

International Tax Alert

News from the Global Tax Desk Network

Spain signs *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*

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Note: This Alert was amended on 21 June. See bold text for revisions.

Executive summary

On 7 June 2017, Spain and 67 other jurisdictions signed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (the MLI) during a signing ceremony hosted by the Organisation for Economic Co-operation and Development (OECD) in Paris.¹

At the time of signature, Spain submitted a list of 86 tax treaties entered into by Spain and other jurisdictions that Spain would like to designate as Covered Tax Agreements (CTAs), i.e., tax treaties to be amended through the MLI. Together with the list of CTAs, Spain also submitted a [provisional list of reservations and notifications](#) (MLI positions) in respect of the various provisions of the MLI. The definitive MLI positions will be provided upon the deposit of its instrument of ratification, acceptance or approval of the MLI.

Detailed discussion

Background

On 5 October 2015, the OECD released its final report on developing a multilateral instrument to modify bilateral tax treaties under its Base Erosion and Profit Shifting (BEPS) Action Plan (Action 15). This report was released in a package that included final reports on all 15 BEPS Actions. On 24 November 2016, the OECD released the text of the MLI and explanatory notes.²

On 7 June 2017, 68 jurisdictions³ signed the MLI during a signing ceremony hosted by the OECD in Paris. Eight other jurisdictions expressed their intent to sign the MLI in the near future.

Together with the list of CTAs, signatories also submitted a preliminary list of their MLI positions in respect of the various provisions of the MLI.⁴ The definitive MLI positions for each jurisdiction will be provided upon the deposit of its instrument of ratification, acceptance or approval of the MLI.

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 may 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 applying 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."

A provision that applies "in place of" an existing provision is intended "to replace an existing provision" if one exists, and is not intended to apply if no existing provision exists. Parties shall include in their MLI positions a section on notifications wherein they will list all CTAs that contain a provision within the scope of the relevant MLI provision, indicating the article and paragraph number of each of such provision. A provision of the MLI that applies "in place of" shall replace a provision of a CTA only where all Contracting Jurisdictions have made a notification with respect to that provision.

A provision that "applies to" provisions of a CTA is intended "to change the application of an existing provision without replacing it," and therefore may only apply if there is an existing provision. Parties shall include in their MLI positions a section on notifications wherein they will list all CTAs that contain a provision within the scope of the relevant MLI provision, indicating the article and paragraph number of each of such provision. A provision of the MLI that "applies to" provisions shall change the application of a provision of a CTA only where all Contracting Jurisdictions have made a notification with respect to that provision.

A provision that applies "in the absence of" provisions of a CTA is intended "to add a provision" if one does not already exist. Parties shall include in their MLI positions a section on notifications wherein they will list all CTAs that do not contain a provision within the scope of the relevant MLI provision. A provision of the MLI that applies "in the absence of" provisions shall apply only in cases where all Contracting Jurisdictions notify the absence of an existing provision of the CTA.

A provision that applies "in place of or in the absence of" provisions of a CTA is intended "to replace an existing provision or to add a provision." This type of provision will apply in all cases in which all the parties to a CTA have not reserved their right for the entirety of a given article to apply to its CTAs. If all Contracting Jurisdictions notify the existence of an existing provision, that provision will be replaced by the provision of the MLI 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 MLI will still apply. If there is a relevant existing provision which has not been notified by all Contracting Jurisdictions, the provision of the MLI will prevail over that existing provision, superseding it to the extent that it is incompatible with the relevant provision of the MLI (according to the explanatory statement of the MLI, an existing provision of a CTA is considered "incompatible" with a provision of the MLI if there is a conflict between the two provisions). Lastly, if there is no existing provision, the provision of the MLI will, in effect, be added to the CTA.

Spanish CTAs and MLI provisions

Spain has submitted a list of 86 tax treaties that it wishes to designate as CTAs, i.e., to be amended through the MLI. See Appendix I for the full list.

Accordingly, Spain has chosen to include the vast majority of jurisdictions that form part of the Spanish tax treaty network. Some of the countries in the Spain's CTA list, however, have not yet signed the MLI (for example, Brazil, Morocco and the United States).

Spain has excluded **certain** tax treaties currently in force, e.g., the ones with China, Japan and the Netherlands, among them. In some cases, the reason behind such exclusion is simply because a bilateral new Protocol incorporating Contracting Jurisdictions' MLI positions is currently being negotiated between Spain and such jurisdiction.

