Frequently Asked Questions on the Multilateral Instrument (MLI)

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GENERAL FAQ's

1. How does the MLI help the fight against base erosion and profit shifting (BEPS)?

Abuse of tax treaties is an important source of base erosion and profit shifting (BEPS). The MLI helps the fight against BEPS by implementing the tax treaty-related measures developed through the BEPS Project in existing bilateral tax treaties in a synchronised and efficient manner. These measures will prevent treaty abuse, improve dispute resolution, prevent the artificial avoidance of permanent establishment status and neutralise the effects of hybrid mismatch arrangements.

2. What is the coverage of the MLI? How many treaties will be modified?

Over 70 jurisdictions participated in the first signing ceremony of the MLI on 7 June 2017, during which 76 countries and jurisdictions have signed the MLI or have expressed their intention to sign the instrument:

- 67 countries and jurisdictions have signed the MLI, covering 68 jurisdictions.
- Nine countries and jurisdictions have signed a letter expressing their intent to sign the MLI.

Therefore, the MLI already has a significant impact on the worldwide network of tax treaties, and additional countries and jurisdictions are actively working to prepare for signature in the near future. As more countries are joining the MLI, the number of matched agreements will increase rapidly. You can find the updated numbers of Signatories and of tax treaties listed and matched on the OECD website at oe.cd/mli.

3. Have developing countries been part of the development process of the MLI?

The MLI was developed by a group of over 100 countries and jurisdictions, including many developing countries. Developing countries have shown great interest in signing the MLI and have started their technical preparations to sign. Many of them however needed more time to complete the domestic procedures for Signatories. It is expected that many additional countries will sign the MLI by year-end, including a significant number of developing countries. The OECD has supported these countries in the completion of their domestic procedures and will continue to offer its support.

4. How many Signatories choose to implement the Action 6 minimum standard with the PPT?

The Principal Purposes Test will apply to all treaties covered by the MLI, introducing this rule to the over 1,100 treaties already covered by the MLI.

In addition, jurisdictions can choose to supplement the provisions of the Principal Purposes Test with a simplified Limitation on Benefits test. You can see which Signatories chose this option on the OECD website at oe.cd/mli.

5. Why have the Signatories not listed all their existing tax treaties?

The Signatories of the MLI cover already 85% of the treaties that they have concluded among themselves. In most cases, for the remaining treaties, renegotiations on a bilateral basis have already started or the Signatories continue their matching discussions and will decide later whether to list a treaty or to update the treaty bilaterally through an amending protocol.

6. How will I know if an existing tax treaty is modified by the MLI?

The MLI modifies tax treaties that are "Covered Tax Agreements". A Covered Tax Agreement is an agreement for the avoidance of double taxation that is in force between Parties to the MLI and for which both Parties have made a notification that they wish to modify the agreement using the MLI. Lists of notified tax treaties by jurisdiction can be found in the MLI Positions available at oe.cd/mli.

7. Will consolidated versions of modified treaties be prepared?

For most countries, there is no legal requirement to prepare consolidated texts of modified treaties. Also, the MLI does not amend treaties like an amending protocol. Instead, the MLI modifies treaties by sitting alongside treaties. However, for purposes of clarity, many governments may produce some form of consolidated text as guidance to aid readers. Given that Signatories' positions can change significantly until ratification of the MLI, most Signatories will not start to prepare consolidated versions immediately.

8. Does the MLI modify all tax treaties in the same manner?

No. The MLI is a flexible instrument which will modify tax treaties according to a jurisdiction's policy preferences with respect to the implementation of the tax treaty-related BEPS measures. Before signature, jurisdictions must accordingly analyse their tax treaty networks and determine how they would want the MLI to affect and modify their tax treaties.

9. Why is the MLI a flexible instrument?

The flexibility provided by the MLI is intended to accommodate a variety of tax policies while still ensuring that the tax treaty-related BEPS measures are effectively implemented. The MLI's flexibility also reflects the circumstance that certain elements of the BEPS minimum standards on treaty abuse and dispute resolution developed through the BEPS Project may themselves be implemented in different ways.

