Multilateral Tax Convention to Prevent Base Erosion and Profit Shifting

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I INTRODUCTION

In 2016, the New Zealand Herald published a series of articles highlighting the problem of tax base erosion. The headline of one article read: "Top multinationals pay almost no tax in New Zealand".[1] This issue is referred to as base erosion and profit shifting (BEPS) — the tax bases of high tax jurisdictions are eroded and profits are shifted to *low* or *no* tax jurisdictions. For example, in Google's *Double Irish Dutch Sandwich* global tax arrangements, profits flow out of high tax jurisdictions via Ireland and the Netherlands and ultimately arrive at a tax haven — Bermuda.[2]

The Organisation for Economic Co-operation and Development (OECD), under mandate from the G20, has spearheaded the BEPS Action Project. Action 15 of the project was to develop a multilateral instrument to implement tax treaty-related measures to prevent BEPS (MLI).[3] On 7 June 2017 in Paris, New Zealand joined 67 other jurisdictions to sign it. Signatories included major Western economies (excluding the United States), BRICS countries[4] (excluding Brazil) and a number of jurisdictions commonly used as tax havens.[5] Three jurisdictions have subsequently signed,[6] and a further six jurisdictions have formally expressed their intention to sign.[7]

The MLI is an interesting development in a number of respects. First, once in force, it will amend thousands of existing bilateral tax treaties. It is the first agreement of its kind to do so. Secondly, the MLI introduces some important substantive provisions. These include a general anti-avoidance rule for international law, an update to the definition of *permanent establishment*, changes to the tax treatment of transparent entities and dual

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1 Matt Nippert "Top multinationals pay almost no tax in New Zealand" *The New Zealand Herald* (online ed, New Zealand, 18 March 2016).

2 See, for example, Gareth Morgan "How foreign corporates avoid paying tax & what we can do about it" *The National Business Review* (online ed, Auckland, 15 July 2016). On Apple's arrangements, see Reuven S Avi-Yonah and Haiyan Xu "Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight" (2016) 6 Harv Bus L Rev 185 at 191–193.

3 Organisation for Economic Co-operation and Development [OECD] *Developing a Multinational Instrument to Modify Bilateral Tax Treaties, Action 15 — 2015 Final Report* (OECD Publishing, Paris, 2015) [*OECD Action 15 Report*].

4 The BRICS countries are Brazil, Russia, India, China and South Africa.

5 OECD "Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting" (22 September 2017) <www.oecd.org>.

6 Mauritius (5 July 2017), Cameroon (11 July 2017) and Nigeria (17 August 2017). OECD, above n 5.

7 Côte d'Ivoire, Estonia, Jamaica, Lebanon, Panama and Tunisia. OECD, above n 5.

resident entities, and improvements to dispute resolution. Finally, global problems require coordinated global solutions, and the MLI sets a precedent for ongoing multilateral norm-shaping in international tax law.

II INTERNATIONAL TAX CONTEXT

The legal jurisdiction for states to impose tax commonly rests on the dual pillars of residence[8] and source.[9] A tax resident of New Zealand is liable to pay tax in New Zealand on his, her or its world-wide income, whether derived in New Zealand or overseas.[10] The *source* principle is that a person is liable to pay tax on income derived in New Zealand even if he, she or it is a non-resident for tax purposes.[11] In the absence of relief in cross-border cases, a taxpayer might be taxed twice: once by the state asserting its right to tax based on source, and again by the state of residence. This kind of double taxation has long been recognised as distortionary and undesirable.[12]

A state might choose to provide unilateral relief from double taxation.[13] Alternatively, a state might choose to enter into bilateral agreements with foreign countries — in particular, countries that are important trading and investment partners. These bilateral treaties are commonly referred to as double tax agreements (DTAs), and are documents of public international law which allocate taxing rights between two states. However, DTAs do not give rise to new tax obligations. Instead, they contain an additional set of provisions built on the foundation of the domestic tax regimes of the contracting states.[14] In 1963, the OECD published its model tax agreement: this has become the dominant model for DTAs globally.[15] The OECD has also published Commentaries on the articles of its model DTA and these have been influential in the interpretation of DTAs.

