

# OECD Multilateral Instrument: Signing and Key Features

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October 2017



# Overview of MLI and outcomes of signing ceremony

# MLI - Background

## BEPS Action 15

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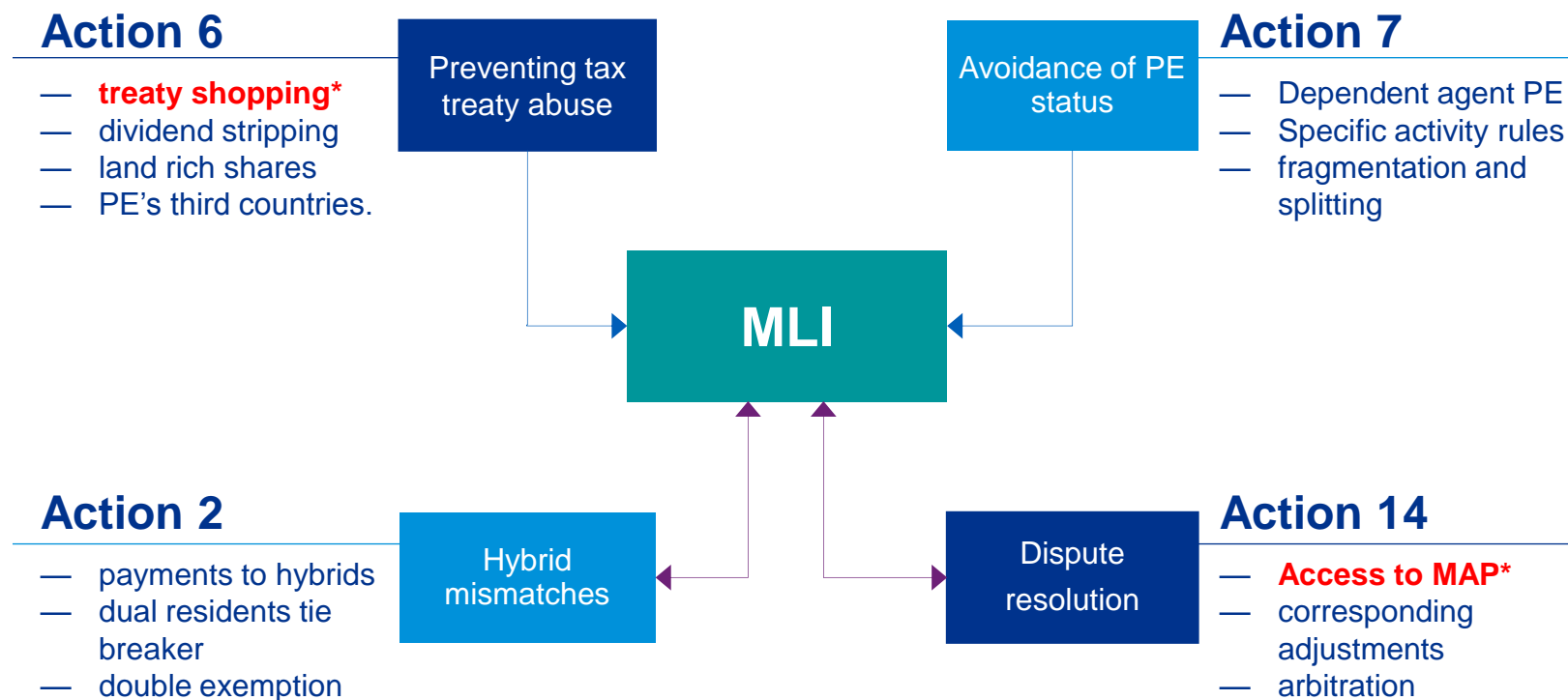
- Several BEPS Action Items produced changes to OECD Model Tax Convention to address:
  - Hybrid Mismatches (Action 2)
  - Treaty Abuse (Action 6)
  - Artificial Avoidance of Permanent Establishment (Action 7)
  - Improving Dispute resolution (Action 14)
- Implementing through bilateral treaty negotiation would take years or even decades
- Action 15 explored possibility of a single instrument to modify all tax treaties at once

