the MLI evolves from Action 7 of the BEPS Report which recommended best practices in preventing the artificial avoidance of PE status. The PE concept as defined in article 5 of MTCs is a crucial element of DTAs which is designed to ensure that business activities of a foreign enterprise are not taxed by a source state unless that enterprise creates significant and substantial economic presence in that state.[152] The PE concept is defined generally in article 5(1) of the OECD and UN MTC as 'a fixed place of business through which the business of an enterprise is wholly or partly carried on'. Article 5(2) provides an illustrative list of places that constitute PEs. Article 5(3) of the OECD MTC provides a special rule PE for building or construction or installation projects if they last for more than 12 months. Article 5(4)(a)–(f) lists a number of business activities (discussed below) which are treated as exceptions to the general definition of a PE in article 5(1). The PE excluded activities that are intended to limit the otherwise wide scope of the definition

148 OECD (n 2 above) 38.
149 PR McDaniel, JH Ault & J Repeti *Introduction to United States International Taxation* (2013) 181.
150 Id 63.
151 National Treasury (n 15 above) 32.
152 K Vogel *Double Tax Conventions* (1997) 280 para 4.

of a PE in article 5(1). Apart from the physical places of business that constitute PEs, article 5(5) provides for a deemed PE where a dependent agent habitually concludes contracts on behalf of the enterprise in the other contracting state.

In Action 7 of the BEPS Reports, the OECD notes that the PE concept has been under attack for years, both from multinationals that abuse it by compartmentalising it, and from developing countries that want to extend its parameters to reclaim their tax jurisdiction. The OECD acknowledges that the current definition of a PE is not sufficient to address BEPS strategies in the changing international tax environment, and that its standards were ineffective in equitably allocating taxing rights between source and residence states.[153] The Action 7 came up with recommendations for the review of the PE definition to prevent artificial avoidance of PE status, which would result in the modification of article 5 of DTAs based on the OECD and the UN MTC. A discussion of the relevant modifications and how they are dealt with in the MLI, is dealt with below.

4.3.1 Article 12 – Artificial Avoidance of PE Status through Commissionaire Arrangements and Similar Strategies

Action 7 of the OECD BEPS Project notes that deemed PE-dependent agent status in article 5(5) of the MTCs, can be circumvented in civil-law countries, through commissionaire arrangements whereby a contact concluded by an agent is not in the principal's name, so it binds only the agent even though the principal will supply the goods or services on the terms agreed to by the agent.[154] Action 7 came up with recommendations to prevent such schemes,[155] now embedded in article 12(1) of the MLI – it provides that a person acting on behalf of an enterprise can be a PE if it 'habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise', and these contracts are (a) in the name of the enterprise, (b) for the transfer of rights to property from the enterprise, or (c) for the provision of services by the enterprise.[156] DTAs that already include this provision may not have to be modified by the MLI.[157] Article 12(1) of the MLI clarifies that article 12(1) does not apply to a person acting in the ordinary course of their business as an independent agent, but this is not

[153] OECD/G20 BEPS Project 'Action 7: Prevent Artificial Avoidance of Permanent Establishment Status' (2015) para 3
[154] Id para 17; Oguttu (n 99) 345.
[155] OECD/G20 BEPS Project Action 7 (n 153 above) para 10.
[156] OECD (n 2 above) para 158.
[157] Article 12(3)(a) MLI (n 6 above).

the case for a person acting 'exclusively or almost exclusively' on behalf of one or more closely related enterprises.

For common-law countries where the *commissionaire* concept is not applied, commissioner arrangements may not be a major concern. Nevertheless, there could be cases where *commissionaire* proxies are employed to escape PE status.[158] Article 12(4) of the MLI provides that a party may reserve the right for the entirety of article 12 not to apply to its CTAs. KPMG's review of countries that signed the MLI shows that several developing countries elected to include this provision; they include Argentina, Chile, Colombia, Costa Rica, Mexico, Uruguay, India and Indonesia.[159] The developed countries that elected to include this provision are France, Japan, the Netherlands, New Zealand and Spain. Countries that opted out of this provision include the UK, Australia, Belgium, Canada, China, Germany, Hong Kong, Ireland, Italy, Korea, Luxembourg, Singapore and Switzerland.[160] South Africa also reserved the right for the entirety of article 12 not to apply to its CTA.[161] Although the OECD's continuing work on Action 1 which deals with the digital economy could result in widening of the definition of a PE, it is recommended that in the meantime, developing countries should adopt this provision as it improves the current definition of a PE.[162]

4.3.2 Article 13 – Artificial Avoidance of PE Status through the Specific Activity Exemptions

Article 5(4)(e)–(f) of both the OECD and the UN MTC list some specific activities which even if conducted through a fixed place of business are not considered to constitute a PE (exceptions to the PE concept). These are generally activities that are considered 'auxiliary and preparatory' in nature such as the storing or keeping goods for display or delivery, purchasing goods or collecting information – the UN MTC does not include delivery.[163] Action 7 of the BEPS Project explains that the PE status can be circumvented by claiming that the business activities are preparatory and auxiliary in nature.[164] However, nowadays business activities that were previously considered preparatory or auxiliary may be the core business activities of an enterprise. For example, a large warehouse with a significant number of employees used for filing orders sold online

158 Oguttu (n 99 above) 346.
159 KPMG (n 58 above).
160 Ibid.
161 National Treasury (n 15 above) 33; Geldenhuys (n 122 above).
162 BEPS Monitoring Group (n 14 above).
163 Oguttu (n 99 above) 349.
164 OECD/G20 BEPS Project Action 7 (n 153 above) para 10.

to customers could be more than just 'preparatory or auxiliary'.[165] In Action 7, the OECD recommends modifications to all the exceptions to the PE concept to be restricted to activities of a preparatory or auxiliary character.[166] These modifications are now embodied in article 13 of the MLI which clarifies that the activities described in the exceptions in article 5(4) of the MTC only fall outside the definition of a PE if they are 'of a preparatory or auxiliary character'. Article 13(1) offers countries two options of achieving this (or they may choose neither).