The global network of over 3,000 DTAs is a regime that dictates the tax treatment of most of the cross-border trade and investment in the world.[16] An original purpose of DTAs was to promote economic openness by eliminating double taxation.[17] However, some multinational corporations

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8 See Craig Elliffe *International and Cross-Border Taxation in New Zealand* (Thompson Reuters, Wellington, 2015) at 13.
9 See 311.
10 Income Tax Act 2007, s BD 1(5).
11 Section BD 1(5).
12 See, for example, League of Nations *Report Presented by the Committee of Technical Experts on Double Taxation and Tax Evasion* (C 216 M 85 1927 II, April 1927) at 8.
13 For example, the Income Tax Act 2007, s LJ 2, provides a tax credit for tax paid overseas.
14 Valentyn Kolosov "International/OECD Guidance on the Application of the Principal Purpose Test in Tax Treaties" (2017) 71 Bull Intl Taxn at [4.2].
15 See "Model Convention with Respect to Taxes on Income and on Capital" in OECD *Model Tax Convention on Income and on Capital 2014 (Full Version)* (OECD Publishing, Paris, 2014) M-3 ["OECD Model"].
16 Reuven S Avi-Yonah "The Structure of International Taxation: A Proposal for Simplification" (1996) 74 Tex L Rev 1301 at 1306.
17 See League of Nations, above n 12. For a critical view, see Tsilly Dagan "The Tax Treaties Myth" (2000) 32 NYU J Intl L & Pol 939.

have used DTAs in schemes to avoid tax. Rather than paying a fair amount of tax in a single jurisdiction, they might arrange their tax liabilities to effectively achieve *double non-taxation* (a situation where no tax is paid in either the residence state or the source state). In light of these arrangements, the OECD sought to update its model DTA to reduce the scope for such mischief. The existing network of DTAs also needed to be brought up to date. The MLI was proposed as an efficient means to update the existing network because the renegotiation of thousands of individual DTAs would have been cumbersome.[18] The MLI is a multilateral treaty with a life of its own, coexisting in perpetuity with existing bilateral DTAs.[19]

III MECHANICS

The MLI requires state signatories to choose which of its DTAs will be "covered tax agreements" to which the MLI will apply.[20] It includes a combination of minimum standards (including the introduction of anti-abuse rules) and optional provisions in respect of which countries can opt in, opt out, or enter reservations. Countries' current positions can be matched on the OECD's matching database.[21] The final position of countries on each provision will be notified when the instrument is deposited for ratification with the Depositary (the OECD).[22]

The MLI will have effect in New Zealand law under s BH 1 of the Income Tax Act 2007. While New Zealand is a dualist system constitutionally, this section of the Income Tax Act puts international tax agreements into a class of their own. Under s BH 1, the MLI — like DTAs — becomes legally binding by Order in Council and does not require incorporation into domestic law by means of its own specific legislation.

IV SUBSTANTIVE PROVISIONS

A General Anti-Avoidance Rule for International Law

The *Inland Revenue Commissioners v Duke of Westminster* principle states that taxpayers are free to choose legitimate ways to organise their affairs and reduce their tax liabilities.[23] However, sometimes tax authorities consider that such arrangements are impermissible, even though the taxpayer is complying with black letter law.

18 Typically it takes around a year to renegotiate a single double tax agreement. See Michael Littlewood "Foreign Trusts, the Panama Papers and the Sherwan Report" [2017] NZ L Rev 59 at 68, n 27.
19 John Hattingh "The Multilateral Instrument from a Legal Perspective: What May Be the Challenges?" (2017) 71 Bull Intl Taxn at [4.2].
20 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (opened for signature 31 December 2016, not yet in force) [MLI], arts 1–2.
21 "MLI Matching Database (beta)" OECD <www.oecd.org>.
22 MLI, art 39.
23 *Inland Revenue Commissioners v Duke of Westminster* [1936] AC 1 (HL).

New Zealand has had a general anti-avoidance rule (GAAR) since 1878.[24] The jurisprudence of domestic anti-avoidance rules has continued since its development in the 20th century.[25] Michael Littlewood contends that avoidance is a particularly difficult area of law because — unlike other legal concepts, which have an established core idea but can be contested at the margins — the concept of avoidance lacks any clearly established core at all.[26] Nevertheless, the MLI makes a general anti-avoidance rule part of international law.

