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Multilateral Convention to implement the Tax Treaty Related measures to prevent Base Erosion and Profit Shifting

March 2020

Note:

Although the MLI position for Mauritius came into force on 01 February 2020, the amendments to the treaties being modified by the MLI will take effect from 01 August 2020 onwards.

The date of entry into effect being the basis period following the expiration of six calendar months after the MLI enters into force for Mauritius and other Jurisdictions.

Introduction

Domestic tax base erosion and profit shifting has been identified as a problem affecting all countries in the world. It arises because multinational enterprises exploit unintended gaps and mismatches between different countries' tax systems to shift profits to locations where there is little or no overall corporate tax being paid. To tackle this problem, the G20 and the Organisation for Economic Cooperation and Development (OECD) developed 15 action points to address Base Erosion and Profit Shifting (BEPS) in a comprehensive manner, and set deadlines to implement those actions, many of which cannot be tackled without amending bilateral tax treaties.

Given the sheer number of treaties in effect across the Globe (over 3,500), implementing these changes on a bilateral basis would take years, if not decades. Recognising that the OECD/G20 BEPS package includes tax-treaty related measures to address certain hybrid mismatch arrangements, prevent treaty abuse, address artificial avoidance of permanent establishment status and improve dispute resolution, the need was felt to consider an innovative way to implement the measures resulting from this work. Action 15 of the BEPS Action Plan provides for the development of a Multilateral Instrument (MLI).

What is the MLI?

The MLI is an instrument that modifies all Covered Tax Agreements in a fast and effective manner to implement BEPS treaty related measures by including two of the four BEPS minimum standards - countering treaty abuse (Action 6) and improving dispute resolution mechanisms (Action 14) together with other measures to improve tax treaties. It does not function in the same way as an amending protocol to a single existing tax treaty. Instead, the MLI is applied alongside existing bilateral tax treaties, modifying their application in order to implement the tax treaty-related BEPS measures. It also enables countries to go through only one ratification procedure in their parliament in order to modify their whole treaty network rather than seek separate ratification of amendments for each bilateral tax treaty. The MLI which is a Convention allows for different forms of flexibility through a system of reservations and notifications of choices. The MLI provides flexibility for a jurisdiction to determine which of its DTAs it would like to amend using the MLI. The MLI will apply only to a DTA that has been specifically listed by all Contracting Jurisdictions to the DTA. Such agreements are referred to as "Covered Tax Agreements" ("CTAs") in the MLI. A party to a CTA is referred to as a "Contracting Jurisdiction".

Mandatory and Non-mandatory provisions

Where the provision relates to a minimum standard, opting out is allowed only in limited circumstances, such as where a Contracting Jurisdiction's CTAs already meet the minimum standard. Where the provision does not relate to a minimum standard, Contracting Jurisdictions are generally given the flexibility to opt out of part of that provision or the entire provision. Accordingly, where a Contracting Jurisdiction has opted out of a provision of the MLI, that provision will not apply to any of the Contracting Jurisdiction's CTAs. The MLI does not permit Contracting Jurisdictions to make treaty-by-treaty choices when they decide how they want the MLI to modify their existing tax treaties. Therefore, where a Contracting Jurisdiction makes a reservation under the MLI, the reservation shall apply to all the Contracting Jurisdiction's CTAs. With regard to the mandatory binding arbitration provisions in Part VI of the MLI, these provisions will apply only between Contracting Jurisdictions who have chosen to apply Part VI to their CTAs.

Structure of the MLI

Recognizing the complexity of designing a general instrument that applies to the CTAs and to the specific provisions included in bilateral tax treaties, the MLI provides flexibility for Contracting Jurisdictions to implement (parts of) the MLI based on their needs. Many of the provisions of the MLI overlap with provisions found in CTAs. Where the provisions of the MLI conflict with existing provisions covering the same subject matter, this conflict is addressed through one or more compatibility clauses which may, for example, describe the existing provisions which the MLI is intended to supersede, as well as the effect on CTAs that do not contain a provision of the same type. Contracting Jurisdictions have the right to reserve certain parts of the MLI (opt-out) and to have these specific articles not apply to their tax treaties.

