Reconstructing treaty network
1st subject – Cancun

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MLI

Signature:
Paris, June 7, 2017

Consent:
Federal parliament: bill of April 7, 2019
Wallonia: bill of April 4, 2019
Flanders: bill of April 5, 2019
Brussels: bill of April 25, 2019
French community: bill of April 25, 2019
German community: bill of May 6, 2019

Ratification:
Paris: June 26, 2019
Background to the MLI

90 treaties in force
  95 countries covered (7 countries covered by the old treaties with USSR and Yugoslavia)
9 treaties signed (not yet in force)
  + 6 new countries

Ongoing negotiations with 13 countries (11 new treaties; 2 protocols)
  + 5 new countries
**Purposes of the treaties**

Belgian standard:
“DESIRING to conclude a Convention for the avoidance of double taxation with respect to taxes on income and on capital and for the prevention of fiscal evasion,”

Albania:
“DESIRING, for the purpose of further developing and facilitating their economic relationship, to conclude a Convention for the avoidance of double taxation with respect to taxes on income and on capital and for the prevention of fiscal evasion”

- Enhancement of economic exchanges
- Prevention of tax evasion or fraud (# avoidance)

**Based on OECD model convention**

Belgium remedies double taxation with the exemption method (art 23A) MC

# subject-to-tax rule (art 23A(1) MC)
# RDT/DBI (art 23A(2) MC)
# art 23A(4) MC
# recapture rule
# art 25(3), 2nd phrase, MC
# hybrid entities
Treaty interpretation

Bernard Peeters, Florence 1993

OECD’s “guiding principle” – 2003:
“the benefits of a convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favorable tax position and obtaining that more favorable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions”

Conflict between domestic anti-abuse rules and treaty rules
MAP Peer review, stage 1, 2017, p. 25

Domestic anti-treaty-shopping rules

Sham theory
Daniel Garabedian, Oslo 2002
Art 344(1) CIR 1992
Wim Panis, Seoul 2018
Anti-splitting-up of contracts
art 229(2/2) CIR 1992
Anti-channeling
art 289 CIR 1992
Beneficial ownership
ECJ February 26, 2019
Treaty-based anti-avoidance rules

Purpose test (cf art 7 MLI)
- general: Estonia, Isle of Man, Latvia, Lithuania, Macao, Moldova, Qatar, San Marino, Seychelles, Tajikistan, Taiwan, Japan
- artificial arrangements: Poland, Uruguay
- movable property: Azerbaijan, Bahrain, Botswana, Chile, China, Greece, Kazakhstan, Mexico, Nigeria, Oman, Ukraine, United Kingdom
- catch-all provision: Azerbaijan, United Kingdom
- remedy for double taxation: United Kingdom
- investment incentive schemes: Congo, Macedonia, Oman, Rwanda, Tunisia, Ukraine

Limitation-on-benefits (cf art 7 MLI)
- United States
- interest-royalties: Canada
- dividends, interest, royalties: Japan

Dual residents (cf art 4 MLI)
- Canada, Japan

Hybrid entities (cf art 3 MLI)
- Isle of Man, Moldova and the United States

Safeguard clause (cf art 11 MLI)
- Australia, Canada, United States + 21
Treaty-based anti-avoidance rules

Residence-State treaty benefit subject to tax in source state
  subject-to-tax rule (art 23A(1) MC)
  # art 23A(4) MC
  recapture rule

Anti-channeling
  art 289 CIR 1992
  base erosion rule (Switzerland, United States)

Reduced rate at source on dividends (*cf* art 8 MLI)
  minimum participation: direct or indirect – 10% to 25%
  minimum holding period: Bahrain, Chile, China, France, Hong Kong, Japan, Isle of Man, Luxembourg, Macao, Macedonia, Malaysia, Mexico, Moldova, Norway, Poland, Russia, Rwanda, San Marino, Switzerland, Tajikistan, United Kingdom, USA, Seychelles, Singapore

