



Australian
National
University

International Tax
Design for the
21st Century

POLICY BRIEF 13/2021

Multilateral Instrument

December 2021

Produced by

Tax Group

Melbourne Law School

Tax and Transfer Policy Institute

Crawford School of Public Policy

Hosted by

**Melbourne School
of Government**

Charlie McMillan Summons

Research Assistant, Melbourne Law School

Daniel Minutillo

Research Fellow, Melbourne Law School
Teaching Fellow, Faculty of Business and Economics,
The University of Melbourne

Miranda Stewart

Professor of Law and Director of the Tax Group,
The University of Melbourne
Honorary Professor, Tax & Transfer Policy Institute
Crawford School of Public Policy, ANU

About this Policy Brief Series

This Policy Brief was produced as part of Discovery Project DP170104244, *Are tax base erosion and profit shifting countermeasures effective?* Australian National University and Melbourne University, funded by the Australian Research Council (Chief Investigators Alfred Tran and Miranda Stewart). This policy brief series is hosted by the Melbourne School of Government as part of its *Regulation and Design* research stream.

Tax Group
Melbourne Law School

The University of Melbourne
Parkville VIC 3010 Australia
www.unimelb.edu.au
CRICOS Provider No. 00116K

Tax and Transfer Policy Institute
Crawford School of Public Policy

The Australian National University
Acton ACT 2601 Australia
www.anu.edu.au
CRICOS Provider No. 00120C

Melbourne School of
Government

The University of Melbourne
Parkville VIC 3010 Australia
www.unimelb.edu.au
CRICOS Provider No. 00120C

Summary

This policy brief makes the following key points:

- The G20/OECD Base Erosion and Profit Shifting (**BEPS**) Project is an international initiative intended to strengthen the international tax system through the adoption of a 15 point plan, and the 2021 Pillar One and Pillar Two consensus proposals.
- BEPS [Action 15](#) proposed a multilateral treaty, known as the Multilateral Instrument (**MLI**), to implement BEPS recommendations in Actions 2 to 14 for bilateral tax treaties. Where the MLI is signed and ratified by a state, relevant Articles of the MLI will apply to modify the tax treaties nominated by states as Covered Tax Agreements (**CTAs**).
- The MLI is an innovative and flexible treaty instrument that permits states to make choices about which Articles, or parts of Articles, to adopt and to make reservations about the instrument’s application to CTAs. This is done through the Instrument of Ratification, Acceptance or Approval submitted by the signatory to the OECD.
- The MLI contains four minimum standards to which all signatories must agree. The standards require action to counter harmful tax practices (Action 5), counter treaty abuse (Action 6), adopt country-by-country reporting (Action 13), and improve dispute resolution (Action 14). Optional Articles of the MLI include provisions relating to anti-hybrid arrangements (Action 2) and permanent establishment status (Action 7).
- For the minimum standards and all optional Articles, the MLI operates on a matching principle. The MLI only modifies the Articles of a bilateral treaty which both parties have nominated as a CTA and for which both parties have made the same adoption choices. The extent to which the MLI has reshaped the existing bilateral treaty network therefore depends on the adoption choices of each signatory jurisdiction and the extent of adoption by member states.
- At December 2021, 96 jurisdictions had signed the MLI although 29 of these had not yet lodged their Instrument of Ratification. The MLI modifications to date apply to 1,723 bilateral tax treaties, more than half of the bilateral treaty network.
- Australia nominated all 43 of its existing tax treaties to be covered by the MLI. Its two recent bilateral tax treaties with Germany (2015) and Israel (2019) incorporate the updated BEPS measures in the MLI rules directly into these new treaties, so that there is no requirement for the MLI to apply to them. To date, 10 of Australia’s bilateral tax treaties have not been modified because the other state party has not signed or ratified the MLI, or has not nominated the tax treaty to be covered by the MLI.
- The MLI has proved to be a useful multilateral treaty mechanism to modify the existing bilateral tax treaty network in an efficient manner. This innovative mechanism is likely to be adopted in future multilateral tax negotiations where the updating of bilateral tax treaties is required, for example in implementing the “subject-to-tax” rule in the Two-Pillar Solution of the Inclusive Framework on BEPS (Policy Brief 17/2017).

Introduction

The G20/OECD Base Erosion and Profit Shifting (BEPS) Project is an international initiative intended to strengthen the international tax system through the adoption of a 15 point plan, and the 2021 Pillar One and Pillar Two consensus proposals. The Action 15 report proposed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, known as the Multilateral Instrument (MLI). The MLI is a key way that BEPS Actions relating to tax treaties are implemented. It is an ambitious and novel multilateral treaty that aims to modify the global network of more than 3000 bilateral tax treaties in an efficient and timely way.

