Should Developing Countries Sign the OECD Multilateral Instrument to Address Treaty-Related Base Erosion and Profit Shifting Measures?

Annet Wanyana Oguttu*

Abstract

The Multilateral Instrument (MLI) is a groundbreaking mechanism to update the network of thousands of bilateral tax treaties that make up the international tax system. It aims to reduce opportunities for multinational corporations to reduce their tax burden through base erosion and profit shifting. While the MLI was not designed primarily to address the priorities of developing countries in relation to the international tax system, it nevertheless offers a means to tackle practices such as "treaty shopping" and companies avoiding setting up taxable "permanent establishments." The extent to which this potential is realized depends on the choices made both by developing countries and by their treaty partners since changes are only operational if both parties choose compatible options. Failure by major economies to adopt the minimum standards in the MLI or to apply these in their treaties with developing countries would create major gaps and inconsistencies in the tax treaty system. This paper argues that developing countries should sign up to the MLI, but that they can afford to take a wait-and-see approach to selecting and finalizing options, while reviewing the options selected by other countries and building capacity for implementation. Developing countries should also be cautious about entering into new tax treaties to be sure that provisions are in their favour.

* Professor of Tax Law, Department of Taxation, Faculty of Economic and Management Sciences, University of Pretoria. Professor Oguttu is a member of the BEPS Monitoring Group.

Annet Wanyana Oguttu. 2018. "Should Developing Countries Sign the OECD Multilateral Instrument to Address Treaty-Related Base Erosion and Profit Shifting Measures?" CGD Policy Paper. Washington, DC: Center for Global Development. https://www.cgdev.org/publication/should-developing-countries-sign-oecd-multilateral-instrument-address-treaty-related

The Center for Global Development is grateful for contributions from its board of directors and the Ford Foundation in support of this work.

Center for Global Development
2055 L Street NW
Fifth Floor
Washington DC 20036
202-416-4000
www.cgdev.org

Center for Global Development
www.cgdev.org

CGD Policy Paper 132
November 2018

Contents

Preface

The Base Erosion and Profit Shifting action plan developed by the G20/OECD to address multinational tax avoidance is the largest set of reforms to international tax rules in 100 years. It requires thousands of bilateral tax treaties to be updated, a task that would have been impossible through individual renegotiations. The Multilateral Instrument (MLI) was therefore developed as a groundbreaking mechanism to allow thousands of treaties to be updated at once. While the MLI was not designed primarily to address developed country priorities in relation to taxation, it nevertheless offers a valuable means for developing countries to tackle practices such as "treaty shopping" and avoidance of "permanent establishment."

While the MLI simplifies the process of updating tax treaties considerably, it remains complex, with a mix-and-match set of articles and options which states can chosse from. They only work if treaty partners both select the same option. Most developed and some developing countries have signed up to the MLI already. Most countries that have signed up are still to ratify and submit their final position on the options. Professor Oguttu's paper provides a guide to these articles and options in relation to developing countries (including a detailed annex). She argues that almost all of the articles in the MLI offer benefits for developing countries if they adopt them, but argues that articles on "corresponding adjustments" (which would allow treaty partners to effectively set transfer prices) and binding arbitration give away too much power.

Ideally, the MLI allows comprehensive and coherent implementation of the BEPS actions. But the value of the MLI to developing countries in large part depends on the options that treaty partners such as Switzerland, Netherlands, the UK, the US, and Ireland select. Of these countries, only the UK has finalized its options to date, while the US is implementing BEPS without using the MLI. Selective or partial adoption of MLI provisions by developed countries is concerning for developing countries, and gaps and mismatches could create opportunities for tax arbitrage. Professor Oguttu suggests that developing countries should sign up to the MLI but they can afford to take a wait-and-see approach, developing capacity for implementation and selecing options once the system has evolved further.

Maya Forstater
Visiting Fellow
Center for Global Development

1. Introduction

In 2015, the OECD finalized an action plan of 15 actions to curtail base erosion and profit shifting (BEPS). These measures are intended to ensure that profits of multinational enterprises are taxed where the economic activities generating those profits are performed and where value is created (OECD, 2013). The OECD BEPS Project, which is considered the most far-reaching set of reforms to international corporate taxation since the system was set up in the 1920s, impact on three main areas of the international tax system: internationally agreed guidance on international tax principles (for example OECD transfer pricing guidelines); domestic law provisions and administrative polices; and changes to tax treaties ("Double Tax Agreements" or DTAs).

Tax treaty rules generally restrict the right of "source" countries in favour of the "residence" countries of taxpayers (predominately developed capital exporting countries). Most tax treaties are based on OECD Model Tax Convention on Income and on Capital, which tend to favour capital-exporting countries over capital-importing countries. Developing countries tend to be more in favour of the United Nation's Double Taxation Convention between Developed and Developing Countries, which favours capital-importing countries over capital exporting countries, in that it generally imposes fewer restrictions on the tax jurisdiction of source countries (Arnold BJ & McIntyre MJ 2002 at 109).

Several BEPS Action Plan measures require updating these tax treaties, however to achieve this requires changes to thousands of bilateral treaties. To avoid a massive, unwieldy, and expensive renegotiation process, governments developed a multilateral instrument to implement tax treaty-related measures in a swift, coordinated and consistent manner enabling the simultaneous renegotiation of thousands of DTAs. The "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting," widely refered to as the Multilateral Instrument, or MLI) was developed by an Ad Hoc Group endorsed by the G20 Finance Ministers and Central Bank Governors, involving 99 states (including developing countries), as well as four non-state jurisdictions and seven international or regional organisations as observers (OECD 2016, para 6). 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 (OECD 2016 in para 7). A signing ceremony was held on 17 August 2017 where 71 jurisdictions signed the MLI.

The MLI provides a means to update treaties, whether they were developed based on the OECD or UN model. However it maintains a significant amount of flexibility in how it is implemented. Countries can pick and choose which provisions of the MLI to adopt in their existing treaties (called Covered Tax Agreements, or CTAs) that they both chose to be modified.

General criticisms and concerns about the MLI and the BEPS project are that developing countries (beyond the major emerging economies in the G20) had little or no involvement in its development and that it does not reform the underlying source-residence split in international tax rules (BMG, 2016). There are also practical questions about whether the MLI will be effective, since many countries have opted out of certain provisions. 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.

Nevertheless, the MLI is potentially a useful mechanism for developing countries to tackle "treaty shopping" and other treaty-related profit shifting.

This paper explains and critically analyses potential and challenges that the MLI offers in relation to addressing the priority concerns of developing countries in taxing multinational corporations. The paper explains the pros and cons of some of the options and provides general recommendations regarding which choices developing countries should take. 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

The MLI modifies CTAs between parties where both parties have made a notification that they wish to modify the agreement. The MLI is open to both countries that are members of the BEPS Inclusive Framework and those that are not. It covers the two treaty-related "minimum standards" which countries that join the BEPS Inclusive Framework are committed to implement; these concern preventing treaty abuse (Action 6) and improving dispute resolution (Action 14). However, countries signing up to the BEPS Inclusive Framework are not obliged to use the MLI as the mechanism for meeting these minimum standards; they can update their tax treaties individually.

The MLI also addresses three treaty related "best practice" areas which are voluntary for members of the BEPS Inclusive Framework. These concern Hybrid Mismatchs (Action 2), Preventing the Granting of Treaty Benefits in Inappropriate Circumstances (Action 6), and Preventing the Artificial Avoidance of Permanent Entity Status (Action 7). Over time it is expected that there will be convergence of national best practices and these may become minimum standards in the future. (Danone & Salome, 2017).