The MLI amends the preambles of covered DTAs, stating explicitly that their purpose is to eliminate double taxation "without creating opportunities for … avoidance (including through treaty-shopping …)".[27] Treaty-shopping is a prominent BEPS technique. This is a situation whereby a resident taxpayer from a particular state derives income in a source country and is able to take advantage of a tax treaty between the source country and yet another jurisdiction. For example, Hong Kong has a large network of tax treaties and very large sums of money pass through Hong Kong "for no other reason than that they would otherwise be taxed (or taxed more heavily) elsewhere".[28] A *limitation on benefits* rule is a specific anti-avoidance rule used to target treaty-shopping. Such a rule aims to ensure that a taxpayer will be entitled to treaty benefits only if it is genuinely carrying on business in the treaty jurisdiction.[29] A fairly complex limitation on benefits rule has long been used by the United States to prevent treaty-shopping.[30] The MLI includes a simplified limitation on benefits provision,[31] in addition to the principal purpose test (PPT) as the MLI's general anti-avoidance rule.[32]

The PPT is designed to catch treaty-shopping situations that might escape a limitation on benefits rule, but it is broader in scope and gives greater discretion to tax authorities. The PPT provision states that a treaty benefit shall not be granted in respect of an item of income if it is reasonable to conclude that *one of the principal purposes* of an arrangement or a transaction was to obtain that benefit.[33] The exception is if it can be established that granting the benefit would be in accordance with the object

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24 Land Tax Act 1878, s 62. The current incarnation of the general anti-avoidance rule is found in s BG 1 of the Income Tax Act 2007.

25 The leading New Zealand case is *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

26 Michael Littlewood "Tax Avoidance, the Rule of Law and the New Zealand Supreme Court" [2011] NZ L Rev 35 at 37.

27 MLI, art 6(1).

28 Michael Littlewood "Tax Competition: Harmful to Whom?" (2004–2005) 26 Mich J Intnl L 411 at 462; and Michael Littlewood and Kyle Rainsford "Hong Kong's Treaty Network: Are the US, Germany and Australia Sensibly Standing Aloof? Or Sadly Missing Out?" [2014] BTR 72.

29 David Kleist "A Multilateral Instrument for Implementing Changes to Double Tax Treaties: Problems and Prospects" (2016) 44 Intertax 823 at 826.

30 Luc De Broe and Joris Luts "BEPS Action 6: Tax Treaty Abuse" (2015) 43 Intertax 122 at 128.

31 MLI, arts 7(8)–(13).

32 Articles 7(1)–(4).

33 Article 7(1).

and purpose of the relevant treaty provisions.[34] Most signatories, including New Zealand, adopted the PPT.[35]

The PPT means that impermissible uses of DTAs can be curtailed through provisions included in the treaty itself, rather than by unilateral domestic rules — such as New Zealand's GAAR. A general anti-avoidance rule is, therefore, affirmed to be an expression of the common intention of both treaty partners.[36] However, the devil is in the details of interpretation and application. What is a *principal* purpose as opposed to an *ancillary* purpose? Where are tax authorities and courts to look for guidance in applying the PPT?

Alongside the MLI, the OECD issued an Explanatory Statement.[37] The Explanatory Statement is intended to clarify the operation of the MLI, but it is not intended to address the *interpretation* of the underlying BEPS measures (except with respect to arbitration).[38] Guidance on the MLI's substantive provisions is to be found in the 2015 BEPS Final Reports.[39] *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 — 2015 Final Report* provides 13 paragraphs of commentary on the PPT and 10 practical examples to illustrate its intended application.[40] The BEPS Final Reports contain amendments to the Commentaries on the Model Convention.[41] Therefore, the Commentaries could ultimately become the key source of guidance on the PPT. The Commentaries have been accepted (to varying degrees) worldwide as a relevant source in interpretation and are actively used by courts, even though their legal status is ambiguous.[42] It will be interesting to monitor the extent to which an ambulatory approach to future Commentary updates will affect interpretation of the PPT.[43] Decision makers will also need to clarify the relationship between the PPT and domestic avoidance rules.