This Policy Brief presents an overview of the MLI including how it is designed and implemented as a matter of international law, what BEPS issues it is designed to address, how the MLI operates to modify existing bilateral tax treaties, and the extent to which it has been adopted globally and by Australia. The substantive BEPS Actions covered by the MLI include Action 2 on hybrid mismatches (Policy Brief 2/2021), Action 6 on treaty abuse (Policy Brief 6/2021), Action 7 on permanent establishment status (Policy Brief 7/2021) and Action 14 on improving dispute resolution (Policy Briefs 11/2021 and 12/2021).

1 What is BEPS?

The G20 declared the era of bank secrecy over in 2009 and later called for action to strengthen international taxation standards. The OECD responded with a 15-point Action Plan to address taxation issues with digitalisation (Action 1); and reform the international tax system to bring cohesion (Actions 2-5), restore substance (Actions 6-10), improve transparency (Actions 11-14), and develop a multilateral instrument (Action 15). This launched the international project to prevent Base Erosion (or double non-taxation) and Profit Shifting from jurisdictions where profitable activities take place: the BEPS Project.

OECD working groups developed technical policy proposals (released October 2015), recommending updates to the model tax convention, OECD-issued guidance, and domestic policy. From November 2016, the Multilateral Instrument would update more than half of the world's bilateral tax agreements. OECD/G20 BEPS project participation is now widespread with the launch of multiple global forums and the Inclusive Framework (now 141 jurisdictions), membership of which requires commitment to the BEPS four 'minimum standards'. Having broadly addressed its mandate to implement the proposed package, the Inclusive Framework delivered in October 2021 Pillar-One (on a new nexus approach) and Pillar-Two (on a minimum global tax) as consensus proposals to tackle the digitalising global economy.

2 Action 15 – Multilateral Instrument

What is the issue?

There are over 3,000 bilateral tax treaties in the global tax treaty network, with most treaties negotiated since the middle of the 20th century. Most bilateral tax treaties are based on the OECD Model Double Taxation Convention on Income and Capital or on the UN Model Double Tax Convention Between Developing and Developed Countries. However, all bilateral treaties have unique features and contain bilaterally agreed departures from the Models. The process of bilateral tax treaty

negotiation can be a lengthy political and economic process between two states. This means that updating the bilateral tax treaty network to implement the BEPS Actions would be an onerous and time-consuming task. Unilateral action to implement BEPS-related measures was not desirable; it could be a treaty override, would double tax even where negotiated into existing treaties, create inconsistency, and risk some treaty relationships being missed, leaving loopholes in the bilateral tax treaty system.

In 2015, the OECD/G20 BEPS project published the final reports for all 15 action items comprising the BEPS package. This finalised the plan for BEPS countermeasures to renovate the international taxation system. Many BEPS countermeasures are treaty-related measures, which aim to close exploitable gaps and mismatches in the global tax treaty network. The legal implementation of BEPS Actions therefore required modification of a tax treaty to have legal effect. BEPS treaty-related measures include the measures intended to deal with the effects of hybrid mismatch arrangements (Action 2), the granting of treaty benefits inappropriately (Action 6), the artificial avoidance of permanent establishment status (Action 7), the facilitation of exchanging country-by-country reporting information (Action 13), and dispute resolution procedures (Action 14).

The BEPS project aimed to implement these Actions while respecting state sovereignty and the sanctity of international tax treaties. A further issue concerned how contradictory provisions of existing bilateral treaties might interact with MLI provisions once modified. These problems required a novel solution.

What does the OECD Recommend?

The BEPS Action 15 Final Report explored the desirability and feasibility of a multilateral convention that could be used to modify the existing bilateral tax treaty network. A feasibility assessment was necessary because this approach had not been taken before in international taxation. The recommendation for a multilateral treaty approach was grounded upon the success of the 2011 amending protocol to the 1988 Convention on Mutual Administrative Assistance in Tax Matters, which refreshed that multilateral convention and opened it to global signature. Many countries have used protocols to amend bilateral tax treaties, however a different solution would be necessary to implement BEPS countermeasures in the global treaty network in an efficient and timely manner.

In proposing adoption of the MLI, the Action 15 report referred to experience in other areas of public international law in which a multilateral instrument had successfully modified bilateral treaties. Examples include the European Convention on Extradition and the European Convention on the Repatriation of Minors. However, this kind of solution had not been widely used and had not been attempted in more contentious matters such as the allocation of taxing rights.

In February 2015, the G20 states and the OECD Committee on Fiscal Affairs endorsed a mandate to establish a non-permanent Ad Hoc Group to begin negotiations with a view to developing the MLI. The multilateral negotiations aimed to establish an instrument so that countries would only need to negotiate, sign, ratify, and domestically implement the MLI once in order to implement the BEPS Actions. The MLI established a set of possible implementing provisions to ensure consistent language in the tax treaties to be modified.