Countries that sign the MLI have several options in how to apply it; first they must first come up with a list of their DTAs they would like to be covered. The list can be provisional until the country ratifies the MLI. This provides an opportunity for parties to discuss and negotiate the changes before the list is confirmed. The intention is that the MLI is to apply to the maximum number of DTAs, however parties may choose to exclude some treaties, for example if they were recently renegotiated or are under seperate renegotiation to implement the BEPS measures.

Countries have flexibility to opt out completely or partially of individual provisions with respect to all or some of its treaties. Each provision therefore only applies between the paties to a CTA where neither of them has made a reservation to opt out of it. Reservations can be subsequently withdrawn, or replaced over time However, once a party has ratified the MLI it cannot add further reservations. Several articles include optional provisions which only apply if both parties have chosen to include it.

After signing the MLI, states are required to ratify it and it comes into force three months after ratification 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. The modifications to the CTAs only apply following ratification by both parties. Any party may withdraw from the MLI at any time, but this would not affect the modifications already made. However countries can revise DTAs subsequently (OECD 2016 MLC, Art 30), or enter into new ones that diverge from the MLI

Some countries only included a small number of their DTAs in the initial signing of the MLI, but indicated that they would bring more treaties in after bilateral discussions. In addition, some countries took a conservative approach at signature, but are considering a more expansive approach at ratification (KPMG 2017).

The OECD is the depository of the MLI, and has the responsibility to collect and make public notifications about the effect of the MLI on the CTAs. Where a provision of the MLI applies, it will override the provisions of the CTA to the extent that they are incompatible. However, it should also be noted that the MLI does no directly revise the wording of CTAs. Rather, it has to be applied alongside them, modifying their application in order to implement the BEPS measures (OECD 2016, para 13). Countries may produce consolidated versions of CTAs as modified by the MLI, but they are not required (Lewis A 2016). The extent to which CTAs are affected by the MLI depends both on the opt in and opt outs and reservations made by each State and on the underlying wording of existing provisions.

3. Should Developing Countries Sign Up to the MLI?

There are several good reasons for developing countries to sign the MLI:

- The tax treaty-related BEPS measures set out in the MLI have the potential to reduce vulnerability to 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.
- The MLI is designed so that it can modify any DTA, whether is based on the OECD or the UN Model Conventions.
- The MLI can strengthen source taxation, especially by addressing treaty shopping, and abuse of the taxable presence requirement in the definition of a permanent establishment (PE).
- 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.
- Considering the costs and time involved in re-negotiating treaties, the MLI provides the easiest and less costly method of updating treaties. Reliance on bilateral negotiations to introduce the BEPS measures would cause uncertainties, delays and expenses and would tend to disadvantage developing countries.

Most of the newer DTAs that developing countries have signed may not have to be

modified by the MLI, if they contain the relevant BEPS measures. The DTAs that will be mainly impacted are the older ones that do not contain recent developments that 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 (Jantjies, 2017 at 44).

4. What Should Developing Countries Consider in Signing Up to the MLI?

The BEPS measure that form the basis of the MLI, are found in Articles 3 to 17 and cover hybrid mismatches, treaty abuse, avoidance of permanent entity status, dispute resolution and mandatory arbitration. This section outlines each of these measures and gives recommendations for developing countries. More detail on each of the articles is given in the annex.

4.1 Hybrid Mismatches

Part II of the MLI relates to Action 2 of the BEPS Project which deals with "neutralising the effects of hybrid mismatch arrangements." Hybrd mismatch arrangements occur when two countries interpret the same entity or transaction differently for tax purposes, which can result in double taxation, or non-taxation." Use of hybrid entities may not be the highest priority for developing countries, however is important that they protect their taxation rights as source states, therefore this author recommends that these articles are adopted.

Table 1. Hybrid mismatches

Problem	Provision in the MLI	Recommendation for Developing Countries
Hybrid entities are treated as a taxable corporation in one jurisdiction and as a transparent (non-taxable, or "pass through") entity in another, resulting in double taxation or non-taxation)	**Article 3 – Transparent entities** Entities are only entitled to treaty benefits such as reduced withholding tax at source if they are treated as taxable entities by the treaty partner.	Adopt. Use of hybrid entities may not be a high priority for developing countries, it is however is important that they protect their taxation rights as source states, by adopting this provision.
Entities claim residence of both treaty countries to gain a tax advantage. The place of effective management tie breaker test was easily manipulated for tax avoidance purposes.	**Article 4 – Dual resident entities** Treaty residency determined by a mutual agreement procedure (MAP). Contracting Jurisdictions are not obligated to successfully reach an agreement and in absence of a successful mutual agreement, a dual resident entity is not entitled to treaty benefits.	Adopt. The UN subcommittee on BEPS recommended that developing countries adopt this provision, with an option for states which wish to do so, to keep the place of effective management as the sole criterion
Hybrid instruments treated as debt in one country and as equity in another, may result in double deduction outcomes.	**Article 5 – Application of methods for elimination of double taxation** • Option A: deny exemption but provide a tax credit for such payments. • Option B: 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: use the tax credit method based on the OECD model provision (for both income and capital)	Adopt the tax credit method (Option C), and urge treaty partners to allow them to do so.

4.2 Treaty Abuse

This part of the MLI evolves from Action 6 of the BEPS Report which deals with preventing 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. This is mainly done by interposing a conduit company in one of the contracting states so as to shift profits out of the treaty states. The key recommended counteracting mechanisms are:

(i) a general anti-abuse provision, in the form of a "principal purpose test" (PPT)
(ii) a combination of the PPT rule with a specific "limitation-on-benefits" (LoB) provision
(iii) a LoB provision supplemented by a mechanism that deals with conduit arrangements, such as a restricted PPT that applies to conduit financing arrangements.

Because the PPT is the only approach that can satisfy the minimum standard on its own, it is presented as the default option and most countries that have signed the MLI so far have opted for this approach (KPMG 2017). This paper recommends that developing countries should also adopt this approach, as well as the other articles related to treaty shopping.

Table 2. Treaty abuse

Problem	Provision in the MLI	Recommendation for Developing Countries
Treaty shopping	**Article 6 – Purpose of a CTA** New preamble language expressing intention to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance	Adopt. Developing countries should adopt this preamble language. (NB: BEPS Minimum standard)
	Article 7 – Prevention of treaty abuse Three options • a combined approach consisting of a Limitation on Benefits (LOB) provision and a Principal Purpose Test (PPT); • a PPT alone (default option) • an LOB provision, supplemented by specific rules targeting conduit financing arrangements.	Adopt. It is recommended that developing should adopt the PPT rule since it is the only measure which satisfies the minimum standard on its own, and it applies by default.