- Option A applies to modify the article 5(4) exceptions so that each of them will be made subject to the proviso of being 'of a preparatory or auxiliary character'.[167]
- Option B allows parties to retain the existing exceptions (a)–(d), without making them subject to the proviso, and that a combination of such activities in a fixed place is also not a considered PE provided that they are 'of a preparatory or auxiliary character'. [168]

In terms of article 13(7), each party that chooses to apply option 1 shall notify the depositary of its choice. PWC[169] and KPMG's[170] review of the options chosen by countries that signed the MLI shows that most of them elected option A; including Argentina, Australia, Austria, Germany, India, Indonesia, Italy, Japan, Mexico, the Netherlands, New Zealand and Spain. South Africa also chose to apply option A, and it listed 76 agreements that contained the wording of article 13(2)(a) of the MLI.[171] Countries that chose option B include Belgium, France, Ireland, Luxembourg and Singapore. Some states opted out of the specific activity exemption rule altogether; these include Canada, China, Hong Kong, Korea and Switzerland.[172] PWC's analysis shows that the United Kingdom chose not to apply either option A or B, so it opts to preserve its positions in existing treaties.[173] Clearly, option A is the only one that makes it possible for a host state to decide that a fixed place of business for the exceptions listed in (a) to (d) may constitute a PE if the activity can be regarded as not merely 'preparatory or auxiliary'. It is thus recommended that developing countries adopt option A to ensure that any activity conducted through a fixed place of business would constitute a PE, unless it is only

165 Id para 28.
166 Id para 38.
167 Article 13(2)(a) MLI (n 6 above).
168 Id art 13(3).
169 PWC (n 109 above) 5.
170 KPMG (n 58 above).
171 National Treasury (n 15 above) 34.
172 KPMG (n 58 above).
173 PWC (n 109 above) 5.

'preparatory or auxiliary'. It should be noted that states choosing option A may reserve the right for it not to apply to their DTAs which already include the 'preparatory or auxiliary' condition for all the exceptions.[174]

Action 7 of the BEPS Project also noted that the exceptions to the PE concept in article 5(4) can be circumvented by fragmenting operations in a country so that different aspects are attributed to separate legal entities, though they all form part of one commercially-related activity of the corporate group so that profits are attributed to affiliates in low-tax jurisdictions.[175] Such fragmented activities may thus be interpreted to be merely 'preparatory or auxiliary' and excluded from PE status.[176] To curtail such strategies Action 7 recommends an anti-fragmentation provision,[177] which is now embedded in article 13(4) of the MLI. The provision denies the exceptions to PE status; if taken together the fragmented business activities would 'constitute complementary functions that are part of a cohesive business operation'. [178] KPMG's review of countries that signed the MLI shows that the majority of them elected to apply the anti-fragmentation rule to their CTAs. The few that opted out of the anti-fragmentation rule include Germany, Luxembourg and Singapore.[179] It is recommended that developing countries should adopt the anti-fragmentation rule.

4.3.3 Splitting-up of Contracts

Action 7 of the BEPS Project recognises that the special PE rule in article 5(3) for building sites, construction, and installation projects that last for more than 12 months, can be circumvented by dividing contracts into several parts each covering a period less than 12 months, and yet they are all owned by the same group.[180] To prevent avoidance of PE status when contracts are split up between closely related enterprises, Action 7 recommends that countries should apply a general anti-abuse rule, such as the PPT discussed above (which was recommended under Action 6 of the BEPS Reports for preventing treaty abuse). [181]

Action 7 also recommended a more targeted rule to combat such abuses,[182] which is now embodied in article 14 of the MLI. It states that where an enterprise carries out activities such as construction,

174 Article 13(6) (n 15 above); BEPS Monitoring Group (n 14 above) 16.
175 OECD/G20 BEPS Project Action 7 (n 156 above) para 40.
176 Oguttu (n 101 above) 350.
177 OECD/G20 BEPS Project (n 153 above) para 10.
178 Ibid.
179 KPMG (n 58 above).
180 Article 5(3) (n 15 above); Oguttu (n 99 above) 346.
181 OECD/G20 BEPS Project Action 7 (n 153 above) para 10.
182 Id paras 42–44.

for a period(s) exceeding 30 days but falling short of the specific time threshold for a PE, and connected activities are carried out at the same place by closely related enterprises for different periods each exceeding 30 days, the periods must be aggregated to decide whether the threshold is exceeded. This targeted rule is generally easier to apply than a general anti-abuse principle such as the PPT. However, it does not preclude the application of the PPT in other cases of abuse. Since the measures for addressing artificial avoidance of PE status through splitting-up of contracts are not minimum standards, article 14(3)(a) of the MLI permits a party to reserve the right for article 14 not to apply to its CTAs. The MLI also recognises that a CTA could contain anti-contract splitting rules, so article 14(3) allows a party to make a reservation for the entirety of article 14 not to apply to its CTA or for the entirety of the article not to apply its CTA relating to the exploration for or exploitation of natural resources.[183] The KPMG review of countries that signed the MLI shows that many of them opted out of the provision on splitting up contracts. Those that adopt the provision (such as Argentina, Australia, France, India, Indonesia, Ireland, the Netherlands and New Zealand), did so only in respect to activities other than natural resource exploration and exploitation.[184]

