

Introduction to BEPS and MLI

WIRC

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Contents

- Broad Overview
- Entry into Force & Entry into Effect
- India Perspective
- MLI Framework and Reading
- Available Tools

Broad Overview

Why BEPS and MLI?

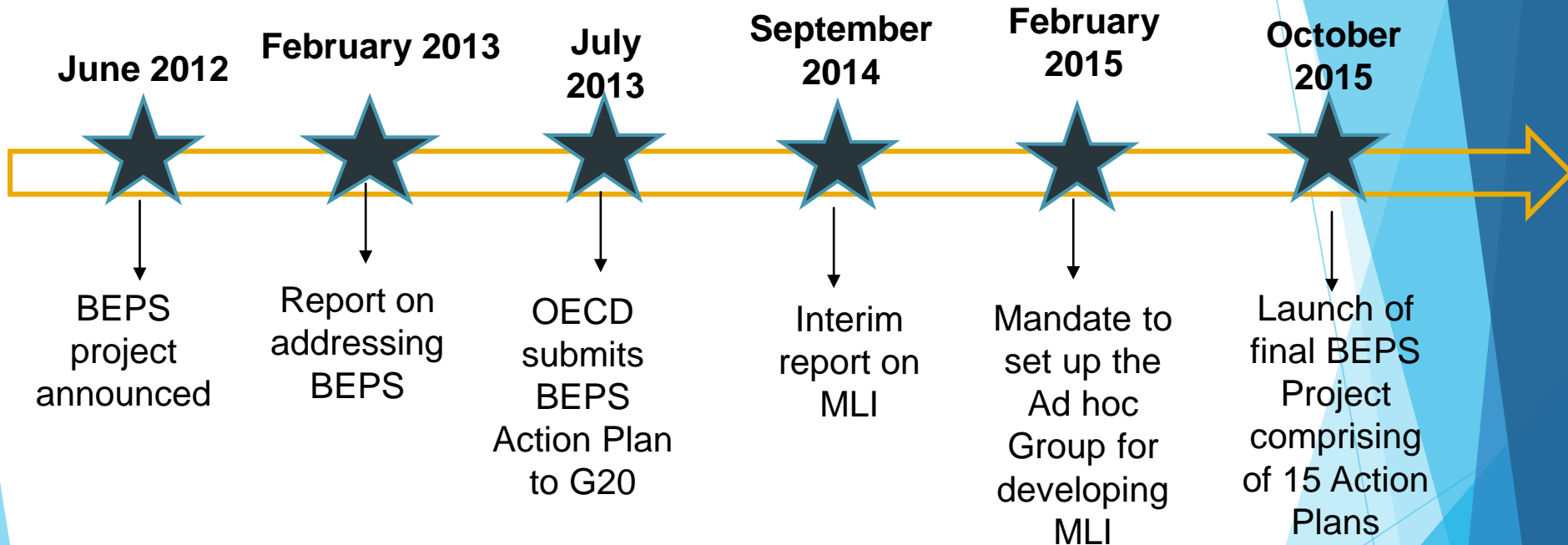
Why BEPS?

- To mitigate
 - Aggressive tax planning
 - Treaty Shopping
 - Other harmful tax practices