Treaty abuse through use of dividend transfer schemes by arranging for a temporary increase in shareholding, shortly before a dividend declaration to access lower withholding tax rates	**Article 8 – Dividend transfer transactions** Anti-abuse rules (e.g. minimum holding period) for benefits provided to dividend transfer transactions	Adopt. It is recommended that developing countries that do not have this provision in their DTAs, adopt it through the MLI.
Indirect transfers – where MNES avoid capital gains tax by incorporating conduit companies in low tax jurisdictions to dispose shares in assets located in source countries	**Article 9 – Capital gains from alienation of shares or interests of entities deriving their value principally from immovable property** Anti-abuse rule with respect to capital gains realized from the sale of shares of entities deriving their value principally from immovable property.	Adopt. It is recommended that developing countries that face BEPS challenges in this regard, should adopt this Article to prevent abuse of capital gains benefits.
Withholding tax limits in a tax treaty abused by income attributed to a permanent establishment (PE) (such as a branch) in a low tax rate in the third country.	**Article 10 – Anti-abuse rule for permanent establishments situated in third jurisdictions** Treaty benefits denied if an item of income attributable to a PE in a third jurisdiction if tax in the PE jurisdiction is less than 60% of the tax that would be imposed in the residence state.	Adopt. It is recommended that developing countries that face BEPS challenges in this regard adopt this Article.
To preserve the right to tax its resident, 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. However these clauses are often interpreted as contrary to treaty provisions (in that they amount to treaty over-ride).	**Article 11 – Application of tax agreements to restrict a party's right to tax its own residents** "saving clause" clarifies that a treaty does not restrict a jurisdiction's right to tax its own residents, except with respect to certain treaty provisions.	Adopt. recommend that developing countries adopt this Article, except where they have DTAs that already contain a savings clause.

4.3 Avoidance of Permanent Establishment Status

This part of the MLI evolves from Action 7 of the BEPS Report Action which recommended best practices in preventing the artificial avoidance of "permanent establishment" (PE) status. The PE concept relates the the taxation nexus via "a fixed place of business through which the business of an enterprise is wholly or partly carried on." Typically PEs include branches, factories, mines, and places of management, lengthy construction projects and places where a dependent agent habitually concludes contracts on behalf of the enterprise.

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 artificially compartmentalising their business to avoid meeting PE definitions (such as by dividing construction projects into smaller parts), and from developing countries that want to extend its parameters to reclaim

their tax jurisdiction. The OECD acknowledged 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. This paper recommends that developing countries adopt these articles in the MLI.

Table 3. Permanent establishment

Problem	Provision in the MLI	Recommendation for Developing Countries
Companies often use commissionaire arrangements to avoid PE status by setting up local distribution arms which contract with customers, while the goods and services are provided by the parent company	**Article 12 – Artificial avoidance of PE status through commissionaire arrangements and similar strategies** Anti avoidance of PE status through commissionaire arrangements and similar strategies can be incorporated in the CTAs	Adopt. Commissionaire arrangements are generally only valid in civil law countries, so for common law countries they may not be a major concern. Nevertheless there could be cases where *commissionaire* proxies are employed to escape PE status. Developing countries should adopt this provision as it improves the current definition of a PE
PE status can be circumvented by claiming that the business activities are preparatory and auxiliary in nature, or fragmenting them.	**Article 13 – Artificial avoidance of PE status through the specific activity exemptions** Clarifies that the activities should 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 such as storing or keeping goods for display or delivery, purchasing goods or collecting information so that each of them will be made subject to the proviso of being "of a preparatory or auxiliary character" (OECD 2016 MLC, Art 13(2)(a)). • Option B, allows parties to retain the these exeptions without making them subject to the proviso (OECD 201 MLC, Art 13(3)). Article 13(4) of the MLI also contains an anti-fragmentation clause	Adopt. 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 such as storing or keeping goods for display or delivery, purchasing goods or collecting information 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. It is recommended that developing countries should adopt the anti-fragmentation rule.

Construction projects split up into smaller contracts to avoid PE status	**Article 14 – Splitting-up of contracts** Anti-contract splitting rule which would apply to deemed PE provisions (e.g., building sites, construction or installation projects).	Adopt. It is important that developing countries adopt this provision against splitting up of contracts.
The concept of "closely related to an enterprise" is used in the above articles.	**Article 15 – Definition of a person closely related to an enterprise** Article 15 contains a definition of the term, based on common control, or direct or indirect ownership of more than 50% of the beneficial ownership. Article 15 denies a tax benefit when a person is closely related to an enterprise for the purposes of Articles 12, 13 and 14 of the MLI.	Developing countries should adopt this Article if they have adopted the articles above.

4.4 Improving Dispute Resolution

Under Action 14 of the BEPS Project, the OECD emphasised the need to effectively resolve treaty disputes as new domestic law and treaty-based anti-abuse rules are susceptible to conflicting interpretation. DTAs provide for the Mutual Agreement Procedure (MAP), as the means for resolving tax treaty disputes.

Article 16 sets out the basis for MAP; who can access the MAP process, and the timelines and processes it should follow. It is important that developing countries that wish to sign the MLI review their treaties to determine which ones do not contain the relevant provisions, so that they can list them as CTAs for purposes of the MLI. However, effectively implementing MAP also requires resources, empowerment of competent authorities, and development of mutual trust among competent authorities.

Article 17 addresses the risk of double taxation when one state makes a transfer pricing adjustment; requiring the other treaty state make a "corresponding adjustment." This is not a minimum standard for BEPS Inclusive Framework members, thus countries are are allowed to reserve the right not to apply this article if it makes other arrangemens. Developing countries have however long been reluctant to provide the corresponding adjustment, insisting on flexibility to apply their own approach to intra-group transactions. The obligation to accept an adjustment could be used to pressurise weaker countries to apply transfer pricing methods which they consider inappropriate. Developing countries may want to retain the flexibility to apply their own approach to intra-group transactions (The BMG 2016). It is thus recommended that developing countries make the reservations not to apply article 17 of the MLC and rather chose that their competent authorities endeavour to resolve the case under the mutual agreement procedure in their covered agreements.

Table 4. Mutual agreement

Problem	Provision in the MLI	Recommendation for Developing Countries
Need to effectively resolve 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	**Article 16 – Mutual Agreement Procedure** Article 16's objective is to improve dispute resolution, making it more effective. The article aims to ensure the consistent and proper implementation of tax treaties, including the effective and timely resolution of disputes regarding their interpretation or application through the MAP.	Developing countries that wish to sign the MLI, review their treaties to determine which ones do not contain the relevant provisions; so that they can list them as Covered tax agreements for purposes of the MLI.
When one state makes a transfer pricing adjustment there can be a danger of economic double taxation if the other state's assessment disagrees	**Article 17 – Corresponding adjustments** Contracting Jurisdictions to provide for a corresponding adjustment with the aim of avoiding double taxation.	Reserve. Considering the challenges of using the arm's length principle to prevent transfer pricing, as well as the practical difficulties involved, developing countries may want to retain the flexibility to apply their own approach to intra-group transactions. It is thus recommended that developing countries make the reservations not to apply article 17 of the MLC and rather chose that their competent authorities shall endeavour to resolve the case under the mutual agreement procedure in their covered agreements

4.5 Arbitration

Article 25(5) of the OECD MTC provides for arbitration as an extension of the MAP. The purpose of arbitration is to provide resolution for specific issues that prevent the competent authorities from reaching a satisfactory resolution of the case (Oguttu AW 2016, 727).

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. 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. However, there is no consensus among all OECD and G20 countries.

Many developing countries find the confidentiality of arbitral proceedings unacceptable. The secrecy involved makes it difficult for countries to draw on the experience gained in a given case or to monitor the fairness and effectiveness of the arbitration process (Picciotto 2017). 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 (Oguttu AW 2016, 729). There is also concern about the

limited guidance on the criteria for selecting arbitrators (OECD 2016 MLC, Art 20). There is scepticism in entrusting decisions involving millions of dollars to a secret and unaccountable procedure of third-party adjudication (Oguttu AW 2016, 729). For developing countries with limited arbitration experience, the process could turn out to be unfair to them when disputes occur with more experienced countries that have had many MAP cases.