## Overview of MLI

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- Developed by “Ad Hoc Group” of 100 jurisdictions and countries
- Not an amending protocol – operates alongside existing treaties
- Function is to implement agreed final BEPS recommendations with limited modification
  - Exception: Arbitration provision developed by Sub-Group of Ad Hoc Group as part of the MLI negotiation
- Text finalized November 24, 2017
- Signing ceremony June 7, 2017

# Action 15 — BEPS measures in the MLI



**\*minimum standards**

# Outcome of MLI signing ceremony – June 7

## Who signed the MLI

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- 67 jurisdictions signed (68 covered), with three more (Mauritius, Cameroon and Nigeria) signing later
- 6 additional jurisdictions expressed intent to sign
- additional jurisdictions expected to sign end of 2017

## Treaties impacted

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- 1,136 treaties impacted (2,381 listed)
- ~85 percent of treaties between signatories covered

## Provisional MLI positions published

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- Information provided at signing includes:
  - tax treaties covered
  - options chosen
  - Information about existing provisions affected by MLI
  - reservations made
- Modifications to individual tax treaties are based on interaction between choices made by each signatory

# MLI signatories (as of October 2)

Americas	Europe/Eurasia			ASPAC	Africa Middle-East
Argentina	Andorra	Guernsey	Norway	Australia	Burkina Faso
Chile	Armenia	Hungary	Poland	China	Cameroon
Colombia	Austria	Iceland	Portugal	Fiji	Egypt
Costa Rica	Belgium	Ireland	Romania	Hong Kong	Gabon
Mexico	Bulgaria	Isle of Mann	Russia	India	Israel
Uruguay	Croatia	Italy	San Marino	Indonesia	Kuwait
Canada	Cyprus	Jersey	Serbia	Japan	Mauritius
Jamaica	Czech Rep.	Latvia	Slovak R.	Korea	Senegal
Panama	Denmark	Liechtenstein	Slovenia	New Zealand	Seychelles
	Finland	Lithuania	Spain	Pakistan	South Africa
	France	Luxembourg	Sweden	Singapore	Nigeria
	Georgia	Malta	Switzerland		Cote d'Ivoire
	Germany	Monaco	Turkey		Lebanon
	Greece	Netherlands	UK		Tunisia
			Estonia		

\*Committed to sign in the future

# Procedural matters

**Signatories can amend their MLI Positions at will until ratification**

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**After ratification countries can opt-in to more provisions, or remove reservations**

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**Consolidated texts might be prepared in local jurisdictions, but will not be legal documents**

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**Expected that first modifications will become effective in course of 2018**

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# Effective Dates

## **Entry into force begins after five countries ratify**

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- Once at least five signatories ratify, the MLI enters into force with respect to those Parties as of the first day of the month following three calendar months after the fifth deposit
  - Example: If fifth deposit is made September 2017, entry into force for first five Parties is January 1, 2018
- Subsequent parties have same three-month period after deposit until entry into force

## **Entry into effect**

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- Withholding tax: takes effect first day of calendar year after both parties to CTA have MLI enter into force
  - Example: If entry into force is February 1, 2018, effective date is 1/1/2019.
- Other taxes: Effective for taxable periods beginning on or after six months after date MLI enters into force for both parties
  - Example: If entry into force is February 1, 2018, provisions take effect for taxable years beginning on or after August 1, 2018 (i.e. 1/1/19 for calendar year taxpayers)

## **Entry into effect may be modified or delayed through reservation**

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- 11 countries elected to delay entry into effect until domestic procedures are complete
- Roughly half made other reservations affecting entry into effect



# Key Provisions of MLI

# Treaty Abuse - Overview

## **Minimum Standard on treaty abuse**

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- **Preamble language regarding purpose of treaties**
- **Principal Purposes Test (PPT) – adopted by ALL signatories**
  - Benefits not granted “if it is reasonable to conclude . . . that obtaining that benefit was **one of the principal purposes** of any arrangement or transaction”

## **Optional Simplified LOB to be paired with PPT – adopted by 12 jurisdictions**

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- Argentina, Armenia, Bulgaria, Chile, Colombia, India, Indonesia, Mexico, Russia, Senegal, the Slovak Republic and Uruguay

## **365 holding period for direct dividend rate (31 countries)**

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## **Expansion and one-year lookback for Real Property Holding Cos (39 countries)**

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## **Provision to Deny Benefits to Triangular PE Arrangements (21 countries)**

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- Does not apply to PE in one of the Contracting States

# Treaty Abuse - PPT

## Language of Provision:

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

## Features of note

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- Intentionally broad:
  - “One of” the principal purposes
  - Arrangement or transaction
  - “directly or indirectly” resulting in benefits
- Is getting treaty benefits ever *not* one of the principal purposes?
- How do you determine the object and purpose of a treaty?

