TAX TREATIES IN THE NEW WORLD OF THE MULTILATERAL INSTRUMENT (MLI)
Jefferson Vanderwolk, Head of Tax Treaty, Transfer Pricing and Financial Transactions Division (OECD) joined a panel discussion led by Antoine Glaize (Arsene Taxand France) and including Christian Kaeser (Siemens) and Anders Oreby Hansen (Bech-Bruun Taxand Denmark) on the practical impact of the multilateral instrument on the application of bilateral tax treaties.
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SUMMARY

Purpose and scope of the MLI
※ What is the MLI?
※ Why the MLI?
※ Is the MLI an indispensable tool to actually implement BEPS actions?
※ Does the MLI solve BEPS implementation related issues?

Legal and practical aspects of the MLI
Legal aspects related to the MLI:
※ Enforcement of the MLI
※ Insertion of the MLI in international law (common law/civil law jurisdictions views)
※ Articulation of the MLI with bilateral tax treaties.

Practical aspects of the MLI:
※ Options and reserves mechanisms
※ Adhesion to and revocation of the MLI
※ Use of the MLI by taxpayers.
PURPOSE AND SCOPE OF THE MLI
MLI: THE AD HOC GROUP
HOW TO FIX 3000+ BILATERAL TAX TREATIES?

OPTIONS

- Bilateral renegotiation of tax treaties
- Model protocol to amend tax treaties
- Multilateral treaty to sit on top of and modify bilateral tax treaties
Multilateral instrument to swiftly modify bilateral tax treaties to implement BEPS tax treaty related measures is desirable and feasible.

Negotiations should be convened quickly.
OVERALL OBJECTIVES AND ADVANTAGES OF THE MULTILATERAL INSTRUMENT

Strengthen and update existing tax treaties
- End to treaty abuse
- Improve dispute resolution
- Modify the Permanent Establishment (PE) definition to address artificial avoidance of the PE status.

Swift, effective and flexible
- No need for cost and time-consuming bilateral negotiations
- Fastest way to implement the agreed BEPs measures
- Options to accommodate different preferences.
KEY ELEMENTS TO HIGHLIGHT

Implementation of BEPS minimum standards in a consistent way in the light of the peer review process
- FTA MAP Forum already started review of countries’ compliance with Action 14 minimum standard
- Action 6 minimum standard to be shortly reviewed.

Introduce the newly developed provision on arbitration
- Flexible and opt-in approach.
**TIMELINE**

**Domestic procedures for signature**
- Policy choices
- Identify treaties to be covered
- Prepare reservations, options, notifications
- Discuss with treaty partners (matching)
- Finalise MLI position for signature.
AUDIENCE POLL

• Do you think the multilateral instrument will be of benefit to multinationals in the long term?

YES  NO
MNES AND PRACTITIONERS PERSPECTIVE

- Is the MLI an indispensable tool to actually implement BEPS actions?
- Does the MLI solve BEPS implementation related issues?
LEGAL AND PRACTICAL ASPECTS OF THE MLI
INSERTION OF THE MLI IN INTERNATIONAL LAW

Multilateral instruments already exist in the tax law area:

- EU directives and arbitrage convention
- OECD multilateral instruments: Convention on Mutual Administrative Assistance in Tax Matters, Multilateral competent authority agreement on the exchange
- …

How the MLI will complete the international tax law corpus?
How the MLI will articulate with tax treaties?
ACCEDING TO THE MLI

Process (civil law)

Signing
In most jurisdictions a representative of the country will sign the MLI:
- President,
- Foreign Affairs minister…

Approval
Depending on the jurisdiction, approval will happen through either:
- Signing authority
- Parliament.

Parliament
The jurisdictions take different approaches:
- List of subjects, general provision of assessment.

Ratification
The signing authority can ratify the treaty
- With or without approval from parliament.
**IMPLEMENTING THE MLI**

| **Direct: Immediately applicable** | ✿ International treaties will be enforceable after ratification  
|                                   | ✿ *Subject to the rules of publication in each jurisdiction.* |
| **Enacted: MLI Copies into law**  | ✿ A law with the wording of the treaty is enacted  
|                                   | ✿ *Either after or prior to ratification of the treaty.* |
| **Enacted: Reference to MLI**     | ✿ A law with solely a reference to the treaty is enacted  
|                                   | ✿ *The law will consist of only a reference to the treaty stating that it is a part of national law.* |
| **Compatibility with national law** | ✿ Monistic approach: international laws have precedence to national laws  
|                                   | ✿ *Control of compatibility before ratification.* |
LEGAL AND PRACTICAL FRAMEWORK OF THE MLI

Minimum Standards can be satisfied in different ways.

- Options
- Reserves

Covered jurisdictions

Minimum standards

Opt-out the provisions which do not constitute Minimum Standards
AUDIENCE POLL

• Will the multilateral instrument increase or decrease uncertainty and complexity for multinationals in the long term?

INCREASE  DECREASE
**PRACTICAL CONCERNS FOR TAXPAYERS**

When, in practice the MLI will impact taxpayers?
- Signatory jurisdictions
- Process of ratification.

**Mechanism of options and reserves**
- Scope and limitations of options and reserves
- How this will articulate if two jurisdictions which do not adopt the same position (reserves or divergent options)?

**Treatment of new bilateral tax treaties between MLI-signatory jurisdictions**
- How to ensure consistency?

**How to revoke the MLI? Which consequences?**
**How to modify or complement the MLI?**

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TAXAND’S TAKE

1. How the MLI will be enforced and implemented over time?

2. Will multilateral instruments become the normal way to deal with international tax?

3. Development of unilateral political or tax strategies from jurisdictions may dramatically harm the actual enforcement of the MLI:
   - Brexit
   - Contemplated US tax reform ‘Blueprint’
   - Other.
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ABOUT TAXAND

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