WHAT’S NEXT FOR BEPS: THE MULTILATERAL INSTRUMENT

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Today’s presenters

**Daniel M. Berman**  
Principal, RSM US  
Dan oversees key projects for the national tax practice and has a wealth of international tax experience, including leading the United States tax treaty program at the U.S. Treasury Department.

**Andrew Seidler**  
Partner, RSM UK  
Andrew is an international tax partner in the London office, acting for mid-market international companies. He chairs the European tax partner quarterly meetings.
## Agenda

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INTRODUCTION TO BEPS
BEPS: Major tax reform project at the OECD

• G20 countries estimate $100 billion to 240 billion per year tax lost due to tax planning to take advantage of:
  – Gaps in the interaction of national tax systems
  – Tax systems lacking the capability to deal with modern business methods

• The Organisation for Economic Co-operation and Development (OECD) published recommendations in October 2015 with the goal of ensuring tax is paid where value is created
BEPS: Major tax reform project at the OECD (cont.)

• A turning point in history of international cooperation on taxation
• Focus on legal tax planning techniques rather than offshore tax evasion
• Closing gaps in international taxation that allegedly avoid or reduce tax by moving operations or migrating intangibles to lower tax jurisdictions
• Expected to result in fairer international tax system that supports sustainable and balanced growth
BEPS: Major tax reform project at the OECD (cont.)

• Impacts all corporations with international aspects, including:
  – Small and mid-size entities (SMEs) expanding overseas
  – Borrowing from related foreign entities
  – Paying royalties to related foreign entities

• OECD recommendations are not law, but most countries will implement some or all of its recommendations
The BEPS project

1. The digital economy
2. Hybrid mismatch arrangements
3. Controlled foreign corporation (CFC) rules
4. Interest deductions
5. Harmful tax practices
6. Preventing treaty abuse
7. Avoidance of permanent establishment (PE) status
8. Transfer pricing aspects of intangibles
9. Transfer pricing risk and capital
10. Transfer pricing risk/high-risk transactions
11. Methodologies and data analysis
12. Disclosure rules
13. Transfer pricing documentation
14. Dispute resolution
15. Multilateral instrument

Source: OECD
INTRODUCTION TO ACTION 15: MULTILATERAL INSTRUMENT
Action 15: Develop a multilateral instrument

Concept:

• It would take decades to separately renegotiate 3,000 bilateral tax treaties to accommodate BEPS
• A single multilateral instrument to encompass all BEPS-related tax treaty revisions
• Countries could join the multilateral instrument to have its provisions take effect between all pairs of acceding countries
• Each country would follow its own treaty ratification procedures with respect to the multilateral instrument
Limitations:

- Flexibility as to the level of commitment to the multilateral instrument
- Countries could opt out of various provisions or apply reservations, understandings, provisos or declarations to their respective accessions
- The OECD attempts to constrain reservations, etc.
- Each provision would be effective only between pairs of countries with consistent accessions
Action 15: Develop a multilateral instrument (cont.)

Language:

- Bilateral tax treaties are executed in all official languages of the two contracting states.
- Multilateral instruments are available in a small number of official languages.
- Acceding countries may provide unofficial translations that could be adopted by colingual country pairs.
- Issues may arise in the interpretation of how, for example, a bilateral treaty executed in Russian and Turkish is modified by a multilateral instrument published in English, French, Spanish and German.
What’s new?

• On Nov. 24, 2016, the OECD released “The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting” (MLI)
• 99 countries participated in the development of the MLI
• Certain articles include alternative provisions
• Published in English and French; additional translations are being developed
• First high-level signing ceremony expected June 2017
• MLI enters into force after five countries ratify. For specific tax treaties MLI is effective once all parties to that treaty have ratified
WALK THROUGH
MLI Structure

- PART I. SCOPE AND INTERPRETATION OF TERMS
  - Article 1 – Scope
  - Article 2 – Interpretation of Terms
- PART II. HYBRID MISMATCHES
  - Article 3 – Transparent Entities
  - Article 4 – Dual Resident Entities
  - Article 5 - Application of Methods for Elimination of Double Taxation
- PART III. TREATY ABUSE
  - Article 6 – Purpose of a Covered Tax Agreement
  - Article 7 – Prevention of Treaty Abuse
  - Article 8 – Dividend Transfer Transactions
  - Article 9 – Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property
  - Article 10 – Anti-abuse Rule for Permanent Establishments Situated in Third Jurisdictions
  - Article 11 – Application of Tax Agreements to Restrict a Party’s Right to Tax its Own Residents
MLI structure (cont.)