On 24 November 2016, the Ad Hoc Group adopted the text of the MLI as well as a detailed Explanatory Statement. The Explanatory Statement sets out the intention of the negotiators of the MLI with respect to each article and forms part of the context for the purposes of interpreting the MLI in accordance with Article 31(2) of the Vienna Convention on the Law of Treaties.

How does the MLI work?

At international law, the provisions of the MLI and the relevant bilateral tax treaty are applied concurrently, with the effect that those treaties are modified, rather than amended. This approach is different from the operation of a protocol to a bilateral tax treaty, which amends that treaty. The approach relies on the principle that subsequently concluded treaties on the same subject matter prevail over previously concluded treaties, under Article 30 of the Vienna Convention on the Law of Treaties. The MLI provisions supersede similar provisions within the covered bilateral tax treaty, or are inserted into the bilateral tax treaty if no similar provision exists. The list of substantive Articles in the MLI is set out in Table 1.

Flexibility was embedded into the MLI to promote participation from the greatest number of jurisdictions. This is one reason why the MLI did not take the form of an amending protocol which wholly binds all signatories under Article 39 of the Vienna Convention on the Law of Treaties. The MLI allows countries to tailor their adoption to suit their domestic policy objectives and in accordance with each treaty relationship. There are adoption choices to be made for all articles.

Table 1: Substantive MLI Articles

BEPS Action	MLI Article	Status
Action 2 (hybrid mismatches)	3. Transparent entities	Optional (opt out)
	4. Dual resident entities	Optional (opt out)
	5. Application of methods for elimination of double taxation	Optional (opt in)
Action 6 (treaty abuse)	6. Purpose of a covered tax agreement	Minimum Standard
	7. Prevention of treaty abuse	Minimum Standard
	8. Dividend transfer transactions	Optional (opt out)
	9. Capital gains from immoveable property	Optional (opt out)
	10. Anti-abuse rules for permanent establishments in third jurisdictions	Optional (opt out)
Action 7 (permanent establishment)	11. Application of tax agreements to restrict a party's right to tax its own residents	Optional (opt out)
	12-13. Artificial avoidance of permanent establishment status	Optional (opt out)
	14. Splitting up of contracts	Optional (opt out)
	15. Definition of a person closely related to an enterprise	Optional (opt out)
	Action 14 (dispute resolution)	16. Mutual agreement procedure
	17. Corresponding adjustments	Minimum Standard
	18-26. Arbitration	Optional (opt in)

Source: Australian Taxation Office, Multilateral Instrument; Australian Treasury Department, Australia's adoption of the BEPS Convention (Multilateral Instrument).

After signing the MLI, a state develops an Instrument of Ratification, Acceptance or Approval in which it nominates which of its bilateral tax treaties are Covered Tax Agreements (CTAs) to be modified by the MLI. The state then declares which reservations and optional articles will apply in respect of those CTAs. Following development of the Instrument of Ratification, the signatory needs to ratify the MLI and implement the treaty in domestic law, and then deposit their Instrument with the OECD Depository.

The MLI enters into force for the signatory on the first day of the month following the expiration of three months from the date of depositing the Instrument of Ratification (Article 34). It applies with

respect to withholding taxes under a CTA from the first day of the next calendar year after deposition and to all other taxes six months after deposition (Article 35).

Minimum Standards in the MLI

While signatories to the MLI have wide flexibility, there are four minimum standards that are required for all members of the Inclusive Framework. The standards require action to counter harmful tax practices (Action 5), counter treaty abuse (Action 6), adopt country-by-country reporting (Action 13), and improve dispute resolution (Action 14). Optional Articles of the MLI include provisions relating to anti-hybrid arrangements (Action 2) and permanent establishment status (Action 7). These minimum standards are summarised in Table 1.

The minimum standards still provide some choice, but it is limited. For example, Article 6 of the MLI inserts a treaty preamble about treaty abuse and contains one choice for signatories to include, in addition, in the preamble a statement that each party desires to enhance their co-operation in tax matters. Article 7 of the MLI inserts the treaty abuse rule and provides a choice for signatories to adopt the Principal Purpose Test or a Limitation on Benefits provision.

Optional Provisions and Reservations

All articles in the MLI that are not minimum standards are optional for signatories. A signatory may notify which of these optional provisions apply to its CTAs. There are further choices about how to implement these provisions. For example, Article 5 is an optional provision which provides three alternative methods for eliminating double taxation: Option A provides for a tax deduction on income already taxed overseas, Option B provides that the exemption method does not apply to tax deductible dividends, and Option C provides for the credit method. The choice of option is specified by the signatory state in its Instrument of Ratification and it will then apply to all of that signatory's CTAs.