The different types of provisions

The MLI contains four types of provisions. Depending on the type of provision, the interaction with CTAs varies. A provision can have one of the following formulations:

(i)"in place of"; (ii)"applies to"; (iii)"in the absence of"; and (iv)"in place of or in the absence of."

i. **"in place of"** - Where a provision of the Convention applies only "in place of" an existing provision, the provision is intended to replace an existing provision if one exists, and is not intended to apply if an existing provision does not exist. In such cases, the notification provision states that the provision of the Convention will apply only in cases where all Contracting Jurisdictions make a notification with respect to the existing provision of the Covered Tax Agreement as described in the Convention.

ii. **"applies to" or "modifies"** - Where a provision of the Convention "applies to" or "modifies" an existing provision, the provision of the Convention is intended to change the application of an existing provision without replacing it, and therefore can only apply if there is an existing provision. In such cases, the notification provision states that the provision of the Convention will apply only in cases where all Contracting Jurisdictions make a notification with respect to the existing provision of the Covered Tax Agreement.

iii. **"in the absence of"** - Where a provision of the Convention applies only "in the absence of" an existing provision, the provision of the Convention will apply only in cases where all Contracting Jurisdictions notify the absence of an existing provision of the Covered Tax Agreement.

iv. **"in place of or in the absence of"** - Where a provision of the Convention applies "in place of or in the absence of" an existing provision, the provision of the Convention will apply in all cases. If all Contracting Jurisdictions notify the existence of an existing provision, that provision will be replaced by the provision of the Convention (to the extent described in the relevant compatibility clause). Where the Contracting Jurisdictions do not notify the existence of a provision, the provision of the Convention will still apply. If there is in fact a relevant existing provision which has not been notified by all Contracting Jurisdictions, the provision of the Convention will prevail over that existing provision, superseding it to the extent that it is incompatible with the relevant provision of the Convention. If there is no existing provision, the provision of the Convention will, in effect, be added to the Covered Tax Agreement.

Position of Mauritius on the MLI

Mauritius signed the MLI on 5 July 2017 and deposited its instrument of ratification with the Secretary General of the OECD on 18 October 2019. The MLI entered into force for Mauritius on 1 February 2020 (i.e., the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit by Mauritius of its instrument of ratification). Under the Mauritian tax laws, the MLI was the subject matter of the Income Tax (BEPS) Regulations 2019 issued on 27 September 2019 (refer to Government Notice No 180 of 2019). However, the amendments generally take effect from the basis period following the expiration of six calendar months after the MLI enters into force for both Jurisdictions.

44 of our 46 Double Tax Avoidance Agreements ('DTAAs') have been listed as Covered Tax Agreements (CTAs) and Mauritius has opted for the minimum standards of the MLI relating to Treaty Abuse and Mutual Agreement Procedure. Although Arbitration is an optional article, Mauritius has signed up to Arbitration since it is investment friendly. Investors will get the assurance that if ever a mutual agreement procedure case cannot be resolved between two Competent Authorities, there will be no deadlock since the arbitration process kicks in.

Hereunder is a brief explanation of the position of Mauritius on each Part and each Article of the MLI.

Part I - Scope and Interpretation of Terms

Article 1 deals with the scope of the Convention while **Article 2** entitled "Interpretation of Terms" contains all the definitions which apply for the purpose of the Multilateral Convention.

Part II - Hybrid Mismatches

Article 3 – Transparent entities (optional article)

This provision addresses the situation of hybrid mismatches as a result of entities such as partnerships that one or both Contracting Jurisdictions treat as wholly or partly transparent for tax purposes. Under Article 3, income derived by or through a transparent entity shall be considered to be income of a resident of a Contracting Jurisdiction, to the extent that the income is treated as that of the resident for purposes of taxation by that Contracting Jurisdiction. Article 3 of the MLI applies "in place of or in the absence of" an existing provision. Article 3 is not a provision required to meet the minimum standard and therefore jurisdictions can opt out of this article entirely.

Mauritius has reserved the right for the entirety of this article not to apply to its CTAs.

Article 4 – Dual resident entities (optional article)

Article 4 modifies the rules for determining the treaty residency of a person other than an individual that is a resident of more than one Contracting Jurisdiction (dual resident entity). Under this provision, treaty residency of a dual resident entity shall be determined by a mutual agreement procedure (MAP) between Contracting Jurisdictions. Under the MAP in Article 4, 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 any relief or exemption from tax provided by the CTA except as may be agreed upon by the Contracting Jurisdictions. Article 4 of the MLI applies "in place of or in the absence of" an existing provision. Article 4 is not a provision required to meet the minimum standard and therefore jurisdictions can opt out of this article entirely.