Hybrid mismatches

Part II of the MLI (Articles 3 to 5) introduces provisions which aim to neutralize certain of the effects of hybrid mismatch arrangements based on the recommendations made in the BEPS Action 2 and 6 final reports released in October 2015. The provisions cover hybrid mismatches related to transparent entities, dual resident entities and elimination of double taxation. These provisions are all not minimum standard provisions and therefore Contracting Jurisdictions have the right to opt to not apply these provisions to their CTAs.

Article 3 - Transparent entities

This provision addresses the situation of hybrid mismatches as a result of entities that one or both Contracting Jurisdictions treat as wholly or partly transparent for tax purposes.

Under Article 3(1), "for the purposes of a CTA, income derived by or through an entity that is treated as wholly or partly transparent under the tax law of either Contracting Jurisdiction shall only be considered income of a resident to the extent that the income is treated, for purposes of taxation by that Contracting Jurisdiction, as the income of a resident of that Contracting Jurisdiction."

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 a minimum standard and therefore jurisdictions can opt out of this article entirely.

Spain has not reserved the right for the entirety of Article 3 not to apply to its CTAs. In other words, Spain chooses to apply this provision (except for those CTAs already containing a provision in this respect, such as Finland, the United Kingdom and the United States). Because Spain chose to opt out for the entirety of Article 11 (*Application of tax agreements to restrict a party's right to tax its own residents*), the following sentence will be added to the

end of Article 3(1): "In no case shall the provisions of this paragraph be construed to affect a Contracting Jurisdiction's right to tax the residents of that Contracting Jurisdiction."

This article will only apply where all **Contracting Jurisdictions have not made a reservation for the entirety of the article not to apply. Where all Contracting Jurisdictions have made a notification with respect to a provision of a CTA, that provision shall be replaced by the provisions of Article 3(1). In other cases (i.e. absent notification or notification mismatch), Article 3(1) shall supersede the provisions of the CTA only the extent that those provisions are incompatible with Article 3(1).**

Article 4 - Dual resident entities

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 a minimum standard and therefore jurisdictions can opt out of this article entirely.

Spain has reserved the right for the entirety of this article not to apply to its CTAs, thus generally maintaining the existing "tie-breaker rule" contained in Article 4(3) of the OECD Model Tax Convention, where the place of effective management is the prevailing factor when resolving dual residency situations.

Article 5 - Application of methods for elimination of double taxation

Article 5 includes three options for Contracting Jurisdictions for the methods of eliminating double taxation. Option A provides that provisions of a CTA that would otherwise exempt income derived or capital owned by a resident of a Contracting Jurisdiction would not apply where the other Contracting Jurisdiction applies the provisions of the CTA to exempt such income or capital from tax or to limit the rate at which such income or capital may be taxed (switch

over clause). Instead, a deduction from tax is allowed subject to certain limitations. Under option B, Contracting Jurisdictions would not apply the exemption method with respect to dividends if those dividends are deductible in the other Contracting Jurisdiction. Option C includes that the credit method should be restricted to the net taxable income. Contracting Jurisdictions may choose different options resulting in an asymmetrical application of this provision. Contracting Jurisdictions may also opt not to apply Article 5 to one or more of its CTAs.

Article 5 of the MLI is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this option entirely.

Spain has chosen option C (i.e., a credit method which should be restricted to the net taxable income), aiming at preventing non-taxation situations. Option C of Article 5 of the MLI applies “in place of” an existing provision and therefore the option is intended to replace an existing provision if one exists, and is not intended to apply if an existing provision does not exist.

Accordingly, by selecting option C, Spain is replacing other mechanisms to avoid double taxation (such as the exemption method, for example) foreseen in certain CTAs (i.e., Brazil, Czech Republic, Morocco, Slovak Republic, Poland and Turkey). The case of Brazil is particularly important, because it could affect the tax treatment of the Brazilian interest on net equity payments (*juros sobre o capital proprio* or *JsCP*).⁵

This article will only apply where all Contracting Jurisdictions have not made a reservation for the entirety of the article not to apply (and Brazil or Morocco have not yet signed the MLI). Where each Contracting Jurisdiction chooses to apply a different Option (or where one Contracting Jurisdiction chooses to apply an Option and the other chooses to apply none of the Options), the Option chosen by each Contracting Jurisdiction shall apply with respect to its own residents (resulting in an asymmetrical application of this provision). However, a Contracting Jurisdiction that does not choose to apply Option C may reserve the right not to permit Spain to apply Option C.