- **PART IV. AVOIDANCE OF PERMANENT ESTABLISHMENT STATUS**
  - Article 12 – Artificial Avoidance of Permanent Establishment Status through Commissionaire Arrangements and Similar Strategies
  - Article 13 – Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions
  - Article 14 – Splitting-up of Contracts
  - Article 15 – Definition of a Person Closely Related to an Enterprise

- **PART V. IMPROVING DISPUTE RESOLUTION**
  - Article 16 – Mutual Agreement Procedure
  - Article 17 – Corresponding Adjustments
MLI structure (cont.)

- PART VI. ARBITRATION
  - Article 18 – Choice to Apply Part VI
  - Article 19 – Mandatory Binding Arbitration
  - Article 20 – Appointment of Arbitrators
  - Article 21 – Confidentiality of Arbitration Proceedings
  - Article 22 – Resolution of a Case Prior to the Conclusion of the Arbitration
  - Article 23 – Type of Arbitration Process
  - Article 24 – Agreement on a Different Resolution
  - Article 25 – Costs of Arbitration Proceedings
  - Article 26 – Compatibility
MLI structure (cont.)

- PART VII. FINAL PROVISIONS
  - Article 27 – Signature and Ratification, Acceptance or Approval
  - Article 28 – Reservations
  - Article 29 – Notifications
  - Article 30 – Subsequent Modifications of Covered Tax Agreements
  - Article 31 – Conference of the Parties
  - Article 32 – Interpretation and Implementation
  - Article 33 – Amendment
  - Article 34 – Entry into Force
  - Article 35 – Entry into Effect
  - Article 36 – Entry into Effect of Part VI
  - Article 37 – Withdrawal
  - Article 38 – Relation with Protocols
  - Article 39 – Depositary
Procedures for permitted reservations

- MLI will apply only with respect to provisions that neither contracting state has adopted with a reservation
- Article 28 contains list of authorized reservations
- Reservations generally to be made at time of signature
  - Provision allows for certain reservations upon ratification, acceptance, or approval, and for later changes
Procedures for permitted reservations (cont.)

- Many provisions of the MLI allow alternatives that may be selected by a signatory country
  - Each signatory may select only one alternative for each provision, applying that alternative to all of its covered agreements
  - The MLI provides certain “compatibility clauses” that indicate what provision might apply between pairs of countries that have elected different alternatives

- The authorized reservations allow each signatory country to opt out of certain provisions that do not constitute a BEPS minimum standard
  - Such an opt-out reservation generally is effective across all of a country’s covered agreements
  - A reservation may be applied to a subset of a country’s covered agreements only with respect to existing treaty provisions with specific, objectively defined characteristics.
Procedures for permitted reservations (cont.)

• The OECD intends that no unauthorized reservations, understandings, provisos, or declarations will be effective.

• That remains unclear as a matter of international law.
Entry into effect

• MLI will enter into force the beginning on the fourth month after five countries have ratified
• MLI will affect only “covered tax agreements” as designated by each signatory country
• Generally effective between pairs of signatory countries on the later of the dates that the two countries complete their respective ratification and notification requirements
  – With respect to taxes withheld at source – first day of the next calendar year beginning after such later date.
  – With respect to all other taxes – taxable periods beginning on or after six calendar months after such later date.
Role of the depositary

• The OECD will be the depositary of the MLI
• Will support governments in the process of its signature, ratification, and implementation
• Transparency
  – Notification of affected treaty provisions
  – Online publication of covered tax agreements, reservations, and notifications
  – Provide guidance, compatibility clauses and explanatory statement
1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially--
   a) a place of management;
   b) a branch;
   c) an office;
   d) a factory;
   e) a workshop; and
   f) a mine, an oil or gas well, a quarry, or any other place of extraction of natural resources.

3. A building site or construction or installation project constitutes a permanent establishment only if it lasts for more than twelve months.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include--
   a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
   b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
   c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
   d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise;
   e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
   f) the maintenance of a fixed place of business solely for any combination of the activities mentioned in sub-paragraphs (a) to (e) of this paragraph, provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.
(5) Notwithstanding the provisions of paragraphs 1 and 2 of this Article, where a person--other than an agent of an independent status to whom paragraph 6 of this Article applies--is acting on behalf of an enterprise and has and habitually exercises in a Contracting State an authority to conclude contracts that are binding on the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities that the person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 of this Article that, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

(6) An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent, or any other agent of an independent status, provided that such person is acting in the ordinary course of his business as an independent agent.