PWC's review of countries that signed the MLI shows that in general a significant number of territories reserved their rights not to apply article 14 since it does not entail minimum standards.[185] South Africa, for instance, reserved the right for the entirety of article 14 not to apply to its Covered Tax Agreements.[186] PWC suggests that in some respects this may suggest a weakening of resolve to effect BEPS changes.[187] Nevertheless, the changes to the PE concept as embodied in article 14 of the MLI are positive steps forward in preventing artificial avoidance of PE status. It is therefore important that developing countries adopt this provision against the splitting up of contracts. PWC is of the view that even if the PE BEPS measures were not universally adopted, those measures have the potential to significantly affect taxpayers, and they will have an impact on future treaties that countries sign.[188]

183 OECD (n 2 above) para 186.
184 KPMG (n 58 above).
185 PWC (n 109 above) 6.
186 National Treasury (n 15 above) 36.
187 PWC (n 109 above) 6.
188 Ibid.

4.3.4 Article 15 – Definition of a Person Closely Related to an Enterprise

Articles 12(2), 13(4) and 14(1) of the MLI refer to the concept of 'closely related to an enterprise' in the context of preventing artificial avoidance of PE status. Article 15 of the MLI contains a definition of the term 'closely related to an enterprise', which is based on the concept of common control, but with an assumption that control is deemed to exist in any case if there is direct or indirect ownership of more than 50 per cent of the beneficial ownership. Developing countries should adopt this article if they have adopted article 12(2), 13(4) or 14(1).

4.4 Part V of the MLI – Improving Dispute Resolution

Under Action 14 of the BEPS Project, the OECD emphasises the need to resolve effectively treaty disputes as the initiatives to address BEPS would lead to the development of a broad range of new domestic law and treaty-based anti-abuse rules, which may be susceptible to conflicting interpretation.[189] DTAs provide for the Mutual Agreement Procedure (MAP) in article 25, as the means for resolving tax treaty disputes.[190] However, the OECD recognises that there are various obstacles that hinder the effectiveness of MAP.[191] These obstacles include lack of resources, inadequate empowerment of competent authorities to reach principled case resolutions and the lack of mutual trust among competent authorities.[192] Action 14 of the BEPS Project sets out minimum standards for improving dispute resolution which are intended to ensure that (1) MAP is implemented in good faith; (2) countries' administrative processes promote the timely resolution of treaty-related disputes; (3) taxpayers that meet the requirements of article 25(1) of OECD MTC can access MAP. [193] These minimum standards resulted in the modification of the provisions of article 25(1)–(3) of the OECD MTC, which are now embodied in article 16 of the MLI.[194]

Article 16(1) provides that when the actions of one or both of the Contracting Jurisdictions result in taxation for a person, not in accordance with the provisions of the Covered Tax Agreement, that

189 OECD/G20 BEPS 'Action 14: Making Dispute Resolution Mechanisms more Effective' (2015) para 5.

190 AW Oguttu 'Resolving treaty disputes: The challenges of mutual agreement procedure with a special focus on issues for developing countries in Africa' 12 (2016) *Bulletin for International Taxation* 725.

191 OECD *Obstacles that Prevent Countries from Resolving Treaty Related Disputes Under the Mutual Agreement Procedure* (16 September 2015) paras 4–7.

192 Ibid.

193 OECD/G20 BEPS Action 14 (n 189 above) paras 4, 24, and 34.

194 OECD (n 2 above) para 193.

person, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, may present the case to the competent authority of either Contracting Jurisdiction. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the CTAs. A country may opt out of this provision if it accepts an obligation to ensure that taxpayers are allowed to present a case within three years.[195] Article 16(2) provides that a competent authority must, if it finds the claim justified and is unable to find a satisfactory solution, 'endeavour to resolve the case by mutual agreement' with the treaty partner. No reservation is permitted to this obligation.[196] Any agreement reached under the MAP must be implemented notwithstanding any time limits in domestic law (such as those relating to adjustments for tax assessments and tax refunds).[197] A country may opt out of this provision if it accepts an alternative in its CTAs.[198] Article 16(3) provides that the competent authorities must 'endeavour to resolve' not only claims brought by taxpayers, but 'any difficulties or doubts arising as to the interpretation or application' of a CTA; and they may also 'consult together for the elimination of double taxation in cases not provided for' in a CTA. No reservation is permitted to these provisions.[199]

Where states choose different ways to achieve the minimum standard, the MLI gives them the option to endeavour to find a satisfactory solution bilaterally with the other contracting state.[200] South Africa reserved the right for article 16(1) not to apply to its CTAs on the basis that it intends to meet the minimum standard for improving dispute resolution. That is, by ensuring that it permits a person to present a case to the competent authority of either Contracting Jurisdiction, if such a person considers that the actions of one or both of the Contracting Jurisdictions result or will result in taxation not in accordance with the provisions of the CTA, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions.[201] Article 16(6)(b)(i) provides that contracting states should list their CTA, which contain a provision to the effect that a case must be presented within a specific period that is shorter than three years from the first notification of the action resulting in taxation not in accordance with the provisions of the CTA. South Africa listed

195 Article 16(5)(b) (n 6 above).
196 OECD (n 2 above) para 197.
197 Commentary on art 25 of the OECD MTC, para 39.
198 Article 16(5)(c)(ii) MLI .
199 OECD (n 2 above) para 198.
200 Article 16(5) (n 6 above).
201 National Treasury (n 15 above) 37; Geldenhuys (n 122 above).

