

Reconstructing treaty network

1st subject – Cancun



Piet De Vos

Head of Section - FPS Finance – Negotiation of international agreements

Caroline Docclo

avocat (Loyens Loeff) ; professor (Université libre de Bruxelles and ULiège)

October 22, 2019

1

MLI

Signature:

Paris, June 7, 2017

Consent:

Federal parliament: bill of April 7, 2019

Wallonia: bill of April 4, 2019

Flanders: bill of April 5, 2019

Brussels: bill of April 25, 2019

French community: bill of April 25, 2019

German community: bill of May 6, 2019

Ratification:

Paris: June 26, 2019



2

Background to the MLI

3

Background to the MLI

90 treaties in force

95 countries covered (7 countries covered by the old treaties with USSR and Yugoslavia)

9 treaties signed (not yet in force)

+ 6 new countries

Ongoing negotiations with 13 countries (11 new treaties; 2 protocols)

+ 5 new countries

4

Purposes of the treaties



Belgian standard:

“DESIRING to conclude a Convention for the avoidance of double taxation with respect to taxes on income and on capital and for the prevention of fiscal evasion,”

Albania:

“DESIRING, for the purpose of further developing and facilitating their economic relationship, to conclude a Convention for the avoidance of double taxation with respect to taxes on income and on capital and for the prevention of fiscal evasion”

- Enhancement of economic exchanges
- Prevention of tax evasion or fraud (# avoidance)

5

Based on OECD model convention



Belgium remedies double taxation with the exemption method (art 23A) MC

subject-to-tax rule (art 23A(1) MC)

RDT/DBI (art 23A(2) MC)

~~art 23A(4) MC~~

recapture rule

~~art 25(3), 2nd phrase, MC~~

hybrid entities

6

Treaty interpretation

Bernard Peeters, Florence 1993

OECD's "guiding principle" – 2003:

"the benefits of a convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favorable tax position and obtaining that more favorable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions"

Conflict between domestic anti-abuse rules and treaty rules

MAP Peer review, stage 1, 2017, p. 25



7

Domestic anti-treaty-shopping rules

Sham theory

Daniel Garabedian, Oslo 2002

Art 344(1) CIR 1992

Wim Panis, Seoul 2018

Anti-splitting-up of contracts

art 229(2/2) CIR 1992

Anti-channeling

art 289 CIR 1992

Beneficial ownership

ECJ February 26, 2019



8

Treaty-based anti-avoidance rules



Purpose test (*cf* art 7 MLI)

general: Estonia, Isle of Man, Latvia, Lithuania, Macao, Moldova, Qatar, San Marino, Seychelles, Tajikistan, Taiwan, Japan

artificial arrangements: Poland, Uruguay

movable property: Azerbaijan, Bahrain, Botswana, Chile, China, Greece, Kazakhstan, Mexico, Nigeria, Oman, Ukraine, United Kingdom

catch-all provision: Azerbaijan, United Kingdom

remedy for double taxation: United Kingdom

investment incentive schemes: Congo, Macedonia, Oman, Rwanda, Tunisia, Ukraine

Limitation-on-benefits (*cf* art 7 MLI)

United States

interest-royalties: Canada

dividends, interest, royalties: Japan

9

Treaty-based anti-avoidance rules



Dual residents (*cf* art 4 MLI)

Canada, Japan

Hybrid entities (*cf* art 3 MLI)

Isle of Man, Moldova and the United States

Safeguard clause (*cf* art 11 MLI)

Australia, Canada, United States + 21

10

Treaty-based anti-avoidance rules



Residence-State treaty benefit subject to tax in source state

subject-to-tax rule (art 23A(1) MC)

art 23A(4) MC

recapture rule

Anti-channeling

art 289 CIR 1992

base erosion rule (Switzerland, United States)

11

Treaty-based anti-avoidance rules



Reduced rate at source on dividends (*cf* art 8 MLI)

minimum participation: direct or indirect – 10% to 25%

minimum holding period: Bahrein, Chile, China, France, Hong Kong, Japan, Isle of Man, Luxembourg, Macao, Macedonia, Malaysia, Mexico, Moldova, Norway, Poland, Russia, Rwanda, San Marino, Switzerland, Tajikistan, United Kingdom, USA, Seychelles, Singapore