Source-State treaty benefit subject to tax in residence State
  Cyprus, Ireland, Japan, United Kingdom, Singapore, Venezuela; see also Switzerland
  catch-all provision: Netherlands, Rwanda, Uruguay

Third-country permanent establishment (*cf* art 10 MLI)
  Canada, USA
**Treaty-based anti-avoidance rules**

Real estate companies and similar entities *(cf art 9 MLI)*

- # premises in which the entity operates: Botswana, Canada, Congo, Hong Kong, Mexico, Moldova, Poland, Russia (new), Rwanda, Uruguay
- # publicly traded shares: Azerbaijan, Botswana, Canada, Congo, Hong Kong, Kazakhstan, Mexico, Moldova, Russia (new), Rwanda, Uruguay, Japan
- # group reorganization: Azerbaijan, Botswana, Congo, Hong Kong, Mexico, Moldova, Russia (new), Rwanda, Uruguay
- # small shareholdings: Botswana, Canada, Congo, Japan, Rwanda, see also Chile
**Treaty-based anti-avoidance rules**

Commissionaire and similar arrangements (*cf* art 12 MLI)
   
   Com. Conv. 5/501

Specific activity exemption (*cf* art 13 MLI)
   
   Doc 54 3510/001, p. 62

Splitting-up of contracts (*cf* art 14 MLI)
   
   *Cf* art 229(2/2) CIR 1992

**Reservation for domestic anti-avoidance rules**

Austria, Germany, Luxembourg
Dispute resolution

MAP

art 9(2) MC: # 43 treaties (15 of which with EU countries)
double taxation only
   Denmark, France, Germany, Ireland, Israel, Luxembourg, Malaysia, Portugal
interpretation issues
   # Australia, Austria, Bosnia, Brazil, Denmark, Finland, France, Ireland, Israel, Côte d’Ivoire, Korea, Kosovo, Luxembourg, Malaysia, Malta, Montenegro, Philippines, Portugal, Serbia, Thailand
cases not provided by the treaty
   Cl. Devillet - S. Knaepen, Madrid 2016
   Japan
   Com OCDE 25/55.1 (2017)

Dispute resolution

Binding arbitration (art 25(5) MC)
Belgian standard:

“Where,

a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of the Convention, and

b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the presentation of the case to the competent authority of the other Contracting State, any unresolved issues arising from the case shall be submitted to arbitration if the person so requests within two years from the first day from which arbitration may be requested.

These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either Contracting State. Unless a person directly affected by the case informs the competent authority of a Contracting State, within three months from the communication of the mutual agreement that implements the arbitration decision, that he does not accept the mutual agreement, the arbitration decision shall be binding and shall be implemented notwithstanding any time limits in the domestic laws of both Contracting States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.”

Botswana, Isle of Man, Japan, Malaysia, Mexico, Moldova, Norway, Poland, Russia, Switzerland, Tajikistan, United Kingdom, United States, Uruguay
Impact of the MLI on Belgium’s treaty network

Covered Tax Agreements

notified Covered Tax Agreements
=> 99 (covering 96 jurisdictions: Moldova – Russia – Tajikistan old and new DTA)

matched agreements
66 (covering 65 jurisdictions) (Russia old and new DTA)

one-way agreements
=> 2 (Netherlands, Oman)
Hybrid Mismatches (art 3 MLI)

art 3(1) MLI - attribution of income to hybrid entity
“For the purposes of a Covered Tax Agreement, income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting Jurisdiction shall be considered to be income of a resident of a Contracting Jurisdiction but only to the extent that the income is treated, for purposes of taxation by that Contracting Jurisdiction, as the income of a resident of that Contracting Jurisdiction.”

art 3(2) MLI - elimination of double taxation

art 3(3) MLI - limited “safeguard clause”
“In no case shall the provisions of this paragraph be construed to affect a Contracting Jurisdiction’s right to tax the residents of that Contracting Jurisdiction.”

added to paragraph 1 in the absence of a general safeguard clause (art 11 of MLI)

