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Why the MLI Will Have Limited Direct Impact on Base Erosion Profit Sharing

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I. INTRODUCTION

In June of 2017, representatives from roughly seventy tax jurisdictions from around the world signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (The "Multilateral Instrument" or "MLI.").[1] To date, a total of seventy-eight countries have signed the MLI.[2] The MLI is one of the more recent outgrowths of the OECD's Base Erosion and Profit Shifting ("BEPS")

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[1] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*, OECD, http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm (last visited Nov. 9, 2017).

[2] *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, OECD (last visited Jan. 24, 2018), http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf.

Project that was announced in 2012.[3] The general purpose of the BEPS Project was to reduce BEPS, which the OECD defines as "tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations."[4] In essence, the BEPS Project seeks to eliminate instances of what is often referred to as "double non-taxation": circumstances in which income is connected with two (or potentially more) jurisdictions, neither of which impose a tax on it.[5]

The MLI is intended to advance several of the "action steps" that the OECD has identified as necessary to address what the OECD identifies as the increasing problem of BEPS.[6] It does this by modifying existing bilateral tax treaties between tax jurisdictions. Where two jurisdictions that have signed a tax treaty have also signed the MLI both indicate that they desire the MLI to apply to that same treaty, that treaty becomes a "covered tax agreement." Covered tax agreements are then subject to at least some of the provisions of the MLI that intend to reduce BEPS based on which provisions the jurisdictions have each adopted.[7]

Therein lies one of the deficiencies of the MLI. The MLI does contain language that addresses some of the OECD's concerns about BEPS. In that way, it may very well signal an international desire to challenge BEPS in a more cooperative fashion than before.[8] However, the MLI ultimately does not require jurisdictions to commit to eliminating double non-taxation scenarios, nor does it provide a mandatory enforcement mechanism for ensuring double non-taxation is eliminated without producing double-taxation.[9] In fact, very little of the MLI is mandatory, and it is worth considering the reality that many of the signees have not adopted some of the most impactful provisions of the MLI. Thus, the MLI largely continues to rely on the voluntary actions of the nations involved in it to address and eliminate double non-taxation scenarios. As voluntary resolution of double

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3 *See* OECD, *Action Plan on Base Erosion and Profit Shifting*, OECD PUBLISHING (2013), https://www.oecd.org/ctp/BEPSActionPlan.pdf (hereinafter *Action Plan*).

4 *Base Erosion and Profit Shifting*, OECD, http://www.oecd.org/tax/beps/ (last visited Nov. 9, 2017).

5 *Action Plan*, *supra* note 3, at 10.

6 *Id.*

7 *Frequently Asked Questions on the Multilateral Instrument (MLI)*, OECD, http://www.oecd.org/tax/treaties/MLI-frequently-asked-questions.pdf (last visited Nov. 9, 2017).

8 *See* Itai Grinberg, *The New International Tax Diplomacy*, 104 GEO. L.J. 1137, 1176-1177 (2016).

9 *See* Org. for Econ. Co-Operation and Dev., *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, OECD (June 7 2017), http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf.; *see also OECD: Countries sign multilateral instrument, implementing BEPS in tax treaties*, KPMG (June 7, 2017), https://home.kpmg.com/xx/en/home/insights/2017/06/tnf-oecd-countries-sign-multilateral-instrument-implementing-beps-in-tax-treaties.html.

non-taxation scenarios may conflict with the policies of many developing tax jurisdictions as well as those that generate the highest tax revenue, the MLI is unlikely to significantly reduce BEPS by itself. Because it relies on voluntary cooperation between tax jurisdictions on addressing BEPS, the MLI will generally be ineffective at reducing BEPS.

The first part of this paper will examine the objectives of the BEPS Project and outputs of the BEPS Project intended to achieve those objectives, including the BEPS Action Plan of 2013. The second part will examine the MLI itself and what exactly the document requires of its signees. The third part of this paper will examine the limits of the MLI itself. Finally, the fourth part of this paper will examine some of the main reasons why countries are likely to resist taking decisive action against BEPS and discusses some possible actions that may be more effective at advancing BEPS Project objectives.

II. THE BEPS PROJECT

The MLI is one of the latest outputs of the OECD's BEPS Project. Simply put, the stated objective of the OECD's BEPS Project is to reduce BEPS. However, the OECD has generally avoided putting too fine of a point on what exactly BEPS is.[10] As described earlier, the OECD defines BEPS broadly as strategies for avoiding taxation that "exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax jurisdictions."[11] This broad definition is likely in part because the OECD intends BEPS to encapsulate a broad range of tax avoidance maneuvers, including, but not limited to, shifting income between jurisdictions using transfer pricing and shifting income between jurisdictions through the use of legal entities that serve little function beyond shifting the income.[12] The OECD identifies a main concern of the BEPS Project to be double non-taxation scenarios.[13]

The OECD provides an example of one particular form of BEPS to illustrate the behavior. Suppose a business is organized as a corporation in Country A. It may have a wholly-owned subsidiary in Country B. The corporation in Country A owns intellectual property that it wants to license to the corporation in Country B. However, both Country A and Country B

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[10] *See Base Erosion and Profit Shifting*, *supra* note 4; *see also Action Plan*, *supra* note 3, at 7-11.

[11] *Action Plan*, *supra* note 3, at 10.

[12] *See* Robert G. Rinninsland & Kenneth Lobo, *US-Based Pushback on BEPS*, 43 INTERTAX 96, 10-11 (2015); *see also* OECD, Addressing Base Erosion and Profit Shifting, OECD PUBLISHING (2013) at 10, http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/addressing-base-erosion-and-profit-shifting_9789264192744-en#.WfuOEDFe6Uk#page3.

[13] *See* OECD, Addressing Base Erosion and Profit Shifting, OECD PUBLISHING (2013) at 10, http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/addressing-base-erosion-and-profit-shifting_9789264192744-en#.WfuOEDFe6Uk#page3.

have relatively high marginal tax rates on the income that would be generated to the parent from licensing this intellectual property. Accordingly, the business incorporates a third entity in Country C, which has very low taxes on this type of income. This third entity then holds the IP, the income from which may largely be taxable in Country C instead of Country A and B, even though the parties have no other presence in Country C.