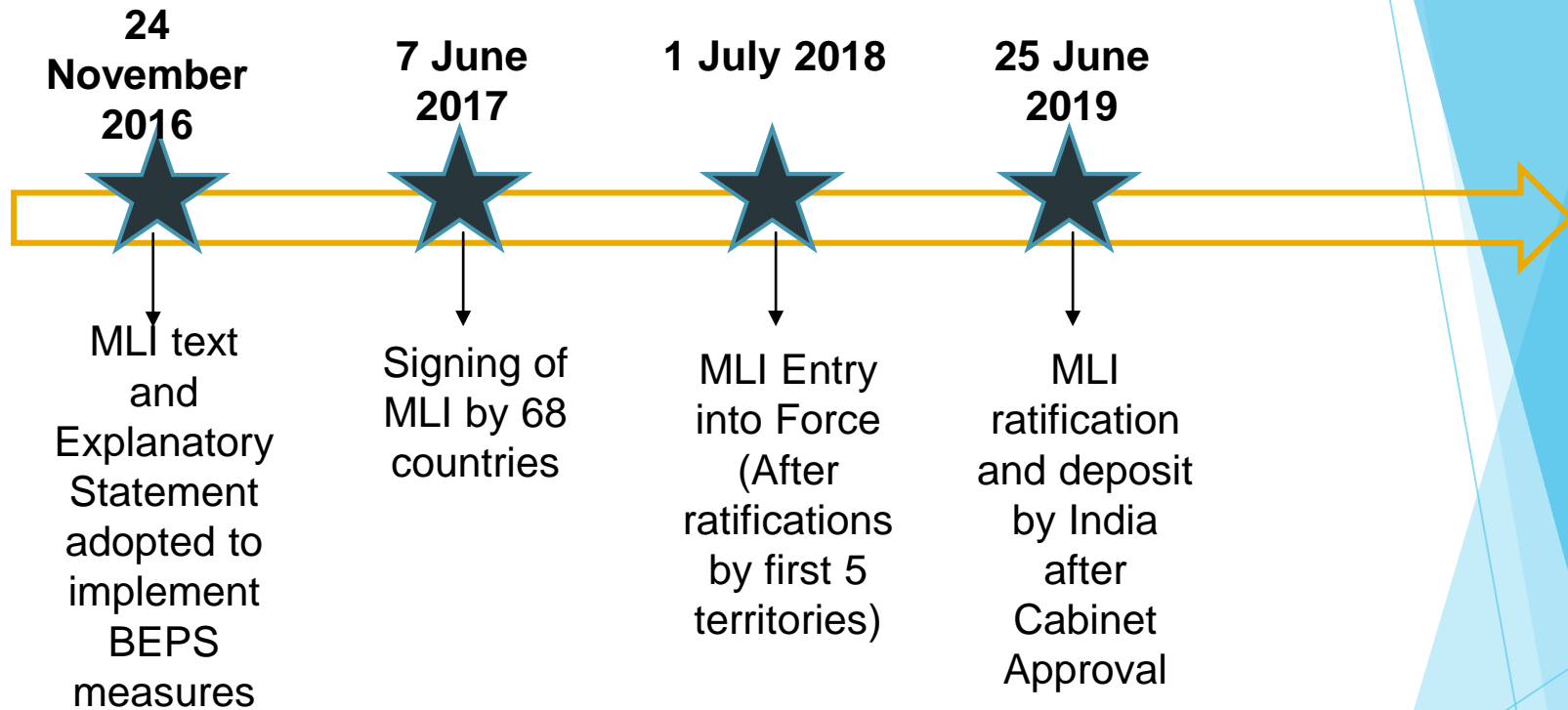
Why MLI?

- To implement treaty related BEPS measures
- Eliminates the need for bilateral negotiation
- Single instrument to modify multiple tax treaties

Implementation journey...