The fact that a company that is a resident of a Contracting State controls or is controlled by a company that is a resident of the other Contracting State, or that carries on business in that other State (whether through a permanent establishment or otherwise), shall not constitute either company a permanent establishment of the other.
Permanent establishment: MLI Article 12

Article 12 – Artificial Avoidance of Permanent Establishment Status through Commissionaire Arrangements and Similar Strategies
(5) Notwithstanding the provisions of paragraphs 1 and 2 of this Article, where a person--other than an agent of an independent status to whom paragraph 6 of this Article applies--is acting on behalf of an enterprise and has and habitually exercises in a Contracting State an authority to conclude contracts that are binding on the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities that the person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 of this Article that, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

(6) An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent, or any other agent of an independent status, provided that such person is acting in the ordinary course of his business as an independent agent.

The fact that a company that is a resident of a Contracting State controls or is controlled by a company that is a resident of the other Contracting State, or that carries on business in that other State (whether through a permanent establishment or otherwise), shall not constitute either company a permanent establishment of the other.
Permanent establishment: MLI Article 12 (cont.)

(Société Zimmer Ltd v Ministre de l'Économie, des Finances et de l'Industrie (2010)

(1) The appellant company did not have a permanent establishment in France. A commissionaire does not have authority to conclude contracts binding upon its principal, so cannot constitute a permanent establishment of the principal unless the terms of the contract or other facts indicate that, notwithstanding the designation as a commissionaire, the agent has authority to conclude contracts binding upon its principal;

(2) The lower courts had erred in failing to appreciate that a commissionaire did not have authority to conclude contracts binding upon its principal, and could only constitute a permanent establishment if the principal was bound by contracts with third parties through the actions of the commissionaire.
1. Notwithstanding the provisions of a Covered Tax Agreement that define the term “permanent establishment”, but subject to paragraph 2, where a person is acting in a Contracting Jurisdiction to a Covered Tax Agreement on behalf of an enterprise and, in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are:

a) in the name of the enterprise; or
b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use; or

c) for the provision of services by that enterprise,

that enterprise shall be deemed to have a permanent establishment in that Contracting Jurisdiction in respect of any activities which that person undertakes for the enterprise unless these activities, if they were exercised by the enterprise through a fixed place of business of that enterprise situated in that Contracting Jurisdiction, would not cause that fixed place of business to be deemed to constitute a permanent establishment under the definition of permanent establishment included in the Covered Tax Agreement (as it may be modified by this Convention).
2. Paragraph 1 shall not apply where the person acting in a Contracting Jurisdiction to a Covered Tax Agreement on behalf of an enterprise of the other Contracting Jurisdiction carries on business in the first-mentioned Contracting Jurisdiction as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.

Closely related means:

…..a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company’s shares or of the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company’s shares or of the beneficial equity interest in the company) in the person and the enterprise.

(Article 15)
Permanent establishment: MLI Article 12 (cont.)

Administration:

Paragraph 1 (dependent agent) applies in place of provisions under which an enterprise shall be deemed to have a permanent establishment in respect of an activity carried on by an agent other than of independent status – but only to the extent that the provisions relate to a situation where the person has an habitually exercise authority to conclude contracts in the name of the enterprise;

Paragraph 2 applies in place of provisions that provide an enterprise shall not have a PE in respect of an activity which the agent of independent status undertakes;

A country must notify the Depositary of each tax agreement that contains a provision affected by this change (specifying the Article and paragraph number).

A country can opt for Article 12 not to apply to its covered tax agreements.
Permanent establishment: MLI Article 13 (cont.)

Article 13 – Artificial Avoidance of Permanent Establishment Status through Specific Activity Exemptions.

The list of specific activity exemptions in the US – UK treaty are found in paragraphs 3 and 4 of the Article:

(3) A building site or construction or installation project constitutes a permanent establishment only if it lasts for more than twelve months.