Although BEPS has existed for decades, the OECD's efforts to reduce it are relatively recent. The OECD cites the League of Nations as identifying problems with double-taxation scenarios in the international context in the 1920s.[14] Indeed, the OECD identifies President John F. Kennedy as observing the phenomenon of businesses minimizing their tax liability through "artificial arrangements" among related entities in 1961.[15] However, little was historically done to prevent BEPS.[16]

A number of more recent developments motivated the international community to take action to prevent BEPS. As businesses have continued to become more global in scope and reach, BEPS is believed to have become more prevalent.[17] Additionally, developments in computer and telecommunications technology in recent decades have made it easier for business enterprises to engage in activities that may affect the tax jurisdiction in which they report income without substantively changing where business activities take place.[18] Indeed, these technological developments have made it easier for many enterprises to do business within a tax jurisdiction without being subject to tax under traditional income tax rules, even without special tax planning.[19] Such technologies have also increased the degree to which income is dependent on intangible assets, and not on tangible fixed assets such as factories.[20] Additionally, the decline in government income tax revenues caused by the decline in income during the great recession motivated many tax jurisdictions to look for politically expedient methods of collecting additional tax revenue.[21] BEPS became a politically expedient target for increasing tax revenues, at least in part, as a result of the media's concentration on the issue.[22]

In 2012, the BEPS Project officially began when the G20 identified BEPS as an issue that it wanted to address.[23] The task of actually addressing

14 *Id.* at 9.

15 *What the BEPS are we Talking About?*, OECD, http://www.oecd.org/ctp/what-the-beps-are-we-talking-about.htm (last visited Nov. 9, 2017).

16 *Action Plan*, *supra* note 3, at 9.

17 *Id.*

18 *Id.* at 10.

19 *Id.*

20 *Id.*

21 Yariv Brauner, *What the BEPS*?, 16 FLA. TAX REV. 55, 58 (2014).

22 *Id.* at 55-57.

23 Grinberg, *supra* note 8, at 1142.

BEPS fell to the OECD, the de facto organization for governing international tax matters.[24] In 2013, the OECD published *Addressing Base Erosion and Profit Shifting*, a report describing the impact of BEPS, how BEPS occurs, and key areas that the OECD believed needed to be addressed in order to reduce BEPS.[25] After justifying its efforts to reduce BEPS, the report identified six "key pressure areas" that needed to be addressed in order to reduce the prevalence of BEPS: (1) jurisdictional differences in the treatment of entities and instruments, (2) the application of ideas from treaties to digital goods and services, (3) tax treatment of financial transactions between related parties, (4) transfer pricing, (5) treaty provisions intended to thwart efforts to use other treaty provisions to avoid tax (anti-avoidance measures), and (6) the presence of tax jurisdictions that tax income at a lower rate than other jurisdictions..[26][27]

Also in 2013, the OECD released the *Action Plan on Base Erosion and Profit Shifting*.[28] This report set out fifteen actions that the OECD assessed needed to be undertaken in order to address BEPS globally, and helped clarify what the OECD identifies as issues that the BEPS Project seeks to resolve.[29] The OECD believes that in order to reduce BEPS, these actions must be taken by "consensus."[30] The first action is to address various difficulties relating to imposing taxes in a digital economy.[31] These difficulties include those brought about by the ability of businesses to sell their products in a tax jurisdiction without having a presence in that jurisdiction that would subject it to taxation under traditional rules.[32]

Actions two through five generally strive to advance "international coherence of corporate income taxation."[33] These actions generally address concerns that tax laws of various jurisdictions are "mismatched" and provide opportunities for double non-taxation.[34] The actions specifically target "hybrid mismatch agreements" (arrangements whereby businesses can deduct the same expense in multiple tax jurisdictions, generate a deduction without an inclusion in income, and other similar maneuvers) by generating model treaty provisions that address these concerns as well as developing domestic tax law recommendations to preclude these types of tax positions.[35]

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24 *See id.*
25 *Addressing Base Erosion and Profit Shifting*, *supra* note 12.
26 *Id.* at 47-48.
27 *Id.*
28 *Action Plan*, *supra* note 3.
29 *Id.*
30 *Id.* at 10-11.
31 *Id.* at 14-15.
32 *Id.*
33 *Id.* at 15-18.
34 *Action Plan*, *supra* note 3, at 15-18.
35 *Id.*

Actions six through ten focus on changing both international and domestic tax laws so that income is generally taxed where "the economic activity that generates that income" occurs.[36] Specifically, these actions desire to create model treaty provisions and domestic law recommendations that prevent entities from obtaining benefits from tax treaties in "inappropriate circumstances,"[37] changing treaty definitions of permanent establishments (PEs) to make it more difficult to avoid PE status,[38] and developing rules that help ensure that transfer pricing aligns with "value creation."[39] These actions target what the OECD considers to be artificial shifting of income between tax jurisdictions.

Actions eleven through fourteen focus on making taxpayer information more available to taxing authorities.[40] These actions include setting up methodologies for gathering and analyzing data and information on BEPS, changing the types and generally increasing the amount of information taxpayers are required to disclose to taxing authorities, such as aggressive tax-planning maneuvers, and ensuring that disputes between taxing jurisdictions are conclusively resolved.[41] Finally, action fifteen endorses the development of a multilateral instrument to allow for the rapid implementation of the OECD's BEPS measures by incorporating them into existing tax treaties.[42] These standards focus on ensuring that tax jurisdictions are able to apply and enforce rules and recommendations to reduce BEPS.[43]

Based on these actions (particularly actions 10-14), the OECD released the *Transfer Pricing Documentation and Country-by-Country Reporting action 13 Final Report* in 2015.[44] This report emphasized that giving tax authorities access to detailed information on businesses' global operations would help them more accurately assess the validity of transfer pricing positions.[45] The next year, the OECD made country-by-country reporting a minimum standard requirement, effective for tax periods beginning on or after January 1, 2016.[46] Under the OECD requirements, businesses meeting certain size thresholds must provide the taxing authorities of countries in which they operate with certain information

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36 *Id.* at 18-21.

37 *Id.* at 19.

38 *Id.* at 19-20.

39 *Id.* at 20-21.

40 *Action Plan*, *supra* note 3, at 21-23.

41 *Id.*

42 *Id.* at 23-24.

43 *Id.* at 21-24.

44 *Country-By-Country Reporting: Some Frequently Asked Questions (FAQs)*, OFFICE OF REVENUE COMMISSIONERS (Dec. 15, 2017), https://www.revenue.ie/en/companies-and-charities/documents/country-by-country-reporting.pdf.

45 *Id.*

46 *Id.*

about the company (including the company's global revenues, profits, and taxes), broken down by tax jurisdiction.[47] This requirement will facilitate assessing the appropriateness and global consistency of tax positions taken by global businesses.