seven CTAs with such a provision.[202] Under article 16(6)(b)(ii) contracting states should list CTA, which contain a provision to the effect that a case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the CTA. South Africa listed 66 CTAs with such a provision.[203]

Article 16(4)(a)(i) extends access to MAP to cases under the provisions of a CTA that deal with non-discrimination based on nationality, and requires that the case may be presented to the competent authority of the contracting jurisdiction of which that person is a national. Under article 16(6)(c)(i), countries are required to list their CTAs that do not contain such a provision. South Africa listed its treaty with Mexico as one that does not contain such provision.[204] Article 16(4)(c)(ii) states that CTAs should allow competent authorities of the contracting jurisdictions to consult together for the elimination of double taxation in cases not provided for in the CTA. Under Article 16(6)(d)(ii), countries are required to list their CTAs that do not contain such a provision. South Africa listed its DTAs with Belgium, Chile, New Zealand and Ukraine, which do not have such a provision.[205]

Most existing DTAs should already contain these provisions. It is important that developing countries that wish to sign the MLI, review their treaties to determine which ones do not have these provisions so that they could list them as CTAs for purposes of the MLI.

4.4.1 Article 17 – Corresponding Adjustments

The measures in Action 14 of the BEPS Project which require that countries implement MAP in good faith and that taxpayers are granted access to MAP, also recommends access to MAP in transfer-pricing cases, in particular by making appropriate adjustments to tax assessed in terms of article 9(2) of the OECD MTC.[206] Article 9(1) of the OECD MTC provides for the use of the arm's-length principle to prevent transfer pricing. The article provides that when conditions are made or imposed between two associated enterprises in their commercial or financial relations – which differ from those that would have been made between independent enterprises – then any profits that accrue to any of those enterprises as a result of those conditions, may be included in the profits of that enterprise and taxed accordingly. An adjustment must be made so that those terms and conditions reflect those that would have existed at

202 National Treasury (n 15 above) 34.
203 Id 38–40.
204 Id 40.
205 Ibid.
206 OECD/G20 BEPS Action 14 (n 189 above) para 44.

arm's length. However, when such an adjustment is made, it may affect transactions between a taxpayer and an associated enterprise in the other contracting state, which might increase the aggregate tax payable by the two entities. Since the two entities are treated as separate legal persons, economic double taxation might result. Thus, article 9(2) calls on the other treaty state to make the corresponding adjustment to the amount of the tax charged on those profits in order to prevent economic double taxation that might result.[207] In determining the corresponding adjustment, article 9(2) provides that the competent authorities of the contracting states, if necessary, shall consult each other.

Article 17 of the MLI embodies the obligation in article 9(2) of the OECD and the UN model conventions to relieve 'economic double taxation'. The obligation is, however, a best practice under Action 14 and is not required as part of the Action 14 minimum standard.[208] Thus, article 17(3)(b)(ii) allows a party to reserve the right not to apply article 17(1) if that party will make the adjustment as referred to in article 17(1); or if its competent authority will endeavour to resolve a transfer-pricing case under the mutual agreement procedure provision of its tax treaty.[209] Under article 17(3), a party may reserve the right for the entire article not to apply to its CTA and for the article not to apply to its CTAs that contain a similar provision; it may undertake to make the appropriate adjustment; or that its competent authority shall endeavour to resolve the case by mutual agreement procedure.[210] South Africa lists 76 agreements that contain a provision described in article 17(2).[211]

Developing countries have, however, long been reluctant to provide the corresponding adjustment even if article 9(2) was included in the OECD MTC in 1977, and if it is now also in the UN MTC. [212] The concern is that article 9 allows a tax authority to adjust the accounts of an enterprise within its jurisdiction, applying the 'independent entity' test, according to its own judgement. Accepting article 9(2) creates an obligation to consider the allocation of the combined profits of that entity and its associated enterprises in other countries, and to accept an adjustment made by the other party if it can be considered in accordance with the treaty. It is argued that this contradicts the 'independent entity' principle, and yet current transfer-pricing guidelines do not provide clear rules for such an allocation of combined profits.[213] Article 9(2) imposes an

207 OECD/G20 BEPS Project Action 14 (n 189 above) paras 11–13.
208 Id para 44.
209 OECD (n 2 above) para 212.
210 Id para 213.
211 National Treasury (n 15 above) 42–43
212 BEPS Monitoring (n 14 above) 19.
213 Ibid.

obligation to remove economic double taxation, resulting from divergent transfer-pricing methods being applied to different affiliates of the same MNE. Developing countries have been insisting on flexibility to apply their own approach to intra-group transactions. [214] The obligation to accept an adjustment could be used to pressurise weaker countries to apply transfer-pricing methods, which they consider inappropriate or unacceptable for their circumstances. [215]

Considering the inherent limitations of the 'independent entity' principle and the challenges of using the arm's-length principle to prevent transfer pricing, as well as the practical difficulties involved,[216] developing countries may want to retain the flexibility to apply their own approach to intra-group transactions.[217] It is thus recommended that developing countries make the reservations not to apply article 17 of the MLI and rather choose that their competent authorities shall endeavour to resolve the case under the mutual agreement procedure in their covered agreements.