Mauritius has reserved the right for the entirety of this article not to apply to its CTAs.

Article 5 – Application of methods for elimination of double taxation (optional article)

Article 5 includes three options for Contracting Jurisdictions for the methods of eliminating double taxation that will ensure that countries relieve double taxation by crediting foreign tax against domestic tax rather than by exempting foreign income. Article 5 of the MLI is not a provision required to meet the minimum standard and therefore jurisdictions can opt out of this option entirely.

Mauritius has reserved the right for the entirety of this article not to apply to its CTAs.

(Note: all Mauritius treaties apply the credit method in relieving double taxation for Mauritian residents.)

Part III. Treaty Abuse

Article 6 – Purpose of a CTA (mandatory article)

Article 6 contains the proposal described in the Action 6 final report to change the preamble language of a CTA to ensure compliance with one of the requirements of the minimum standard consisting of expressing the common intention to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements. Article 6 also includes optional wording that may be added to the preamble of a CTA referring to the desire to develop an economic relationship or to enhance cooperation in tax matters. Article 6 of the MLI applies "in place of or in the absence of" an existing provision. Article 6 is a provision required to meet a minimum standard and therefore jurisdictions cannot opt out of this article, unless they reserve the right for this article not to apply to its CTAs that already contain preamble language within the scope of the reservation. Mauritius has adopted Article 6, including the optional text indicating a desire to further develop its economic relationships with other Contracting Jurisdictions and enhance cooperation in tax matters.

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Article 7 – Prevention of Treaty Abuse (mandatory article)

This article contains the provisions to be included in a CTA to prevent treaty abuse. As concluded in the Action 6 final report, the prevention of treaty abuse should be addressed in one of the following ways: (i) a combined approach consisting of a Limitation on Benefits (LOB) provision and a principal purpose test (PPT); (ii) a PPT alone; or (iii) an LOB provision, supplemented by specific rules targeting conduit financing arrangements. With respect to the LOB provision, the Action 6 final report provided for the option of including a detailed or a simplified version. Given that a PPT is the only way that a Contracting Jurisdiction can satisfy the minimum standard on its own, it is presented as the default option in Article 7. Contracting Jurisdictions are allowed to supplement the PPT by electing to also apply a simplified LOB provision. Specifically, Article 7 articulates the PPT which denies treaty benefits when considering all relevant facts and circumstances, obtaining that benefit is one of the principal purposes for entering into a specific transaction or arrangement that resulted directly or indirectly in that benefit, unless if granting that benefit is not contrary to the object and purpose of the relevant provisions of the CTA. Mauritius has indicated that it will adopt the PPT alone in its CTAs. The asymmetrical application of the simplified LOB provision will not be allowed. With the exception of the tax treaty Mauritius has with Germany, Mauritius has also opted for Article 7(4) to apply to all its CTAs. Under Article 7(4), the benefits of a CTA may still apply subsequent to consultations between the Contracting Jurisdictions: the competent authority should be satisfied that the treaty benefit would be appropriate in the absence of the transaction or arrangement considering all the facts and circumstances.

Article 8 – Dividend transfer transactions (optional article)

Article 8 of the MLI specifies anti-abuse rules for benefits provided to dividend transfer transactions consisting of exempting or limiting the tax rate on dividends paid by a company resident of a Contracting Jurisdiction to a beneficial owner or recipient that is resident of the other Contracting Jurisdiction, provided certain ownership requirements which need to be met throughout a 365-day period that includes the day of payment of the dividend are met. The 365-day holding period will apply in place or in the absence of a minimum holding period contained in the provisions described above.

Article 8 of the MLI applies "in place of or in the absence of" an existing provision. Article 8 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely.

Mauritius has reserved its right for the entirety of this article to not apply to its CTAs.