The BEPS Project is fundamentally motivated by the belief that existing tax laws provide too many opportunities for businesses operating internationally to avoid tax by moving profits between tax jurisdictions without substantively changing or moving their operations. The OECD believes that recent developments in computer and communications technology and the increasingly international scope of business mean that a larger amount of income goes either untaxed or taxed at relatively low rates.[48] To reduce BEPS in order to increase tax revenues, the OECD has laid out a number of actions that it intends to take. These essentially fall into two categories: developing recommendations for tax jurisdictions' domestic tax law, and developing model treaty provisions or parts of a multilateral instrument that will address BEPS concerns. The OECD sees these as the main methods it can use to address BEPS.

III. THE MULTILATERAL INSTRUMENT (THE "MLI")

In November of 2016, the OECD released the language of the MLI, with the intent that countries would begin signing it the following summer.[49] The MLI that the OECD ended up drafting seeks to address several of the actions it identified as being key steps to reduce BEPS.[50] Specifically, the MLI includes provisions that intend to advance Action Two ("Neutralise the Effects of Hybrid Mismatch Agreements"), Action Six ("Prevent Treaty Abuse"), Action Seven ("Prevent the Artificial Avoidance of PE Status"), Action Fourteen ("Make Dispute Resolution Mechanisms More Effective"), and of course, Action Fifteen ("Develop a Multilateral Instrument").[51]

The MLI works by modifying existing bilateral tax treaties, that is, treaties that are exclusively between two tax jurisdictions.[52] Tax

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47 Org. for Econ. Cooperation and Dev., Country-by-Country Reporting: Handbook on Effective Implementation, (Sep. 2017), http://www.oecd.org/ctp/beps/country-by-country-reporting-handbook-on-effective-implementation.pdf.

48 Joint Comm. on Taxation, *Background, Summary, and Implications of the OECD/G20 Base Erosion and Profit Shifting Project*, (Nov. 30, 2015).

49 *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*, *supra* note 1.

50 *See Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* 1-7, OECD, https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf (last visited Feb. 3, 2018).

51 *See* KPMG, *supra* note 9.

52 *See Frequently Asked Questions on the Multilateral Instrument (MLI)*, *supra* note 7, at 3.

jurisdictions that sign the MLI indicate that they desire the provisions of the MLI to apply to at least some of the tax treaties they have signed.[53] However, signing tax jurisdictions need not apply the provisions of the MLI to all of their tax treaties. Furthermore, the MLI only applies to tax treaties signed by two parties that have both indicated their desire to have the MLI cover that tax treaty.[54] In the MLI's language, treaties that both parties want covered are referred to as "covered tax agreements," or CTAs.[55] Of the over 3,000 bilateral tax treaties currently in force, roughly 1,100 would become CTAs if the signing tax jurisdictions ratify the MLI in accordance with their currently-filed lists of reservations and notifications at the time of their signing.[56]

Each of the substantive provisions of the MLI includes at least one clause implementing a measure to reduce BEPS.[57] This language is essentially equivalent to the language developed by the OECD for its Model Tax Convention,[58] which is undergoing significant alteration to reflect the BEPS Project.[59] These provisions are found in parts II through VI.[60] Generally speaking, Part II of the MLI seeks to limit the effects of certain types of "hybrid mismatch agreements" by limiting the degree to which entities can obtain tax relief from both contracting jurisdictions simultaneously.[61] Part III seeks to limit "treaty abuse" by restricting the circumstances in which taxpayers can receive certain treaty benefits.[62] Part IV includes provisions to limit the ability of PEs to avoid PE status through what the OECD sees as artificial behavior.[63] Part V features numerous provisions to facilitate the resolution of tax disputes under a CTA.[64] Finally, Part VI provides for binding arbitration when the contracting jurisdictions cannot reach an agreement on the CTA tax issues presented.[65]

More specifically, Part II of the MLI deals specifically with Action

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53 *See id.*

54 *See id.* at 4.

55 *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 2(1)(a).

56 *See* KPMG, *supra* note 9.

57 *See* Reuven S. Avi-Yonah & Haiyan Xu, *A Global Tax Override? The New OECD Multilateral Tax Instrument and Its Limits*, (Univ. of Mich. Pub. Law Research, Paper No. 542, Mar. 17, 2017), at Part 2.4.

58 See *id.*

59 OECD, DRAFT CONTENTS OF THE 2017 UPDATE TO THE OECD MODEL TAX CONVENTION 2 (Jul. 11, 2017).

60 *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9.

61 *Id.* at Art. 3 – Art. 5.

62 *Id.* at Art. 6 – Art. 11.

63 *Id.* at Art. 12 – Art. 15.

64 *Id.* at Art. 16 – Art. 17.

65 *Id.* at Art. 18 – Art. 26.

Two and thus seeks to neutralize the effect of hybrid mismatches.[66] Article 3 deals specifically with "transparent entities," [67] or entities whose income is taxed to the owner rather than the entity itself.[68] This provision requires signing jurisdictions to treat the income of transparent entities as income of a resident to the extent that the jurisdiction treats such a transaction as income.[69] This provision also prohibits the contracting jurisdictions from providing tax exemptions, credits, or deductions for taxes paid by their residents on income that the other jurisdiction may tax, if the only basis for the other jurisdiction's right to tax the income is that the taxpayer is a resident of the other jurisdiction.[70] In other words, Country A is not permitted to give tax relief to Resident 1 on income that Country B can tax if the sole reason Country B can tax that income is that Country B views that income as income of a resident of Country B. Under this provision, the mere fact that an entity is a resident of one contracting jurisdiction does not itself eliminate the other jurisdiction's ability to tax its income. Thus, where applied, this provision makes it more difficult for taxpayers to avoid taxes in one jurisdiction by using a transparent entity to conduct business in that jurisdiction.

Article 4 of the MLI addresses how contracting jurisdictions will resolve situations in which a non-individual taxpayer appears to be a citizen of both of the signing jurisdictions.[71] It provides that if the taxing jurisdictions both identify a taxpayer as a resident of their jurisdiction for tax purposes, "the competent authorities" of the two jurisdictions will "endeavor to determine by mutual agreement" which jurisdiction will be the taxpayer's tax residence.[72] This is to be determined based on the taxpayer's place of effective management, place of incorporation or organization, and "any other relevant factors."[73] In essence, Article 4 establishes a commitment of the signing jurisdictions to try to agree on which jurisdiction is the residence of a non-individual taxpayer.

Article 5 offers three potential options for signing tax jurisdictions to apply in order to eliminate double taxation.[74] Option A requires CTA provisions that (in order to prevent double taxation) exempt income or

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66 *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, supra* note 9, at Art. 3 – Art. 5.

67 *Id.* at Art. 3.

68 *See* Avi-Yonah & Xu, *supra* note 57, at 14.