Source-State treaty benefit subject to tax in residence State

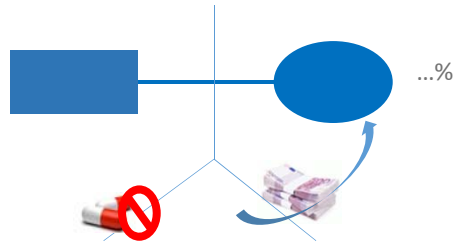
Cyprus, Ireland, Japan, United Kingdom, Singapore, Venezuela; see also Switzerland

catch-all provision: Netherlands, Rwanda, Uruguay

Third-country permanent establishment (*cf* art 10 MLI)

Canada, USA

12



13

Treaty-based anti-avoidance rules



Real estate companies and similar entities (*cf* art 9 MLI)

- # premises in which the entity operates: Botswana, Canada, Congo, Hong Kong, Mexico, Moldova, Poland, Russia (new), Rwanda, Uruguay
- # publicly traded shares: Azerbaijan, Botswana, Canada, Congo, Hong Kong, Kazakhstan, Mexico, Moldova, Russia (new), Rwanda, Uruguay, Japan
- # group reorganization: Azerbaijan, Botswana, Congo, Hong Kong, Mexico, Moldova, Russia (new), Rwanda, Uruguay
- # small shareholdings: Botswana, Canada, Congo, Japan, Rwanda, see also Chile

14

Treaty-based anti-avoidance rules

Commissionaire and similar arrangements (*cf* art 12 MLI)

Com. Conv. 5/501

Specific activity exemption (*cf* art 13 MLI)

Doc 54 3510/001, p. 62

Splitting-up of contracts (*cf* art 14 MLI)

Cf art 229(2/2) CIR 1992



15

Treaty-based anti-avoidance rules

Reservation for domestic anti-avoidance rules

Austria, Germany, Luxembourg



16

Dispute resolution



MAP

art 9(2) MC: # 43 treaties (15 of which with EU countries)

double taxation only

Denmark, France, Germany, Ireland, Israel, Luxembourg, Malaysia, Portugal

interpretation issues

Australia, Austria, Bosnia, Brazil, Denmark, Finland, France, Ireland, Israel, Côte d'Ivoire, Korea, Kosovo, Luxembourg, Malaysia, Malta, Montenegro, Philippines, Portugal, Serbia, Thailand

cases not provided by the treaty

Cl. Devillet - S. Knaepen, Madrid 2016

Japan

Com OCDE 25/55.1 (2017)

17

Dispute resolution



Binding arbitration (art 25(5) MC)

Belgian standard:

“Where,

a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of the Convention, and

b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the presentation of the case to the competent authority of the other Contracting State, any unresolved issues arising from the case shall be submitted to arbitration if the person so requests within two years from the first day from which arbitration may be requested.

These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either Contracting State. Unless a person directly affected by the case informs the competent authority of a Contracting State, within three months from the communication of the mutual agreement that implements the arbitration decision, that he does not accept the mutual agreement, the arbitration decision shall be binding and shall be implemented notwithstanding any time limits in the domestic laws of both Contracting States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.”

Botswana, Isle of Man, Japan, Malaysia, Mexico, Moldova, Norway, Poland, Russia, Switzerland, Tajikistan, United Kingdom, United States, Uruguay

18

Impact of the MLI on Belgium's treaty network

19

Covered Tax Agreements

notified Covered Tax Agreements

=> 99 (covering 96 jurisdictions: Moldova – Russia – Tajikistan *old* and *new* DTA)

matched agreements

66 (covering 65 jurisdictions) (Russia *old* and *new* DTA)

one-way agreements

=> 2 (Netherlands, Oman)

20

Hybrid Mismatches (art 3 MLI)



art 3(1) MLI - attribution of income to hybrid entity

“For the purposes of a Covered Tax Agreement, income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting Jurisdiction shall be considered to be income of a resident of a Contracting Jurisdiction but only 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.”

art 3(2) MLI - elimination of double taxation

art 3(3) MLI - limited “safeguard clause”

“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.”

added to paragraph 1 in the absence of a general safeguard clause (art 11 of MLI)

21

Hybrid Mismatches (art 3 MLI)