Countries can also make reservations to the MLI at the time of signing and depositing the Instrument of Ratification. Reservations allow the signatory to opt-out of non-minimum standard Articles with respect to a chosen CTA. The effect is that the MLI provision does not apply to the reserving party or counterparty of that CTA. Under Article 28(9), reservations can subsequently be withdrawn or made less restrictive through notifications to the OECD Depository. This rule means that a country can only reverse MLI-implemented changes by renegotiating each bilateral tax treaty with its respective counterparty.

A signatory can make later additional notifications by sending them to the OECD Depository under Article 29(6) of the MLI. The cumulative combination of a country's selection of CTAs, notification of options and how they apply to CTAs, and reservations constitutes that country's MLI position. The OECD provides a summary of a country's MLI position upon signing.

Matching Principle

The MLI operates on a matching principle. Not all tax treaties nominated as CTAs by a signatory will be modified by the MLI. Minimum standards only apply where both parties to a tax treaty designate it to be a CTA under the MLI, while option articles only modify a treaty if parties adopt that specific article (or clause) in their notification. This ensures that a signatory jurisdiction's consent is obtained and its sovereignty over tax matters is not infringed.

To facilitate the complex interpretation of the MLI positions layered over existing bilateral tax treaty provisions, the OECD hosts an up-to-date toolkit which includes a matching database. Additionally, the OECD issued guidance on creating synthesised texts to simplify the interpretation and application of tax treaties modified by the MLI. While the guidance anticipates that both MLI signatories and third-party publishers would produce synthesised texts, the law still derives from the MLI provisions read

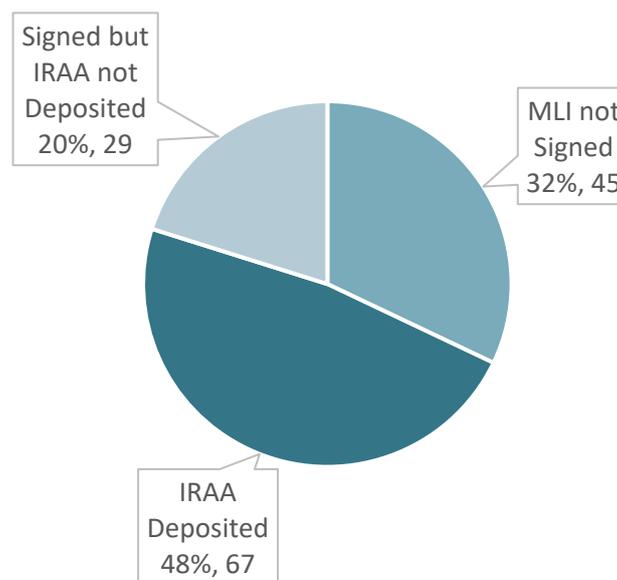
alongside CTAs. In other words, synthesised texts facilitate comprehension but are not a source of law. Indeed, the OECD recommends a disclaimer before synthesised texts to this effect.

3 How has the Action Been Implemented Globally?

On 7 June 2017, Australia joined 67 other countries as original signatories to the MLI. The MLI first entered into force for these jurisdictions on 1 July 2018 and came into effect from 1 January 2019. As of December 2021, 96 jurisdictions have signed the MLI (Figure 1), producing 1,723 matched CTAs. This represents about 70 per cent of the 141 member states in the Inclusive Framework on BEPS, including Algeria, Eswatini, Lebanon, and Thailand, who have expressed an intent to sign.

Of the 96 signatories to date, 29 have not deposited the Instrument of Ratification, which means that their signature does not yet have legal effect on the treaty network. If all the CTAs specified by current signatories were duly nominated by their counterparties, the MLI would cover 85% of tax agreements between Inclusive Framework members.

Figure 1: Adoption of the MLI by Inclusive Framework Member States



Source: OECD, Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting; OECD, Members of the OECD/G20 Inclusive Framework on BEPS. IRAA is Instrument of Ratification.

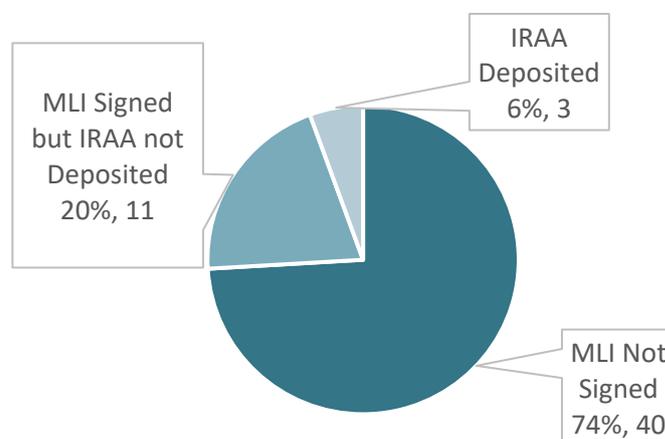
Significant jurisdictions that have not signed the MLI include the United States of America (**US**) and Brazil. The US considers that its treaties already contain robust anti-treaty shopping and anti-BEPS measures while Brazil provided no justification. China has signed the MLI but not yet deposited its Instrument of Ratification.