Table 5. Mandatory arbitration

Problem	Provision in the MLI	Recommendation for Developing Countries
Mandatory binding arbitration is prosumed to provide a means of ensuring that tax treaty disputes are effectively resolved through MAP	**Articles 18 to 26 – Mandatory binding arbitration** Articles 18 to 26 aim to implement mandatory binding arbitration, reflecting the commitment by some countries to provide for mandatory binding arbitration in their bilateral tax treaties.	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.

5. Other Developing Country Concerns about the MLI

Interests of developing countries: Considering that the outcomes of the BEPS project and their ultimate inclusion in the MLI largely addresses concerns of OECD countries; it remains to be determined whether the taxing rights of source countries will be protected. Although the MLI, can apply to all DTAs whether based on the OECD or UN models 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 model, the UN Committee of Tax Experts played only a marginal role in the BEPS project (UN Sub-committee on BEPS). Even though the BEPS Project is intended to ensure the alignment of tax with economic activities and value creation, the BEPS outcomes only provide patch-up remedies to weaknesses in the existing tax system, and not a more coherent and comprehensive revision to international tax and DTA rules that would comprehensively protect source taxation (The BMG 2016, at 4). The compressed timeframe with which the BEPS Project was carried out has also been criticized 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" (Silberztein C & Tristram J 2016 at 348). Also, the process of drafting the MLI took a relatively short period, and it has been criticized for covering mainly the "bare bones" of the structural issues rather than the details of its content and that the consultation process was minimal (Arnold B 2016, at 683). This leaves developing countries concerned as to whether the MLI will be instrumental in alleviating their BEPS concerns especially if Parties opt out of articles that are pertinent to developing countries.

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. This flexibility implies that it is possible for a country to sign the MLI and still opt out of the BEPS minimum standards for example those in in article 7 (dealing with preventing treaty abuse), on the basis that it intends to negotiate an alternative meeting the minimum commitments. The advantages of the MLI would 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 endeavor to find a satisfactory solution bilaterally with the other contracting States of, this may result in a loss of the advantages of the envisaged MLI (Arnold B 2016 at 684). It will result in a more complex and non-uniform structure of anti-abuse provisions in DTAs (The BMG 2016 at 4).

Ideally, one would have expected that countries would list all their DTAs as CTAs under the MLI. 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 (The BMG 2016 at 5). From that premise, one would have expected that all the OECD and G20 countries, which initiated the BEPS project and were actively involved in formulation of the proposals, would the lead in full implementation of the MLI. Some of these countries (such as Switzerland, Netherlands, the UK, the US, Ireland) have an extensive network of DTAs that have been used in international treaty shopping schemes; and they have notoriously availed themselves as hubs for tax planning strategies for their own residents and for MNEs based in other countries (The BMG 2016, at 5). Failure by these countries to comprehensively adopt 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.

The approach taken by countries signing the MLI jurisdictions with respect to reservations varies. Some countries, such as Switzerland, have reserved their right not to apply most of the provisions, other jurisdictions, have chosen to apply several of them. 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 DTAs (The BMG 2016, at 4). This selective or partial adoption of MLI provisions by developed countries is very concerning for developing countries which are not very sure of what to opt in or out of, and are skeptical that this 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.

Complexity: The MLI entails a complicated reservation and option mechanism. It is highly technical, and the arrangements governing its application to CTAs 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 (Silberztein C & Tristram J 2016 at 353). 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 (Lewis A 2016). To resolve some complexities, the OECD has developed a Toolkit to facilitate the Application of the MLI (OECD Toolkit for MLI).

The uncertainties that the MLI creates: When countries negotiate DTAs, the articles they agree upon are often interconnected. The 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 which would have never been accepted in bilateral situations (Silberztein C & Tristram J 2016, at 353). Uncertainty also arises where the MLI may modify a provision that is fundamentally connected to other provisions of DTAs which may not be in covered in the MLI. For example, the MLI deals with preventing artificial avoidance of PE status in article 5 of DTAs, which is fundamentally connected to the attribution of profits to PEs in article 7 of DTAs which was not dealt with in the BEPS Project (Silberztein C & Tristram J 2016, at 353). This connectivity of these articles is concerning to many developing countries, since many of them have not adopted the OECD's approach of attributing profits to PE which recognises the economic differences between the PE and subsidiaries by adopting a "functionally separate entity" between the PE and the head office when pricing transactions between them on an arm's length basis, without regard to the actual profits of the enterprise of which the PE is a part. This implies that non-actual management expenses, notional interest and royalties from head office may be charged on the PE (Deloitte 2013). This approach differs from the UN model which, denies the deduction of such notional expenses. Many developing countries have not adopted the OECD's approach because of concerns that it may be detrimental to their tax revenue if deductions for notional internal payments are allowed that exceed expenses actually incurred by the taxpayer (Oguttu AW 2016, at 353).

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 of the length and complexity BEPS Reports which are relevant to understanding the provisions of the MLI.

Parliamentary approval before ratification: The MLI is an unprecedented procedure, which in many countries will require parliamentary approval before ratification. 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 modified by the MLI (Lewis A 2016).

There is no information in the public domain on whether and to what extent countries which have negotiated the MLI have been briefing 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.

Language: Many countries require that legislation presented to their respective parliaments be in the native language. The MLI is so far available only in English and French (OECD 2016 MLC, Art 32(2)). An increasing number of DTAs are concluded in a variety of languages; for instance in Arabic and Chinese (Arnold B 2016 at 686). 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 (OECD 2016 MLC, Art 32(2)). 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 (Lewis A 2016, at 2). 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 (Lewis A 2016, at 2).

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 the BEPS project whose agenda did not initially include the interests of developing countries. Although non-OECD/G20 countries were latter 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 (PWC 2016 at 2). The reason given is that "the bulk of the multilateral instrument is consistent with U.S. tax treaty policy that the Treasury Department has followed for decades." For example all US treaties have a LOB provision to prevent treaty shopping, a saving clause and an arbitraton provision (Bell K, 2017).

Concerns about the OECD becoming a world tax organisation: Since the OECD is the secretariat and the Depositary of the MLC, 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 (Muchhala B & Sengupta R 2015). Thus, many developing countries view MLI with suspicion.

6. Conclusions and Recommendations

Any change in a country's tax laws and DTAs has an influence on its trade and commerce *vis-a-vis* its economic relations with other countries. Hence, great care and caution has to be taken before signing the MLI so as to prevent the endangerment of national economic interests (Singh 2011, at 1). 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.

With all the administrative and political challenges the MLC elicits, as well as the complexities and uncertainties that prevail, it is advisable for developing countries that were not that 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 learn how the process evolves. This would allow countries with a limited treaty network and limited treaty negotiating capacity to consider the provisions that other countries are choosing, and to understand the treaty policy considerations that are pertinent for their specific circumstances, so that they can make informed decisions (Lewis A 2016 at 2). 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 (KPMG 2017).

Clearly the MLI elicits many unanswered questions and more questions and challenges will arise when the MLI is applied in practice (Silberztein C & Tristram J 2016 at 353). Developing countries should therefore heed the caution of the IMF, warning countries that have treaty negotiation incapacities not to rush into signing new DTAs if they are sure whether its provisions are in their favour (IMF 2014, at 25). 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 ML, as they could opt into or out of provisions that may not be in their favour.

ANNEX. Detailed Discussion and Recommendations

MLI Part II: Hybrid Mismatches

Part II of the MLI relates to the treaty aspects of Action 2 of the BEPS Project which deals with "Neutralising the effects of hybrid mismatch arrangements." Hybrd mismatch arrangements occur when two countries interpret the same entity or transaction differently for tax purposes, which can result in double taxation, or non-taxation."