Finally, the development of anti-avoidance jurisprudence might be helpful as a resource to guide application of the PPT. Reuven Avi-Yonah and Haiyan Xu urge the OECD to publish cases regularly to serve as a resource — particularly for developing countries, which lack the technical capacity "to make the best use of the PPT provision".[44] However, because there are differing domestic laws between states, guidance will have to be selected carefully. If states fail to apply the PPT with restraint, taxpayers

34 Article 7(1).
35 See OECD, above n 5.
36 De Broe and Luts, above n 30, at 145.
37 OECD "Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting" (2017) <www.oecd.org>.
38 At [12] and [19]–[20].
39 At [12].
40 OECD *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 — 2015 Final Report* (OECD Publishing, Paris, 2015) at 55–64.
41 At 10.
42 Kolosov, above n 14, at [4.1].
43 On reference to subsequent Commentaries, see Elliffe, above n 8, at 646–648.
44 Avi-Yonah and Xu, above n 2 at 221.

could face uncertainty to a degree that would "undermine the whole system of tax treaty benefits".[45]

Permanent Establishments

DTAs usually provide that the source state will only tax profits of a non-resident company if it has a "permanent establishment" in the source state.[46] A permanent establishment commonly means a fixed place of business, such as a branch, office or factory. However, various activities are deemed to be exempted from this definition, including facilities used solely for storage, display or delivery.[47] Article 13 of the MLI provides options for ensuring that exempted activities must be of a "preparatory or auxiliary character" to avoid permanent establishment status.[48] Therefore, situations in which an exempted activity forms a core part of the company's business will constitute a permanent establishment.[49]

An important area that the MLI does *not* cover is the concept of a digital permanent establishment. The MLI affects companies that dispatch goods sold online via storage facilities in the country of sales. However, the changes do not deal with sales of intangible products or services — they affect sales of "physical but not electronic books, and DVDs but not streaming services".[50] Therefore, states will continue to resort to unilateral measures, rather than an internationally coordinated response to challenges of e-commerce. These unilateral measures include the United Kingdom's diverted profits tax and the Australian multinational anti-avoidance law.[51]

The MLI also addresses contract splitting arrangements, whereby companies seek to avoid certain timing thresholds to avoid being treated as having a permanent establishment. For example, a construction company will be held to have a permanent establishment in a source country if its construction project takes longer than 12 months to complete.[52] Inevitably, certain companies were tempted to split the project into multiple undertakings of less than 12 months. Even though the substantive outcome remained the same, the company was not deemed to have a permanent establishment.[53] The MLI now provides for an aggregation rule for related

45 Philip Baker "The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting" [2017] BTR 281 at 283.

46 "OECD Model", above n 15, arts 5 and 7. See Elliffe, above n 8, at 336. If a foreign parent company incorporates a subsidiary in the source state, the subsidiary will be liable to tax based on residence.

47 "OECD Model", above n 15, art 5(4).

48 MLI, art 13(1)–(3).

49 OECD *Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 — 2015 Final Report* (OECD Publishing, Paris, 2015) [*OECD Action 7 Report*] at 29.

50 BEPS Monitoring Group "Overall Evaluation of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project" as cited in Avi-Yonah and Xu, above n 2, at 223.

51 Finance Act 2015 (UK), s 77–116; and Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015 (Cth). See also Craig Elliffe "The Lesser of Two Evils: Double Tax Treaty Override or Treaty Abuse" [2016] BTR 62.

52 "OECD Model", above n 15, art 5(3).

53 *OECD Action 7 Report,* above n 49, at 42–43.

parties.[54] The PPT is also envisaged as a backstop measure against contract splitting.[55]

It is not necessary for a permanent establishment to be a physical place at which business operations occur. For example, an agent can constitute a permanent establishment if the agent "habitually exercises … authority to conclude contracts in the name of the enterprise".[56] In *commissionaire* arrangements, a non-resident supplier might attempt to avoid permanent establishment status by having a person sell products in the person's own name.[57] The source state would be able to tax the commission payment made by the company to the seller, but not the company's profit on the goods sold. The MLI broadens the ability of a source state to tax these arrangements by looking into the economic substance of contracts. For example, a company will be deemed to have a permanent establishment where contracts are routinely concluded "for the transfer of ownership of property … owned by that enterprise", even if the contracts are not concluded in the name of the company.[58]

Transparent Entities and Dual Resident Entities

The legal systems of most, if not all, countries recognise the existence of artificial persons. There is a considerable degree of variance between jurisdictions in the treatment of these entities as distinct taxable units.[59] An entity is fiscally transparent when the tax authority looks through the legal construct and taxes its human members, beneficiaries or participants. For example, in New Zealand, a look-through company is a transparent entity and is taxed in the manner of a partnership.[60]