Developing countries and the MLI

The MLI has not been widely adopted by developing countries, although many are members of the Inclusive Framework on BEPS. For example, out of a total of 54 African countries, of which 27 are members of the Inclusive Framework, 26% have signed the MLI and only 6% have deposited their Instrument of Ratification (Figure 2). This is despite the fact that some MLI provisions should appeal

to developing countries, such as those which address treaty shopping (Articles 4, 6-11) and that enhance source-based taxation (Articles 12-15).

Figure 2: Adoption of the MLI by African Countries



Source: OECD, Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting; OECD, Members of the OECD/G20 Inclusive Framework on BEPS. IRAA is Instrument of Ratification.

4 How has Australia Implemented the Action?

Government response

At the time of signing the MLI in 2017, Australia listed all of its then-existing 43 bilateral tax treaties as CTAs. To date, 32 of Australia's CTAs have been modified by the MLI under the matching principle. Australia has signed two bilateral tax treaties, with Germany (2015) and Israel (2019) since adopting the MLI. These have not been added as CTAs because they conform to BEPS minimum standards and do not need to be modified by the MLI.

Australia deposited its Instrument of Ratification with the OECD Depository on 26 September 2018, and the MLI entered into force from 1 January 2019 in respect of withholding taxes and 1 July 2019 in respect of all other taxes (Article 35), subject to counter-party ratification and notifications. As of December 2021, Australia has ten pre-MLI tax treaties that are not covered by the MLI due to counterparty positions. These treaties are with Austria, Kiribati, Philippines, Sri Lanka, Sweden, Switzerland, Taiwan, Thailand, the United States, and Vietnam. From 1 January 2022, Australia's treaties with Chile, Hungary, and Malaysia will be modified by the MLI with effect for all taxes.

The Australian Taxation Office has published 19 synthesised texts that incorporate the MLI modifications with the relevant Articles of its CTAs. While Australia had indicated an intention not to do this during the consultation process before Australia signed the MLI, the publication of synthesised texts will assist in the application of the MLI.

Notifications by Australia

Overall, Australia has come close to full adoption of the MLI. This reflects Australia’s active involvement in negotiating the final terms of the MLI. The Treasury Consultation Paper on Australia’s MLI position indicated that Australia, consistent with its strong approach to tackling multinational tax avoidance, would adopt the MLI to the fullest extent possible and would make only limited use of the MLI’s reservation system. However, the public consultation tempered this initial position so that Australia ultimately did not adopt Articles 10 and 12 of the MLI in its Instrument of Ratification. The modification of Australia’s CTAs by optional MLI articles is presented in Figure 3, revealing that despite 33 tax treaties being modified by the MLI, there is diversity in adoption of the optional articles..

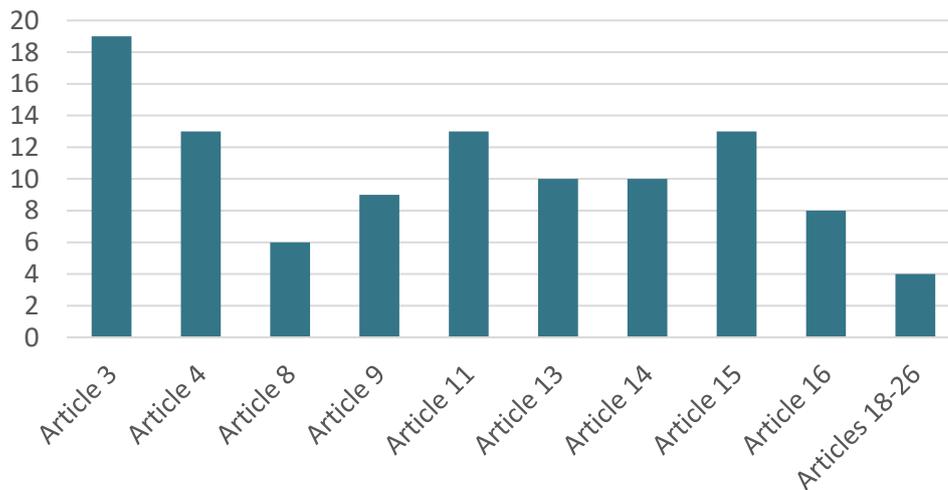
Australian tax treaties already apply the foreign tax credit method for eliminating double taxation, so Australia did not adopt Article 5 which provides alternative methods for eliminating double taxation. The other reservations by Australia to the MLI relate to permanent establishment status. As a net capital importer with a heavy reliance on resource extraction, Australia already adjusts the OECD model tax agreement to include a broader definition of ‘permanent establishment’ and impose a higher withholding tax rate on dividends, interest, and royalties for non-residents. These adjustments are geared toward taxing Multinational Enterprises (**MNEs**) which exploit domestic resources.