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 one that is treated as a taxable corporation in one jurisdiction and as a transparent (non-taxable, or "pass through") entity in another (Arnold B & Mclntyre M 2012, at 114; Olivier L & Honiball M 2011, at 554). The most common hybrids involve partnerships and trusts. Article 3(4) of the MLI embodies the recommendations in Action 2 (OECD 2015 BEPS Action 2) 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 (OECD 2016, para 44). In terms of article 3(5) a party may under certain circumstances make a reservation to this article, by for instance reserving to the entirety of 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 CTAs, with Chile, and Mexico, since they contain a provision described in article 3(4) of the MLC (National Treasury 2017 at 17).

Although some developing countries take the view that measures against the use of hybrid entities are not a high priority for them, due to the complexity involved, it is important that they protect their taxation rights as source states, by adopting this provision. Despite the complexities involved, adoption of these provisions would improve the effectiveness of their DTAs in preventing the erosion of source country taxation (The BMG 2016, 9-10).

Action 2 of the BEPS Project, also came up with recommendations to modify rules related 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 models (OECD 2016 BEPS Action 6, para 64). 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 (OECD 2016, para 42).

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 for dual resident entities in Article 4(3) of both the OECD and the UN models provides that a dual resident entity shall be deemed to be resident only of the state where its place of effective management (POEM) is situated. However this was 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 MLC to the effect that the POEM "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 POEM, but also the place where it is incorporated, or any other relevant factor (OECD 2015 BEPS Action 6, para 48). If the competent authorities fail to agree, the taxpayer shall lose entitlement to tax relief, except as may be agreed by the competent authorities (OECD 2016, para 52). The MLI provides that countries may choose not to adopt the article 4, or not to apply it to treaties which already have one of the specified tie-breaker rules (OECD 2016, para 54). For example, South Africa issued a notification listing 76 DTAs, that contain a provision similar provision, thus reserving the right not to adopt the provision (National Treasury 2017, 18-19). It is recommended that developing countries that do not have the provision in their current DTAs, should adopt it if they sign the MLI. The UN subcommittee on BEPS recommended that developing countries adopt this provision, with an option for states which wish to do so, to keep the POEM as the sole criterion (UN 2016, at 45).

Article 5 - Application of methods for elimination of double taxation: Article 5 of the MLI covers issues pertaining to applications of methods to elimination double taxation with respect to hybrid instruments (OECD 2015 BEPS Action 2). A hybrid instrument is one that is treated as debt in one country and as equity in another, which may result in a payment being deducted as a cost under the rules of the payer jurisdiction and are not included as income in the other jurisdiction, or two deductions arising in respect of the same payment (double deduction outcomes). To prevent abuses that may arise, Action 2 recommended linking rules that align the tax treatment of an instrument with the tax treatment in the counterparty jurisdiction (OECD 2015 BEPS Action 2, at 16). 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 (OECD 2015 BEPS Action 2, para 438).

Action 2 also recommends a secondary "defensive" rule, that 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 (OECD 2015 BEPS Action 2, 442-444). For countries which relieve double taxation by exempting foreign income, a treaty change may be needed to implement this defensive rule. This is not necessary for countries which already include such payments as income, but allow a tax credit (The BMG 2016, at 10). Article 5 of the MLI embodies these recommendations and provides three options from which countries which use an exemption system countries can choose:

- Option A: to deny exemption but provide a tax credit for such payments.
- 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) (OECD 2016, para 61-68).

Article 5 of the MLI permits asymmetrical application of the options i.e. if parties choose different options (or none). Each party may apply the option it choses on its residents. Parties that decides not to choose any option may reserve the right not to adopt any of these options in one or more of its CTAs (OECD 2016 MLC, Art 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 (National Treasury 2017 at 20).

Since most developing countries often apply the exemption method, that frequently facilitates tax avoidance, it is recommend that adopt the tax credit method (option C), and urge their treaty partners to allow them to do so.

MLI Part III: Treaty Abuse

This part of the MLI evolves from Action 6 of the BEPS Report which deals with preventing 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 (Becker & Wurm 1998, at 10; Oguttu AW 2016 Part 2, at 335). This is mainly done by interposing a conduit company in one of the contracting states so as to shift profits out of the treaty states.

Article 7 -Treaty abuse: 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 for non- taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping (OECD 2015 BEPS Action 6 para 19). Thus Article 6(1) of the MLI includes this preamble text. In addition, under article 6(3), a party may also choose to include in the preamble of its CTAs reference to a desire to "develop an economic relationship or to enhance co-operation in tax matters." A party may make a reservation for the above preamble language not to apply to its CTAs that already contain that language. An example of a developing country that adopted this preamble language is South Africa, which issued a notification listing 60 agreements that it wishes to include the preamble text in article 6(1), and 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 (National Treasury 2017, at 21-26). Developing countries should adopt this preamble language.

BEPS Action 6 also recommends that countries should include in their CTAs, either

(iv) a general anti-abuse provision, in the form of a "principal purpose test" (PPT)
(v) a combination of the PPT rule with a specific "limitation-on-benefits" (LoB) provision
(vi) a LoB provision supplemented by a mechanism that deals with conduit arrangements, such as a restricted PPT that applies to conduit financing arrangements.

These recommendations are now embodied in Article 7 of the MLI. Because 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 treaty benefits "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." The PPT has been drafted much wider than domestic "general anti-avoidance provisions" (GAAR) which may refer to avoidance being the "main" rather than "one of the principal purposes" of the entering into a given transaction (Oguttu AW 2016 Part 2, at 431). 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 (BMG, 2016). To overcome such concerns, it is recommended that PPT is adopted in DTAs (Para 37, commentary on Article 1 of the UN MTC).

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 (Danone & Salome 2017, at 16). The PPT rule is also criticized for being too broad in scope and thus does not cover classical treaty shopping structures, where dividends channeled are through conduit companies or stepping stone schemes which involve claiming excessive deductible expenses (Danone & Salome 2017, at 16). Because of these concerns, some countries prefer a more targeted provision in the form of a limitation of benefits (LoB) provision, that can denial treaty benefits in specific cases. However, LoB provisions, typically applied in DTAs entered into with the US, tend to be very complex and difficult to apply for countries with limited administrative capacity, as they require countries to have access to information so as to verifying that the prerequisites for qualifying for treaty benefits (IMF 2014, at 27; Oguttu AW 2016 Part 2, at 340). Consequently, under the BEPS Project, countries did not agree on a detailed LoB provision, rather they came up with simplified LoB provisions (SloB). which is include in the MLI (OECD 2016 BEPS Action 6 at 23).

The MLI permits parties, to supplement the PPT by with a SLoB provision (OECD 2016 MLC, Art 7(6)). 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 article 7 and then the states must find a solution which meets the minimum standard (OECD 2016 MLC, Art 7(16)).

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 (OECD 2016 MLC, Art 7(15a)); in such cases, the parties shall endeavour to reach a mutually satisfactory solution which meets the minimum standard" (OECD 2016 MLC, Art 7(7)). 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 (OECD 2016, para 90).

