

Canada's Limited Approach to the OECD's MLI

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In this article, the authors discuss Canada's signing of the OECD multilateral instrument to adopt many of the anti-BEPS tax treaty rules. Canada, reflecting its own policy priorities and some initial hesitation about the MLI initiative, has taken a limited approach to the convention, as outlined in this article.

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On June 7, 2017, Canada, together with 67 other countries, signed the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (multilateral instrument, or MLI)¹ at a ceremony hosted by the OECD in Paris. On the same day, the Canadian Department of Finance issued a news release² containing a brief

¹Unless otherwise specified, capitalized terms shall have the meaning assigned to them in the MLI.

²See Canadian Department of Finance, release, "Canada Signs Agreement to Combat International Tax Avoidance" (June 7, 2017).

background³ and a link to the OECD's website, which contains Canada's Status of List of Reservations and Notifications at the Time of Signature,⁴ an official document that sets out a provisional list of expected reservations and notifications to be made by Canada under articles 28(7) and 29(4) of the MLI.

In this article, we examine this significant development in international taxation from a Canadian perspective.

I. Background

On November 24, 2016, the OECD announced that more than 100 countries, including Canada, had successfully carried out action 15 of the OECD/G-20 initiative to combat base erosion and profit shifting⁵ by negotiating and coming to agreement on the MLI. The stated objective of action 15 has been to develop an innovative approach under which all signatories could quickly and efficiently add anti-BEPS measures to

³Canadian Department of Finance, "Background: Impact of Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting" (2017).

⁴Canadian Department of Foreign Affairs, Trade and Development, "Status of List of Reservations and Notifications at the Time of Signature" (May 30, 2017).

⁵The BEPS initiative commenced with the OECD's publication of the report titled "Addressing Base Erosion and Profit Shifting" (Feb. 12, 2013) and the issuance of the "Action Plan on Base Erosion and Profit Shifting" (July 19, 2013). It culminated with the October 5, 2015, release of the final reports for each of the 15 actions (final package), which contains a report and executive summary for each item. The package also included an explanatory statement and various other incidental documents. See also Nathan Boidman and Michael N. Kandev, "BEPS: The OECD Discovers America?" *Tax Notes Int'l*, Dec. 16, 2013, p. 1017; Boidman and Kandev, "The BEPS Deliverables: A Macro Critique," *Tax Notes Int'l*, Nov. 17, 2014, p. 611; Boidman and Kandev, "BEPS and Acquisitions of Canadian Targets," *Tax Notes Int'l*, Aug. 3, 2015, p. 431; Boidman and Kandev, "BEPS: A Spent Force or Radical Change?" *Tax Notes Int'l*, Dec. 7, 2015, p. 837; Boidman and Kandev, "Canada Takes First BEPS Steps," *Tax Notes Int'l*, Apr. 25, 2016, p. 371; and Boidman and Kandev, "BEPS Effects: In the Eye of the Beholder?" *Tax Notes Int'l*, Oct. 10, 2016, p. 171.

covered tax agreements without the necessity of bilaterally renegotiating thousands of treaties (collectively over 3,000). At the outset of the BEPS project in 2013, we expressed reservations at a conceptual level and identified issues with the legal practicability of the MLI.⁶ Hence, it is very much to the credit of the OECD team in charge of developing and obtaining consensus on the MLI that action 15 has come to fruition and that the MLI opened for signature on December 31, 2016.⁷

At its most essential, the MLI, a complex 48-page multilateral treaty that is subject to ratification, acceptance, or approval,⁸ incorporates the minimum tax treaty standards established by the BEPS final package, specifically the mandatory adoption of the actions 6 and 14 items relating to treaty abuse and dispute resolution, respectively, and also sets out a number of optional tax treaty provisions.

II. Treaty Abuse

As to action 6, the action plan called for the development of treaty provisions (as well as domestic rules) to prevent treaty abuse, including, most notably, provisions preventing so-called treaty shopping.⁹ The October 5, 2015, final package put forward a new minimum standard¹⁰ involving the adoption of provisions to deal with treaty shopping.¹¹

This standard requires the inclusion of a clear, yet fairly innocuous, statement that the countries that enter into a tax treaty intend to avoid creating

opportunities for nontaxation or reduced taxation through tax evasion or avoidance, including through treaty-shopping arrangements. More concretely, the minimum standard also contemplates that a country must, *at its option*, include in its treaties *either*:

- the combined approach of a limitation on benefits¹² rule and principal purposes of transactions or arrangements (PPT)¹³ rule;
- the PPT rule alone; or
- the LOB rule supplemented by a mechanism that would deal with conduit financing arrangements not already dealt with in tax treaties.