Possible reservations - art 3(5) MLI :

- no application of Article 3
- keep existing provisions
- no application of paragraph 2
- only replace existing provisions

BE position:

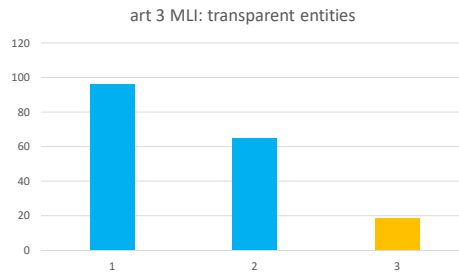
no reservation (in line with existing tax treaty policy)

Impact (as of July 27, 2017):

19 DTA impacted (out of 65)

22

Statistics



Argentina, Armenia, Australia, Chile, Israel, New Zealand, Nigeria, Poland, Romania, Russia, Slovakia, South Africa, Spain, Turkey, Uruguay; article 3(1): Ireland, Luxembourg, Malaysia, United Kingdom

23

Dual Resident Entities (art 4 MLI)



OECD Model (2014)

place of effective management

MLI and OECD Model (2017)

CAs must endeavour to determine State of residence by mutual agreement

no agreement => no treaty benefits (except to the extent agreed upon by CAs)

24

Dual Resident Entities (art 4 MLI)



Possible reservations - art 4(3):

- no application of art 4
- no agreement => no treaty benefits

BE position:

general reservation

Impact (as of July 27, 2017):

art 4 will not apply – anti-abuse rule (dependant on agreement between MAP – CA discretionary powers <=> Council of State)

25

Elimination of double taxation (art 5 MLI)



Option A

applies to provisions similar to art 23A(1) OECD Model

no exemption if the other CJ applies the CTA to exempt the relevant income or to limit the tax rate (*cf.* art 23A(4) OECD Model)

if no exemption: the tax levied by the other CJ must be credited

26

Elimination of double taxation (art 5 MLI)



Option B

applies to provisions exempting income treated as dividends by the Jurisdiction of residence

no exemption if deduction in the other CJ

if no exemption: the tax levied by the other CJ must be credited

27

Elimination of double taxation (art 5 MLI)



Option C

replace

- exemption method (= art. 23A OECD Model)

with

- credit method (= art. 23B OECD Model)

28

Elimination of double taxation (art 5 MLI)



an option applies unilaterally

Possible reservations:

- no application of art 5 (for jurisdictions that do not choose an option)
- no application of Option C (for jurisdictions that do not choose option C) to some/all of its CTAs

BE position:

no option – no reservation (options chosen by partners will apply)

29

Object and Purpose of a CTA (art 6 MLI)



art 6 (1) and 6(3) - Preamble

art 6(3) [optional]: *Desiring to further develop their economic relationship and to enhance their co-operation in tax matters,*

Art 6(1) bold text [minimum standard]: *Intending to conclude a Convention for the elimination of double taxation with respect to taxes on income and on capital **without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of residents of third States),***

Impact (as of July 27, 2017):

art 6 (1): all 65 DTA

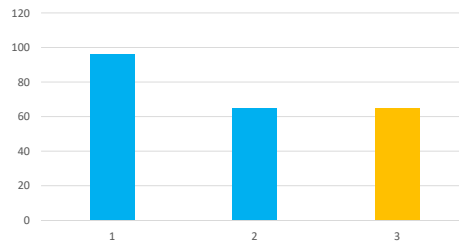
art 6 (3): 32 DTA

30

Statistics



art 6 (1): preamble

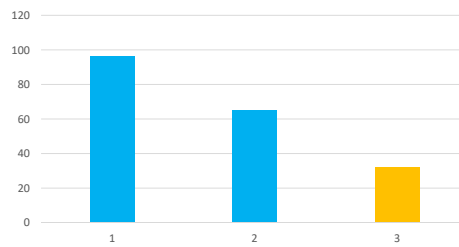


31

Statistics



art 6(3) MLI – economic relationships



Argentina, Australia, Chile, China, Croatia, Cyprus, Egypt, France, Greece, Hong Kong, Ireland, Luxembourg, Malta, Mauritius, Mexico, Nigeria, Pakistan, Romania, Russia, Senegal, Serbia, Seychelles, Singapore, Slovakia, Slovenia, South Africa, Spain, Tunisia, Turkey, United Arab Emirates, United Kingdom, Uruguay