Hybrid Mismatches (art 3 MLI)

Possible reservations - art 3(5) MLI:
- no application of Article 3
- keep existing provisions
- no application of paragraph 2
- only replace existing provisions

BE position:
no reservation (in line with existing tax treaty policy)

Impact (as of July 27, 2017):
19 DTA impacted (out of 65)
Statistics

Art 3 MLI: transparent entities

Argentina, Armenia, Australia, Chile, Israel, New Zealand, Nigeria, Poland, Romania, Russia, Slovakia, South Africa, Spain, Turkey, Uruguay; article 3(1): Ireland, Luxembourg, Malaysia, United Kingdom

Dual Resident Entities (art 4 MLI)

OECD Model (2014)
place of effective management

MLI and OECD Model (2017)
CAs must endeavour to determine State of residence by mutual agreement
no agreement => no treaty benefits (except to the extent agreed upon by CAs)
**Dual Resident Entities (art 4 MLI)**

Possible reservations - art 4(3):
- no application of art 4
- no agreement => no treaty benefits

**BE position:**
general reservation

**Impact (as of July 27, 2017):**

art 4 will **not** apply – anti-abuse rule (dependant on agreement between MAP – CA discretionary powers <= Council of State)

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**Elimination of double taxation (art 5 MLI)**

**Option A**

- applies to provisions similar to art 23A(1) OECD Model
  - no exemption if the other CJ applies the CTA to exempt the relevant income or to limit the tax rate (**cf.** art 23A(4) OECD Model)
  - if no exemption: the tax levied by the other CJ must be credited
Elimination of double taxation (art 5 MLI)

Option B
- applies to provisions exempting income treated as dividends by the Jurisdiction of residence
- no exemption if deduction in the other CJ
- if no exemption: the tax levied by the other CJ must be credited

Elimination of double taxation (art 5 MLI)

Option C
- replace
  - exemption method (= art. 23A OECD Model)
  with
  - credit method (= art. 23B OECD Model)
Elimination of double taxation (art 5 MLI)

an option applies unilaterally

Possible reservations:
- no application of art 5 (for jurisdictions that do not choose an option)
- no application of Option C (for jurisdictions that do not choose option C) to some/all of its CTAs

BE position:
no option – no reservation (options chosen by partners will apply)

Object and Purpose of a CTA (art 6 MLI)

art 6 (1) and 6(3) - Preamble
art 6(3) [optional]: Desiring to further develop their economic relationship and to enhance their co-operation in tax matters,

Art 6(1) bold text [minimum standard]: Intending to conclude a Convention for the elimination of double taxation with respect to taxes on income and on capital without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of residents of third States),”

Impact (as of July 27, 2017):
art 6 (1): all 65 DTA
art 6 (3): 32 DTA
art 6 (1): preamble

art 6(3) MLI – economic relationships

Argentina, Australia, Chile, China, Croatia, Cyprus, Egypt, France, Greece, Hong Kong, Ireland, Luxembourg, Malta, Mauritius, Mexico, Nigeria, Pakistan, Romania, Russia, Senegal, Serbia, Seychelles, Singapore, Slovakia, Slovenia, South Africa, Spain, Tunisia, Turkey, United Arab Emirates, United Kingdom, Uruguay
Prevention of treaty abuse (art 7 MLI)

2 elements of minimum standard:
- PPT
- “simplified LOB”

no “detailed LOB”

Prevention of Treaty Abuse (art 7 MLI)

PPT – art 7(1) MLI
= new art 29(9) OECD Model (2017)
applies in the absence of PPT
replaces existing PPT (general or limited)

Possible reservations:
– for CJ intending to negotiate a detailed LOB
– with respect to CTAs that already contain a general PPT
– for a CJ that cannot apply the simplified LOB (art 7 (16))
**Prevention of Treaty Abuse (art 7 MLI)**