Article 9 – Capital gains from alienation of shares or interests of entities deriving their value principally from immovable property (optional article)

Article 9 incorporates an anti-abuse rule with respect to capital gains realized from the sale of shares of entities deriving their value principally from immovable property. In this respect, Article 9(1) provides two conditions to be incorporated into a CTA. Such conditions would require meeting a relevant value threshold at any time during the 365 days preceding the sale and would require that the rule is expanded to apply to shares or comparable interests such as interests in a partnership or trust. The article provides that the 365-day period will replace or add such minimum period in CTAs, unless a Contracting Jurisdiction wishes to preserve the minimum period specified in its CTAs. In addition, Article 9(4) allows Contracting Jurisdictions to apply Article 13(4) of the OECD Model Tax Convention as included in the Action 6 final report that provides a 365-day holding period prior to the alienation of shares and requires that the shares or comparable interests derive more than 50% of their value directly or indirectly from immovable property. Article 9 of the MLI contains two substantial provisions (Article 9(1) and Article 9(4) which is an optional addition) and both apply "in place of or in the absence of" an existing provision. Article 9 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely.

Mauritius has reserved its right for the entirety of this article to not apply to its CTAs.

Article 10 – Anti-abuse rule for permanent establishments situated in third jurisdictions

Article 10 contains the anti-abuse rule for permanent establishments (PEs) situated in third jurisdictions, the so called "triangular provision." The article provides that treaty benefits will be denied where an entity that is a resident of one country derives 'passive' income from the other country through a permanent establishment located in a third country, and that income is both exempt in the entity's home country and subject to reduced taxation in the third country (i.e. less than 60% of the tax that would be imposed in the residence state if the PEs were located there).

The article makes an exception for cases where the income is derived in connection to or incidental to an active trade or business carried out through the PE and allows discretionary relief to be requested when treaty benefits are denied under this article. Article 10 of the MLI applies "in place of or in the absence of" an existing provision. Article 10 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely. Mauritius has reserved its right for the entirety of this article to not apply to its CTAs.

Article 11 – Application of tax agreements to restrict a party's right to tax its own residents (optional article)

Article 11 contains a so-called "saving clause" rule that preserves a Contracting Jurisdiction's right to tax its own residents. Article 11 of the MLI applies "in place of or in the absence of" an existing provision. Article 11 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely.

Mauritius has reserved its right for the entirety of this article to not apply to its CTAs.

Part IV. Avoidance of Permanent Establishment Status

Article 12 – Artificial avoidance of PE status through commissionaire arrangements and similar strategies (optional article)

This article sets out how the changes to the wording of Article 5 of the OECD Model Tax Convention to address the artificial avoidance of PE status through commissionaire arrangements and similar strategies can be incorporated in the CTAs specified by the Contracting Jurisdictions. In particular:

- In Article 12(1), the concept of Dependent Agent PE is broader so as to include situations where a person is acting in a Contracting Jurisdiction on behalf of an enterprise and, in doing so, habitually concludes contracts, or habitually exercises the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise.
- In Article 12(2), the concept of Independent Agent is restricted to exclude persons acting exclusively or almost exclusively on behalf of one or more enterprises to which it is “closely related”, e.g., certain situations of control, such as an enterprise that possesses directly or indirectly more than 50% of the interest in the agent.

Article 12 of the MLI applies “in place of” an existing provision. This article is intended to replace an existing provision if one exists and is not intended to apply if an existing provision does not exist. Article 12 of the MLI will apply only in cases where all Contracting Jurisdictions (i.e., Contracting Jurisdictions to a CTA under the MLI) make a notification with respect to the existing provision of the CTA. Article 12 has two notification clauses: one for the definition of dependent agent and another for the definition of independent agent. Further, Article 12 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely.

Mauritius has reserved its right for the entirety of this article to not apply to its CTAs.

Article 13 – Artificial avoidance of PE status through the specific activity exemptions (optional article)

This article addresses the artificial avoidance of PE status through the specific activity exemptions such as warehousing or purchasing goods included in Article 5(4) of the OECD Model Tax Convention. Only genuine preparatory or auxiliary activities will be excluded from the definition of permanent establishment. In addition, related entities will be prevented from fragmenting their activities in order to qualify for this exclusion. Given that provisions addressing artificial avoidance of permanent establishment status and fragmentation of activities are not required to meet the minimum standard jurisdictions can opt out of this article entirely.

Mauritius has reserved its right for the entirety of this article not to apply to its CTAs.

Article 14 – Splitting-up of Contracts

This provides a method for determining whether the period referred to in a CTA that stipulates a period of time after which specific projects or activities shall constitute a permanent establishment has been exceeded. As a provision addressing splitting-up of contracts is not required to meet the minimum standard, Mauritius has indicated that it will reserve the right for the entirety of Article 14 not to apply to its CTAs.