32

Prevention of treaty abuse (art 7 MLI)



2 elements of minimum standard:

- PPT
- “simplified LOB”

no “detailed LOB”

33

Prevention of Treaty Abuse (art 7 MLI)



PPT – art 7(1) MLI

= new art 29(9) OECD Model (2017)

applies in the absence of PPT

replaces existing PPT (general or limited)

Possible reservations:

- for CJ intending to negotiate a detailed LOB
- with respect to CTAs that already contain a general PPT
- for a CJ that cannot apply the simplified LOB (art 7 (16))

34

Prevention of Treaty Abuse (art 7 MLI)



Simplified LOB – art 7(8)-(13)

optional provision

only applies if both CJ opt in

a CJ not opting for the simplified LOB may agree to a bilateral/unilateral application of the LOB if the other CJ opts in

a CJ opting for the simplified LOB may reserve on the PPT if the LOB does not apply
(=> bilateral negotiations)

35

Prevention of Treaty Abuse (art 7 MLI)



BE position:

no reservation

no option (except option art 7 (4) MLI)

=> PPT alone applies except if partner reserves because wants a detailed LOB/the simplified LOB

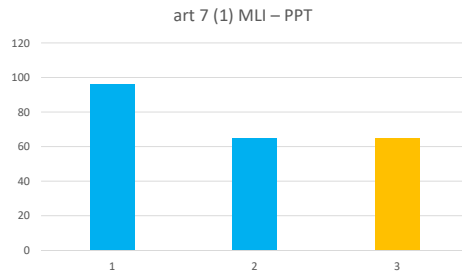
Impact (as of July 27, 2017):

art 7 (1) (PPT only): all DTA (65)

art 7 (4): 22 DTA

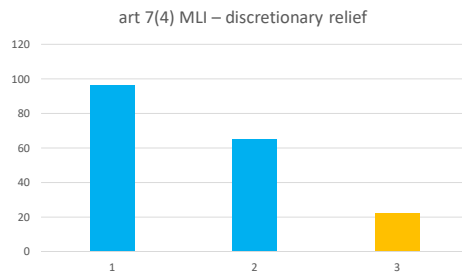
36

Statistics



37

Statistics



Australia, Cote d'Ivoire, Cyprus, Czechia, Gabon, Hungary, Ireland, Isle of Man, Lithuania, Luxembourg, Malta, Mauritius, New Zealand, Pakistan, San Marino, Senegal, Seychelles, Singapore, Ukraine, United Arab Emirates, United Kingdom, Uruguay

38

Dividend Transfer Transactions (art 8 MLI)



art 8(1) MLI

applies to provisions that exempt or subject a reduced rate for companies to a minimum holding requirement

adds a minimum holding period (365 days)

applies in the absence of a minimum holding period

replaces existing minimum holding periods

Possible reservations

no application of Article 8

keep existing holding periods

39

Dividend Transfer Transactions (art 8 MLI)



BE position:

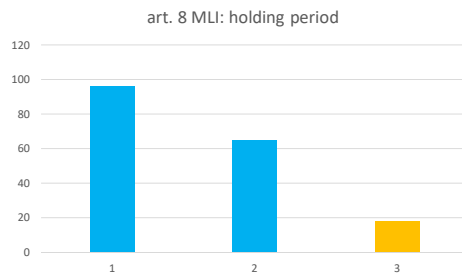
no reservation

Impact (as of July 27, 2019):

18 DTA

40

Statistics



Albania, Argentina, Armenia, Canada, China, Egypt, France, Indonesia Kazakhstan, Mexico, Romania, Serbia, Slovakia, Slovenia, South Africa, Spain, Tunisia, Uruguay

41

Capital Gains Real estate entities (art 9 MLI)



art 9(1) MLI

applies to provisions similar to art 13(4) of the OECD Model

two effects:

- includes a period of reference of 365 days (or replaces an existing period of reference)
- makes the provision applicable to comparable interests, such as interests in a partnership or trust

BE position:

opts in

Impact (as of July 27, 2019):

