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WHEN THE WORLD IS YOUR PLAYING FIELD

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THE IMPACT OF MLI

ITPG, Buenos Aires, 18th October 2018

TAX + EXPAT

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Presentation

- Background
- From concept to Entry into Effect
- Signatories
- Purpose
- Implementation
- Principal Purpose Test
- Example/case study
- Conclusions

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Background

MLI based on article 15 BEPS, recommendations for:

- Action 2, hybrid mismatches
- Action 6, treaty abuse
- Action 7, permanent establishment
- Action 14, dispute resolution

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From Concept to Entry into Force

February 2013	Start BEPS Project
July 2013	Endorsement BEPS Project, presentation 15 actions to G20
September 2014	Call for the development of the MLI, action
February 2015	Start MLI negotiations, mandate to set up Ad Hoc Group
October 2015	Adoption BEPS package, endorsed by G20
November 2016	Adoption of MLI and Explanatory Notes by > 100 countries
June 2017	First High Level Ceremony, signed by 68 countries

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Purpose MLI


EMPLOI
EGALITE
CONFIANCE
JOBS
EQUALITY
TRUST
OCDE
ORGANISATION
FOR ECONOMIC
CO-OPERATION
AND DEVELOPMENT

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Signatories as per September 2018

- 84 countries signed

1	Andorra	16	Cote d'Ivore	31	Guernsey	46	Kuwait	61	Panama	76	Spain
2	Argentina	17	Croatia	32	Hong Kong (China)	47	Latvia	62	Peru	77	Sweden
3	Armenia	18	Curacao	33	Hungary	48	Liechtenstein	63	Poland	78	Switzerland
4	Australia	19	Cyprus	34	Iceland	49	Lithuania	64	Portugal	79	Tunesia
5	Austria	20	Czech Republic	35	India	50	Luxembourg	65	Romania	80	Turkey
6	Barbados	21	Denmark	36	Indonesia	51	Malaysia	66	Russia	81	Ukraine
7	Belgium	22	Egypt	37	Ireland	52	Malta	67	San Marino	82	United Arab Emirates
8	Bulgaria	23	Estonia	38	Isle of Man	53	Mauritius	68	Saudi Arabia	83	United Kingdom
9	Burkina Faso	24	Fiji	39	Israel	54	Mexico	69	Senegal	84	Uruguay
10	Cameroon	25	Finland	40	Italy	55	Monaco	70	Serbia		
11	Canada	26	France	41	Jamaica	56	Netherlands	71	Seychelles		
12	Chile	27	Gabon	42	Japan	57	New Zealand	72	Singapore		
13	China	28	Georgia	43	Jersey	58	Nigeria	73	Slovak Republic		
14	Colombia	29	Germany	44	Kazakhstan	59	Norway	74	Slovenia		
15	Costa Rica	30	Greece	45	Korea	60	Pakistan	75	South Africa		

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Signatories as per September 2018

6 countries expressed intent to sign:

- Algeria
- Kenya
- Lebanon
- Oman
- Swaziland
- Thailand

Not signed by:

- United States of America

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Entry into Force

- Signatories ratify MLI in accordance with domestic procedures
- 3 months + 1st of next month after ratification/deposit final positions first 5 → July 1, 2018
  - Austria
  - Isle of Man
  - Jersey
  - Poland
  - Slovenia
- 3 months + 1st of next month for other states

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Entry into Force

Applicable to Covered Tax Treaty ("CTA"):

- Tax treaty in force between parties to the MLI
- Notification to modify the tax agreement using the MLI
  - Switzerland: 14 out of 94
  - Netherlands: 82 out of 94
  - Luxembourg 81 out of 81
- Local ratification process completed
- Compatible options

The MLI will not change the text of the treaties but will work alongside them: interpretation issues.

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Treaty abuse/BEPS Action 6

3 treaty regulations to prevent treaty benefits granted in case of “treaty shopping”:

Preamble +

- Principal Purpose (PPT)
- Principal Purpose (PPT) + Simplified/Detailed Limitation of Benefits (LOB)
- Detailed limitation on benefits (LOB) + anti conduit clause or purpose test

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Preamble and PPT

Article 7 – Prevention of Treaty Abuse

1. Notwithstanding any provision of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement.

- **Not the sole or essential purpose of the transaction**
- **MLI has the potential to apply to a broad variety of structures and transactions**
- **Burden of proof from the tax authorities to taxpayer?**

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Treaty interpretation

Article 31, Vienna Convention on the Law of Treaties (VCLT)

Article 31, GENERAL RULE OF INTERPRETATION
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty

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Treaty interpretation, sources

MLI/BEPS Action 6 Final Report/2017 Model Tax Convention

- Action 6 Final report: minimum standard + treaty text + explanatory notes + examples
- MLI: preamble + treaty texts, Explanatory Notes refer to Final BEPS Package
- 2017 OECD Model Tax Convention: treaty text + commentary + sources

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Treaty interpretation, sources

Explanatory Statement MLI:

12. (…) Accordingly, the provisions contained in Articles 3 through 17 should be interpreted in accordance with the ordinary principle of treaty interpretation, which is that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. In this regard, the object and purpose of the Convention is to implement the tax treaty-related BEPS measures. The commentary that was developed during the course of the BEPS Project and reflected in the Final BEPS Package has particular relevance in this regard.