It's worth pointing out that this provision will not interfere with the ability of Spanish companies (including foreign holding companies or ETVEs⁶) to apply the Spanish participation exemption rules in the terms contemplated under the Spanish domestic tax law.

Treaty abuse

Part III of the MLI (Articles 6 to 13) contains six provisions related to the prevention of treaty abuse, which correspond to changes proposed in the BEPS Action 6 final report (*Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*). In particular, the report contains provisions relating to the so-called “minimum standard” aimed at ensuring a minimum level of protection against treaty shopping (Article 6 and Article 7 of the MLI).

Article 6 - Purpose of a CTA

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.

As such, Spain only makes a reservation not to apply this provision with regards to its CTA with Mexico, which already contains preamble language within the scope of the reservation.

Additionally, Spain has chosen to apply Article 6(3), aiming at adding to the preamble of its CTAs its desire to further develop an economic relationship and enhance co-operation in tax matters with the other Contracting Jurisdictions.

Article 7 - Prevention of Treaty Abuse

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. Parties 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. This provision applies “in place of or in the absence of” an existing provision.

Spain has opted for applying the PPT alone, in the terms contained in Article 7(1), only except for those CTAs which already contain a provision in this respect, i.e., Mexico and Andorra. Furthermore, Spain does not affirmatively agree to the application of the simplified LOB, thus entirely excluding its application with respect to its CTAs (i.e., only the PPT would apply).

This article will only apply where all Contracting Jurisdictions have not made a reservation for the entirety of the article not to apply. Where all Contracting Jurisdictions have made a notification with respect to a provision of a CTA, that provision shall be replaced by the provisions of Article 7(1). In other cases (i.e. absent notification or notification mismatch), Article 7(1) shall supersede the provisions of the CTA only the extent that those provisions are incompatible with Article 7(1). However, because most countries have chosen to apply the PPT option as well, it is foreseeable that this provision will become effective to a significant number of CTAs included in Spain's list.

Article 8 - Dividends transfer transactions

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.

This provision 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.

Spain has not reserved the right for the entirety of Article 8 not to apply to its CTAs. In other words, Spain chooses to apply this provision **and thus, subject to reservations made by the other Contracting Jurisdiction, Article 8 will apply with respect to Spain's CTAs.**

Article 9 - Capital gains from alienation of shares or interests of entities deriving their value principally from immovable property

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 Party wishes to preserve the minimum period specified in its CTAs.

In addition, Article 9(4) allows Parties 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.

Spain has not reserved the right for the entirety of Article 9(1) not to apply to its CTAs. In other words, Spain chooses to apply this provision **and thus, subject to reservations made by the other Contracting Jurisdiction, Article 9(1) will apply with respect to Spain's CTAs.**

Moreover, Spain has chosen to apply Article 9(4). Given that this is an optional addition and it is not required to meet a minimum standard, it will apply to a CTA only where all Contracting Jurisdictions agree to such optional addition by choosing to apply Article 9(4).

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 if an item of income derived by a treaty resident and attributable to a PE in a third jurisdiction, is exempt from tax in the residence state and the tax in the PE jurisdiction is less than 60% of the tax that would be imposed in the residence state if the PE 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.

Spain has not reserved the right for the entirety of Article 10 not to apply to its CTAs. In other words, Spain chooses to apply this provision. This article will only apply where all Contracting Jurisdictions have made a notification in such respect.

Article 11 - Application of tax agreements to restrict a party's right to tax its own residents

Article 11 contains a so-called “saving clause” rule that preserves a Party'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.

Spain has reserved the right for the entirety of this article not to apply to its CTAs, thus completely opting out.

Avoidance of PE status

Part IV of the MLI (Articles 12 to 15) describes the mechanism by which the PE definition in existing tax treaties may be amended pursuant to the BEPS Action 7 final report

to prevent the artificial avoidance of PE status through: (i) commissionaire arrangements and similar strategies (Article 12); (ii) the specific activity exemptions (Article 13); and (iii) the split ting-up of contracts (Article 14). Article 15 of the MLI provides the definition of the term “closely related to an enterprise,” which is used in Articles 12 through 14.⁷

Article 12 - Artificial avoidance of PE status through commissionaire arrangements and similar strategies

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 parties. In particular:

- ▶ In Article 12(1), the concept of Dependent Agent PE is broaden 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; and
- ▶ 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., parties 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 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.