Canada's government has been concerned with treaty shopping since long before the advent of the OECD's BEPS initiative.¹⁴ After several unsuccessful court challenges to perceived treaty-shopping situations,¹⁵ the Canadian federal government announced a consultation on treaty shopping in its 2013 budget and, the following year, released for comments a blueprint for a broad domestic anti-treaty-shopping provision combining both LOB and PPT features.¹⁶ Then, somewhat surprisingly, later in 2014 the government shelved this proposal while awaiting further developments as part of the OECD BEPS process.¹⁷ After the final package was released on October 5, 2015, the government, in the 2016 budget, confirmed its commitment to address treaty abuse in accordance with the minimum

⁶ "BEPS: The OECD Discovers America?" *supra* note 5.

⁷ Article 27(1) MLI.

⁸ Article 27(2) MLI.

⁹ The OECD's BEPS work on treaty shopping was facilitated by the 2003 commentary to article 1 of the OECD model, which at paras. 7 to 26 exhaustively addressed "Improper Use of the Convention." The OECD had by that time also given an antiabuse spin to many other areas of the commentary. For example, much effort was invested in transforming the beneficial owner concept in treaty articles 10, 11, and 12 into an anti-treaty-shopping tool. See, e.g., Kandeve and Matthew Peters, "Treaty Interpretation: The Concept of 'Beneficial Owner' in Canadian Tax Treaty Theory and Practice," in: Report of Proceedings of the Sixty-Third Tax Conference, 2011 Tax Conference (Toronto: Canadian Tax Foundation, 2012), at 26:1-60.

¹⁰ According to the final package, all OECD and G-20 countries have committed to the consistent implementation of the minimum standards. For comment, see "BEPS: The OECD Discovers America?" *supra* note 5.

¹¹ See executive summaries, *supra* note 5 at 21-22. Significantly, these changes are not proposed to be included in domestic anti-treaty-shopping legislation.

¹² A U.S.-style LOB rule that limits the availability of treaty benefits to entities that meet certain conditions. These conditions, based on the legal nature of, ownership in, and general activities of the entity, seek to ensure that there is a sufficient link between the entity and its state of residence. These LOB provisions are found in treaties concluded by a few countries, most notably the U.S.

¹³ A PPT is a general antiabuse rule aimed at addressing other forms of treaty abuse, including treaty-shopping situations that would not be covered by an LOB rule. Under the PPT rule, if one of the principal purposes of transactions or arrangements is to obtain treaty benefits, these benefits would be denied unless it is established that granting these benefits would be in accordance with the object and purpose of the provisions of the treaty.

¹⁴ This is surprising considering Canada's broad treaty network; Canada has 93 comprehensive tax treaties in force and 22 tax information exchange agreements in force.

¹⁵ See *Canada v. MIL (Investments) S.A.*, 2007 FCA 236; *The Queen v. Prevost Car Inc.*, 2009 FCA 57; and *Velcro Canada Inc. v. The Queen*, 2012 TCC 57.

¹⁶ See Canadian Department of Finance, "Consultation Paper on Treaty Shopping — The Problem and Possible Solutions" (Aug. 12, 2013). For prior coverage, see Kandeve, "Canada Intent on Stoppin' the Shoppin' and More," *Tax Notes Int'l*, Mar. 31, 2014, p. 1201.

¹⁷ Special Release IT 14-7.

standards established by the OECD.¹⁸ That budget stated that going forward, Canada will consider either of the minimum standard approaches suggested under BEPS action 6 (on treaty abuse), depending on the particular circumstances and on discussions with its tax treaty partners. Canada could amend its tax treaties to include a treaty antiabuse rule through bilateral negotiations, the MLI, or a combination of the two.¹⁹