69 *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, supra* note 9, at Art. 3(1).

70 *Id.* at Art. 3(2); Avi-Yonah & Xu, *supra* note 57, at 14.

71 *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, supra* note 9, at Art. 4(1).

72 *Id.*

73 *Id.*

74 *Id.* at Art. 5(1). Although Article 4 is labeled as providing options for eliminating double taxation, Options A and B appear to only target double non-taxation.

capital of a signing jurisdiction resident to not apply in cases where the other tax jurisdiction exempts the same income or capital (or tax it at a lower rate than it otherwise would) using the CTA provision.[75] However, the first jurisdiction must allow a deduction for taxes paid in the second jurisdiction under this scenario.[76] In other words, both tax jurisdictions cannot exempt from taxation or apply a reduced tax rate on the same tax base using the same CTA agreement.

Option B requires CTA provisions that exempt income of a resident from taxation as dividend income to not apply where that income creates a deduction in the other tax jurisdiction.[77] As in Option A, the first jurisdiction must still provide a deduction for taxes paid in the other jurisdiction.[78] Under Option C, where a resident of one of the signing jurisdictions derives income or owns capital which may be taxed in the other jurisdiction, the first jurisdiction must allow a deduction for those taxes paid to the other jurisdiction.[79] Furthermore, where a provision of the CTA exempts income or property of a resident from tax in its jurisdiction of residence, that jurisdiction may still consider that exempt income or capital in determining the tax on the taxpayer's remaining income or capital.[80] Each of these three options seeks to minimize the opportunities for taxpayers to avoid tax in two jurisdictions simultaneously.

Part III of the MLI focuses on Action Six of the BEPS Project and thus seeks to address a number of concerns regarding "Treaty Abuse."[81] Article 6 mandates a preamble to CTAs that expresses a desire to eliminate double taxation without creating opportunities for non-taxation or reduced taxation, and provides optional language expressing a desire to develop the economic relationship between the two signing jurisdictions.[82] Article 7 is the longest provision of the MLI, and it deals with numerous issues pertaining Action Six. First, it applies what is often referred to as the "principal purpose test" to CTAs.[83] This means that a taxpayer will not receive the benefits of a CTA in a particular instance if it is reasonable to conclude that one of the principal purposes of the arrangement or transaction that resulted in a benefit is to obtain the CTA benefit.[84] However, there are two exceptions to this. The first permits the taxpayer to receive the CTA benefit when doing

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75 *Id.* at Art. 5(2)-5(3).

76 *Id.*

77 *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 5(4)-5(5).

78 *Id.*

79 *Id.* at Art. 5(6)-5(7).

80 *Id.*

81 *Id.* at Art. 6 – Art. 11.

82 *Id.* at Art. 6(1)-6(3).

83 Avi-Yonah & Xu, *supra* note 57, at Part 2.7.2.

84 *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 7(1).

so comports with the purpose of the applicable provision of the CTA.[85] The other exception permits the taxpayer to receive the benefit when the taxpayer would have received the CTA benefit even if it had not engaged in the pertinent behavior in order to obtain the treaty benefit.[86]

Article 7 also provides what the MLI refers to as the "Simplified Limitation on Benefits Provision"[87] Under this rule, most of the benefits provided by the CTA are only available to residents of one of the signing jurisdictions that are "qualified person[s]."[88] The exceptions to this are: (1) CTA provisions that determine residency of taxpayers other than individuals who are residents of more than one contracting jurisdiction under the CTA rules; (2) CTA provisions allowing for tax adjustments in one contracting jurisdiction corresponding to tax adjustments made by the other contracting jurisdiction; and (3) CTA provisions that allow residents of the contracting jurisdictions to request that the competent authority of the contracting jurisdiction consider a tax case.[89] "Qualified person[s]" include individuals, government entities of either contracting jurisdiction, publicly traded entities, certain non-profit entities, government employee benefit related-entities, and entities owned at least 50% by "qualified person[s]" for at least half of the days of a twelve-month period including the time when the benefit would be accorded.[90]

Additionally, residents of the contracting jurisdictions can receive treaty benefits if they are "engaged in the active conduct of a business" in their jurisdiction of residence and they generate income in the other jurisdiction as a result of that business.[91] In such cases, they are entitled to CTA benefits for income that has arisen in the other jurisdiction from their business activity or that of a connected person in the other jurisdiction if that business activity is substantially related to, or complementary to, business conducted in the other jurisdiction.[92] Finally, a resident of a contracting jurisdiction can receive a CTA benefit if that resident is owned at least 75% by persons who are entitled to those tax benefits or more favorable ones for at least half of the days of a twelve-month period, including the time when the benefit would be accorded.[93] These provisions make it more difficult for non-residents to benefit from tax treaty provisions in jurisdictions in which they are not residents, potentially eliminating

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85 *Id.*

86 *Id.* at Art. 7(4).

87 *Id.* at Art. 7(6).

88 *Id.* at Art. 7(8).

89 *Id.*

90 *Id.* at Art. 7(9).

91 *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 7(10).

92 *Id.*; Avi-Yonah & Xu, *supra* note 57, at Part 2.7.2.

93 *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 7(11).

many tax-planning opportunities.

Article 8 of the MLI limits the degree to which internationally paid dividends that are exempt from tax are also deductible under a CTA.[94] Specifically, under Article 8, CTA provisions that reduce or eliminate tax on dividends from a company in one contracting jurisdiction to an owner in the other contracting jurisdiction only apply if the owner has had the requisite ownership interest for a 365-day period.[95] This theoretically reduces opportunities for businesses to receive treaty benefits on dividends received from stock held for only a short amount of time.

Article 9 of the MLI makes it more difficult to avoid capital gain taxation under CTAs by contributing real property to a business entity shortly before selling an interest in the entity.[96] Article 9 allows for the taxing of gains a resident of one contracting jurisdiction recognizes on the sale of an interest in an entity by the other contracting jurisdiction in certain circumstances.[97] These circumstances are met if, at any point during the 365 days preceding the sale, more than a certain portion of the property owned by the entity in which the interest is being sold derives from real property located in the jurisdiction of which the taxpayer is not a resident.[98] Article 9 also allows a contracting jurisdiction to tax the gains that an entity in the other contracting jurisdiction recognizes on the alienation of an interest in another entity, if those interests derived more than 50% of their value from real property in the first contracting jurisdiction at any time during the prior 365 days.[99] These provisions would make it difficult for entities selling interests in enterprises holding large amounts of real property to avoid taxation by contributing the real property shortly before selling the interest.