Spain has not reserved the right for the entirety of Article 12 not to apply to its CTAs. Therefore, Article 12(1) and/or 12(2) of the MLI could apply in respect of matching CTAs of these jurisdictions if all Contracting Jurisdictions have made a notification with respect to the existing provision of the CTA.

Article 13 - Artificial avoidance of PE status through the specific activity exemptions

This article addresses the artificial avoidance of PE status through the specific activity exemptions included in Article 5(4) of the OECD Model Tax Convention. Action 7 recommended that this exemption should only be available if the specific activity listed is of a preparatory or auxiliary character. The MLI provides two options for implementing the changes. Option A is based on the proposed wording in Action 7 (i.e., this exemption should only be available if the specific activity listed is of a preparatory or auxiliary character), while option B allows the Contracting Jurisdiction to preserve the existing exemption for certain specified activities.

This article applies “in place of” an existing provision and therefore this first part of 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.

Spain has chosen to apply Article 13(2) (option A). This article will apply only in cases where all Contracting Jurisdictions make a notification with respect to the existing provision of the CTA and the option chosen matches.

Article 13(4) contains a second substantial provision: the anti-fragmentation clause, pursuant to which exemptions included in Article 5(4) will not apply in situation where the business activities may constitute complementary functions that are part of a cohesive business operation. Spain has not opted out of Article 13(4), thus applying provided that all Contracting Jurisdictions have made a notification in such respect.

Article 14 - Splitting-up of contracts

Under the Action 7 final report recommendations on *Preventing the Artificial Avoidance of PE Status* the splitting-up of contracts is a potential strategy for the avoidance of PE status through abuse of the exception in Article 5(3) of the OECD Model Tax Convention, governing the situations where building sites, construction or installation projects may constitute a PE.

The Action 7 final report further noted, however, that the PPT provision could still address BEPS concerns related to the abusive splitting-up of contracts in these types of cases.

Article 14 of the MLI applies “in place of or in the absence of” an existing provision. Article 14 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely.

Spain has reserved the right for the entirety of Article 14 not to apply to its CTAs, thus completely opting out.

Article 15 - Definition of a person closely related to an enterprise

Article 15 describes the conditions under which a person will be considered to be “closely related” to an enterprise for the purposes of Articles 12, 13 and 14 of the MLI. Therefore, only jurisdictions that have made the reservations under Article 12(4), Article 13(6)(a), Article 13(6)(c) and Article 14(3)(a), may reserve their right for the entirety of Article 15 to apply.

Spain has not reserved the right for the entirety of Article 15 not to apply to its CTAs. In other words, Spain chooses to apply this provision.

Article 16 - MAP

Part V of the MLI (Articles 16 and 17) introduces provisions which aim to introduce the minimum standards for improving dispute resolution (the BEPS Action 14 minimum standards) and a number of complementing best practices.

Article 16 of the MLI requires countries to include in their tax treaties the provisions regarding the MAP of Article 25 paragraph 1 through paragraph 3 of the OECD Model Tax Convention, including certain modifications of those provisions.

Spain has opted out for the first sentence of Article 16(1), which includes the possibility to present the MAP to the competent authority in either Contracting Jurisdiction, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions.

Spain however has not opted out for the second sentence of Article 16(1), which includes an obligation to present a case for a MAP to either of the competent authorities of the treaty partners within three years of the first notification for the action resulting in taxation not in accordance with a CTA.

Additionally, Spain would opt in for applying the following Articles to those CTAs that do not currently include such provisions: Article 16(2) (any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting Jurisdictions) and Article 16(3) (Contracting Jurisdictions may consult together for the elimination of double taxation in cases not provided for in the CTA).

Article 17 - Corresponding adjustments

This provision is meant to apply in the absence of provisions in CTAs that require a corresponding adjustment where the other treaty party makes a transfer pricing adjustment.

Article 17 of the MLI applies “in place of or in the absence of” an existing provision. Article 17 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely. However, BEPS Action 14 minimum standard requires that jurisdictions provide access to the MAP in transfer pricing cases and implement the resulting mutual agreements regardless of whether the tax treaty contains a provision dealing with corresponding adjustments. In light of this, a Party may reserve the right not to apply Article 17 of the MLI on the basis that in the absence of a corresponding adjustments provision, either (i) the Party making the reservation will make the corresponding adjustment as described in Article 17 of the MLI or (ii) its competent authority will endeavor to resolve a transfer pricing case under the MAP provision of its tax treaty.