Notably, the two tax treaties that Canada has negotiated since the advent of the BEPS project, with Israel and Taiwan, did not directly reflect the action 6 minimum anti-treaty-shopping standards.²⁰ Neither contains the recommended preamble stating that the parties intend to avoid creating opportunities for double nontaxation, nor do they contain an LOB rule or a general PPT rule. However, both include “mini PPT” rules in the dividends, interest, and royalties articles (an approach seen in pre-BEPS Canadian treaties, such as that with the U.K.).²¹ Further, the Taiwan treaty, but not the Israel treaty, has a special regime provision (in article 26(3) and seen in prior Canadian treaties). That means that, for example,

if Taiwan did not impose tax on Canadian-source dividends earned by a Taiwanese corporation owned by nonresidents of Taiwan but would if the corporation were owned by individuals resident in Taiwan, the treaty would not reduce the Canadian domestic withholding tax rate (25 percent) on such dividends, paid to such foreign-owned Taiwanese corporation, to the treaty rate (of 10 percent or 15 percent, depending on the level of ownership of the Canadian company that paid the dividends). Meanwhile, the Israel treaty, but not the Taiwan treaty, seeks to emulate Article XXIXA(7) of the Canada-U.S. treaty by incorporating domestic antiavoidance rules in its article 25. Notably, Canada’s provisional list of covered tax agreements includes Israel but not Taiwan.²²

III. Dispute Resolution

As to action 14, the final package identified the following elements of a minimum standard to ensure the timely, effective, and efficient resolution of treaty-related disputes:

- full implementation in good faith of treaty obligations regarding mutual agreement procedures and resolution of MAP cases in a timely manner;
- establishment of administrative processes promoting the prevention and timely resolution of tax-treaty-related disputes; and
- establishment of access to MAPs by taxpayers.

In parallel, a large group of countries had committed to move quickly toward mandatory and binding arbitration.²³ A provision to that effect is now seen in the Canada-U.S. treaty.

¹⁸“Canada Takes First BEPS Steps,” *supra* note 5.

¹⁹Despite the clear suggestion that the Canadian government is pursuing a treaty-based approach to treaty shopping, the Department of Finance has quietly been building up a mechanical anti-conduit regime that would eliminate treaty-shopping benefits in a broad variety of situations without regard to the taxpayer’s principal purpose or whether the transactions are abusive. Budget 2014 introduced rules to limit the use of back-to-back loan arrangements in the context of Canada’s thin capitalization rule and withholding tax regime. Most recently, Budget 2016 expanded the existing back-to-back loan rules in the context of Canada’s withholding tax regime to apply to back-to-back rents and royalties and catch specified character substitution arrangements. See Steve Suarez, “Canada’s Problematic Proposed New Loan Rules,” *Tax Notes Int’l*, May 5, 2014, p. 441; Suarez, “An Analysis of Canada’s Latest International Tax Proposals,” *Tax Notes Int’l*, Sept. 29, 2014, p. 1131; Kandev, “Canadian Interest Anti-Conduit Rule Soon to Be Law,” *Tax Notes Int’l*, Dec. 15, 2014, p. 1027; and Kandev, “Canada Expands Back-to-Back Regime: Examining the Character Substitution Rules,” *Tax Notes Int’l*, June 19, 2017, p. 1087.

²⁰Boidman and Kandev, “How Is BEPS Reflected in Canada’s Newest Treaties?” *Tax Notes Int’l*, Nov. 7, 2016, p. 585.

²¹For example, article 10 of the new treaty with Israel states:

A resident of a Contracting State shall not be entitled to any benefits provided under this Article in respect of a dividend if one of the main purposes of any person concerned with an assignment or transfer of a dividend, or with the creation, assignment, acquisition or transfer of the shares or other rights in respect of which the dividend is paid or with the establishment, acquisition or maintenance of the person that is the beneficial owner of the dividend, is for that resident to obtain the benefits of this article.

See “Convention between the Government of Canada and the Government of the State of Israel for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income,” signed on Sept. 21, 2016.

²²Taiwan is not on Canada’s list because of its particular status in relation to the People’s Republic of China. See “Arrangement Between the Canadian Trade Office in Taipei and the Taipei Economic and Cultural Office in Canada for the Avoidance of Double Taxation and Prevention of Fiscal Evasion With Respect to Taxes on Income,” signed on Jan. 18, 2016.

²³Albania, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, the People’s Republic of China, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, the Netherlands, New Zealand, Nigeria, Norway, Peru, the Philippines, Poland, Portugal, the Russian Federation, Saudi Arabia, Senegal, Singapore, the Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, the United Kingdom, the United States, and Vietnam.

This minimum standard is procedural in nature, and its adoption by Canada and other countries is not surprising, because, at least in principle, both taxpayers and tax administrations would benefit from efficient and effective tools for dispute resolution.