KPMG's review of countries' approaches revealed that most countries that signed the MLI

opted for the PPT thus accepting the default approach to treaty abuse (KPMG 2017). South Africa opted for the PPT (Geldenhuys G - Werksman's Attorney's 2017). Some countries reserved the right not to apply the PPT to their CTA on the basis of an existing PPT. For example, South Africa listed 13 agreements, reserving the right for the PPT not to apply to those agreements since they already have the PPT (National Treasury 2017 at 27). Only 12 countries, many of which developing countries including Argentina, Chile, Colombia, Mexico, Uruguay, India and Indonesia, opted for both the PPT and the SLoB. 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 (KPMG 2017).

It is recommended that developing should adopt the PPT rule since it is the only measure which satisfies the minimum standard on its own, and it applies by default. Tax professionals believe the universal adoption of a PPT will have a significant on preventing treaty abuse (KPMG 2017). It is however concerning for developing countries that some countries opted out of Article 7 of the MLC 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 (The BMG 2016, at 13).

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 which tend to be lower for dividends paid to direct investors (typically 5 percent) than for portfolio investors (15 percent). Taxpayers my get involved in dividend transfer transactions, by arranging for a temporary increase in shareholding, shortly before a dividend declaration (Oguttu AW 2016 Part 2, at 337). Action 6 of the OECD BEPS Project recommends the inclusion of a minimum shareholding period before the distribution of the profits to curtail such schemes. Is 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 (OECD 2015 BEPS Action 6, para 37). Article 8 of the MLC embodies these recommendations. It is recommended that developing countries that do not have this provision in their DTAs, adopt it through the MLI. This provision would be relatively easy for developing countries to administer (The BMG 2016, at 13).

Article 9 - Capital gains from alienation of shares or interests of entities deriving their value principally from immovable property: Treaties can also be abused by MNEs seeking to avoid capital gains tax by incorporating conduit companies in low tax jurisdictions to dispose shares in assets located in source countries (OECD 2015 BEPS Action 6, para 34-36). To reinforce taxation of capital gains from sales of immovable property in the source state the OECD model includes an article that allows the State in which immovable property is situated to tax capital gains from shares of companies that derive more than 50 per cent of their value from such immovable property. Action 6 of the OECD Reports recommends that countries ensure that they include this article in their DTAs and that it will be extended to cover partnerships and trusts (OECD 2016 BEPS Action). Article 9(1) of the MLI embodies these recommendations. 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. It is recommended that developing countries adopt this Article to prevent abuse of capital gains benefits.

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) (such as a branch) of the recipient in a third country, and is taxed at a low rate in the third country (OECD 2016 BEPS Action 6 para 52). Article 10 of the MLC 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 percent of the tax that would be payable by its enterprise in the state of residence (OECD 2016, para 142). It is recommended that developing countries adopt this Article.

Article 11 - Application of tax agreements to restrict a party's right to tax its own residents: Since a DTA is a contract between two states, that limits, the application of their domestic tax laws, it has been interpreted that application of domestic provisions that permit a country to tax its resident's income, for example, the taxation of the income of their controlled foreign corporations, or partners on their share of partnership income; would be contrary to treaty provisions (as it would amount to treaty over-ride). To preserve the right to tax its resident, 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 (McDaniel PR, Ault JH, Repeti J 2013, at 181). Action 6 of the BEPS Report recommended 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 (OECD 2015 BEPS Action 6 at 63). Article 11 of the MLI provides for the "savings clause" while article 11(2) lists some exceptions to when residents may be entitled to a tax benefit. 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 article not to apply to its CTAs or for it not to apply to those that already contain the provision. It is however recommend that developing countries adopt this Article, except where they have DTAs that already contain a savings clause.

MLI Part IV: Avoidance of Permanent Establishment Status

This part of the MLI evolves from Action 7 of the BEPS Report Action which recommended best practices in preventing the artificial avoidance of "permanent establishment" (PE) status. The PE concept is defined generally in Article 5(1) of the OECD and UN models as "a fixed place of business through which the business of an enterprise is wholly or partly carried on." Typically PEs include branches, factories, mines, and places of management, construction projects which take place for more than a specified length of time, and places where a dependent agent habitually concludes contracts on behalf of the enterprise.

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 artificially compartmentalising their business to avoid meeting PE definitions (such as by dividing construction projects into

smaller parts), and from developing countries that want to extend its parameters to reclaim their tax jurisdiction. The OECD acknowledged 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 (OECD 2015, BEPS Action 7, para 3). The Action 7 came up with recommendations for the review of the PE definition to prevent artificial avoidance of PE status.

Article 12 - Artificial avoidance of PE status through commissionaire arrangements and similar strategies: Companies often use commissionaire arrangements to avoid PE status by setting up local distribution arms which contract with customers, while the goods and services are provided by the parent company (OECD 2015 BEPS Action 7, at 17; Oguttu AW 2016 Part 2, at 345). Article 12(1) of the MLI provides a means to prevent such schemes by providing that a person acting on behalf of an enterprise can be a PE under certain conditions and where they are acting "exclusively or almost exclusively" on behalf of one or more closely related enterprises. DTAs that already include this provision may not have to be modified by the MLI. Commissionaire arrangements are generally only valid in civil law countries, so for common law countries they may not be a major concern. Nevertheless there could be cases where *commissionaire* proxies are employed to escape PE status (Oguttu AW 2016 Part 2, at 346). Parties may reserve the right for the entirety of this Article not to apply to its CTAs. KPMG's review of countries that signed the MLC shows that several developing countries elected to include this provision including Argentina, Chile, Colombia, Costa Rica, Mexico, Uruguay India and Indonesia. 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 (KPMG 2017). South Africa also reserved the right for the entirety of Article 12 not to apply to its CTA (National Treasury 2017 at 33; E Geldenhuys - Werksman's Attorney's 2017). 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 (The BMG 2016).

Article 13 - Artificial avoidance of PE status through the specific activity exemptions: Article 5(4)(e)-(f) of both the OECD and the UN models list some specific activities which even if conducted through a fixed place of business are not considered to constitute a PE. These are generally activities that are considered "auxiliary and preparatory" in nature such as storing or keeping goods for display or delivery, purchasing goods or collecting information (note however that the UN model does not include delivery, Oguttu AW 2016 Part 2, at 349). 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 (OECD 2015 BEPS Action 7 para 10). 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 filling orders sold online to customers could be more than just "preparatory or auxiliary"

(OECD 2015 BEPS Action 7 para 28). In Action 7, OECD recommended modifications to all the exceptions to the PE concept to be restricted to activities of a preparatory or auxiliary character (OECD 2015 BEPS Action 7 para 38). These modifications are now embodied in Article 13 of the MLI which clarifies that the activities should 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" (OECD 2016 MLC, Art 13(2)(a)).
- 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" (OECD 2016 MLC, Art 13(3)).

KPMG's review of the options chosen my countries that signed the MLI shows that one-third of them elected option A; including Australia, Austria, Germany, India, Italy, Japan, the Netherlands, New Zealand, Spain and developing countries such as Mexico, Indonesia, Argentina and South Africa. The later listed 76 agreements that contained the wording of Article 13(2)(a) of the MLC (National Treasury 2017 at 34). 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 (KPMG 2017). 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. 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 (OECD 201 MLC, Art 13(6); The BMG 2016, at 16).

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. Such fragmented activities may thus be interpreted to be merely "preparatory or auxiliary" and excluded from PE status (Oguttu AW 2016 Part 2, at 350). To curtail such strategies Action 7 recommended an anti-fragmentation provision (OECD 2015 BEPS Action 7, at 10) which is now embedded in Article 13(4) of the MLI. The rule 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" (OECD 2015 BEPS Action 7, at 10). KPMG's review of countries that signed the MLI shows that the majority of them elected to apply the anti-fragmentation rule. The few that opted out of the anti-fragmentation rule, include Germany, Luxembourg and Singapore (KPMG 2017). It is recommended that developing countries should adopt the anti-fragmentation rule.