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Treaty interpretation, sources

Commentary article 29, § 9 OECD Model Tax Convention (PPT/general anti-abuse rule)

169. Paragraph 9 mirrors the guidance in paragraphs 61 and 76 to 80 of the Commentary on Article 1. According to that guidance, the benefits of a tax convention should not be available where one of the principal purposes of certain transactions or arrangements is to secure a benefit under a tax treaty and obtaining that benefit in these circumstances would be contrary to the object and purpose of the relevant provisions of the tax convention. Paragraph 9 incorporates the principles underlying these paragraphs into the Convention itself in order to allow States to address cases of improper use of the Convention even if their domestic law does not allow them to do so in accordance with the paragraphs 76-80 of the Commentary on Article 1; it also confirms the application of these principles for States whose domestic law already allows them to address such cases.

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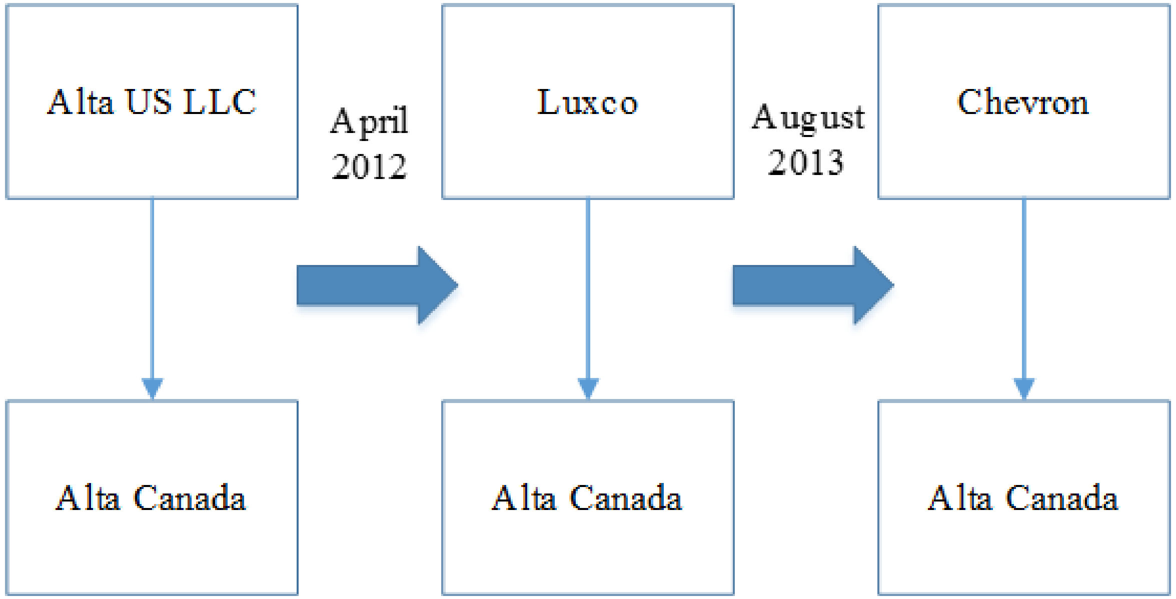
Case study/example Luxembourg Canada

Alta Energy Luxembourg v. Her Majesty the Queen (August 22, 2018)



In 2013 sale to Chevron for nearly $680 million and realized a capital gain in excess of $ 380 million which Luxco claimed was exempt from Canadian tax under the treaty between Canada and Luxembourg.

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Case study/example Luxembourg Canada

Court considerations

[77] A tax treaty is a multi-purpose legal instrument. The preamble of the Treaty states that the two governments desired “to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital.” While indicative of the general purpose of the Treaty, this statement remains vague regarding the application of specific articles of the Treaty. Under the GAAR analysis, the Court must identify the rationale underlying Article 1, 4 and 13, not a vague policy supporting a general approach to the interpretation of the Treaty as a whole.

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Case study/example Luxembourg Canada

Court considerations

[85] In this light, if Canada wished to curtail the benefits of the Treaty to potential situations of double taxation, Canada could have insisted that the exemption provided for under Article 13(5) be made available only in the circumstance where the capital gain was otherwise taxable in Luxembourg. Canada and Luxembourg did not choose this option.

[91] There is nothing in the Treaty that suggests that a single purpose holding corporation, resident in Luxembourg, cannot avail itself of the benefits of the Treaty. There is also nothing in the Treaty that suggests that a holding corporation, resident in Luxembourg, should be denied the benefit of the Treaty because its shareholders are not themselves residents of Luxembourg.

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Case study/example Luxembourg Canada

Outcome in case of applicability MLI

- Canada signed the MLI in June 2017
- Under article 7, Canada has declared that it accepts the PPT as an interim measure, with the intention that bilateral negotiations will replace or supplement it with a LOB provision (as in the US-Canada tax treaty

Once effective, the MLI will introduce a new anti-treaty shopping rule up to 75 of Canada’s tax treaties and will likely be the mechanism by which the Government challenges treaty shopping arrangements that it doesn’t like.

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Conclusions

- Scope MLI is far beyond tax treaties between OECD member states
- Interpretation will be complex (tax treaty, OECD Commentary, BEPS and MLI)
- Burden of proof may shift from the tax authorities to the taxpayer
- Additional anti treaty abuse provisions to be carefully considered (e.g. Netherlands – India)

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QUESTIONS?

During the coffee break?