IV. Canada Signs the MLI

A. Process

Until earlier this year, the Canadian government was taking, at least in public, a wait-and-see approach regarding the MLI. As recently as November 29, 2016, at the Department of Finance presentation during the Annual Tax Conference of the Canadian Tax Foundation, Brian Ernewein, the general director (Legislation) of the Department of Finance's Tax Policy Branch, stated that while Canada played an extensive role in developing the MLI, the government had yet to decide whether to sign the MLI and which provisions to adopt.

Then, in the budget presented on March 22, the Canadian government formally announced that it is pursuing signature of the MLI and undertaking the necessary domestic processes to do so.

Later, at the 2017 International Tax Conference of the International Fiscal Association Canada held in Toronto on April 25, 2017, Stephanie Smith, senior chief of the Tax Treaties Section, Tax Legislation Division, Tax Policy Branch at the Department of Finance, outlined the process for Canada's adoption of the MLI. She explained that the process would begin with approval by the Cabinet, followed by signing of the MLI and tabling in Canada's House of Commons for a period of 21 sitting days, after which would come the formal tabling of an implementing bill, which must be passed in accordance with Canada's normal parliamentary procedure. Following royal assent, Canada would request an order in council to send its notice of ratification, indicating that Canada has followed the domestic processes necessary to implement the MLI. A letter of ratification could then be sent, thus triggering the entry into force of the MLI as to Canada.²⁴ Under its terms, the MLI would

generally enter into force after five jurisdictions have deposited their instruments of ratification, acceptance, or approval.²⁵ Entry into effect is regulated by article 35 of the MLI, which provides specified delays as is typical for tax treaties. Smith estimated that the implementation process would take the rest of 2017 and most of 2018, suggesting that the MLI would enter into effect on January 1, 2019, for withholding taxes and that entry-into-effect periods for all other taxes would generally start on January 1, 2020.²⁶

On June 7 Canada announced that it had signed the MLI. Canada has listed its tax treaties with 75 jurisdictions as covered tax agreements to which it intends the MLI to apply. However, only 50 of these countries are signatories to the MLI; another five have expressed their intent to sign the MLI in the near future. Notably, Canada's list of covered tax agreements does not include its treaty with the U.S., which has not signed the MLI (and with which Canada already has complex, detailed treaty arrangements including an LOB). It also does not include Germany and Switzerland, even though Germany and Switzerland are signatories to the MLI. Canada has, however, announced that it is commencing bilateral renegotiation of its treaties with Germany and Switzerland. The list does include countries such as Luxembourg and the Netherlands that have traditionally been entry points for foreign investment into Canada.

When the MLI comes into force for Canada's covered tax agreements, it will modify those tax treaties, assuming the contracting jurisdiction has also ratified the MLI and has made matching choices. If one contracting jurisdiction has made a reservation regarding the application of a particular provision of the MLI, this will preclude the modification of that provision in the relevant covered tax agreement, whether or not the other contracting jurisdiction has made a similar reservation.

Substantively, Canada has only adopted the minimum standard provisions and the binding mandatory arbitration provision of the MLI. Canada will register a reservation on all other

²⁴ Article 34(2) MLI.

²⁵ Article 34(1) MLI.

²⁶ Of course, this only applies when another treaty jurisdiction has also had the MLI treaty enter into effect and when the states have included each other in their list of covered treaties.

provisions in the MLI. The backgrounder states that Canada will continue to assess whether to adopt the optional provisions of the MLI at the time it is ratified. Procedurally, Canada's conservative position may be explained by a key feature of the MLI — a country can sign on for additional provisions or remove reservations in the future (or, as explained by Smith, "if you start small, you can go bigger"), but a country cannot do the reverse²⁷ unless it altogether withdraws from the MLI,²⁸ which presumably would be politically unpalatable.

B. Minimum Standards and Binding Arbitration

The backgrounder explains that the MLI will allow Canada to address treaty abuse in accordance with the BEPS minimum standard:

The minimum standard consists of the inclusion of a new tax treaty preamble and a substantive technical rule. The substantive technical rule is intended to prevent the inappropriate use of bilateral tax treaties by third-country residents as an instrument to reduce or eliminate taxation. This use of tax treaties, often referred to as "treaty shopping," defeats the purpose of bilateral tax treaties and poses risks to the Canadian and international tax bases. Canada will opt for the "principal purpose test" as a substantive technical rule. This test is a general anti-abuse rule based on the principal purpose of transactions or arrangements. It has the effect of denying a benefit under a tax treaty where one of the principal purposes of an arrangement or transaction that has been entered into is to obtain a benefit under the tax treaty.