# Treaty Abuse – Guidance on PPT

## **Purpose determined case by case on basis of facts and circumstances**

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- Test is not of subjective intent; it is whether it is **reasonable to conclude** that one of the principal purposes was to obtain benefits
- This requires looking beyond mere tax effects, taking into account possibility of multiple interpretations
- Obtaining benefits need not be sole or dominant purpose

## **Obtaining benefits need not be sole or dominant purpose**

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- Purpose is not “principal” if it is reasonable to conclude that obtaining that benefit would not have justified entering into an arrangement which (alone or together with other transactions) resulted in the benefit
- An arrangement “inextricably linked” to a “core” commercial activity in a form not driven by considerations of treaty benefits is “unlikely” to have principal purpose

# Artificial Avoidance of PE

## Commissionaire Arrangements and Similar Strategies (Article 12)

- Expanded DAPE test: person that habitually plays a “principal role” leading to the conclusion of contracts for the sale of goods or provision of services of a related enterprise without material modification by the enterprise
- Provides that an agent that acts exclusively or almost exclusively on behalf of one or more closely related enterprises is not an independent agent
- Adopted by 29 countries, including many in LATAM, France, India, Indonesia, Japan, the Netherlands, New Zealand and Spain

## Specific Activity Exemptions (Article 13)

- Subjects specific activity exemptions from PE status to testing for preparatory or auxiliary status (i.e., no longer safe harbor) (adopted by 32 countries)
- Anti-fragmentation provision to apply where an enterprise or closely related enterprise carries on business activities in the same place or at another place in the same State that rise to the level of a PE (adopted by 38 countries)

## Contract Splitting to avoid Construction/Extraction PEs (Article 14)

- Aggregates (1) time spent (in excess of 30 days in the aggregate) at a building site project by an enterprise, and (2) time spent during different periods (in excess of 30 days) by closely related enterprises at the same site

# Dispute Resolution

## **Mandatory MAP provisions (Articles 16 and 17)**

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- Allowing taxpayers to present to either Competent Authority
  - Alternatively, allowing taxpayers to present to Competent Authority of state of residence
- Obligation to endeavor to resolve cases
- Corresponding adjustments

## **Optional Mandatory Binding Arbitration**

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- 26 Countries opted to apply, covering 150 treaties
- Choice between “last best offer” (“baseball-style”) or “independent opinion” arbitration
- If one jurisdiction chooses baseball and one chooses independent opinion, independent opinion applies
- Basic framework provided, but competent authority agreement is needed
- Model competent authority agreement to be developed

# "Hybrid Mismatches"

## **Transparent Entities (Article 3)**

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- Provision addressing whether an item of income derived through a transparent entity is eligible for treaty relief
- Adopted by 24 countries

## **Dual Resident Entities (Article 4)**

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- Residence tie-breaker rule for persons other than individuals based on whether the competent authorities can mutually agree on a single Jurisdiction of residence
- Adopted by 26 countries

## **Limitation on Elimination of Double Taxation (Article 5)**

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- 3 Alternative approaches to prevent exemption for dividends received if the issuer is entitled to a deduction for the dividend
- Adopted by 15 countries, with an additional 25 willing to permit application by treaty partner

# Actions to Consider

## **Identify jurisdictions of relevance that are MLI signatories**

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- Identify and prioritize tax treaties of interest
- Map relevant MLI outcomes

## **Identify cross-border cash flows/activity relying on treaty benefits**

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- Dividends, interest, royalties, rents (reduced or no withholding tax)
- Sales/services relying on PE protection
- Hybrid entities/instruments
- 3<sup>rd</sup> country PEs
- conduit arrangements / dividend stripping transactions

## **Model ETR impact of new changes**

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- Availability of treaty benefits
- PE exposure
- Profit attribution
- Withholding tax exposure

## **Plan for change**

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- Address PE risks
- Address hybrid/residency issues
- Prepare for controversy



Thank you