10. How is this flexibility reflected in the MLI?

The MLI provides for different types of flexibility: jurisdictions can choose amongst alternative provisions in certain MLI articles; jurisdictions can choose to apply optional provisions (for instance, the provisions on mandatory binding arbitration); and, in certain cases, jurisdictions may choose to reserve the right not to apply MLI provisions (to opt out through a "reservation") with respect to all of their Covered Tax Agreements or with respect to a subset of their Covered Tax Agreements. Jurisdictions only have the possibility to opt out of provisions that do not reflect a BEPS minimum standard, with the possibility to withdraw their reservation (and opt in) later.

11. Is the MLI an à la carte instrument?

No. The MLI does not permit jurisdictions to make treaty-by-treaty choices when they decide how they want the MLI to affect and modify their tax treaties. Instead, before signature, jurisdictions are generally required to express how they want the MLI to modify their Covered Tax Agreements.

12. Are there MLI provisions for which the MLI offers no flexibility at all?

The MLI covers the treaty-related minimum standards that were agreed as part of the BEPS Package in November 2015 and to which all countries and jurisdictions within the Inclusive Framework on BEPS have committed. These minimum standards relate to the prevention of treaty abuse (BEPS Action 6) and the improvement of dispute resolution (BEPS

Action 14). Where an MLI provision reflects an agreed BEPS minimum standard, a jurisdiction must meet the minimum standard when signing the MLI. Certain elements of these minimum standards can, however, be met in different ways provided for in the MLI.

13. Where are Signatories' tax treaty policy decisions reflected?

Each Signatory must prepare and submit its "MLI Position" before signing the MLI. The MLI Position sets out all of the Signatory's choices with respect to the different options provided for in the MLI. Provisional MLI Positions of Signatories are available at oe.cd/mli.

14. Can Signatories opt in for certain MLI provisions later in time (after signature)?

The provisional MLI Position of each Signatory indicates the tax treaties it intends to cover, the options it has chosen and the reservations it has made. Signatories can amend their MLI Positions until ratification. Even after ratification, Parties can choose to opt in with respect to optional provisions or to withdraw reservations.

15. When will the modifications become effective?

It is likely that the first modifications to covered treaties will become effective in the course of 2018. The timing of entry into effect of the modifications is linked to the completion of the ratification procedures in the jurisdictions that are parties to the covered tax treaty.

The Signatories will inform the OECD of the completion of their ratification procedures. As the Depositary of the MLI, the OECD will be tracking ratification procedures completed by the MLI Signatories and will make available to the public all relevant information on effects of the MLI provisions.

16. How will the OECD provide further clarity?

The OECD Secretariat is developing tools and guidance on the MLI. The first tools are already available at oe.cd/mli. These tools include interactive flowcharts on each of the substantive MLI Articles and the MLI Toolkit on the application of the MLI.

17. Will the MLI be a model for future implementation of treaty standards?

The MLI is a milestone for international taxation and treaty law as it allows all interested jurisdictions to update tax treaties with provisions reflecting internationally agreed standards. By providing an efficient instrument to swiftly and consistently implement these standards in the extensive network of existing bilateral tax treaties, the MLI could pave the way for the future of tax treaties in a fast-moving globalised environment.

18. Will other jurisdictions sign the MLI after the MLI signing ceremony on 7 June?

The MLI remains open for signature to all interested jurisdictions after the signing ceremony of 7 June 2017. A large number of jurisdictions are actively working towards signature of the MLI and more are expected to follow by the end of 2017. At the occasion of the 7 June signing ceremony, a group of countries have already explicitly expressed their intent to sign the MLI as soon as possible. It is expected that many other jurisdictions will sign the MLI in the course of 2017. The OECD and other international and regional organisations will provide extensive support to prepare these governments for signature in the coming period. Support will be provided to interested jurisdictions through dedicated regional events, one-on-one workshops and online materials and tools.

19. Will the OECD support the ratification processes of jurisdictions signing the MLI?

In the first place, jurisdictions signing the MLI are in charge of completing their domestic process to ratify the MLI. The OECD will provide a platform through the ad hoc Group to share experiences and information in the ratification processes and to make tools and materials available that support the technical work involved in countries' ratification processes.