MLI Article 10 on abuse of permanent establishment status was not adopted by Australia because such a rule was not contained in any of Australia’s tax treaties at the time and Treasury stated that it intended to carry out further analysis of the likely impact on Australia. MLI Article 12, also concerning artificial avoidance of permanent establishment status, was not adopted by Australia in response to industry concerns that it had uncertain implications for Australian companies selling products abroad. Another reason was that Australia’s unilateral Multinational Anti-Avoidance Law (**MAAL**) in Part IVA of the *Income Tax Assessment Act 1936* already applied to MNEs in relation to the existence of a permanent establishment in Australia. However, language similar to Article 12 has been adopted by Australia in its bilateral tax treaties with Germany and Israel.

Legislative reform

For treaties to have legal effect in Australian domestic law, they must be enacted through legislation. Australia’s tax treaties have been incorporated into Australian domestic law by amendments to the *International Tax Agreements Act 1953*. Agreements listed in s 5(1) of the International Tax Agreements Act apply domestically once they have come into force. The MLI was added to the list of agreements on 24 August 2018 under the *Treasury Laws Amendment (OECD Multilateral Instrument) Act 2018*.

By virtue of section 4 of the International Tax Agreements Act, Australia’s tax treaties, including the MLI, take priority over other income tax law (in the *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997*). However, there is an exception for Australia’s General Anti-Avoidance Rule (GAAR) in Part IVA of the *Income Tax Assessment Act 1936*, including the MAAL. The GAAR therefore can apply to tax avoidance utilising tax treaties and prevails over treaty provisions. Australia has long taken a strong position in respect of tax avoidance, including treaty shopping.

Figure 3: Australia’s Covered Tax Agreements Modified by Optional MLI Articles (2020)

Source: OECD, *MLI Matching Database (beta)*.

5 Impact

The flexible approach of the MLI, allowing signatories to choose their level of adoption, was necessary to reach multilateral agreement. The primary impact of the MLI has been to implement the mandatory BEPS minimum standards, which apply to all modified CTAs. Yet take-up of the optional articles has been modest.

The MLI negotiating process and language has had a wider impact which can be seen in subsequently signed or renegotiated bilateral tax treaties. Most of the 465 bilateral tax treaties that have been concluded between states since the MLI came into effect (up to 2020) include the BEPS minimum standards. There has been less take up of optional articles. Of these 465 tax treaties, 58 included language on hybrid mismatches (Article 3), 91 addressed dual resident entities (Article 4), 50 included the proposed rule to tax capital gains in relation to immovable property (Article 9), 19 included the anti-abuse rules for permanent establishments in third jurisdictions (Article 10), 45 included rules against the artificial avoidance of permanent establishment status (Articles 12-13), and 83 included arbitration provisions (Articles 18-26).

The experience with the MLI indicates that an initial multilateral consensus establishing minimum standards can be effective at producing widespread and consistent tax treaty reform, but is much less effective at updating the treaty network for optional standards. The difficulty is reaching the initial consensus.

One question that remains unanswered is the impact of adopting the MLI in addressing BEPS, and specifically on increasing tax revenues in participating states. Prior to signing, the MLI was assessed as likely to be revenue positive for Australia. This assessment was necessarily contingent on whether the counterparty to each CTA adopted the same MLI position. As of 2021, the MLI’s final impact of Australian tax revenue is yet to be definitively answered.

6 What comes next?

The OECD considers the MLI to be a “[living instrument](#)”. Parties to the MLI can withdraw reservations (Article 28(9)), expand the number of CTAs (Article 29(5)), and opt for alternative optional provisions after depositing their Instrument of Ratification (Article 29(6)).

It is not clear whether the MLI amendments to bilateral tax treaties will be sustained in the long term. Parties to any CTA are not prevented by Article 30 of the MLI from negotiating amendments to CTAs that alter the effect of MLI modifications to that treaty. This opens the door for a degradation of BEPS standards in the bilateral treaty network. More generally, over time, the MLI may lose relevance as jurisdictions renegotiate their treaties bilaterally. However, once the MLI comes into force for the CTAs of a signatory, withdrawal from the MLI does not undo the retroactive modifications made to those agreements (Article 31). Additionally, peer reviews with respect to BEPS minimum standards promote ongoing compliance by Inclusive Framework members.