**Simplified LOB – art 7(8)-(13)**
- optional provision
- only applies if both CJ opt in
- a CJ not opting for the simplified LOB may agree to a bilateral/unilateral application of the LOB if the other CJ opts in
- a CJ opting for the simplified LOB may reserve on the PPT if the LOB does not apply (=> bilateral negotiations)

**BE position:**
- no reservation
- no option (except option art 7 (4) MLI)

=> PPT alone applies except if partner reserves because wants a detailed LOB/the simplified LOB

**Impact (as of July 27, 2017):**
- art 7 (1) (PPT only): all DTA (65)
- art 7 (4): 22 DTA
Statistics

art 7 (1) MLI – PPT

0 20 40 60 80 100 120
1 2 3

art 7(4) MLI – discretionary relief

0 20 40 60 80 100 120
1 2 3

Australia, Cote d’Ivoire, Cyprus, Czechia, Gabon, Hungary, Ireland, Isle of Man, Lithuania, Luxembourg, Malta, Mauritius, New Zealand, Pakistan, San Marino, Senegal, Seychelles, Singapore, Ukraine, United Arab Emirates, United Kingdom, Uruguay
Dividend Transfer Transactions (art 8 MLI)

art 8(1) MLI
applies to provisions that exempt or subject a reduced rate for companies to a minimum holding requirement
adds a minimum holding period (365 days)
applies in the absence of a minimum holding period
replaces existing minimum holding periods

Possible reservations
no application of Article 8
keep existing holding periods

BE position:
no reservation

Impact (as of July 27, 2019):
18 DTA
Statistics

Albania, Argentina, Armenia, Canada, China, Egypt, France, Indonesia, Kazakhstan, Mexico, Romania, Serbia, Slovakia, Slovenia, South Africa, Spain, Tunisia, Uruguay

Capital Gains Real estate entities (art 9 MLI)

art 9(1) MLI
applies to provisions similar to art 13(4) of the OECD Model
two effects:
  a) includes a period of reference of 365 days (or replaces an existing period of reference)
  b) makes the provision applicable to comparable interests, such as interests in a partnership or trust

BE position:
opts in

Impact (as of July 27, 2019):
13 DTA
Capital Gains Real estate entities (art 9 MLI)

art 9(4) MLI

optional provision (only if both CJ opt in)

allow Parties to include art 13(4) OECD Model in their CTAs

Statistics

Albania, Armenia, Australia, Chile, China, Estonia, India, Kazakhstan, Poland, Mexico, Spain, Ukraine, Uruguay
Safeguard Clause (art 11 MLI)

art 11(1) MLI – art 1(3) OECD Model

“This Convention shall not affect the taxation, by a Contracting State, of its residents except with respect to the benefits granted under paragraph 3 of Article 7, paragraph 2 of Article 9 and Articles 19, 20, 23 [A] or [B], 24, 25 and 28.”

BE Position:
no reservation

Impact (as of July 27, 2019):
18 DTA

Statistics

Art 11 MLI: safeguard clause

Argentina, Armenia, Australia, Chile, China, Gabon, India, Indonesia, Mexico, New Zealand, Poland, Portugal, Romania, Russia, Senegal, Slovakia, South Africa, United Kingdom
Avoidance of PE status

art 12 – commissionaire and similar strategies
art 13 – specific activity exemptions
art 14 – splitting-up of contracts
art 15 – definition of a person closely related to an enterprise

Avoidance of PE status: dependant and independent agent

art 12 (1) and (2) MLI:
new definitions in art 5(5) and 5(6) OECD Model
BE Position:
NO reservation
Impact (as of July 27, 2019):
29 DTA
Avoidance of PE status - specific activity exemptions

Art 13 MLI

2 elements:

- Specific activities deemed not to constitute a PE even if exercised through a fixed place of business (= art 5(4) OECD Model)
- Anti-fragmentation rule (= new art 5(4.1) OECD Model)
Avoidance of PE status - specific activity exemptions

Art 13 (1) MLI: Option A (art 5(4) new OECD Model)
=> all activities are subject to the “preparatory/auxiliary” requirement