20. In what form will MLI Positions be published online?

Upon signature of the MLI, Signatories are required to submit their MLI Positions to the Depositary. MLI Positions are documents of 10 to 60 pages, the length of which varies depending on the number of treaties a jurisdiction wishes to modify with the MLI and its policy choices. The PDF version of Signatories' MLI Positions will be made available on the OECD Website upon signature of the MLI. The MLI Positions have been based on a template developed by the OECD Secretariat to ensure consistency in the formulation of the options chosen and reservations made by the Signatories. The content of MLI Positions will remain provisional until ratification of the MLI. The OECD Webpage will present a list of jurisdictions for which MLI Positions are available.

21. When will the public have full access to countries' MLI Positions?

The provisional MLI Positions of the Signatories will be made public on the OECD website shortly after the June 7 signing ceremony. An up-to-date list of the MLI Signatories as well as their provisional MLI Positions are available at oe.cd/mli.

22. What tools will the OECD make available to make the MLI Positions accessible?

The OECD expects to launch a public online matching tool. The tool will be based on a database containing all relevant data from the MLI Positions, facilitating the analysis of information. As a next step, the matching tool could also simulate the likely matching outcome, while noting that the final matching process is one of legal interpretation of the formal documents. The tool will be expanded and refined over the next couple of years, for example to include detailed information on the timing of the modifications made by the MLI. The first parts of the tool will be made available as soon as possible, when all data will be carefully processed and analysed by the Signatories and the OECD Secretariat. It is expected that a beta version of the tool will be available by October.

23. How will the OECD track future changes to MLI positions?

The OECD will be the Depositary for the MLI. The MLI requires Signatories to notify all changes to their MLI Positions to the Depositary in order for those changes to become effective. The Depositary will record and publish all future changes made to MLI Positions.

24. What is the impact of the MLI on the worldwide network of tax treaties?

The number of jurisdictions that have already signed the MLI or that have expressed their intention to sign the MLI is already impressive, and the MLI will accordingly modify a significant and growing number of treaties. Signatories include developed and developing jurisdictions, including financial centres and treaty-shopping hubs. With a large number of treaties covered and with key countries included, treaty-shopping structures will come to an end as the anti-abuse provisions are introduced in the treaty networks of treaty-shopping hubs.

SPECIFIC FAQ's

25. What is mandatory binding MAP arbitration?

The mutual agreement procedure (MAP) article of tax treaties based on the OECD and UN Models provides a mechanism to resolve disputes in cases in which a taxpayer considers that he has been taxed in a manner inconsistent with the provisions of the treaty. One weakness of this mechanism is that the MAP article does not require to parties to the treaty to resolve the dispute but only to use their best efforts to do so. As a result, some MAP cases may remain unresolved for long periods or never be resolved when it is not possible to reach an agreement. Mandatory binding arbitration is a mechanism which, in defined circumstances, obliges the parties to the treaty to submit unresolved issues in a MAP case to an independent and impartial decision-maker – an arbitration panel. The decision reached by the arbitration panel is binding on the parties to the treaty and thus resolves the issues that can otherwise prevent agreement in deadlocked MAP cases.

26. In how many treaties will arbitration be introduced?

You can see which Signatories chose to introduce the arbitration provisions on the OECD website at oe.cd/mli. This will lead to the introduction of arbitration to over 150 existing treaties. Most of the countries opting in for arbitration have opted for the default option of final offer arbitration (also referred to as "baseball arbitration") as provided for in Article 23(1) of the MLI.

27. How does the MLI introduce mandatory binding arbitration into more than 150 treaties?

The MLI introduces the MAP arbitration provisions that are included in Part VI of the MLI into treaties concluded by Parties opting in for these provisions. It is expected that the provisions will apply to more than 150 existing treaties. This ensures that taxpayers that initiate a case under the mutual agreement articles procedure of these treaties will be certain that their cases will be resolved and double taxation will be eliminated in accordance with the treaty.