13 DTA

42

Capital Gains Real estate entities (art 9 MLI)

art 9(4) MLI

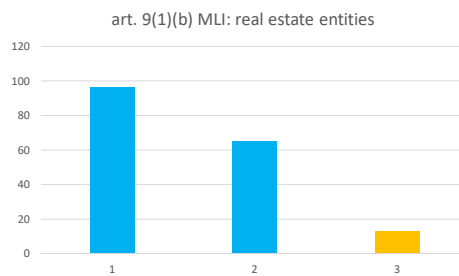
optional provision (only if both CJ opt in)

allow Parties to include art 13(4) OECD Model in their CTAs



43

Statistics



Albania, Armenia, Australia, Chile, China, Estonia, India, Kazakhstan, Poland, Mexico, Spain, Ukraine, Uruguay

44

Safeguard Clause (art 11 MLI)



art 11(1) MLI – art 1(3) OECD Model

*“This Convention **shall not affect the taxation, by a Contracting State, of its residents** except with respect to the benefits granted under paragraph 3 of Article 7, paragraph 2 of Article 9 and Articles 19, 20, 23 [A] or [B], 24, 25 and 28.”*

BE Position:

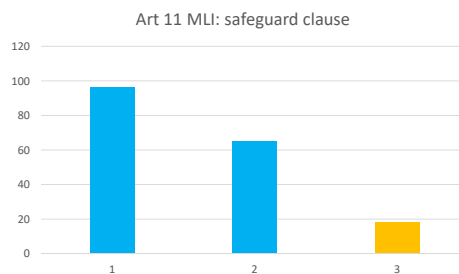
no reservation

Impact (as of July 27, 2019):

18 DTA

45

Statistics



Argentina, Armenia, Australia, Chile, China, Gabon, India, Indonesia, Mexico, New Zealand, Poland, Portugal, Romania, Russia, Senegal, Slovakia, South Africa, United Kingdom

46

Avoidance of PE status

art 12 – commissionaire and similar strategies

art 13 – specific activity exemptions

art 14 – splitting-up of contracts

art 15 – definition of a person closely related to an enterprise



47

Avoidance of PE status: dependant and independent agent

art 12 (1) and (2) MLI:

new definitions in art 5(5) and 5(6) OECD Model

BE Position:

NO reservation

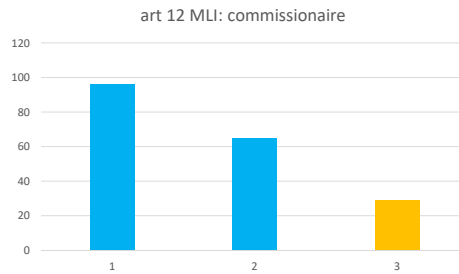
Impact (as of July 27, 2019):

29 DTA



48

Statistics



Albania, Argentina, Armenia, Chile, Cote d'Ivoire, Croatia, Egypt, France, Gabon, India, Indonesia, Israel, Kazakhstan, Lithuania, Malaysia, Mexico, New Zealand, Nigeria, Romania, Russia, Senegal, Serbia, Slovakia, Slovenia, Spain, Tunisia, Turkey, Ukraine, Uruguay

49

Avoidance of PE status- specific activity exemptions



art 13 MLI

2 elements:

- specific activities deemed not to constitute a PE even if exercised through a fixed place of business (= art 5(4) OECD Model)
- anti-fragmentation rule (= new art 5(4.1) OECD Model)

50

Avoidance of PE status- specific activity exemptions



art 13 (1) MLI: Option A (art 5(4) *new* OECD Model)

=> all activities are subject to the “preparatory/auxiliary” requirement

art 13 (1) MLI: Option B (art 5(4) *old* OECD Model)

(alternative in OECD commentary)

a PE is deemed not to include:

- the activities specifically exempted in the CTA ⇒ “automatic” exemptions (e.g. (a)-(e) of OECD Model)
- the maintenance of a fixed place of business solely for carrying on any other activity, provided that it is preparatory/auxiliary
- the maintenance of a fixed place of business solely for any combination of activities mentioned above, provided that the overall activity is preparatory/auxiliary

51

Avoidance of PE status- specific activity exemptions



BE Position:

option B

Impact (as of July 27, 2019) :