4.5 Part VI of the MLI – Arbitration

Article 25(5) of the OECD MTC provides for arbitration as an extension of the MAP. The purpose of the arbitration provision is not to decide the case itself but to provide resolution for only the specific issues that prevent the competent authorities from reaching a satisfactory resolution of the case.[218]

In Action 14 of the OECD BEPS Project, the OECD notes that 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. [219] Thus, the agreement to a minimum standard in Action 14 to make MAP more effective was complemented by a commitment by a number of countries to adopt mandatory binding arbitration.[220] However, there is no consensus among all OECD and G20 countries on the adoption of mandatory binding arbitration.[221] Part VI will apply only if both parties notify the depositary that they choose to resolve treaty disputes using mandatory binding arbitration.[222]

Article 19(1) provides that, where the competent authorities are

214 Ibid.
215 Ibid.
216 Oguttu (n 190 above) 138–158.
217 BEPS Monitoring Group (n 14 above) 19.
218 Oguttu (n 190 above) 727.
219 OECD/G20 BEPS (n 189 above) para 62; Silberztein & Tristram (n 35 above) 352.
220 OECD/G20 BEPS Action 14 (n 189 above) para 8.
221 Ibid.
222 Article 18 MLI (n 6 above); OECD (n 2 above) para 215.

unable to reach an agreement on a case pursuant to the MAP under the CTA within a period of two years (or three),[223] unresolved issues will, at the request of the person who presented the case, be submitted to arbitration in the manner described in Part VI. A country can reserve the right for a claim not to proceed to arbitration, or for the arbitration to end, if a decision on it has been given by a court or administrative tribunal.[224] The case also terminates if the competent authorities reach agreement, or if the taxpayer withdraws the claim.[225] In terms of article 28, a party may make reservations as to the scope of cases which are eligible for arbitration, and these reservations are deemed to have been accepted by other parties unless they object within 12 months.

Article 23(1) sets out the procedure for arbitration. The default procedure is the 'last best offer' or 'baseball' arbitration,[226] in that the parties must submit a proposal for the resolution of the case; for instance, specific monetary amounts, or a maximum tax rate to be charged and the arbitrators have to choose between these proposals.[227] No reasons are given for their decision.[228] Under Article 23(2), parties may opt for the 'reasoned opinion' procedure whereby the arbitrators can indicate reasons for decisions reached and also provide the sources of law relied upon.[229] The 'reasoned opinion' is considered a better approach as it offers precedents for future cases. Where the reasoned opinion procedure applies, the parties may choose that the arbitrators' decision is not binding on them if they agree to a different resolution within three months.[230] In terms of article 21, arbitrators are subject to confidentiality obligations. Since the arbitral decision is supposed to be kept secret, under article 23(5), the parties may require the taxpayer and its advisers to accept a written obligation of non-disclosure and of the arbitral decision, the breach of which would result in termination of the MAP and of the arbitration.

Developing countries find the confidentiality of arbitration proceedings unacceptable.[231] The secrecy involved makes it difficult for countries to draw on the experience gained in a given case or to monitor the fairness

223 Article 19(11) MLI (n 6 above).
224 Id art 19(2).
225 Id art 22.
226 P Temple-West 'International arbitration for tax disputes, "baseball" style' *Reuters* (25 November 2012).
227 Oguttu (n 190 above) 729.
228 Ibid.
229 Commentary on art 25 of the OECD MTC, para 15.
230 Article 24 MLI (n 6 above).
231 S Picciotto 'ICTD Summary Brief 7: What Have We Learned About International Tax Disputes' (2017) http://www.ictd.ac/publication/ictd-sb9/ (24 November 2017).

and effectiveness of the arbitration process.[232] The emphasis placed on confidentiality over transparency makes it difficult to develop confidence in the system since taxpayers cannot ascertain if the same decision would be applied in other similar cases.[233] The fact that the arbitrated decisions cannot be reviewed or appealed against, creates a further lack of confidence in the system.[234] In addition, some countries consider that arbitration impacts on their sovereignty, in that it goes beyond what the tax treaty intended as it requires giving too much discretionary power to individuals who are third parties to the treaty, to decide treaty matters, without any checks and balances to the actions taken by such individuals (the arbitrators).[235] There is also concern about the limited guidance on the criteria for selecting arbitrators.[236] Since the arbitration procedure does not guarantee the neutrality and independence of arbitrators, there is scepticism in entrusting decisions involving millions of dollars to a secret and unaccountable procedure of third-party adjudication.[237]

PWC's analysis is that although most taxpayers welcome the tightening of the criteria for access to MAP under the MLI, they remain sceptical of various aspects pending practical experience; and some countries are strongly against using arbitration.[238] For example, developing countries with limited arbitration experience hold the view that the process could turn out to be unfair to them when disputes occur with more experienced countries that have had many MAP cases. Countries with arbitration experience tend to know more about what appeals to certain arbitrators, whereas inexperienced countries may be forced to hire specialist counsel, which may not always work to their advantage.[239] There are for instance concerns that arbitrators from developed countries will not be impartial if a MAP case involves their own country.[240] Since the logistical costs of arbitration are supposed to be borne by the countries concerned (the salaries of arbitrators, hiring facilities, hiring external advisors and counsel, the cost of organising arbitration proceedings, travelling costs, as well as costs for translating and preparing documents),[241] such costs

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232 Ibid.
233 Oguttu (n 190 above) 729.
234 UN Committee of Experts on International Cooperation in Tax Matters *Secretariat Paper on Alternative Dispute Resolution in Taxation* (8 October 2015) para 132.
235 UN *Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries* (2013) 329.
236 Article 20 MLI (n 6 above).
237 Oguttu (n 190 above) 729.
238 PWC (n 109 above) 4.
239 UN (n 234 above) 99.
240 Oguttu (n 190 above) 729.
241 Commentary on art 25 of the OECD MTC para 12.