Article 10 addresses the OECD's concerns that taxpayers use PEs in third jurisdictions to avoid taxation in both of the parties to a bilateral tax treaty.[100] This provision envisions a scenario in which a business located in Jurisdiction A generates income in Jurisdiction B, but Jurisdiction A treats the income as attributable to a PE in Jurisdiction C, and thus does not tax the income.[101] In such cases, the MLI denies the benefits of an applicable CTA to any such item of income on which Jurisdiction C's tax is less than 60% of the tax Jurisdiction A would have imposed had the PE been in Jurisdiction A.[102] Furthermore, that income will be taxable to Jurisdiction B

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[94] Avi-Yonah & Xu, *supra* note 57, at Part 2.7.3.

[95] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 8(1).

[96] Avi-Yonah & Xu, *supra* note 57, at Part 2.7.4.

[97] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 8(1).

[98] *Id.*

[99] *Id.* at Art. 9(4).

[100] *Id.* at Art. 10.

[101] *Id.* at Art. 10(1).

[102] *Id.*

under its domestic law.[103]

There are two exceptions to this. The first is when the income attributed to the PE in Jurisdiction C is related to the active conduct of a business done by the PE.[104] The second is when the pertinent tax authority in Jurisdiction B in the above example (after consulting with Jurisdiction A's tax authority) determines that granting the benefits of the CTA is justified due to the reason the taxpayer failed to meet the test above.[105] This provision of the MLI theoretically limits the ability of businesses to use inactive PEs to shift income out of high tax jurisdictions into low or no-tax jurisdictions.

As the last article of Part III of the MLI, Article 11 limits the restrictions that CTAs place on contracting jurisdiction's ability to tax their own residents, thus preserving the ability of tax jurisdictions to tax their own residents.[106] It does this by stating that a CTA does not affect the ability of a contracting jurisdiction to tax its residents except in ten enumerated areas.[107] This article thus strives to provide fewer opportunities under tax treaties for entities to avoid paying taxes to their jurisdiction of residence.

Part IV of the MLI focuses on Action Seven of the BEPS Project and thus strives to make it more difficult for entities to artificially avoid PE status.[108] Article 12 of the MLI makes it more difficult for entities to avoid PE status. The article provides that a business will have a PE in a contracting jurisdiction where a person acts on behalf of the business and habitually concludes or principally negotiates contracts in the business's name for the transfer property rights owned by the business or that commit the business to providing services.[109] There is an exception to this rule where the business conducts these activities through a fixed place of business and the activities would be insufficient to make that fixed place of business a PE under the CTA.[110] There is also an exception where the person concluding or negotiating contracts does so as an independent agent under the terms of the treaty in the ordinary course of business.[111] Thus, this

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[103] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9; Avi-Yonah & Xu, *supra* note 57, at Part 2.7.5.

[104] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 10(2). There are some exceptions to this exception as well.

[105] *Id.* at Art. 10(3).

[106] Avi-Yonah & Xu, *supra* note 57, at 2.7.6.

[107] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 11(1).

[108] *Id.* at Art. 12 – Art. 15; *Action Plan*, *supra* note 3, at 19-20.

[109] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art 12(1).

[110] *Id.*

[111] *Id.* at Art. 12(2).

article, in spite of the exceptions, seeks to limit the ability of international business enterprises to have agents operating in foreign tax jurisdictions without creating a PE.

Article 13 of the MLI provides two options for contracting jurisdictions to limit the ability of business enterprises to avoid PE status determined by their activities.[112] Option A establishes that only certain enumerated activities, including those included in a CTA as well as the maintenance of a fixed place of business solely for any activity included in the CTA, are permitted without causing a PE.[113] A combination of exempt activities must be limited to those "of a preparatory or auxiliary character."[114] Option B includes much of the same language as Option A but provides a few additional restrictions on activity that does not constitute PE status.[115] Additionally, Option B provides that a fixed place of business will be accorded PE status where the business operating that fixed place or a related business carries on other business activities in the same tax jurisdiction as the fixed place of business that constitutes a PE, or makes the overall level of activity in the jurisdiction not of "a preparatory or auxiliary character."[116] Under this additional rule, PE status only applies where the business activities of the enterprise in the jurisdiction are "complementary functions that are part of a cohesive business operation."[117] This seeks to limit businesses' abilities to avoid PE status by conducting business activities discretely within a given tax jurisdiction.

Article 14 of the MLI limits the ability of international businesses to avoid PE status by temporally separating certain activities in a tax jurisdiction.[118] Article 14 envisions a scenario in which a business from Contracting Jurisdiction A conducts activities in connection with a building site or other location listed in the CTA or the MLI in Contracting Jurisdiction B.[119] In such cases,

- if the activities take place over more than an aggregate of thirty days, or
- if the activities are for a period of time exceeding thirty days if done by businesses "closely related to the first-mentioned" business,[120]

[112] *Id.* at Art. 13.

[113] *Id.* at Art. 13(2).

[114] *Id.*

[115] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 13(3).

[116] *Id.*

[117] *Id.* at Art. 13(4).

[118] Avi-Yonah & Xu, *supra* note 57, at Part 2.8.3.

[119] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 14(1).

[120] *Id.* at Art. 15. Article 15 of the MLI defines a "Person Closely Related to an Enterprise" to be a person that controls or is controlled by the other person, or a person that

these activities will be added to the aggregate period of time that the "first mentioned" business carried activities at that location.[121] In essence, this provision of the MLI forces businesses to include short periods of time, or somewhat longer periods of time in the case of related businesses, in their aggregate amount of time working at a location in another tax jurisdiction. This makes it harder for businesses to avoid PE status by doing work in other countries through separate entities or by engaging in activities in other countries for short, discrete periods at a time.[122]

Part V of the MLI focuses on Action Fourteen of the BEPS Project: more effective dispute resolution mechanisms.[123] The first article of this part, Article 16, establishes some of the procedures for determining how the contracting jurisdictions resolve tax disputes that arise under the MLI.[124] Under this article, referred to as the Mutual Agreement Procedure (MAP), a person who "considers" the actions of at least one of the contracting jurisdictions to tax that person in violation of the CTA may present its case to either jurisdiction's tax authority.[125] This must be done within three years of the "first notification" of the action that results in the taxation in violation of the CTA.[126]

When a person brings such a case and the authority to which the person brought its case cannot resolve the issue, the tax authorities of the contracting jurisdictions are to seek mutual agreement in accordance with the CTA in resolving the issue.[127] The tax authorities of the jurisdictions are also to endeavor to resolve difficulties or doubts in the interpretation or application of the CTA.[128] This provision thus provides for the ability of persons to present grievances under the CTA and expresses the intent for the tax jurisdictions to resolve issues under the CTA in agreement with each other.