Article 3 of the MLI addresses situations where an entity is treated as a fiscally opaque taxable unit in one jurisdiction and (wholly or partly) fiscally transparent in the other.[61] One group of authors argues that the provision mandates a two-step process.[62] First, the source state needs to apply its usual approach under its domestic law to determine which non-resident entities and which taxable events it seeks to tax. Secondly, the source state needs to determine the extent to which the taxpayer should be granted or denied treaty benefits as a function of the *residence* state's qualification of the entity as fiscally transparent or opaque.[63]

54 MLI, arts 14–15.
55 *OECD Action 7 Report*, above n 49, at 42.
56 "OECD Model", above n 15, art 5(5).
57 *OECD Action 7 Report*, above n 49, at 15.
58 MLI, art 12(1)(b).
59 Angelo Nikolakakis and others "Some Reflections on the Proposed Revisions to the OECD Model and Commentaries, and on the Multilateral Instrument, With Respect to Fiscally Transparent Entities" [2017] BTR 295 at 299.
60 Income Tax Act 2007, s HB 1.
61 See also OECD *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 — 2015 Final Report* (OECD Publishing, Paris, 2015) [*OECD Action 2 Report*] at 139–143.
62 Nikolakakis and others, above n 59, at 301.
63 At 301.

This approach appears clear enough in principle. However, the OECD had earlier recommended such an approach in respect of partnerships.[64] It was an innovation which many states found impossible to apply because states have traditionally applied tax treaties on the basis of their own attribution rules.[65] Therefore, the technical competency of tax authorities — as well as resource constraints — will be particularly significant with respect to the implementation of this provision in practice. In a detailed analysis of the provision, the authors conclude that further work is required to develop solutions in this area.[66]

Occasionally, taxpayers are found to satisfy the tax residency definitions of more than one state. DTAs commonly provide a "place of effective management" test to determine a company's residence.[67] The MLI broadens the test, so that states "[have] regard to its place of effective management, the place where it is incorporated and otherwise constituted and *any other relevant factors*".[68] The previous test is, therefore, replaced with tax authority discretion to settle questions of dual tax residence on a case-by-case basis.[69] The change is intended to ensure that dual resident entities are "not used to obtain benefits of treaties unduly".[70] With this measure — as with the PPT — a theme of the MLI emerges: states have agreed to increase the discretionary powers granted to tax authorities in response to the challenges of globalised business.

Improved Dispute Resolution

Tax authorities occasionally interpret a DTA differently or regard the taxpayer's actions in different ways.[71] However, the world does not have an international tax court to resolve disputes over DTA interpretation. States have been unenthusiastic about ceding their sovereign power to such an institution. Similarly, many states have been reluctant to commit to mandatory binding arbitration. The most common dispute resolution mechanism in DTAs has been the *mutual agreement procedure* promoted by the OECD.[72] This procedure is designed to facilitate the resolution of disputes between taxpayers and one or both of the DTA parties.[73] Before the MLI, if a taxpayer believed that it was being taxed in a manner inconsistent with the provisions of a DTA, the taxpayer had to lodge a complaint in its

64 OECD *Application of the OECD Model Tax Convention to Partnerships* (OECD Publishing, Paris, 1999).
65 Nikolakakis and others, above n 59, at 304.
66 For a detailed review of the measure, see Nikolakakis and others, above n 59.
67 "OECD Model", above n 15, art 4(3).
68 MLI, art 4(1) (emphasis added).
69 *OECD Action 2 Report*, above n 61, at 137.
70 At 137.
71 Elliffe, above n 8, at 624.
72 "OECD Model", above n 15, art 25(1)–(4).
73 Elliffe, above n 8, at 624.

state of residence.[74] The MLI broadens this to allow the taxpayer to trigger the mutual agreement procedure in either state.[75]

Under the MLI, a number of countries have opted to introduce arbitration.[76] However, its form — final offer arbitration — preserves a significant amount of control for states.[77] The taxpayer can request arbitration only after two years of the mutual agreement procedure.[78] Once requested, there are four key stages in the arbitration process. First, a panel of three arbitrators is appointed.[79] Secondly, the tax authority of each DTA party must submit to the panel a proposed resolution to each unresolved issue in the case.[80] Thirdly, the panel must, by simple majority, select *one* of the proposed resolutions with respect to each outstanding issue.[81] The fourth stage preserves a zone of discretion for states in the post-decision period. If within three months of the arbitrators' decision the states involved are able to come to a different mutual agreement, then their agreement will override the arbitration decision.[82] New Zealand opted into the MLI's final offer arbitration provisions, but it reserved the right to exclude any case involving New Zealand's GAAR.[83] This gives the Inland Revenue Department discretion to exclude certain cases from arbitration — namely, any case in which avoidance is alleged.