28. How can a jurisdiction adopt the MLI provisions on arbitration?

A jurisdiction and its treaty partner must expressly choose to adopt Part VI in order for the MLI arbitration provisions to apply. As a result, mandatory binding arbitration will be available to resolve disputes in relation to a specific Covered Tax Agreement only where both Contracting Jurisdictions to that Covered Tax Agreement have expressly chosen to adopt it.

29. When can a taxpayer apply for arbitration under a treaty for which Part VI applies?

Where Part VI applies to a particular Covered Tax Agreement, Article 19 of the MLI provides that a taxpayer will be able to request arbitration with respect to the unresolved issues in a MAP case when the competent authorities are unable to reach an agreement to resolve the case within a period of two or three years.

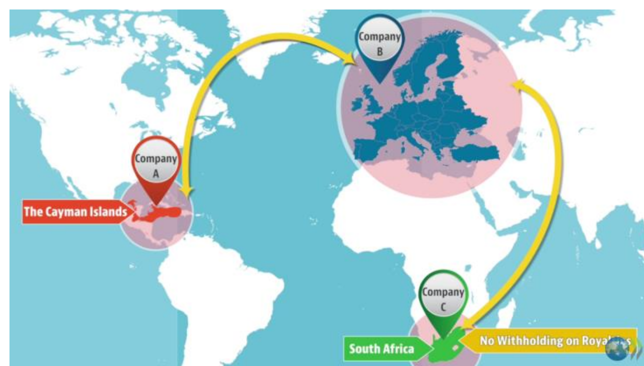
30. What is treaty shopping?

"Treaty shopping" generally refers to arrangements through which a person who is not a resident of one of the two States that concluded a tax treaty may attempt to obtain indirectly benefits that the treaty grants only to residents of these States. These strategies are often implemented by establishing intermediary companies that may be qualified as "letterboxes", "shell companies" or "conduits" in jurisdictions that have networks of favourable tax treaties. Such companies typically exist on paper only and have no (or minimal) substance or activities in the

jurisdictions in which they are created. In general, the parties to a bilateral tax treaty would not intend these types of companies or similar entities to obtain the benefits of the treaty. Treaty shopping can be addressed through changes to bilateral tax treaties implementing the minimum standard agreed in the context of Action 6 of the BEPS Project.

→ For more information, also see the Frequently Asked Questions on Action 6.

31. How does treaty shopping work in practice?



An example of treaty shopping is set out in this video developed by the OECD on the occasion of the launch of the BEPS Package in 2015.

As explained in the video, treaty shopping occurs when a person seeks to take advantage of a tax treaty concluded by two Contracting Jurisdictions to obtain tax treaty benefits it could not otherwise obtain. This could be the case, for example, when this person is a resident of a jurisdiction that has not concluded a tax treaty with the jurisdiction where the income arises. In the example set out in the video, Company A, a resident of the Cayman Islands, wants to provide a license for the use of intellectual property to Company C in South Africa. South Africa, however, has not concluded a tax treaty with the Cayman Islands, and would thus be entitled to apply its domestic withholding tax rate on outbound royalties. However, a European country has concluded a tax treaty with South Africa that reduced the withholding tax rates on royalties. Also, this country does not itself levy a source tax on royalties. Therefore, Company A establishes a letterbox company in this European country and diverts the royalty payments through the letterbox company to reduce the tax withheld by South Africa. In this example, the principal purpose of the establishment of the arrangement including the letterbox company was to obtain the lower withholding tax rate available under the tax treaty between South Africa and the European country.

Similar schemes can also be established to escape capital gain tax (for example, with respect to sales of shares in source State companies or of other movable property), where letterbox companies are established in jurisdictions that have concluded tax treaties with source jurisdictions including provisions that limit the taxing rights of the source jurisdictions to tax the capital gains.

32. How does the MLI address treaty abuse and treaty shopping?

The MLI contains six Articles to address treaty abuse. Two of these provisions reflect the Action 6 minimum standard on treaty abuse and the four other provisions are specific anti-abuse rules that target specific avoidance strategies.