However, the backgrounder adds that, when appropriate, Canada will seek to negotiate on a bilateral basis over the long term a detailed LOB provision that would also meet the minimum standard. This is interesting because it suggests that Canada still prefers bilateral negotiations and sees the MLI as more of a stopgap measure.

Article 6(1) of the MLI requires the inclusion of the following preamble text, unless one is already used in a treaty:

Intending to eliminate double taxation with respect to the taxes covered by this agreement 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 agreement for the indirect benefit of residents of third jurisdictions).

Smith explained that from the perspective of the Canadian government, there is an expectation (or, at least, a hope) that courts will refer to that preamble provision when contemplating the context, object, and purpose of the treaty.

Article 7(1) includes the default PPT rule:

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

The primary concern with the PPT is the subjective and unpredictable nature of the test, while its principal redeeming feature is its flexibility as compared with the more objective but more rigid LOB approach. In this respect, the PPT may play in favor of taxpayers. Also, the reference to "one of the principal purposes" is unfortunate because the internal inconsistency of the phrase would likely lead the tax authorities or the courts to ignore either "one of" or "principal."²⁹ On a more positive note, unlike the

²⁷ Articles 28(9) and 29(5) MLI.

²⁸ Article 37 MLI.

²⁹ Regarding the phrase "one of the main purposes," see Boidman, "One of the Main Purposes' Test," 22 *Canadian Tax Highlights* 9 (May 2014). See generally Kandev, "Canada Intent on Stoppin' the Shoppin' and More," *supra* note 17.

mini PPT rules historically found in the U.K.'s tax treaties, the MLI's general PPT rule contains a saving provision applicable when it is established that granting a benefit in the specific circumstances would be in accordance with the object and purpose of the relevant provisions of the covered tax agreement.

In its reservations and notifications, Canada states that under article 7(17)(a) of the MLI, it considers that some agreements are not subject to a reservation under article 7(15)(b) and contain a provision described in article 7(2).³⁰ These include Canada's treaties that contain mini PPTs, such as its treaties with the U.K., Hong Kong, and, most recently, Israel.

As far as adopting beefed-up MAP rules and binding arbitration, Canada and all other countries involved are to be praised. These endeavors provide some protection and relief from the specter of double taxation that is raised by the almost missionarylike zeal with which countries are adopting and administering aggressive (and often inappropriate) anti-tax-planning rules as well as rules that simply seek to rationally allocate profit between different countries (that is, transfer pricing and nexus (for example, permanent establishment) rules)).

The backgrounder notes that the binding arbitration provisions are similar to the provisions in the Canada-U.S. tax treaty in terms of scope and form. Of the 68 jurisdictions that have signed the MLI, 25 have opted for

mandatory binding arbitration.³¹ Importantly, under article 28 of the MLI, Canada has made a reservation to limit the scope of issues covered by arbitration to, essentially, the following: residency, determination of a PE, determination of profits attributable to a PE, transfer pricing disputes, and royalty issues in transfer pricing disputes.³²

C. Canada Reserves on Most Optional Provisions

At this time, Canada is not adopting any parts of the MLI other than articles 6 and 7, dealing with treaty abuse, and parts V and VI, dealing with MAP and binding arbitration.

Canada's notifications and reservations document³³ lists the MLI articles that will not apply in their entirety to Canada's covered tax agreements. These include:

- article 3 (transparent entities);
- article 4 (dual-resident entities);
- article 5 (application of methods for elimination of double taxation);
- article 8 (dividend transfer transactions);
- article 9 (capital gains from the alienation of shares or interests of entities deriving their value principally from immovable property);
- article 10 (antiabuse rule for PEs situated in third jurisdictions);
- article 12 (artificial avoidance of PE status through commissionaire arrangements and similar strategies);
- article 13 (artificial avoidance of PE status through the specific activity exemptions);
- article 14 (splitting-up of contracts);
- article 15 (definition of a person closely related to an enterprise); and
- article 17 (pricing corresponding adjustments).