Article 15 – Definition of a Person Closely Related to an Enterprise

This describes the conditions under which a person will be considered to be "closely related" to an enterprise for the purpose of Articles 12, 13 and 14. Mauritius has indicated that it will reserve the right for the entirety of Article 15 not to apply to its CTAs to which reservations in Article 12, 13 and 14 have been made.

Article 16- Mutual Agreement Procedure (mandatory article)

The minimum standard for improving dispute resolution under Action 14 requires jurisdictions to allow a taxpayer to present a case to the competent authority of either Contracting Jurisdiction for mutual agreement assistance. The competent authority shall endeavor to resolve the case by mutual agreement with the other competent authority. This will provide taxpayers with a more effective tax treaty-based dispute resolution procedure.

Mauritius has adopted Article 16 without reservation.

Article 17 – Corresponding adjustments (best practice article)

The minimum standard under Action 14 requires jurisdictions to provide access to the MAP in transfer pricing cases and implement the resulting mutual agreements. In addition, it would be more efficient if jurisdictions also had the possibility to provide for corresponding adjustments unilaterally in cases where they find the taxpayer's objection to be justified.

Mauritius has adopted Article 17.

Note: Article 17 will apply in the absence of the provision in the tax treaties it has with Belgium, France, Malaysia, Oman, Tunisia and Zimbabwe and will apply in place of the existing provisions in the remaining CTAs, to the extent that the Contracting Jurisdictions have also adopted Article 17.

Articles 18-26 – Arbitration (optional article)

Mandatory binding arbitration, namely Part VI of the MLI (Articles 18 to 26), enables countries to include mandatory binding treaty arbitration (MBTA) in their CTAs in accordance with the special procedures provided by the MLI. Unlike the other articles of the MLI, Part VI applies only between jurisdictions that expressly choose to apply Part VI with respect to their tax treaties. Currently, 30 countries, including Mauritius, have committed to adopting and implementing MBTA in their CTAs. The MBTA provision will apply to all cases of taxation contrary to the relevant CTA, unless a country has made a reservation specifying a more limited scope. The MLI provides flexibility for jurisdictions to bilaterally agree on the mode of application of the MBTA, including the form of arbitration. However, the default rules defined in the MLI will apply if jurisdictions do not reach such an agreement before a case materializes that is eligible for arbitration. For those jurisdictions that choose to implement MBTA through the MLI, the MLI provisions would apply to all CTAs that do not have such a provision, or instead of existing provisions that provide for MBTA. Nevertheless, jurisdictions may reserve the right not to apply the MBTA provision of the MLI to some or all of its CTAs that already have a MBTA provision. Mauritius makes the following reservations:

- Any unresolved issue from a MAP case shall not be submitted to arbitration, if a decision has already been rendered by a court or administrative tribunal of either Contracting Jurisdiction, unless the case is within the scope of the MBTA.

- The arbitration process shall terminate, if a decision is rendered by a court or administrative tribunal of one of the Contracting Jurisdictions subsequent to the request for arbitration being made and before the arbitration panel has issued its decision.

Importantly, to the extent that Mauritius has chosen to apply Article 24(2) (where the competent authorities depart from the arbitration decision and are willing to agree on a different resolution within three calendar months after the decision has been delivered to them), Mauritius reserves the right to apply a type of arbitration process other than that contained in Article 23(1) (i.e., “baseball arbitration”) to such situations. Lastly, Mauritius has formulated the following reservations with respect to the scope of cases that are eligible for arbitration:

- Mauritius reserves the right to exclude from the scope of Part VI cases falling under the general anti avoidance law of Mauritius. Any changes to the existing general anti-abuse law will be notified to the Depositary.
- Mauritius also reserves the right to exclude from the scope of Part VI any cases of offences under the Mauritian tax laws: any changes to the existing provision will be notified to the Depositary

END NOTES

1. http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (List of MLI signatories)
2. http://www.oecd.org/tax/treaties/beps-mli-position-mauritius-instrument-deposit.pdf (Mauritius MLI position)
3. https://www.mra.mu/download/GNno180of2019IncomeTaxReg-BEPS.pdf (GN no 180 of 2019 Income Tax Regulations - BEPS)

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