The MLI itself is able to be amended by states parties under Articles 31 and 33. This could be done to update it to take into account future developments in the BEPS Project. Under Article 40(4) of the [Vienna Convention on the Law of Treaties](#), any amendment to the MLI would not apply to jurisdictions that do not additionally become party to the amending agreement. Practically speaking, the difficulty of reaching multilateral agreement dissuades against piecemeal amendments to the MLI. Nevertheless, the possibility of applying future BEPS changes to the treaty network using the MLI may still be valuable, facilitating timely adaptation to future changes in the global economy. Amendments to the MLI may be more targeted in future thereby narrowing risks in awaiting consensus.

Another approach to support rapid modification of bilateral tax treaties is a most-favoured-nation provision. This approach, advocated by scholars including [Avi-Yonah and Xu](#), is widely adopted in trade and investment treaties. It is rarely used in international tax, although it has been adopted for some Articles in tax treaties, for example regarding non-discrimination. A most-favoured-nation approach would allow tax innovations to spread quickly through the network of bilateral tax agreements and create the effect of a multilateral tax convention without lengthy negotiations and threshold of consensus. However, such an approach is better suited to support concessional tax treatment, for example by putting downward pressure on withholding rates in tax treaties, and is less suitable for implementing higher taxation or anti-abuse rules. Under a traditional most-favoured-nation approach, lower rates or concessions would spread rapidly through the treaty network whilst tax rate increases would usually be disallowed.

The innovative approach of the MLI might be adopted to support implementation of aspects of the Two-Pillar Consensus on BEPS, in particular, the subject-to-tax rule that may be included in tax treaties as part of Pillar Two (Policy Brief 17/2021). Looking ahead, is the MLI an intermediate step towards a multilateral tax convention among all Inclusive Framework members or globally? It seems unlikely that a broad-based agreement will be reached among states in relation to the international tax system as a whole. However, the Inclusive Framework Pillar One is to be implemented with a multilateral convention (Policy Brief 16/2021) and building on this growing experience of multilateralism in international tax, such an approach is likely to continue in future.

References

Australian Government Treasury Department (2016) ‘Australia’s adoption of the BEPS Convention (Multilateral Instrument)’. Available here: https://treasury.gov.au/sites/default/files/2019-03/C2016-057_MLI_dcp.pdf, viewed 30 September 2021.

Australian Government Treasury Department (2017) ‘Australia’s adoption of the OECD Multilateral Instrument’. Available here: <https://treasury.gov.au/consultation/australias-adoption-of-the-oecd-multilateral-instrument>, viewed 2 October 2021.

Australian Government Treasury Department ‘Income Tax Treaties’. Available here: <https://treasury.gov.au/tax-treaties/income-tax-treaties>, viewed 30 September 2021.

Australian Taxation Office (2010) ‘TD 2010/20 - Income tax: treaty shopping - can Part IVA of the Income Tax Assessment Act 1936 apply to arrangements designed to alter the intended effect of Australia’s International Tax Agreements network?’. Available here: <https://www.ato.gov.au/law/view/pdf?DocID=TXD%2FTD201020%2FNAT%2FATO%2F00001&filename=law/view/pdf/pbr/td2010-020.pdf&PiT=99991231235958>, viewed 21 October 2021.

Australian Taxation Office (2021) ‘Multilateral Instrument’. Available here: <https://www.ato.gov.au/General/International-tax-agreements/In-detail/Multilateral-Instrument/>, viewed 14 October 2021.

Australian Taxation Office (2021) ‘Tax Avoidance Taskforce’. Available here: <https://www.ato.gov.au/general/Tax-avoidance-taskforce/#:~:text=Tax%20Avoidance%20Taskforce%201%20Results.%20As%20of%20June,backgrounds.%204%20Legislation.%20...%205%20Media%20releases.%20>, viewed 21 October 2021.

Avi-Yonah, R. S., Xu, H. (2018) ‘A Global Treaty Override? The New OECD Multilateral Tax Instrument and Its Limits’. Available here: <https://www.proquest.com/docview/2102830490>, viewed 30 September 2021.

Board of Taxation (2003) ‘International Taxation: A Report to the Treasurer’. Available here: https://taxboard.gov.au/sites/taxboard.gov.au/files/migrated/2015/07/international_taxation_arrangements_report_volume_1.pdf, viewed 14 October 2021.

Department of Foreign Affairs and Trade (2017) ‘National Interest Analysis: Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting’. Available here: <https://www.austlii.edu.au/au/other/dfat/nia/2017/20.html>, viewed 2 October 2021.