V FISCAL SOVEREIGNTY AND ONGOING NORM SHAPING

Will states be able to assert fiscal sovereignty over globalised business in the 21st century? A key insight of the BEPS project — exemplified by the signing of the MLI — is that, to remain sovereign in the international tax area, states must cooperate.[84] The United States' refusal to enter into the MLI indicates that global tax competition has by no means been displaced by a rosy era of global tax cooperation. Nevertheless, multilateralism in international tax law is not the custom, particularly with regard to norm

74 "OECD Model", above n 15, art 25(1).
75 MLI, art 16.
76 Article 19. At the time of writing, 25 countries have signed up for arbitration, although signatories can modify their MLI positions until ratification. The countries are: 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. OECD, above n 5.
77 MLI, art 23(1); and OECD, above n 37, at 61–62. Article 23(2) of the MLI includes an option for arbitration in which arbitrators give an independent opinion. However, most states opted for final offer arbitration.
78 MLI, art 19.
79 Article 20.
80 Articles 23(1)(a) and 23(1)(b).
81 Article 23(1)(c).
82 Article 24.
83 OECD "New Zealand: Status of List of Reservations and Notifications at the Time of Signature" <www.oecd.org>.
84 Dirk Broekhuijsen and Henk Vording "The Multilateral Tax Instrument: How to Avoid a Stalemate on Distributional Issues?" [2016] BTR 39 at 50.

setting for substantive tax law.[85] Therefore, the MLI is an important achievement of significant direct and symbolic value.[86]

The MLI looks to the future by providing that signatory states may convene a Conference of the Parties to address any question arising as to its interpretation or implementation.[87] The OECD also contemplates that further updates to the network of DTAs might be implemented multilaterally.[88] Avi-Yonah and Xu note that there were shortcomings in the BEPS project owing to the short two-year framework.[89] However, the MLI and BEPS project is "not the final destination of international tax law reform", but rather "the first step toward the modernization of global tax governance in the long run".[90] They argue that the BEPS project has seen "the old principles" of the 20th century international tax regime "strengthened by a patch up of current rules".[91] More fundamental changes were beyond the scope of the MLI. Nevertheless, if states want to protect their tax bases, they will need to confront fundamental design issues in international tax and collaborate to construct a regime appropriate for the 21st century.[92]

VI CONCLUSION

The MLI is an ingenious solution to the practical problem of updating the global network of DTAs. The problem of multinationals using DTAs in avoidance arrangements will be curtailed to an extent by the MLI's anti-avoidance measures — at the cost of increased taxpayer uncertainty. The effectiveness of the PPT and the tax authorities in applying the test will depend on adequate expertise, resourcing and the sharing of useful information.

Problems in the permanent establishment definition have been tidied up. However, broader challenges of the digital economy remain unresolved. The new test for dual resident entities expands tax authorities' discretionary power. The article on transparent entities attempts to deal with jurisdictional asymmetry. However, it is unlikely to be a magic bullet to finally resolve problems in this area. Finally, the MLI's dispute resolution measures strike a realistic balance between taxpayers' desire to resolve disputes speedily and states' desire to retain their sovereign autonomy in disputed cases. As a first step toward a new era of multilateralism, the MLI illustrates the remarkable speed in which binding international norms can be implemented when the issue concerns lost revenue to states.

85 Hattingh, above n 19, at [2].
86 At [2].
87 MLI, arts 31 and 32.
88 *OECD Action 15 Report,* above n 3, at 26.
89 Avi-Yonah and Xu, above n 2, at 207–208.
90 At 208.
91 At 207.
92 See, for example, the proposals of Avi-Yonah and Xu, above n 2, at 207–211 (supporting the taxation of multinational groups as single unitary entities) and 234–237 (reversing the "benefits" principle by primarily taxing active income at residence and passive income at source).