Article 17 strives to address situations in which both contracting jurisdictions attempt to tax the same income from two different enterprises.[129] This article envisions a scenario in which Jurisdiction A

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is under the control of the same persons or enterprises as the other, closely related person. Whether this part of the definition is met is based on a facts and circumstances test. Additionally, a person is closely related to another person where one of the persons directly or indirectly "possesses" more than 50% of the "beneficial interest" (both vote and value) in the other, or if another person possesses more than 50% of the beneficial interest of both persons.

[121] *Id.* at Art. 14(1).

[122] Avi-Yonah & Xu, *supra* note 57, at 2.8.3.

[123] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, supra* note 9, at Art. 16 – Art. 17.

[124] *Id.* at Art. 16.

[125] *Id.* at Art. 16(1).

[126] *Id.*

[127] *Id.* at Art. 16(2).

[128] *Id.* at Art. 16(3).

[129] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base*

includes in the (taxable) profits of a domestic enterprise, amounts that Jurisdiction B has attributed as (taxable) profits to an enterprise located in Jurisdiction B.[130] In such cases, if the profits would have been attributable to the enterprise in Jurisdiction A had the "conditions" between the enterprises been those of independent enterprises, Jurisdiction B must adjust its tax on those profits.[131] Such an adjustment should be made in accordance with the CTA, and the tax authorities of the jurisdictions are to consult with each other "if necessary."[132] This provision of the MLI thus provides procedures for tax jurisdictions to unilaterally address certain issues brought by taxpayers.[133]

Part VI of the MLI also seeks to advance Action Fourteen of the BEPS Project.[134] It does this by providing for binding arbitration of certain tax controversies brought within one of the contracting jurisdictions.[135] Article 19 of the MLI provides for arbitration when a party brings an action on a tax controversy under Article 16 of the MLI (the MAP), thus claiming that one or both of the jurisdictions is taxing it in violation of the applicable CTA.[136] Specifically, where the tax authorities of the two contracting jurisdictions are unable to resolve the controversy within two years of one of several specified dates, any unresolved issues from the case are submitted to binding arbitration, if the party bringing the suit so desires.[137] The arbitration is then implemented by mutual agreement.[138]

There are several situations in which the arbitration is not binding on the tax jurisdictions.[139] The first situation is when "a person directly affected by the case" does not withdraw issues resolved via the arbitration from consideration within sixty days of the notification of mutual agreement following the arbitration process.[140] The second situation is when a court within the territory of one of the contracting jurisdictions holds that the arbitration decision is invalid.[141] A third situation is when "a person directly affected by the case" litigates on the issues that had already been resolved by the mutual agreement procedure which implemented the

Erosion and Profit Shifting, *supra* note 9, at Art. 17.

130 Avi-Yonah & Xu, *supra* note 57, at 2.9.2.

131 *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 17(1).

132 *Id.*

133 Avi-Yonah & Xu, *supra* note 57, at 2.9.2.

134 *See Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 18 – Art. 26.

135 *Id.* at Art. 19.

136 *Id.*

137 *Id.* at Art. 19(1).

138 Avi-Yonah & Xu, *supra* note 57, at 2.10.2.

139 *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 19(4).

140 *Id.*

141 *Id.*

arbitration decision..[142] Under Article 22, should the tax authorities of the contracting jurisdictions reach an agreement to resolve the issues or the person who brought the case withdraws it prior to the delivery of the arbitration decision, the arbitration proceedings are terminated.[143] Finally, under Article 24, if the contracting jurisdictions reach a different agreement on all the issues within three calendar months of the delivery of the arbitration decision, the arbitration decision is not binding.[144] The remaining provisions of Part VI of the MLI establish procedures for selecting arbitrators, ensuring confidentiality through the arbitration process, determining the type of arbitration process, handling arbitration costs, and other procedural matters regarding arbitration of tax issues.[145] Part VI of the MLI thus generally, but not universally, subjects tax jurisdictions to binding arbitration on many issues under CTAs.

Therefore, the MLI includes provisions that aim to address many of the BEPS Project's concerns. Under Action Fifteen, the MLI includes provisions that seek to limit the effects of certain types of "hybrid mismatch agreements" by limiting the degree to which entities can obtain tax relief from both contracting jurisdictions simultaneously.[146] It also includes numerous provisions to prevent "treaty abuse" by limiting the circumstances in which taxpayers can receive various treaty benefits, such as deductions related to dividends.[147] The MLI also includes a variety of mechanisms to make it more difficult to avoid PE status through what the OECD considers to be artificial maneuvers.[148] Finally, the MLI includes numerous provisions to facilitate the resolution of tax disputes under a CTA. Such provisions include the assurance that injured taxpayers will have a venue in which to seek relief,[149] the assurance that the contracting jurisdictions will attempt to reach an agreement between each other on tax issues arising under the CTAs,[150] and the assurance that binding arbitration is an option when the contracting jurisdictions cannot reach an agreement on CTA tax issues presented.[151] Thus, the MLI provisions do attempt to address some of the BEPS Project's concerns.

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[142] *Id.*

[143] *Id.* at Art. 22.

[144] *Id.* at Art. 24.

[145] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 18 – Art. 26.

[146] *Id.* at Art. 3 – Art. 5.

[147] *Id.* at Art. 6 – Art. 11.

[148] *Id.* at Art. 12 – Art. 15.

[149] *Id.* at Art. 16.

[150] *Id.* at Art. 17.

[151] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 18 – Art. 26.

IV. THE WEAKNESSES OF THE MLI PROVISIONS

Despite the efforts to resolve many of the BEPS Project's concerns, the MLI itself ultimately does not provide final solutions to the BEPS Actions and will ultimately be largely ineffective at reducing BEPS. As the MLI itself indicates, it is "flexible."[152] While in some cases this means that the MLI provides multiple options for signing jurisdictions, in many cases, this provides tax jurisdictions with the opportunity to reject entire provisions of the MLI. The impact of a tax jurisdiction's rejection of an MLI provision is magnified by the fact that where one of the parties to a CTA has made reservations against a provision of the MLI, the provision will not apply to that CTA.[153] Although there are some mandatory provisions within the MLI, they are relatively few in number.[154] Accordingly, signing the MLI does not, in and of itself, mean that tax jurisdictions are committing to abide by all, or even most, of the MLI's provisions.