can also be quite prohibitive for developing countries to engage in arbitration proceedings. [242]

PWC's review of the countries that signed the MLI shows that 25 of the 7 June signatories signed up for the arbitration provisions in the MLI. These are: Andorra, Australia, Austria, Belgium, Canada, Fiji, Finland, France, Germany, Greece, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malta, the Netherlands, New Zealand, Portugal, Singapore, Slovenia, Spain, Sweden, Switzerland and the United Kingdom. [243] Most of the countries that opted for arbitration, opted for the default last best offer arbitration (18 countries) while seven countries opted for the 'reasoned opinion' arbitration.[244]

It is advised that developing countries should not opt for mandatory binding arbitration when they sign the MLI, until the process is opened up to full transparency with reasoned decisions based on principles that can guide other taxpayers and tax authorities. This is going to become very important to ensure certainty in international tax practice as the OECD approach to resolving some of the BEPS concerns, gives a lot of discretion to competent authorities to resolve the matters, which may increase the number of treaty disputes. For example, as discussed above, the resolution of dual residence of entities is left to the competent authorities to agree based on their discretion. Another example of the discretional approach is the use of the subjective PPT as the default approach for satisfying the minimum standard in preventing treaty abuse. The disputes that could arise as a result of the uncertainties of applying the discretionary approach will necessitate the OECD to develop guidelines that will make international tax arbitration more transparent as is the case with arbitration procedures in trade agreements, such as the World Trade Organization.[245] This will also require consideration of other means of resolving treaty disputes such as the use of mediation and conciliation as recommended by the UN.[246]

5 Other Developing Country Concerns about the MLI

5.1 Interests of Developing Countries

Considering that the outcomes of the BEPS Project and their ultimate inclusion in the MLI largely address the BEPS concerns of OECD

242 UN (n 234 above); Oguttu (n 190 above) 727.
243 PWC (n 109 above) 6.
244 Ibid; see also KPMG (n 24 above).
245 WTO *Dispute Settlement System Training Module* https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s3p1_e.htm (accessed 21 October 2017).
246 UN (n 234 above) 14.

countries,[247] it remains to be determined whether the fundamental taxing rights of source countries will be protected. Although the MLI can apply to all DTAs whether based on the OECD or UN MTC, and although the UN established a subcommittee to monitor and facilitate input in the BEPS process from developing countries and to consider BEPS implications for the UN MTC, the UN Committee of Tax Experts played only a marginal role in the BEPS Project.[248] Even though the BEPS Project is intended to ensure the alignment of tax with economic activities and value creation, many of the BEPS outcomes only provide patch-up remedies, and not a more coherent and comprehensive revision to international tax and DTA rules that would comprehensively protect source taxation.[249] The two-time frame with which the BEPS Project was carried out (2013–2015) has also been criticised for putting extraordinary pressure on the consensus-driven process at the OECD, which risks 'creating a false consensus around vague standards that have not been adequately considered'.[250] Also, the process of drafting the MLI took a relatively short period, and it has been criticised for covering mainly the 'bare bones' of the structural issues rather than the details of its content and that the consultation process was minimal.[251] This makes one wonder whether the MLI will be instrumental in alleviating the BEPS concerns of developing countries especially if parties opt out of articles that are pertinent to developing countries.

5.2 Concerns Arising from the Flexibility of the MLI

The measures in the MLI have great potential to improve existing tax treaty rules, especially if adopted uniformly. Although the minimum standards in the BEPS Project are supposed to be implemented by all countries that are part of the OECD Inclusive framework, the mechanism for the application of the minimum standards in the MLI provides a certain level of flexibility on how the minimum standards will be implemented by states, since they can opt out of some provisions.[252] This flexibility implies that it is possible for a country to sign the MLI and opt out of the BEPS minimum standards, for example those in article 7 (dealing with preventing treaty abuse), and rather choose to negotiate an alternative to meeting the minimum commitments. The advantages of the MLI would

247 Oguttu (n 80 above) 540.
248 UN Sub-committee on BEPS *Subcommittee on Base Erosion and Profit Shifting Issues for Developing Countrie*s, http://www.un.org/esa/ffd/tax/BEPS_note.pdf (accessed 12 November 2017).
249 BEPS Monitoring Group (n 14 above) 4.
250 Silberztein & Tristram (n 35 above) 348.
251 Arnold (n 60 above) 683.
252 OECD (n 2 above) para 14.

be more effective if it is introduced quickly and as uniformly as possible. However, if countries opt out of some of the provisions, it may result in the continuation or even proliferation of the tax-planning strategies that the MLI is intended to restrict. Where states are free to choose different ways to achieve the treaty-related BEPS minimum standards, as long as they endeavour to find a satisfactory solution bilaterally with the other contracting states of the covered DTCs, this results in a loss of uniformity in the way countries were envisaged to adopt these minimum standards.[253] It will also mean that instead of moving towards a simpler and more uniform structure of anti-abuse provisions in DTAs, non-uniform adoption would add a new layer of complexity and potential confusion.[254]

Ideally, one would have expected that countries would list all their DTAs as CTAs under the MLI. Ideally, comprehensive and coherent implementation of the BEPS Project proposals would imply that all countries would adopt both the minimum standards and the recommended best practices, even though further improvements may be considered and could be subsequently negotiated.[255] From that premise, one would have expected that all the OECD and G20 countries, which initiated the BEPS Project and were actively involved in the formulation of the proposals, would take the lead in full implementation of the MLI. This is a concern considering that some OECD countries (such as Switzerland, the Netherlands, the UK, the USA and Ireland) have an extensive network of DTAs which have been used in international treaty-shopping schemes. These countries have notoriously availed themselves as hubs for tax-planning strategies for their own residents and for MNEs based in other countries.[256] Failure by these countries to adopt comprehensively the treaty-based minimum standards in the MLI, such as those relating to preventing artificial avoidance of PE status, would create major gaps and inconsistencies in the tax treaty system.