The Principal Purposes Test that is introduced in all treaties covered by the MLI is an effective instrument to counter arrangements such as those described above that have been put in place for the principal purpose to obtain the benefits of a tax treaty.

33. What is the Principal Purposes Test and how does it address treaty abuse?

The Principal Purposes Test (PPT) is an anti-abuse rule based on the principal purposes of transactions or arrangements. This rule provides a general way to address cases of treaty abuse, including treaty-shopping situations, such as certain conduit financing arrangements that are not covered by more specific anti-abuse rules.

Once introduced to a tax treaty through the MLI or bilateral negotiations, the PPT would apply to the treaty in its entirety and would address all cases of treaty abuse. Under the PPT, if one of the principal purposes of transactions or arrangements is to obtain treaty benefits (e.g. a lower withholding tax in the case of a treaty shopping scheme), these benefits would be denied unless it is established that granting these benefits would be in accordance with the object and purpose of the provisions of the treaty. The PPT is a subjective test based on an assessment of the intentions behind a transaction or arrangement. This approach is similar to approaches taken under domestic anti-abuse rules or doctrines applied by countries around the world, such as general anti-avoidance rules or an 'abuse of laws' doctrine.

The PPT provisions included in the MLI establish that a tax authority may deny the benefits of a tax treaty where it is reasonable to conclude, having considered all the relevant facts and circumstances, that one of the principal purposes of an arrangement or transaction was for a benefit under a tax treaty to be obtained. The Action 6 Report of the BEPS Package includes detailed guidance and examples in the form of the commentary that was developed during the course of the BEPS Project and has particular relevance in this regard.

In reality, treaty shopping schemes typically involve the use of layered structures abusing the provisions of multiple tax treaties. Now that the PPT will be introduced in a large number of treaties, the treaty shopping routes will be blocked effectively.

34. Why are there alternatives to address treaty abuse in the MLI?

Treaty abuse, like the abuse of domestic law, can be addressed through a combination of (i) specific anti-abuse rules, which provide greater certainty but can only deal with known abusive strategies, and (ii) general anti-abuse rules or judicial doctrines, which are less certain but offer protection against abusive transactions that have not previously been identified or addressed. Both of these approaches can be equally effective to address treaty abuse, but countries have different legal environments and policy preferences. Therefore, the MLI and the minimum standard on treaty abuse guarantee that treaty abuse is targeted effectively and that countries have some flexibility in deciding which anti-abuse rules to adopt.

35. What will be the impact of the MLI treaty abuse provisions on CIVs and Pension Funds?

Since the investment decisions of Collective Investment Vehicles, REITs and pension funds are typically not dictated by their beneficiaries, these investment vehicles do not raise the same treaty-shopping concerns as entities such as private companies.

36. How will compliance with the minimum standard on treaty abuse be monitored?

Like the minimum standard on dispute resolution, the implementation of the minimum standard on treaty abuse will be evaluated through a monitoring mechanism in order to ensure that the commitments embodied in the Action 6 minimum standard are effectively satisfied. The relevant Peer Review documents have been published on the OECD website.

37. How will the MLI change the definition of permanent establishment?

Changes to the permanent establishment (PE) definition developed through the work on BEPS Action 7 and included in the MLI address techniques used to inappropriately avoid the existence of a PE, including through the replacement of distributors with commissionnaire arrangements, through strategies where contracts which are substantially negotiated in a State are not formally concluded in that State because they are finalised or authorised abroad, or where the person that habitually exercises an authority to conclude contracts in the name of a foreign enterprise claims to be an "independent agent" even though it is acting exclusively or almost exclusively for closely related enterprises. These changes also address strategies based on the specific activity exceptions in Article 5(4) of the OECD Model Tax Convention by restricting these exceptions to preparatory or auxiliary activities and by addressing the fragmentation of business activities between closely related enterprises in order inappropriately to take advantage of these exceptions.

→ For more information, also see the Frequently Asked Questions on Action 7.