Indeed, many of the MLI's strictest and otherwise most impactful provisions are either optional or can be opted out of by signing jurisdictions. The entirety of Part II of the MLI, addressing what the OECD calls "hybrid mismatches," is optional for signing parties.[155] Accordingly, the mere signing of the MLI does not necessarily bind a tax jurisdiction to classify transparent entity income as that of a resident, take measures to prevent double non-taxation, or to do anything to address Action Two of the BEPS Project.[156] Indeed, of the seventy-eight tax jurisdictions that have signed the MLI as of the date of this writing, fifty-nine have indicated that they do not intend to apply Article 3 in its entirety, fifty-six have indicated that they do not intend to apply Article 4 in its entirety, and forty-three have indicated that they do not intend to apply one of the options in Article 5 to their CTAs.[157]

The MLI provisions dealing with the prevention of treaty abuse require only slightly more action from signing jurisdictions. Specifically, all but Article 6, Article 7, and Article 9 within Part III of the MLI are

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[152] *Frequently Asked Questions on the Multilateral Instrument (MLI)*, *supra* note 7, at 4.

[153] Jack Bernstein, *It Takes Two to Tango*, 88 TAX NOTES INT'L 1073, (2017).

[154] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 19(4).

[155] *Id.* at Art. 3 – Art. 5.

[156] *See id.*

[157] *See* ORG. FOR ECON. CO-OPERATION AND DEV., *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 2. For the purposes of these numbers, tax jurisdictions that do not intend to apply a particular MLI provision because they believe comparable substance is already reflected in their treaties are considered to intend to apply the MLI provision. The accuracy of this assumption obviously depends on the accuracy of the language of individual tax treaties.

completely optional.[158] Thus, the measures limiting the tax exemption of international dividends,[159] the provisions limiting the ability of entities to avoid tax by conducting business through entities in third jurisdictions,[160] and the provisions limiting the exceptions to a tax jurisdiction's ability to tax its own residents are entirely optional.[161]

Even under the articles that carry mandatory requirements, the requirements are relatively minimal. Under Article 6, signing jurisdictions must only commit to including in their CTAs a preamble indicating their desire to eliminate double-taxation and double non-taxation.[162] Article 7 only mandates the application of the principal purpose test. Article 7 leaves the Simplified Limitation on Benefits Provision , which makes it more difficult for businesses to receive treaty benefits, optional.[163] Article 9 also permits signing jurisdictions to refrain from applying paragraph (1), which provides for the taxing of gain on the alienation of interests an entity holds in another entity that derive a certain amount of their value from real property in another contracting jurisdiction.[164] As of the date of this writing, forty-three of the signing jurisdictions have indicated that they do not intend to fully apply Article 8; at least forty-six have indicated that they do not intend to fully apply Article 9; fifty-seven have indicated that they do not intend to fully apply Article 10; and fifty-five have indicated that they do not intend to fully apply the provisions of Article 11 to their CTAs.[165]

In addition, the entirety of Part IV of the MLI is optional for signing jurisdictions.[166] These articles, which target the ability of businesses to avoid PE status through "artificial" tax maneuvers, are thus not inherently binding on signing jurisdictions.[167] At the time of this writing, forty-three signing jurisdictions have expressed their intent not to apply the provisions of Article 12; thirty have expressed their intent to not apply the provisions of Article 13; fifty-seven have expressed their intent to not fully apply Article 14; and thirty-four have expressed their intent to not fully apply the Article 15 definitions to their CTAs.[168]

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[158] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 6, Art. 7, and Art. 9.

[159] *Id.* at Art. 8.

[160] *Id.* at Art. 10.

[161] *Id.* at Art. 11.

[162] *Id.* at Art. 6.

[163] *Id.* at Art. 7.

[164] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 9.

[165] *See Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 2.

[166] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 12 – Art. 15.

[167] *Id.*

[168] *See Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 2.

Additionally, many of the efforts to improve dispute resolution measures are optional. The entire provision for binding arbitration is optional,[169] and only twenty-eight signing jurisdictions have indicated their intent to apply it to their CTAs.[170] In general, the provisions of Part V of the MLI are required by signers of the MLI unless the CTA is covered by otherwise comparable dispute resolution measures.[171]

Finally, the MLI provisions do not even seek to address many of the OECD's primary concerns about BEPS. As the BEPS Project actions indicate, many of the primary opportunities for BEPS are really the result of domestic laws rather than provisions in treaties.[172] Domestic law must address issues such as characterizing income to reflect what the OECD sees as economic reality, adjusting taxation of controlled foreign corporations (Action 3), and changing domestic law on transfer pricing (Action 13).[173] Although this issue is not unique to the particular text of the MLI, the need for domestic laws to change in order to comprehensively reduce BEPS severely limits the effectiveness of the MLI at reducing BEPS. Thus, there are relatively few binding obligations that signing the MLI inherently entails. Binding provisions include the requirement to express a desire to avoid double-taxation without providing opportunities for double non-taxation, adopt the principal purpose test, and commit to trying to reach an agreement with the other contracting tax jurisdiction on certain tax disputes arising under a CTA.[174] However, the enforcement of these commitments is largely left to the individual tax jurisdictions.[175] The mere fact that a tax jurisdiction ratifies the MLI does not inherently mean that it has committed to taking significant substantive measures to reduce BEPS.[176] Indeed, most of the optional articles of the MLI are not expected to be fully applied by

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[169] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 18.

[170] *See Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 2.

[171] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 16 – Art. 17.

[172] *Action Plan*, *supra* note 3; *see* Michael V. Sala, *Breaking Down BEPS: Strategies, Reforms, and Planning Responses*, 47 CONN. L. REV. 573, 604 (2014).

[173] *Action Plan*, *supra* note 3.

[174] *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 6, Art. 7, and Art. 16.

[175] *See id.*

[176] As of this writing, only four signing jurisdictions have ratified the MLI: Austria, the Isle of Man, Jersey, and Poland. However, three of these have expressed the intent to not fully apply most of the optional provisions of the MLI. The other seventy-four signing jurisdictions have merely expressed which provisions of the MLI they hope to ratify through their domestic ratification process. It is thus entirely possible that if/when tax jurisdictions ratify the MLI, they will reject more of the optional provisions than their representatives originally hoped to ratify. *See Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 2.

the majority of signing jurisdictions.

V. WHY TAX JURISDICTIONS ARE UNLIKELY TO ABIDE BY THE MLI'S PROVISIONS

As indicated above, even the tax jurisdictions that signed the MLI have generally not committed themselves to taking many substantive steps in order to reduce BEPS. Nevertheless, that does not mean that the MLI will not be effective in reducing BEPS. It is theoretically conceivable that tax jurisdictions would willingly implement policies recommended by the BEPS Project under the BEPS Actions, particularly those reflected in the MLI. However, the goals of the MLI and BEPS Project more generally often conflict with many of the policy interests that non-signing and signing jurisdictions may have. Accordingly, with its mostly optional and largely unenforceable provisions, the MLI is unlikely to be effective in reducing BEPS.