(4) Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include--

   (a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
   (b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
   (c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
   (d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise;
   (e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
   (f) the maintenance of a fixed place of business solely for any combination of the activities mentioned in sub-paragraphs (a) to (e) of this paragraph, provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

Options:

A country can choose one of two options in Article 13, or to not opt into the Article.
Option A

2. Notwithstanding the provisions of a Covered Tax Agreement that define the term “permanent establishment”, the term “permanent establishment” shall be deemed not to include:

a) the activities specifically listed in the Covered Tax Agreement (prior to modification by this Convention) as activities deemed not to constitute a permanent establishment, whether or not that exception from permanent establishment status is contingent on the activity being of a preparatory or auxiliary character;

b) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any activity not described in subparagraph a);

c) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) and b),

provided that such activity or, in the case of subparagraph c), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.
Option B

3. Notwithstanding the provisions of a Covered Tax Agreement that define the term “permanent establishment”, the term “permanent establishment” shall be deemed not to include:

a) the activities specifically listed in the Covered Tax Agreement (prior to modification by this Convention) as activities deemed not to constitute a permanent establishment, whether or not that exception from permanent establishment status is contingent on the activity being of a preparatory or auxiliary character, except to the extent that the relevant provision of the Covered Tax Agreement provides explicitly that a specific activity shall be deemed not to constitute a permanent establishment provided that the activity is of a preparatory or auxiliary character;

b) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any activity not described in subparagraph a), provided that this activity is of a preparatory or auxiliary character;

c) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) and b), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.
Related entities/operations

The list of specific exemptions shall not be made available if the same enterprise or a closely related enterprise carried on business at the location at a different location in the country, AND

• The other operation is not covered by the exempt activities, or it otherwise constitutes a PE; OR
• The combination of the two activities is an activity not of a preparatory or auxiliary nature.

(Paragraph 4)

This provision can be opted out of by a country.

(Paragraph 6)
Article 14 – Splitting-up of Contracts

Time bound provisions of the US – UK:

(3) A building site or construction or installation project constitutes a permanent establishment only if it lasts for more than twelve months.

Aggregation of time for closely connected parties:

Where two related entities carry on activities at building or construction site or installation project and each spends more than 30 days there but less than the limit of the exemption, aggregation shall apply in determining whether the limit has been breached.
IMPROVING DISPUTE RESOLUTION
Mutual agreement procedures (MAP)

- Mutual agreement is the mechanism laid down by treaties for resolving disputes.
- It can also be the tie breaker for determining corporate residence for treaty purposes, or in the case of the US–UK treaty it is the means of determining treaty residence where dual residence is in point:

5) Where by reason of the provisions of paragraph 1 of this Article a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the mode of application of this Convention to that person. If the competent authorities do not reach such an agreement, that person shall not be entitled to claim any benefit provided by this Convention, except those provided by paragraph 4 of Article 24 (Relief from Double Taxation), Article 25 (Non-discrimination) and Article 26 (Mutual agreement procedure).

- There have been concerns that the mechanism is slow and therefore costly.
- In some instances it simply does not work: the competent authorities fail to meet.
- Some tax authorities conduct their contentious disputes in a way that prevents proper operation of the Mutual Agreement process, for example:
  - By having a penalty regime that discourages going to appeal;
  - By bringing criminal charges in relation to tax disputes.
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(1) Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of this Convention or, if later, within six years from the end of the taxable year or chargeable period in respect of which that taxation is imposed or proposed.

(2) The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with this Convention. Any agreement reached shall be implemented notwithstanding any time limits or other procedural limitations in the domestic law of the Contracting States, except such limitations as apply for the purposes of giving effect to such an agreement.
(3) The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Convention. In particular the competent authorities of the Contracting States may agree—

   a. to the same attribution of income, deductions, credits, or allowances of an enterprise of a Contracting State to its permanent establishment situated in the other Contracting State;
   b. to the same allocation of income, deductions, credits, or allowances between persons;
   c. to the same characterisation of particular items of income, including the same characterisation of income that is assimilated to income from shares by the taxation law of one of the Contracting States and that is treated as a different class of income in the other Contracting State;
   d. to the same characterisation of persons;
   e. to the same application of source rules with respect to particular items of income;
   f. to a common meaning of a term;
   g. that the conditions for the application of the second sentence of paragraph 5 of Article 7 (Business profits), paragraph 9 of Article 10 (Dividends), paragraph 7 of Article 11 (Interest), paragraph 5 of Article 12 (Royalties), or paragraph 4 of Article 22 (Other income) of this Convention are met; and
   h. to the application of the provisions of domestic law regarding penalties, fines, and interest in a manner consistent with the purposes of this Convention.

They may also consult together for the elimination of double taxation in cases not provided for in this Convention.

(4) The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs
MLI Article 16: Mutual agreement procedure

1. Where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, that person may, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, present the case to the competent authority of either Contracting Jurisdiction. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting Jurisdiction, with a view to the avoidance of taxation which is not in accordance with the Covered Tax Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting Jurisdictions.