6 DTA : France, Ireland, Lithuania, San Marino, Singapore

52

Avoidance of PE status

art 13 (4) MLI: specific activity exemptions

anti-fragmentation rule (= new art 5(4.1) OECD Model)

BE Position:

NO reservation

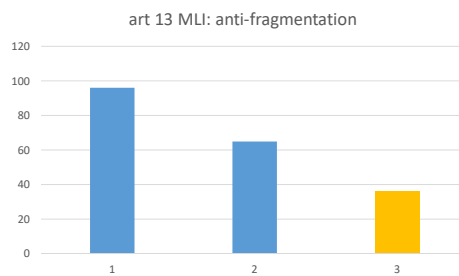
Impact (as of July 27, 2019):

36 DTA



53

Statistics



Argentina, Armenia, Australia, Chile, Cote d'Ivoire, Croatia, Egypt, France, Gabon, India, Indonesia, Ireland, Israel, Italy, Kazakhstan, Kuwait, Lithuania, Malaysia, Mexico, New Zealand, Nigeria, Portugal, Romania, Russia, San Marino, Senegal, Serbia, Slovakia, Slovenia, South Africa, Spain, Tunisia, Turkey, Ukraine, United Kingdom, Uruguay

54

Avoidance of PE status



art 14 (1) MLI – anti-splitting-up of contracts

- to different time thresholds (e.g. 6 months)
- to other types of activities/projects (e.g. the furnishing of consultancy services)
- in place of/in the absence of provisions addressing the splitting-up of contracts to avoid the application of a time threshold

BE Position :

reservation – application of PPT followed by domestic anti-contract splitting rule

55

Mandatory Binding Arbitration (art 18-26 MLI)



Optional:

scope: art 28(2) MLI - free reservations possible – subject to acceptance

BE position:

BE opts in

no reservation – no objections

type (art 23 MLI) : Default baseball (BE no reservation)

if other CJ opt for independent opinion; BE follows (in that case independent opinion is default method)

agreement of different resolution (art 24 MLI) : BE opts in

maintaining existing DTA provisions on mandatory arbitration (art 26 (4) MLI) : BE opts in

56

Mandatory Binding Arbitration (art 18-26 MLI)

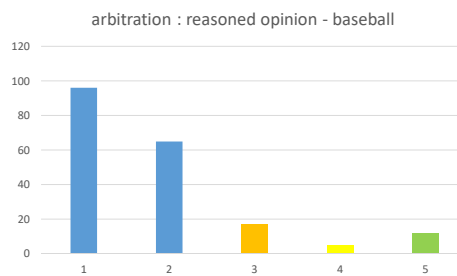


Impact (besides MLI as of July 27, 2019):

- arbitration provisions maintained: 7 DTA (BOTS, MAN, MOL, POL, UK, US, UR)
- (renewed) arbitration provisions : 17 DTA (of which 12 EU MS)

57

Statistics



(4) reasoned opinion: Greece, Malta, Portugal, Slovenia, Sweden
(5) baseball: Australia, Austria, Canada, Finland, France, Ireland, Italy, Luxembourg, Mauritius, New Zealand, Singapore, Spain

58

Indirect impact of the MLI

59

Indirect Impact

BE MLI positions => BE Model DTA

bilateral negotiations – BEPS protocols

- if members signatories MLI : Norway, Switzerland (Chinese Taipei)
- Others

bilateral negotiations – others :

- Andorra, Colombia, France, Germany, Netherlands, Kenya, Ethiopia, Lebanon, Kosovo, Kuwait, Montenegro, Ukraine.

60

Implementation of the MLI in Belgium

61

MLI Practical Implementation

BE Entry into force : 1/10/2019

application

- non-resident withholding taxes : as from 1/1/2020
- other: taxable periods starting as from 1/4/2020

62

MLI Practical Implementation



impact on bilateral treaties

- status of ratifications : <https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf>
- synthesized texts (<> coordinated texts) preferably agreed between competent authorities (not binding for tax administration/taxpayer) – publication on *fisconetplus*

Interpretation issues

- context of the MLI => approval of the Explanatory Statement (annexed to draft Bill) by the Parliament (Federal, Regional and Community Level)
- application/interpretation alongside the bilateral treaties (OECD Model Commentary 2017)