³⁰ Article 7(2) is the rule that establishes the paramouncy of the PPT minimum standard by declaring that it shall apply in place of or in the absence of an existing PPT provision of a covered tax agreement. Article 7(15)(b), however, allows a party to reserve the right for the MLI PPT rule not to apply to its covered tax agreements that already contain PPT provisions. If a party has not made such reservation, article 7(17)(a) requires it to notify the depositary of whether each of its covered tax agreements that is not subject to a reservation described in article 7(15)(b) contains a provision described in article 7(2) and, if so, the article and paragraph number of each such provision. Where all contracting jurisdictions have made such a notification regarding a provision of a covered tax agreement, that provision shall be replaced by the MLI PPT or the MLI PPT shall supersede the provisions of the covered tax agreement to the extent that those provisions are incompatible with it. A party making a notification under article 7(17)(a) may also include a statement that while such party accepts the application of the MLI PPT alone as an interim measure, it intends where possible to adopt a limitation on benefits provision, in addition to or in replacement of the MLI PPT, through bilateral negotiation. As noted above, Canada has included such statement.

³¹ Andorra, Australia, Austria, Belgium, Canada, Fiji, Finland, France, Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, New Zealand, Portugal, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

³² EY, "Tax Alert — Canada: Canada and 67 Other Jurisdictions Sign the MLI" (June 14, 2017). At the International Tax Seminar of the Canadian Branch of IFA, Stephanie Smith provided extensive and elaborate comments regarding the background to, and key aspects of, the arbitration clause. For a summary of her oral presentation, see the roundtables section of the Tax Interpretations site.

³³ *Supra* note 4.

Regarding Canada's reservations, we observe the following. First, Part II of the MLI (articles 3 to 5) deals with hybrid mismatches. Domestically, Canada has taken limited legislative action on this front, with the adoption of the relatively obscure anti-tax-credit generator rules.³⁴ In the treaty context, since 2010, the Canada-U.S. tax treaty has contained Article IV(7), which attacks some hybrid entity structures. Beyond this, Canada has said or done little to fight the use of hybrids. Canada's reservation on articles 3 and 5 is consistent with this stance. As to article 4 (dual-resident entities), Canada has likely reserved on this provision because most of its tax treaties already contain it.

Regarding articles 8 and 9, there is no indication that Canada intends to adopt lookback rules in its treaty dividend and capital gains articles.

Part IV of the MLI deals with the avoidance of PE status. Specifically, article 12 deals with the artificial avoidance of PE status through commissionaire arrangements; article 13 deals with the artificial avoidance of PE status through the specific activity exemptions; article 14 deals with the splitting-up of contracts; and article 15 provides a definition of a person closely related to an enterprise. These provisions would normally be of interest to source countries. Canada generally behaves as a residence country in relation to the PE standard.³⁵ Accordingly, Canada's reservation on the PE package is understandable.

³⁴ See sections 126(4.11)-(4.13) and 91(4.1)-(4.7) and reg. 5907(1.03)-(1.09) of the Income Tax Act (Canada). But there is a type of anti-hybrid rule in the new back-to-back rules referred to in note 19.

³⁵ The only exception in this regard is the inclusion of a deemed service PE rule in the Canada-U.S. tax treaty.

V. Conclusion

There appears to be a direct link from Canada's response to the final package released on October 5, 2015, the content of Canada's first two post-BEPS treaties, and Canada's signing of the MLI on June 7, 2017, to the theme of our first commentary piece for *Tax Notes International* about BEPS, published in December 2013 and titled "BEPS: The OECD Discovers America?"³⁶

It was evident from earlier events that the Canadian government would be comfortable with protecting Canada's tax base against treaty shopping and other treaty-planning measures by extending the rules it has developed and used in several pre-BEPS treaties to other countries. Particularly telling provisions include the mini PPT rules in both the Taiwan and Israel treaties, the special regime rule in the Taiwan treaty, and the retention of domestic antiavoidance rules in the Israel treaty. Significantly, these treaties contained neither an LOB rule nor a general PPT rule. They also did not include any special PE or hybrid rules. Canada's approach to the final package recommendations and the MLI indicates no radical change in thinking.

This is in keeping with the theme of our December 2013 article, namely that there is nothing in international tax planning and related tax avoidance techniques that governments of countries like Canada haven't seen before and nothing they need to learn from the OECD about preventing these attempts. As a result, we thought it doubtful that the BEPS project would add much to the substantive law governing domestic and treaty objectives. And there appears to be nothing in Canada's current plans to participate in the action 15 MLI that is inconsistent with that view. ■

³⁶ *Supra* note 5.