Where one Contracting Jurisdiction to a CTA makes such a reservation and the other Contracting Jurisdiction does not, Article 17 of the MLI will not apply to the CTA, and there is no expectation created under the MLI that the Contracting Jurisdiction that has not made the reservation will make a corresponding adjustment.

Spain has not reserved the right for the entirety of Article 17 not to apply to its CTAs (only making a due reservation on those CTAs that already contain a provision in this respect). In other words, Spain chooses to apply this provision.

This article will only apply where all Contracting Jurisdictions have not made a reservation for the entirety of the article not to apply. Where all Contracting Jurisdictions have made a notification with respect to a provision of a CTA, that provision shall be replaced by the provisions of Article 17(1). In other cases (i.e. absent notification or notification mismatch), Article 17(1) shall supersede the provisions of the CTA only the extent that those provisions are incompatible with Article 17(1).

Mandatory binding arbitration

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, 25 jurisdictions,⁸ including Spain, 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.

Spain makes the following reservations:

- ▶ Any unresolved issue arising from a MAP case otherwise within the scope of the arbitration process provided for by the Convention shall not be submitted to arbitration, if a decision on this issue has already been rendered by a court or administrative tribunal of either Contracting Jurisdiction.
- ▶ If at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting Jurisdictions, a decision concerning the issue is rendered by a court or administrative tribunal of one of the Contracting Jurisdictions, the arbitration process shall terminate.

This is a unilateral reservation, i.e., does not require a “matching position.”

Importantly, to the extent that Spain 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), Spain 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, Spain has formulated the following reservations with respect to the scope of cases that are to be eligible for arbitration:

- ▶ Cases involving the application of anti-abuse rules in a CTA as modified by the Convention or domestic law (e.g., Articles 15 and 16 of the Spanish General Tax Law)
- ▶ Cases involving conduct for which a person directly affected by the case has been subject, by a final ruling resulting from legal or administrative proceeding, to a penalty for tax fraud, willful default and gross negligence
- ▶ Transfer pricing cases involving items of income or capital that are not taxed in a Contracting Jurisdiction either because they are not included in the taxable base in that Contracting Jurisdiction or because they are subject to an exemption or zero tax rate provided only under the domestic tax law or that Contracting Jurisdiction that is specific to that item of income or capital
- ▶ Cases eligible for arbitration under the Convention on the Elimination of Double Taxation in Connection with the Adjustments of Profits of Associated Enterprises (90/436/EEC), as amended, or any subsequent regulation
- ▶ Cases which the competent authorities of both Contracting Jurisdictions agree are not suitable for resolution through arbitration. Such agreement shall be reached before the date on which arbitration proceedings would otherwise have begun and shall be notified to the person who presented the case

Implications

Spain wishes to apply MLI provisions to 86 tax treaties, i.e., the vast majority of those which make up its tax treaty network. This certainly constitutes an unprecedented moment for the Spanish international taxation system and the implementation of the treaty-based BEPS recommendations in Spain.

The provisional reservations and notifications made by Spain at the MLI signature seem quite balanced and consistent with the double tax treaty negotiation policies followed by Spain during the past years. The fact that Spain, together with other 25 jurisdictions, has also opted in for the mandatory binding arbitration, reinforces the role of Spain as a jurisdiction which is willing to adopt BEPS recommendations and uses its best efforts to resolve disputes involving other Contracting Jurisdictions as efficiently as possible.

The MLI will enter into force after five jurisdictions have deposited its instrument of ratification, acceptance or approval of the MLI. During the ratification process the choices made by jurisdictions may still change. With respect to a specific bilateral tax treaty, the measures will only enter into effect after both parties to the treaty have deposited its instrument of ratification, acceptance or approval of the MLI and a specified time has passed. The specified time differs for different provisions. For example, for provisions relating to withholding taxes, the entry into force date is the 1 January of the following year after the last party has notified of its ratification. It is possible that the changes made as a result of being a party to the MLI would be effective in 2019, though some tax treaties may be affected as early as sometime in 2018.