38. Does the MLI change the rules for attribution of profits to permanent establishments?

The MLI addresses challenges related to permanent establishments only by modifying the permanent establishment definition in Covered Tax Agreements – the MLI does not change the rules on the attribution of profits to permanent establishments in Article 7.

39. How does the MLI make dispute resolution mechanisms more effective?

Recognising the need to do better in this area, jurisdictions have agreed through the work on BEPS Action 14 on a minimum standard and a number of best practices in relation to dispute resolution. The minimum standard will ensure that treaty obligations related to the mutual agreement procedure are fully implemented in good faith and that administrative processes promote the prevention and timely resolution of treaty-related disputes.

→ For more information, also see the Frequently Asked Questions on Action 14.

40. How will compliance with the minimum standard on dispute resolution be monitored?

Like the minimum standard on treaty abuse, the implementation of the minimum standard on dispute resolution will be evaluated through a monitoring mechanism in order to ensure that the commitments embodied in the minimum standard are effectively satisfied.

41. Is this the end for bilateral treaties?

Jurisdictions will continue to conclude tax treaties on a bilateral basis. The MLI only modifies existing bilateral agreements. It is expected that jurisdictions will include treaty related BEPS measures in future bilateral tax treaties.

GLOSSARY

Compatibility Clause

Clauses which define the relationship between the provisions of the MLI and existing tax treaties in objective terms and the effect the provisions of the MLI may have on Covered Tax Agreements.

Contracting Jurisdiction

Party to a Covered Tax Agreement under the Multilateral Instrument.

Covered Tax Agreement (CTA)

An Agreement for the avoidance of double taxation with respect to taxes on income that is in force between two or more Parties and/or jurisdictions which respect to which each such Party has notified to the Depository as a listed agreement under the Multilateral Instrument.

Matching Exercise

Process to match reservations and notifications made under the Multilateral Instrument by one Contracting Jurisdiction with the reservations and notifications made by another Contracting Jurisdiction to a Covered Tax Agreement to translate possible effects of the MLI on that Covered Tax Agreement.

MLI Position

Choices and options made by a Signatory or Party to the MLI and provided to the Depositary on listed tax agreements, reservations and notifications of optional provision chosen and existing treaty provisions.

Notification

Information submitted to the Depositary to ensure clarity and transparency on the application of alternative or optional provisions of the MLI and on the application of provisions that supersedes or modifies specific types of existing provisions of a Covered Tax Agreement.

Notification clause

Clauses reflecting requirements with respect to notifications to be made to the Depositary by a Signatory or a Party to the MLI and that describes the consequences of a mismatch between the Contracting Jurisdictions to a Covered Tax Agreement.

Term	Definition
Notification mismatch	Cases in which – • a notification is not made in accordance with requirements a notification clause of the MLI, or • the Contracting Jurisdictions to a Covered Tax Agreement have made different notifications with respect to the same provision of the MLI, or • one of the Contracting Jurisdictions to a Covered Tax Agreement has made a notification with respect to a provision of the MLI and the other Contracting Jurisdiction did not make any notification with respect to that provision of the MLI.
Party	State or jurisdiction for which the Multilateral Agreement has entered into force.
Reservation	Where a substantive provision of the Multilateral Instrument does not reflect a minimum standard, a Party is generally given the flexibility to opt out of the provision entirely or, in some cases, partly. Where a Party uses a reservation to opt out of a provision, that provision will not apply between the reserving Party and all other Parties to the Covered Tax Agreements under the Multilateral Instrument.
Reservation clause	The substantive provisions of the Multilateral Instrument contain list of permitted reservations with respect to each provision of the MLI.
Signatory	State or jurisdiction which has signed the Multilateral Instrument.
Substantive Provisions	Parts II to V (Articles 3 to 17) are the substantive provisions of the Multilateral Instrument reflecting the tax treaty related measures presented in the BEPS Package. These provisions generally duplicate the language of the provisions of the OECD Model Tax Convention as amended in the course of the BEPS Project.
Template	Document prepared by the OECD Secretariat aiming to help states or jurisdictions to form their lists of Covered Tax Agreements, reservations and notifications (MLI position) in a streamlined way before its submission to the MLI Depositary.