G20 (2009) ‘London Summit – Leaders’ Statement: 2 April 2009’. Available here: https://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf, viewed 19 August 2021.

G20 (2013) ‘Communique of Meeting of G20 Finance Ministers and Central Bank Governors: Moscow, February 16, 2013’. Available here: <http://www.g20.utoronto.ca/2013/2013-0216-finance.html>, viewed 19 August 2021.

International Fiscal Association (2020) ‘Cahiers de Droit Fiscal International Volume 105A: Reconstructing the Treaty Network’. Available here: <https://www.ifa.nl/media/6223/ifacahievoll-105ab-summary.pdf>, viewed 4 November 2021.

Lobo, K., Magat, C., Shervashidze, R. (2014) ‘Action 15: Developing a Multilateral Instrument to Modify Bilateral Tax Treaties’. Available here: http://publications.ruchelaw.com/news/2014-10/Vol.1No.9-9_BEPS_Action_15-Multilateral_Instrument.pdf, viewed 28 October 2021.

OECD (2010) ‘Model Tax Convention on Income and on Capital’. Available here: https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2010_9789264175181-en#page1, viewed 21 October 2021.

OECD (2013) ‘Action Plan on Base Erosion and Profit Shifting’. Available here: <https://www.oecd.org/ctp/BEPSActionPlan.pdf>, viewed 19 August 2021.

OECD (2014) ‘Developing a Multilateral Instrument to Modify Bilateral Tax Treaties’. Available here: https://read.oecd-ilibrary.org/taxation/developing-a-multilateral-instrument-to-modify-bilateral-tax-treaties_9789264219250-en#page1, viewed 14 October 2021.

OECD (2015) ‘Action 15: A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS’. Available here: <https://www.oecd.org/ctp/beps-action-15-mandate-for-development-of-multilateral-instrument.pdf>, viewed 30 September 2021.

OECD (2015) ‘BEPS 2015 Final Reports’. Available here: <https://www.oecd.org/ctp/beps-2015-final-reports.htm>, viewed 19 August 2021.

OECD (2016) ‘Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting’. Available here: <https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf>, viewed 30 September 2021.

OECD (2016) ‘Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS’. Available here: <https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm>, viewed 19 August 2021.

OECD (2017) ‘Australia: Status of List of Reservations and Notifications at the Time of Signature’. Available here: <https://www.oecd.org/tax/treaties/beps-mli-position-australia.pdf>, viewed 30 September 2021.

OECD (2017) ‘Model Tax Convention on Income and on Capital: Condensed Version 2017’. Available here: <https://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm>, viewed 19 August 2021.

OECD (2017) ‘OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017’. Available here: <https://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm>, viewed 19 August 2021.

OECD (2021) ‘Members of the OECD/G20 Inclusive Framework on BEPS’. Available here: <https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf>, viewed 5 November 2021.

OECD (2021) ‘Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting’. Available here: <https://www.oecd.org/tax/beps/beps-mli-signatories-and-parties.pdf>, viewed 21 October 2021.

OECD (2021) ‘Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy – 1 July 2021’. Available here: <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.htm>, viewed 19 August 2021.

OECD ‘Action 15 – OECD BEPS’. Available here: <https://www.oecd.org/tax/beps/beps-actions/action15/>, viewed 30 September 2021.

OECD ‘Global Relations’. Available here: <https://www.oecd.org/global-relations/globalforums/>, viewed 19 August 2021.

OECD ‘MLI Matching Database (beta)’. Available here: <https://www.oecd.org/tax/treaties/mli-matching-database.htm>, viewed 21 October 2021.

OECD ‘Multilateral Convention to Implement Tax Treaty related Measures to Prevent Base Erosion and Profit Shifting’. Available here: <https://www.oecd.org/tax/beps/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf>, viewed 30 September 2021.

OECD ‘Toolkit for the Adoption of the Multilateral Instrument for BEPS Tax Treaty Related Measures’. Available here: <https://www.oecd.org/tax/beps/application-toolkit-multilateral-instrument-for-beps-tax-treaty-measures.htm>, viewed 24 October 2021.

OECD/Inclusive Framework on BEPS (2020) ‘Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint’. Available here: <https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-one-blueprint-beba0634-en.htm>, viewed 19 August 2021.

OECD/Inclusive Framework on BEPS (2020) ‘Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint’. Available here: <https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-two-blueprint-abb4c3d1-en.htm>, viewed 19 August 2021.

OECD (2015) ‘Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 - 2015 Final Report’. Available here: <https://www.oecd-ilibrary.org/deliver/9789264241688-en.pdf?itemId=/content/publication/9789264241688-en&mimeType=pdf>, viewed 28 October 2021.



Australian
National
University



THE UNIVERSITY OF
MELBOURNE