Art 13 (1) MLI: Option B (art 5(4) old OECD Model)
(alternative in OECD commentary)

A PE is deemed not to include:
- the activities specifically exempted in the CTA ⇒ “automatic” exemptions (e.g. (a)-(e) of OECD Model)
- the maintenance of a fixed place of business solely for carrying on any other activity, provided that it is preparatory/auxiliary
- the maintenance of a fixed place of business solely for any combination of activities mentioned above, provided that the overall activity is preparatory/auxiliary

BE Position:
Option B

Impact (as of July 27, 2019):
6 DTA: France, Ireland, Lithuania, San Marino, Singapore
Avoidance of PE status

**art 13 (4) MLI** : specific activity exemptions

anti-fragmentation rule (= new art 5(4.1) OECD Model)

**BE Position**: NO reservation

**Impact (as of July 27, 2019)**: 36 DTA

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**Statistics**

![Statistics Chart](attachment:chart.png)

Argentina, Armenia, Australia, Chile, Cote d’Ivoire, Croatia, Egypt, France, Gabon, India, Indonesia, Ireland, Israel, Italy, Kazakhstan, Kuwait, Lithuania, Malaysia, Mexico, New Zealand, Nigeria, Portugal, Romania, Russia, San Marino, Senegal, Serbia, Slovakia, Slovenia, South Africa, Spain, Tunisia, Turkey, Ukraine, United Kingdom, Uruguay
Avoidance of PE status

**art 14 (1) MLI** – anti-splitting-up of contracts
- to different time thresholds (e.g. 6 months)
- to other types of activities/projects (e.g. the furnishing of consultancy services)
- in place of/in the absence of provisions addressing the splitting-up of contracts to avoid the application of a time threshold

**BE Position:**
reservation – application of PPT followed by domestic anti-contract splitting rule

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Mandatory Binding Arbitration (art 18-26 MLI)

**Optional:**
scope: art 28(2) MLI - free reservations possible – subject to acceptance

**BE position:**
BE opts in
no reservation – no objections
type (art 23 MLI ) : Default baseball (BE no reservation)
if other CJ opt for independent opinion; BE follows (in that case independent opinion is default method)
agreement of different resolution (art 24 MLI) : BE opts in
maintaining existing DTA provisions on mandatory arbitration (art 26 (4) MLI) : BE opts in
Mandatory Binding Arbitration (art 18-26 MLI)

Impact (besides MLI as of July 27, 2019):
- arbitration provisions maintained: 7 DTA (BOTS, MAN, MOL, POL, UK, US, UR)
- (renewed) arbitration provisions: 17 DTA (of which 12 EU MS)

Statistics

(4) reasoned opinion: Greece, Malta, Portugal, Slovenia, Sweden
(5) baseball: Australia, Austria, Canada, Finland, France, Ireland, Italy, Luxembourg, Mauritius, New Zealand, Singapore, Spain
Indirect impact of the MLI

Indirect Impact

BE MLI positions => BE Model DTA

bilateral negotiations – BEPS protocols
  • if members signatories MLI : Norway, Switzerland (Chinese Taipei)
  • Others

bilateral negotiations – others :
  • Andorra, Colombia, France, Germany, Netherlands, Kenya, Ethiopia, Lebanon, Kosovo, Kuwait, Montenegro, Ukraine.
Implementation of the MLI in Belgium

MLI Practical Implementation
BE Entry into force: 1/10/2019
application
• non-resident withholding taxes: as from 1/1/2020
• other: taxable periods starting as from 1/4/2020
MLI Practical Implementation

impact on bilateral treaties


• synthesized texts (<> coordinated texts) preferably agreed between competent authorities (not binding for tax administration/taxpayer) – publication on fisconetplus

Interpretation issues

• context of the MLI => approval of the Explanatory Statement (annexed to draft Bill) by the Parliament (Federal, Regional and Community Level)

• application/interpretation alongside the bilateral treaties (OECD Model Commentary 2017)