Splitting-up of contracts: Action 7 of the BEPS Project recognises that the special PE rule in article 5(3) for building sites, construction, installation projects that last for more than 12 months, can be circumvented by dividing contracts into several shorter contracts, and yet they are all owned by the same group (para 18, commentary on Art 5(3) OECD MTC; Oguttu AW 2016 Part 2, at 346). To prevent this, Action 7 recommends that countries should apply a general anti-abuse rule, such as the PPT discussed above (OECD 2015 BEPS Action 7, at 10).

Action 7 also recommended a more targeted rule to combat such abuses, (OECD 2015 BEPS Action 7, para 42-44) which is now embodies in Article 14 of the MLI. The rule allows for shorter contracts to be aggregated to decide if the threshold is exceeded. This targeted rule is generally more clear and easier to apply than a general anti-abuse principle such as the PPT. It does not however 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, countries may reserve the right not to apply them. The MLI also recognises that a CTA could already be containing anti-contract splitting rule, so article 14(3) allows a party to make a reservation for the entirety of Article 14 not to apply to its CTA or the for the entirety of the Article not to apply its CTA relating to the exploration for or exploitation of natural resources (OECD 2016, para 186). The KPMG's 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 (KPMG 2017). South Africa reserved the right for the entirety of Article 14 not to apply to its CTA (National Treasury 2016 at 36). Nevertheless, the changes to the PE concept as embodied in Article 14 of the MLI are a positive step forward in preventing artificial avoidance of PE status resulting from splitting of contracts. It is therefore important that developing countries adopt this provision against splitting up of contracts.

In general, tax Professionals are of the view that even if the PE BEPS measures were not universally adopted, those measures have the potential to significantly impacts on taxpayers (KPMG 2017).

Article 15 - Definition of a person closely related to an enterprise: The concept of "closely related to an enterprise" is used in article 12(2), 13(4) and 14(1) of the MLI (referred to above). Article 15 contains a definition of the concept, based on common control, or direct or indirect ownership of more than 50 percent of the beneficial ownership. Developing countries should adopt this Article if they have adopted the articles above.

MLI Part V: Improving Dispute Resolution

Under Action 14 of the BEPS Project, the OECD emphasised the need to effectively resolve 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 (OECD 2015, BEPS Action 14 para 5). DTAs provide for the Mutual Agreement Procedure (MAP), as the means for resolving tax treaty disputes. The

OECD recognises that are however, various obstacles that hinder the effectiveness of MAP. These include; lack of resources, inadequate empowerment of competent authorities and the lack of mutual trust among competent authorities (OECD 2015 Obstacles to MAP para 4-7). 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) administrative processes promote the timely resolution of treaty-related disputes; (3) relevant taxpayers can access MAP (OECD 2015 BEPS Action 14, paras 9, 24, 34). These minimum standards are now embodied in Article 16 of the MLI (OECD 2016, para 193).

Article 16 sets out the basis for dispute resolution: a person who considers that the actions of one or both of the Contracting Jurisdictions is not in accordance with the tax treaty, they can present the case to the competent authority of either state. The competent authority must, if it finds the claim justified and is unable to find a satisfactory solution, "endeavor to resolve the case by mutual agreement" with the treaty partner. 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.

Where parties chose different ways to achieve the minimum standard, the MLI gives them the option to endeavor to find a satisfactory solution bilaterally (OECD 2016 MLC, Art 16(5)). For example, 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 (National Treasury 2017 at 37; Geldenhuys G - Werksmans Attorneys 2017).

Article 16 contains provisions about who can access the MAP process and the circumstances which need to be applied if they are not already included in existing tax treaties. It is important that developing countries that wish to sign the MLI, review their treaties to determine which ones do not contain the relevant provisions; so that they can list them as CTAs for purposes of the MLI.

Article 17 – Corresponding adjustments: The measures in Action 14 of the BEPS Project which require countries to implement MAP in good faith and that taxpayers are granted access to MAP, also recommend access to MAP in transfer pricing cases. When one state makes a transfer pricing adjustment to reflect its assessment of "arm's length pricing" there can be a danger of economic double taxation if the other state's assessment disagrees on the arms length price. Thus article 9(2) the OECD Model Treaty 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 arise (OECD 2016 BEPS Action 14, par 11-13). Article 17 of the MLC embodies the obligation in article 9(2) of the OECD and the UN model conventions. The obligation is however a best practice under Action 14 and is not required as part of the Action 14 minimum standard (OECD 2015 BEPS Action 14, para 44). Thus, a party to the MLI are allowed to reserve the right not to apply this article: if its CTAs contain a similar provision; if it shall make the appropriate adjustment; or if its competent authority shall endeavour to resolve the case by mutual agreement procedure (OECD 2016, para 213).

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 is now also in the UN MTC. 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 (The BMG 2016, at 19). This article imposes an 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. 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 (The BMG 2016, at 19).

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 (Oguttu AW 2016, 138-158), developing countries may want to retain the flexibility to apply their own approach to intra-group transactions (The BMG 2016, at 19). It is thus recommended that developing countries make the reservations not to apply article 17 of the MLC and rather chose that their competent authorities shall endeavour to resolve the case under the mutual agreement procedure in their covered agreements.

MLI Part VI: Arbitration

Article 25(5) of the OECD MTC provides for arbitration as an extension of the MAP. The purpose of arbitration is to provide resolution for specific issues that prevent the competent authorities from reaching a satisfactory resolution of the case (Oguttu AW 2016, 727).

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 (OECD 2015 BEPS Action 14, para 62; Silberztein C & Tristram J 2016 at 352). 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. However, there is no consensus among all OECD and G20 countries on the adoption of mandatory binding arbitration (OECD 2015 BEPS Action 14, para 8). Thus Part VI of the MLI will apply only if both Contracting Jurisdictions choose it (OECD 2016 MLC, Art 18; OECD 2016, para 215).

Article 19(1) provides that, where the competent authorities are unable to reach an agreement on a case pursuant to the MAP under the CTA within a period of two years (or three) (OECD 2016 MLC, Art 19(11)), unresolved issues will, at the request of the person who presented the case, be submitted to arbitration. 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 (OECD 2016 MLC, Art 19(2)). The case also terminates if the competent authorities reach agreement, or if the taxpayer withdraws the claim (OECD 2016 MLC, Art 22). 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 (Temple-West P 2012), 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 (Oguttu AW 2016, 729). No reasons are given for their decision. Under Article 23(2), parties may opt for the "reasoned opinion" procedure whereby the arbitrators can indicate reasons for reasons reached and also provide the sources of law relied upon which can be followed as precedents (OECD MTC, commentary on Art 25, para15). 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 (OECD 2016 MLC, Art 24). Arbitrators are subject to confidentiality obligations. Under Article 23(5), the parties may require the taxpayer and its advisers to accept a written obligation of nondisclosure, breach of which would result in termination of the MAP and of the arbitration.

Many developing countries find the confidentiality of arbitral proceedings unacceptable. The secrecy involved makes it difficult for countries to draw on the experience gained in a given case or to monitor the fairness and effectiveness of the arbitration process (Picciotto 2017). 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 (Oguttu AW 2016, 729). The fact that the arbitral decisions cannot be reviewed or appealed against creates further lack of confidence in the system (UN Secretariat 2015, para 132). 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 third parties individuals, without any checks and balances (UN Handbook 2013, at 329). There is also concern about the limited guidance on the criteria for selecting arbitrators (OECD 2016 MLC, Art 20). 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 (Oguttu AW 2016, 729).