Endnotes

1. For more background on the global significance of the MLI signature, see EY Global Tax Alert, [68 jurisdictions sign the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS](#), dated 7 June 2017.
2. See EY Global Tax Alert, [OECD releases multilateral instrument to implement treaty related BEPS measures on hybrid mismatch arrangements, treaty abuse, permanent establishment status and dispute resolution](#), dated 2 December 2016, for a more detailed analysis of the MLI related BEPS measures.
3. Andorra, Argentina, Armenia, Australia, Austria, Belgium, Bulgaria, Burkina Faso, Canada, Chile, China, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Fiji, Finland, France, Gabon, Georgia, Germany, Greece, Guernsey, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Isle of Man, Israel, Italy, Japan, Jersey, Korea, Kuwait, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Monaco, Netherlands, New Zealand, Norway, Pakistan, Poland, Portugal, Romania, Russia, San Marino, Senegal, Serbia, Seychelles, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom and Uruguay.
4. For more detail on the MLI Positions taken by the signing jurisdictions on 7 June 2017, see EY Global Tax Alert, [Signing by 68 jurisdictions of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS highlights impacts for business to consider](#), dated 14 June 2017.
5. See EY Global Tax Alert, [Spanish Tax Administrative Court revises position and characterizes Brazilian Juros as "dividends" for domestic law purposes](#), dated 20 February 2017 on the tax treatment of the JsCP.
6. *Entidades de Tenencia de Valores Extranjeros*.
7. For further context on the stance taken by the Spanish tax authorities and case-law over the last years on the PE status, see EY Global Tax Alert, [Spanish Supreme Court confirms broad interpretation of PE concept in line with BEPS Action 7](#), dated 30 June 2016.
8. Andorra, Australia, Austria, Belgium, Canada, Fiji, Finland, France, Germany, Greece, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malta, the Netherlands, New Zealand, Portugal, Singapore, Slovenia, Spain, Sweden, Switzerland and the United Kingdom.

For additional information with respect to this Alert, please contact the following:

Ernst & Young LLP, Spanish Tax Desk, New York

▶ Jose Bustos	+1 212 773 8954	joseantonio.bustos@ey.com
▶ Manuel Paz	+1 212 773 4164	manuel.pazfigueiras@ey.com

Ernst & Young Abogados, Madrid

▶ Laura Ezquerro	+34 91 572 7570	laura.ezquerramartin@es.ey.com
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Appendix I

Provisional list dated on 7 June 2017		
Covered Tax Agreements list (MLI signing countries)	Covered Tax Agreements list (MLI non-signing countries)	Non-Covered Tax Agreements (MLI signing or non-signing countries)
Andorra	New Zealand	Albania
Argentina	Oman	Algeria
Armenia	Pakistan	Azerbaijan (DTT pending to enter into force)
Australia	Poland	Barbados
Austria	Portugal	Bolivia
Belgium	Russia	Bosnia and Herzegovina
Bulgaria	Senegal	Brazil
Canada	Serbia	Cuba
Chile	Singapore	Dominican Rep.
Colombia	Slovak Rep.	Ecuador
Costa Rica	Slovenia	El Salvador
Croatia	South Africa	Estonia (intended to join MLI soon)
Cyprus	Switzerland	Iran
Czech Republic	Turkey	Jamaica (intended to join MLI soon)
Egypt	United Kingdom	Kazakhstan
Finland	Uruguay	Kyrgyzstan (ex-USSR)
France		Macedonian
Georgia		Malaysia
Germany		Moldova
Greece		Morocco
Hong Kong (China)		Nigeria (intended to join MLI soon)
Hungary		Panama (intended to join MLI soon)
Iceland		Philippines
India		Qatar (DTT pending to enter into force)
Indonesia		Saudi Arabia
Ireland		Tadzhikistan (ex-USSR)
Israel		Thailand
Italy		Trinidad and Tobago
Korea		Tunisia (intended to join MLI soon)
Kuwait		Turkmenistan (ex-USSR)
Latvia		United Arab Emirates
Lithuania		United States of America
Luxembourg		Uzbekistan
Malta		Venezuela
Mexico		Vietnam
		Bahrain (DTT pending to enter into force)
		Belarus (DTT pending to enter into force)
		Cape Verde (DTT pending to enter into force)
		China
		Denmark (DTT non applying since 2009)
		Japan
		Montenegro (DTT pending to enter into force)
		Namibia (DTT pending to enter into force)
		Netherlands
		Norway
		Peru (DTT pending to enter into force)
		Romania
		Sweden
		Syria (DTT pending to enter into force)
		Ukraine (ex-USSR)

Source: <http://www.oecd.org/tax/treaties/beps-ml-signatories-and-parties.pdf>

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