3. The competent authorities of the Contracting Jurisdictions shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Covered Tax Agreement. They may also consult together for the elimination of double taxation in cases not provided for in the Covered Tax Agreement.
MLI Article 16: Mutual agreement procedure (cont.)

• Where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, that person may, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, present the case to the competent authority of either Contracting Jurisdiction. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement.
MLI Article 16: Mutual agreement procedure (cont.)

1. Where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, that person may, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, present the case to the competent authority of either Contracting Jurisdiction. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement.

Compared to the existing US – UK treaty provision

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of this Convention or, if later, within six years from the end of the taxable year or chargeable period in respect of which that taxation is imposed or proposed.
2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting Jurisdiction, with a view to the avoidance of taxation which is not in accordance with the Covered Tax Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting Jurisdictions.
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Compared to the existing US – UK treaty provision

(2) The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with this Convention. Any agreement reached shall be implemented notwithstanding any time limits or other procedural limitations in the domestic law of the Contracting States, except such limitations as apply for the purposes of giving effect to such an agreement.
• The competent authorities of the Contracting Jurisdictions shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Covered Tax Agreement. They may also consult together for the elimination of double taxation in cases not provided for in the Covered Tax Agreement.
US-UK Treaty: Article 16 Mutual agreement procedure

(3) The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Convention. In particular the competent authorities of the Contracting States may agree—

a. to the same attribution of income, deductions, credits, or allowances of an enterprise of a Contracting State to its permanent establishment situated in the other Contracting State;

b. to the same allocation of income, deductions, credits, or allowances between persons;

c. to the same characterisation of particular items of income, including the same characterisation of income that is assimilated to income from shares by the taxation law of one of the Contracting States and that is treated as a different class of income in the other Contracting State;

d. to the same characterisation of persons;

e. to the same application of source rules with respect to particular items of income;

f. to a common meaning of a term;

g. that the conditions for the application of the second sentence of paragraph 5 of Article 7 (Business profits), paragraph 9 of Article 10 (Dividends), paragraph 7 of Article 11 (Interest), paragraph 5 of Article 12 (Royalties), or paragraph 4 of Article 22 (Other income) of this Convention are met; and

h. to the application of the provisions of domestic law regarding penalties, fines, and interest in a manner consistent with the purposes of this Convention.

They may also consult together for the elimination of double taxation in cases not provided for in this Convention.

(4) The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.
MLI Article 16: Mutual agreement procedure- Reservations

Reservations are possible but:

1. The country must meet the minimum requirements for dispute resolution by virtue of their own domestic administrative procedures;
2. This must include bi-lateral processes for notification and dealing with disputes;
3. Time limits can be extended domestically beyond the three year minimum;
4. Implementation of agreed outcomes must be adopted notwithstanding time limits in domestic laws.

Administration:
Notifications required to the Depositary of:

1. Operative provision in the case where a reservation has not been made; and
2. Agreements which do not already contain the relevant provisions.
MLI Article 17: Corresponding adjustments

1. Where a Contracting Jurisdiction includes in the profits of an enterprise of that Contracting Jurisdiction — and taxes accordingly — profits on which an enterprise of the other Contracting Jurisdiction has been charged to tax in that other Contracting Jurisdiction and the profits so included are profits which would have accrued to the enterprise of the first-mentioned Contracting Jurisdiction if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other Contracting Jurisdiction shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of the Covered Tax Agreement and the competent authorities of the Contracting Jurisdictions shall if necessary consult each other.

2. Paragraph 1 shall apply in place of or in the absence of a provision that requires a Contracting Jurisdiction to make an appropriate adjustment to the amount of the tax charged therein on the profits of an enterprise of that Contracting Jurisdiction where the other Contracting Jurisdiction includes those profits in the profits of an enterprise of that other Contracting Jurisdiction and taxes those profits accordingly, and the profits so included are profits which would have accrued to the enterprise of that other Contracting Jurisdiction if the conditions made between the two enterprises had been those which would have been made between independent enterprises.
ARBITRATION
A Party may choose to apply this Part with respect to its Covered Tax Agreements and shall notify the Depositary accordingly. This Part shall apply in relation to two Contracting Jurisdictions with respect to a Covered Tax Agreement only where both Contracting Jurisdictions have made such a notification.
Arbitration framework