PWC's analysis shows that the approach taken by countries signing the MLI jurisdictions with respect to reservations varies; some countries have reserved their right not to apply most of the provisions, while other jurisdictions have chosen to apply several of them.[257]

Ideally, a decision to opt out of any of the other MLI provisions should only be made after very careful consideration, supported by strong reasons. The ability to opt in and opt out of provisions could open a means for a country to sign the MLI, just for one benefit – opting in to mandatory binding arbitration in resolving cross-border disputes under existing

253 Arnold (n 60 above) 684.
254 BEPS Monitoring Group (n 14 above) 4.
255 Id 5.
256 Ibid.
257 PWC (n 109 above) 1.

DTAs.[258] This selective or partial adoption of MLI provisions by developed countries is very concerning for developing countries, which are not very sure of what provisions to opt in or out of. Developing countries are sceptical that this selective approach may inevitably create more gaps and mismatches between tax rules applied by different countries, it would encourage tax arbitrage, generate disputes, and thwart the BEPS Project. [259]

5.3 Complexity

The MLI entails a complicated reservation and option mechanism. It is highly technical, and the arrangements governing its application to existing DTAs are complex. Some of this complexity is due to the difficulty of reconciling divergences between the states, while aiming at ensuring consistency in the final text. The Explanatory Statement to the MLI may also lead to increased complexity in interpretation, adding a new layer of interpretative sources for the treaty provisions, which may be challenging to apply.[260] One of the biggest challenges of the MLI will depend in large part on the OECD and participating jurisdictions' ability to distinguish between which treaty provisions have been modified and which remain the same.[261] To resolve some complexities, the OECD has developed a toolkit for the application of the MLI, which will be found helpful to developing countries that want to sign the MLI. It contains innovative tools to facilitate the application of the MLI to existing DTAs (OECD Toolkit for MLI).

5.4 The Uncertainties that the MLI Creates

When countries negotiate DTAs, the articles they agree upon are often interconnected. The give-and-take negotiation process may result in various concessions that are covered in other articles. The MLI creates uncertainties where it impacts on this interconnectivity and the equilibrium reached by the contracting countries during the negotiation, which may lead to situations that would have never have been accepted in bilateral situations. [262]

Uncertainty also arises where the MLI may modify a provision that is fundamentally connected to other provisions of DTAs, which may not be covered in the MLI. For example, although the MLI deals with preventing artificial avoidance of PE status under article 5 of DTAs, this article is

[258] BEPS Monitoring Group (n 14 above) 4.
[259] Id 5; see also PWC (n 109 above) 6.
[260] Silberztein & Tristram (n 35 above) 353.
[261] Lewis (n 21 above) 2.
[262] Silberztein & Tristram (n 35 above) 353.

fundamentally connected to the attribution of profits to PEs in article 7 of DTAs, which was not dealt with in the BEPS Project and is not covered in the MLI.[263] This connectivity of these articles is concerning to many developing countries, since many of them have not adopted the OECD's authorised approach of attributing profits to PE. It recognises the economic differences between the PE and subsidiaries by adopting a 'functionally separate entity' approach, whereby the internal dealings between the PE and the head office are recognised by pricing them on an arm's length basis, without regard to the actual profits of the enterprise of which the PE is part. This implies that non-actual management expenses, notional interest and royalties from head office may be charged on the PE.[264] This approach differs from the UN MTC, which denies the deduction of such notional expenses. Concerned that the OECD authorised approach may be detrimental to tax revenue as it allows deductions for notional internal payments that exceed expenses actually incurred by the taxpayer, many developing countries have not adopted the OECD's approach.[265] This situation creates uncertainties regarding the MLI.

5.5 Administrative Capacity

Many developing countries do not have experience in multilateral conventions, even though there is an increasing number of African countries that have signed the OECD Multilateral Convention on Mutual Assistance in Tax Matters. Significant work in administrative capacity will be required for developing countries to engage with and benefit from the MLI. These matters are compounded by the complexity and length of the BEPS Reports, which are relevant to understanding the provisions of the MLI.

5.6 Parliamentary Approval before Ratification

The MLI is an unprecedented procedure, which in many countries will require parliamentary approval before ratification.[266] Parliaments will need a lot of guidance and explanation on the treaty-related BEPS measures and on how the MLI operates. Parliaments may require detailed analyses of the projected impact on bilateral trade and investment flows. Further, they may want to see analyses of the impact of each opt-in/opt-out combination for every DTA affected by the MLI.[267] For instance, in preparation for the ratification of the MLI in South Africa, on 23 May

263 Ibid.
264 Oguttu (n 99 above) 357.
265 Oguttu (n 190 above) 353.
266 PWC (n 109 above) 2.
267 Lewis (n 21 above) 2.

2017, the National Treasury made a presentation to the Finance Standing Committee of the Parliament on the MLI. The Committee was expected to take part in the treaty ratification on processes by making comments on relevant documents that would be sent to the Cabinet. Committee members were concerned about the complexity of the MLI and its cost implications.[268] Other committee members needed more clarity on the role South Africa played in MLI negotiations and whether protocols would be beneficial to South Africa as a developing country.[269] Currently, there is no information in the public domain on whether, and to what extent, countries that have negotiated the MLI have been briefing and bringing the advisers to parliamentary committees responsible for the ratification process to bring them up to speed with developments. Such information may be helpful for developing countries, as they embark on getting parliamentary approval.