In the first place, going beyond the bare linguistic requirements of the MLI to reduce BEPS in the treaty context requires tax jurisdictions to surrender a degree of their control over their taxing authority. Although Parts V and VI of the MLI provide means for tax jurisdictions to avoid submitting to or even reaching agreements on tax treaty provisions, the idea of these provisions is that tax jurisdictions will resolve international tax issues either by mutual agreement or arbitration.[177] Such activity by a tax jurisdiction requires a tax jurisdiction to potentially change its taxing activities on the basis of another tax jurisdiction or the arbitrators, thus surrendering a measure of control over its own taxes. As taxes are the primary means by which the taxing entities raise revenue, tax jurisdictions tend to strongly avoid giving up control of them.[178]

Furthermore, as the power to tax is not only the power to destroy, but also the power to regulate and incentivize private actors, tax jurisdictions have a strong incentive to retain as much control over their tax schemes as possible.[179] Indeed, fear of losing this autonomy is thought to be a reason why some tax jurisdictions have refused to sign the MLI at all.[180] In order to preserve control over their own ability to raise revenue, even signing jurisdictions are unlikely to go beyond the minimum amount required by the language of the MLI to which they adhere.

Second, efforts to reduce BEPS beyond the strict language of the MLI require tax jurisdictions to be more transparent with the international

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[177] See *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, *supra* note 9, at Art. 16 – Art. 26.

[178] *See* Grinberg, *supra* note 8, 1155.

[179] *See* Mark Bowler-Smith, *Can Sovereign Interests be Aligned with International Tax Cooperation?*, 2017 N.Z.L. REV. 207, 209-10 (2017).

[180] *See* Lucas de Lima Carhalho, *The MLI and Mutual Agreement Procedure: Improving Tax Treaty Dispute Resolution in Brazil*, 2017 WTD 176-10, September 13, 2017.

community as to both their tax schemes and the financial information of entities operating within their borders. In addition to providing a competitive advantage for attracting business activity,[181] a lack of transparency as to tax information of those operating inside a tax jurisdiction's borders can be seen as necessary for protecting the tax regime itself from external pressures.[182] This desire for tax jurisdictions to avoid greater transparency will incentivize signing jurisdictions of the MLI to avoid going beyond the language of the MLI to prevent BEPS.

Finally, the MLI and BEPS Project's fundamental goal of increasing the effective tax rates on international enterprises conflicts with the interests of many tax jurisdictions, including those who have signed the MLI.[183] As is commonly accepted, under a competitive tax regime, many tax jurisdictions seek to reduce the taxes they collect from entities that they desire to engage in activity within their borders.[184] Clearly, these jurisdictions, such as Ireland, have a strong incentive to avoid more heavily taxing international entities operating in their borders.[185] Furthermore, while the OECD has documented the extent to which it believes governments miss collecting tax revenues because of BEPS, the significant increase in global tax revenues over periods of decreasing nominal tax rates may lead some tax jurisdictions to refrain from combating BEPS in the interest of preserving tax revenue.[186] Thus, in the interest of protecting their own tax revenue, tax jurisdictions may refrain from vigorously applying the standards of the MLI to reduce BEPS.

It is also worth noting that several jurisdictions with a substantial impact on global business have not signed the MLI. Of these, the most influential is the United States.[187] Because of its economic and political influence, the United States has historically dominated international tax policy and continues to have significant influence over the outcomes of international tax policies.[188] Various facets of the United States' federal government have expressed resistance to signing the MLI on the grounds that it disproportionately targets U.S. firms.[189] Additionally, Brazil has not

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[181] *See* Tsilly Dagan, *International Tax and Global Justice*, 18 THEORETICAL INQ. L. 1, 2-4 (2017).

[182] *See* Grinberg, *supra* note 8, at 1165-1169.

[183] *Action Plan*, *supra* note 3, at 7-11.

[184] *See* Grinberg, *supra* note 8, at 1154.

[185] *See* Stephanie Johnston Soong, *Ireland's Strong Corporate Tax Take Sustainable to 2020, Review Says*, 2017 WTD 176-2, Sep. 13, 2017.

[186] Sala, *supra* note 172, at 577.

[187] Rifat Azam, *Ruling the World: Generating International Tax Norms in the Era of Globalization and BEPS*, 50 SUFFOLK U. L. REV. 517, 562 (2017).

[188] *Id.*

[189] *Id.*; Ramon Tomazela, *Brazil's Absence from the Multilateral BEPS Convention and the New Amending Protocol Signed between Brazil and Argentina*, Kluwer International Tax Blog (Sep. 5, 2017), http://kluwertaxblog.com/2017/09/05/brazils-absence-multilateral-beps-convention-new-amending-protocol-signed-brazil-argentina/.

signed the MLI, and has expressed a preference for engaging in bilateral changes to its existing tax treaties.[190] As long as countries such as Brazil and the United States continue to resist signing the MLI at all, the MLI's impact will be limited in reducing BEPS.

Thus, the MLI will generally be ineffective at achieving BEPS objectives. While the BEPS Project seeks to prevent entities from using "artificial" maneuvers to minimize global taxation, the provisions of the MLI that confront those maneuvers are generally optional or fail to comprehensively address the BEPS objectives. Indeed, many of the BEPS objectives are beyond the scope of the MLI. Furthermore, even the jurisdictions that have signed the MLI have little incentive to take action beyond the letter of the MLI to prevent BEPS. Accordingly, "mock compliance" with the MLI is likely from many of the signing jurisdictions.[191] This means that the MLI, although it expresses an international desire to address BEPS, ultimately is not likely to effectively reduce BEPS.

VI. CONCLUSION

The MLI is the product of several years of work by the OECD to develop measures to reduce BEPS. It attempts to apply several of the action items that the OECD has identified as being particularly important in reducing BEPS. However, the impact of this document will likely be constrained by the selective, optional nature of many of its provisions, which do not require signing jurisdictions to commit themselves to taking significant measures to reduce BEPS. Indeed, some of the most influential tax jurisdictions have refused to even sign the MLI. Furthermore, those jurisdictions which have signed the MLI are often incentivized to apply its provisions sparingly. Thus, while it likely reflects many increasingly accepted principles of international taxation, the MLI is likely to have a limited impact on global taxation.

[190] Tomazela, *supra* note 190.
[191] *See* Grinberg, *supra* note 8, at 1176-1177.