For developing countries with limited arbitration experience, 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 particular arbitrators, whereas inexperienced countries may be forced to hire specialist counsel, which may not always work to their advantage (UN Secretariat 2015 at 99). There are also concerns that arbitrators from developed countries will not be impartial if a MAP case involves their own country. 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), (Para 12, Commentary on Art 25 OECD

MTC) such costs can also be quite prohibitive for developing countries to engage in arbitration proceedings (UN Secretariat 2015, in para 76; Oguttu AW 2016, 729).

KPMG's review of the countries that signed the MLI shows that twenty-five 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. Most of the countries that opted for arbitration, opted for the default final offer arbitration (KPMG 2017). 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.

References

Arnold BJ 2016, BJ Arnold "The Proposed OECD Multilateral Instrument Amending Tax Treaties" Vol 70, No. 12 *Bulletin for International Taxation* (2016)

Arnold B & McIntyre MJ 2012, B Arnold & MJ Mclntyre *International Tax Primer* (2002).

Becker H & Wurm FJ 1998, H Becker & FJ Wurm *Treaty Shopping: An Emerging Tax Issue and its Present Status in Various Countries* (1988).

Bell KA 2017, KA Bell "Treasury Official Explains Why U.S. Didn't Sign OECD Super-Treaty" (2017). Available at https://www.bna.com/treasury-official-explains-n73014453413/ accessed 5 June 2018.

Danone & Salome 2017, Danone and Salome News Letter "The signature of the Multilateral BEPS Convention A first critical look and overview around the globe" 14 June 2017.

Deloitte 2013, Deloitte "Transfer Pricing Law Reforms" (2013). Available at http://www.deloitte.com/view/en_AU/au/insights/browse-by-job-title/cfos/f364b564daf7c310VgnVCM2000003356f70aRCRD.htm accessed 14 November 2017.

Geldenhuys G - Werksman's Attorney's 2017, G Geldenhuys – Welksman's Attorney's "The Implementation of The BEPS Multilateral Instrument in South Africa" 3 July 2017, available at https://www.werksmans.com/legal-briefs-view/the-implementation-of-the-beps-multilateral-instrument-in-south-africa/ Accessed 12 November 2017.

IMF 2014, IMF 'Spillovers in International Corporate Taxation' (2014) at 27.

Jantjies D 2017, D Jantjies "5 Questions on the Multilateral Treaty Instrument Answered" *Taxtalk* Issue 66 September/October (2017).

KPMG 2017, 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-MLC-implementing-treaty-related-beps.html accessed 12 November 2017.

Lewis A 2016, Alexander Lewis "Multilateral Instrument Faces Challenges on Way to Success, OECD Official Says" *Tax Notes* 2016.

National Treasury 2017, National Treasury "The Republic of South Africa: Status of List of Reservations and Notifications at the Time of Signature (6 June 2017). Available at

www.oecd.org/tax/treaties/beps-MLC-position-south-africa.pdf accessed 12 November 2017.

McDaniel PR, Ault JH, Repeti J, 2013, PR McDaniel, JH Ault, J Repeti J *Introduction to United States International Taxation* (2013).

Muchhala B & Sengupta R 2015, B Muchhala & R Sengupta *Third Conference on Financing for Development: Outcomes document adopted without intergovernmental tax body or new financial commitments*, 16 July 2015, available online at https://www.twn.my/title2/finance/2015/fi150706.htm accessed 12 November 2017.

OECD "Sample mutual agreement on arbitration," annexed to the Commentary on Article 25 of the OECD MTC.

OECD "Toolkit for Application of the Multilateral Instrument for BEPS Tax Treaty Related Measures." Available at http://www.oecd.org/tax/treaties/application-toolkit-multilateral-instrument-for-beps-tax-treaty-measures.htm

OECD 2013, OECD "Addressing Base Erosion and Profit Shifting" (2013).

OECD 2015 BEPS Action 14, OECD/G20 *2015 Final Report on Action 14* in paras 11–13.

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

OECD 2015 BEPS Action 6, OECD/G20 BEPS Project, OECD/G20 Base Erosion and Profit Shifting Project "Preventing the Granting of Treaty Benefits in Inappropriate Circumstances Action 6 (2015) in para 64.

OECD 2015 BEPS Action 7, OECD *BEPS Action 7: Preventing the Artificial Avoidance of PE Status,* Public Discussion Draft, 31 October 2014 in para 3).

OECD Obstacles to MAP 2015, OECD *Obstacles that prevent countries from resolving treaty related disputes under the mutual agreement procedure* (16 September 2015) para 4-7.

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

OECD 2016 MLC, OECD Multilateral Convention to Implement Tax Related Measures to prevent Base Erosion and Profit Shifting: Information Brochure" 17 August 2017.

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

OECD 2017, OECD Background Brief: Inclusive Framework on BEPS (January 2017), available at https://www.oecd.org/ctp/background-brief-inclusive-framework-for-beps-implementation.pdf. Accessed 11 November 2017.

OECD "Milestone in BEPS implementation: Multilateral BEPS Convention will enter into force on 1 July following Slovenia's ratification" (2018). Available at 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.

Oguttu AW 2006, AW Oguttu "Transfer Pricing and Tax Avoidance: Is the Arm's Length Principle still relevant in the E-commerce era?" (2006) 18 No. 2 *SA Mercantile Law Journal* 138-158.

Oguttu AW 2016 Part 2, 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" Vol 70 No 6 *Bulletin for International Taxation* (2016).

Oguttu AW 2016, AW Oguttu Resolving treaty disputes: The challenges of mutual agreement procedure with a special focus on issues for developing countries in Africa" Issue No. 12 (2016) *Bulletin for International Taxation***.**

Olivier L & Honiball M 2011, L Olivier & M Honiball *International Tax: A South African Perspective* (2011) at 554

Picciottp S 2017, S Picciotto, ICTD Summary Brief 7: What Have We Learned About International Tax Disputes (2017), available at http://www.ictd.ac/publication/7-policy-briefing/152-summary-brief-number-7-what-have-we-learned-about-international-tax-disputes accessed 24 November 2017.

PWC 2016, PWC "Multilateral Instrument to Implement BEPS Treaty Related Recommendations Almost Final" *Tax Policy Bulletin* 10 October 2016.

Singh 2011, Singh *Model Tax Conventions* (2011) at 1.

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

Temple-West P 2012, P Temple-West "International arbitration for tax disputes, 'baseball' style" *Reuters* (25 November 2012).

The BMG 2016, 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.

UN 1969, United Nations "Vienna Convention on the Law of Treaties" (1969).

UN Handbook 2013, UN *Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries* (2013).

UN Secretariat 2015, UN Committee of Experts on International Cooperation in Tax Matters *Secretariat paper on alternative dispute resolution in taxation* (8 October 2015).

UN Sub-committee on BEPS, UN, *Subcommittee on Base Erosion and Profit Shifting Issues for Developing Countries*, available at http://www.un.org/esa/ffd/tax/BEPS_note.pdf accessed 12 November 2017.

Van Weeghel S 1998, S van Weeghel *The Improper Use of Tax Treaties with Particular Reference to the Netherlands and The United States* (1998).

Vogel K 1997, K Vogel *Double Tax Conventions* (1997) at 280 in para 4.