Article 19 – Mandatory Binding Arbitration
Article 20 – Appointment or Arbitrators
Article 21 – Confidentiality of Arbitration Proceedings
Article 22 – Resolution of Case Prior to Conclusion of Arbitration
Article 23 – Type of Arbitration Process
Article 24 – Agreement of Different Resolution
Article 25 – Costs of Arbitration Proceedings
Article 26 - Compatibility [with MAP]
Article 19: Mandatory binding arbitration

- Deals with the resolution of disputes that cannot be resolved by MAP within a two year period (although the competent authorities can extend that by mutual agreement to three years).
- Suspension of the two year time line is permitted in cases where the outcome is contingent on a matter before the courts, perhaps even on a different case.
- Failure by a party to provide information in a timely manner can also push back the two year deadline.
- The competent authorities refer the case to Arbitration (not the taxpayers).
- The arbitration panel’s decision is final (it cannot be appealed) except where
  - The taxpayer does not accept the outcome and therefore does not withdraw any outstanding proceedings covered by the MAP: accordingly the case is not eligible for any further consideration by the competent authorities;
  - If the courts of one of the jurisdictions holds that the decision is invalid;
  - If a taxpayer pursues litigation on issues that were resolved.
Article 19: Mandatory binding arbitration (cont.)

- However Article 24 permits the competent authorities adopt a provision into their agreements to permit them to agree a different outcome to displace the outcome from the arbitration, so long as it is done within three months from the delivery of the arbitration decision.
- There are strict procedural time lines.
- The competent authorities can agree the minimum information required in order to undertake substantive consideration of the case.
- A matter can be carved out of the referral to arbitration if a court or administrative tribunal decision has been given or is expected in the time before the matter is expected to go to arbitration.
Article 20: Appointment of arbitrators

- The panel shall be made up of three arbitrators.
- Each country appoints a member of the panel and they shall in turn appoint the chair.
- The panel members shall have experience or expertise in international tax matters.
- They shall be independent of the tax authorities and the parties connected with the case.
- The competent authorities could agree on different rules, but these apply in the absence of that.
Article 21: Confidentiality of arbitration proceedings

- Information provided to the panel is regarded as provided under the information exchange and mutual assistance provisions of a double tax treaty.
- The information provided remains confidential.
- Indeed the outcome of the Arbitration remains confidential.
- Under Article 23(5) there are provision that breach of confidentiality can bring the process to an end (if the parties have including that option in their adoption of this Part).
Article 23: Type of arbitration process

EITHER

• Each competent authority shall submit their proposed solution for the unresolved issues. The submission shall be in terms of specific monetary amounts (where that is relevant).
• The competent authorities can submit a supporting paper, which must also be provided to the other side. There is a right of reply to the paper of the other side.
• The panel will select one of the proposals (it will not develop its own)
• The panel will not provide justification for its choice and the decision does not represent precedent.
• The panel will vote by simple majority.

OR

• The competent authorities shall provide information to the panel and the other parties, in relation to the case.
• The panel shall decide the matter based on the double tax agreement and the domestic law provisions, along with other relevant sources brought to their attention by the competent authorities.
• The panel with give their decision in writing setting out their reasoning, but with no precedential value.

Where the parties have each opted for a different option above, the competent authorities shall attempt to agree on the arbitration mechanism.
Arbitration– other matters

• Costs shall be divided between the contracting states or shall be borne in a manner to be settled by mutual agreement.

• Customary notification to the Depositary are required, of the various options elected: these can be specified in relation to each double tax agreement.

• Although the decisions of the panel have not precedent weight, if a matter already been settled by arbitration under a bilateral or multilateral agreement, then the matter should not be referred again (although this provision may be subject to a reservation).
United States views

- U.S. wants to lead the world to mandatory arbitration, so will likely sign onto the MLI for that reason.
- U.S. sees little to gain by adopting the BEPS provisions with respect to Permanent Establishments or Treaty Abuse so may reserve very broadly with respect to those provisions.
- The MLI saving clause doesn’t apply to citizens or to former citizens and residents, which has been a longstanding difference between the OECD and U.S. model treaties; the U.S. will not abandon that policy difference now.
- U.S. Senator Rand Paul (R-KY) continues to block Senate approval of all pending U.S. tax treaties and protocols on tax privacy grounds.
Contact RSM

Daniel M. Berman
Principal
+1 617 241 1258
daniel.berman@rsmus.com

Andrew Seidler
Principal
+44 (0)20 3201 8000
andrew.seidler@rsmuk.com
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