5.7 Language

Many countries require that legislation presented to their respective parliaments be in the native language. At the writing of this article, the MLI is available in English and French only.[270] An increasing number of DTAs are concluded in a variety of languages for instance in Arabic and Portuguese.[271] Where questions of interpretation arise in relation to CTAs concluded in other languages or in relation to translations of the Convention into other languages, it may be necessary to refer back to the English or French texts.[272] The OECD has already begun creating official texts in a number of common languages, but it is unclear if ratification will have to wait for those translations to be completed.[273] Another challenge for the MLI is whether parliaments will have to wait for the OECD to complete its work on PE profit attribution matters, because some parliaments will not ratify an incomplete agreement.[274]

5.8 Global Acceptance of the MLI

There are concerns about the global acceptance of the MLI due to the manner in which it was developed. The content of the MLI evolves from

[268] Parliamentary Monitoring Group 'Rates and Monetary Amounts Bill & sugary beverages tax; BEPS Multilateral Instrument: Briefing' (23 May 2017) https://pmg.org.za/committee-meeting/24430/ (accessed 12 May 2018).
[269] Ibid.
[270] Article 32(2) (n 6 above).
[271] Arnold (n 60 above) 686.
[272] Article 32(2) (n 6 above).
[273] Lewis (n 21 above) 2.
[274] Ibid.

the BEPS Project, whose agenda did not initially include the interests of developing countries. Although non-OECD/G20 countries were later allowed to join on an equal footing, under the inclusive framework, the content of the MLI substantially covers concerns of OECD countries. Global acceptance of the MLI was also hampered by the fact that whereas the United States of America was part of the Ad Hoc Group that developed the MLI, it did not sign up.[275]

5.9 Concerns about the OECD becoming a World Tax Organisation

Since the OECD is the Secretariat and the depositary of the MLI, there are concerns that the OECD is indirectly establishing itself as a de facto international tax organisation, despite continuing calls from developing countries for the establishment of a truly representative body under UN auspices.[276] Thus, many developing countries view the MLI with suspicion.

6 Conclusions and Recommendations

Any change in a country's tax laws and double tax treaties has an influence on its trade and commerce vis-à-vis its economic relations with other countries. Hence, great care and caution has to be taken before signing the MLI to prevent the endangerment of national economic interests.[277] For businesses, decisions such as those relating to organisational structures, financing, or other arrangements depend on many factors. Tax is just one cost to consider.[278] Although the MLI has great potential to protect source countries' tax bases by ensuring that treaty-related BEPS measures are implemented quickly and consistently among states, inconsistent implementation of the measures would lead to increased double taxation and a negative impact on cross-border trade and development, which is contrary to the objectives of the BEPS Project. There are also concerns that the changes resulting from the MLI may lead to greater future uncertainty about the tax burdens of taxpayers since there will be more subjectivity in the application of certain provisions of tax treaty provisions.[279]

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275 PWC 'Multilateral Instrument to Implement BEPS Treaty Related Recommendations Almost Final' *Tax Policy Bulletin* (10 October 2016) 2.

276 B Muchhala & R Sengupta *Third Conference on Financing for Development: Outcomes Document adopted without Intergovernmental Tax Body or New Financial Commitments* (16 July 2015) https://www.twn.my/title2/finance/2015/fi150706.htm (accessed 12 November 2017).

277 Initial Singh *Model Tax Conventions* (2011) 1.

278 PWC (n 109 above) 6.

279 Ibid.

With all the administrative and political challenges the MLI elicits, as well as the complexities and uncertainties that prevail, it is advisable for developing countries that were not engaged with the BEPS process, or not part of the ad hoc group that developed the MLI, to adopt a wait-and-see approach while they become acquainted with the practical implications of the MLI. This would allow countries with a limited treaty network and limited treaty negotiating capacity to consider the provisions that other countries are opting in or out of, and to understand the treaty policy considerations that are pertinent for their specific circumstances, so that they can make informed decisions before they decide to sign the MLI.[280] Reference could also be had to the recommendations provided in this article on the approach developing countries should adopt with respect to specific articles of the MLI. It is important that countries pay close attention to the options and opt-outs that other countries make to the MLI, evaluate how and when the MLI will have an impact on their operations, and develop plans to address that impact.[281] It is also important to note that although at the signing of the MLI, many countries' initial positions were conservative in that they opted out of certain provisions, it is not yet clear whether that will be their final position. The MLI allows countries to change their positions before ratification. It is, therefore, important for countries to monitor other countries' positions, as these can change any time until ratification.[282]

Clearly, the MLI elicits many unanswered questions and more questions and challenges will arise when the MLI is applied in practice.[283] Developing countries should therefore heed the caution of the IMF, that as long as they still have treaty negotiation incapacities, they should not rush into signing new DTAs.[284] The OECD BEPS Action 6 also points to the importance of identifying the tax policy considerations that, in general, countries should consider before deciding to enter into a tax treaty with another country. Even though these cautions were provided with respect to DTAs, they are still relevant with respect to the MLI. Until developing countries have developed clear policy guidelines that inform why they negotiate particular treaty provisions, they should not be too quick to sign the MLI, as they could opt into or out of provisions that may not be in their favour.

280 Lewis (n 21 above) 2.
281 KPMG (n 58 above).
282 Ibid.
283 Silberztein & Tristram (n 35 above) 353.
284 IMF (n 113 above) 25.