...Implementation journey



BEPS Action Plans

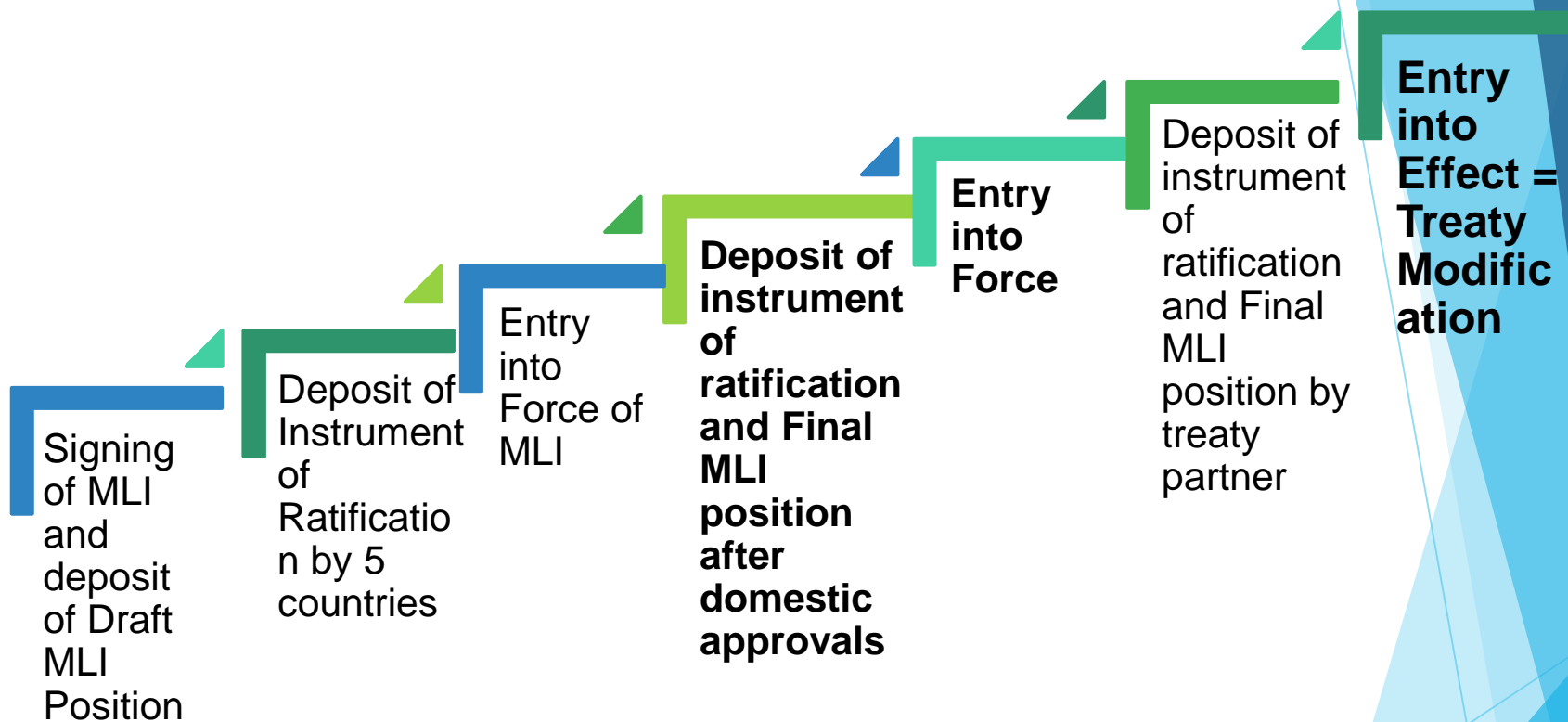
BEPS Action Plans	
AP 1	Address the Tax challenges of Digital economy
AP 2	Neutralising the Effects of Hybrid Mismatch Instruments
AP 3	Strengthen CFC Rules
AP 4	Limit base erosion interest deductions and other financial payments
AP 5	Counter harmful tax practices more effectively taking into account transparency and substance
AP 6	Preventing the Granting of Treaty Benefits in Inappropriate Circumstances
AP 7	Prevent the Artificial Avoidance of Permanent Establishment Status
AP 8	Consider Transfer Pricing for intangibles
AP 9	Consider Transfer Pricing for risks and capital
AP 10	Consider transfer pricing for high risk transactions
AP 11	Establish methodologies to collect and analyse data on BEPS and actions addressing it
AP 12	Require taxpayers to disclose their aggressive tax planning arrangements
AP 13	Re-examine transfer pricing documentation
AP 14	Making dispute resolutions more effective
AP 15	Development of a multilateral instrument for amending bilateral treaties

MLI - Overview

- Signing of Multilateral Convention (MLI) - 7 June 2017
 - 68 signatories including India
 - As of 14 February 2020, signatories increased to 94
 - Further 4 countries have expressed their intent to sign
- Applies only to listed treaties of a country
- Provisions
 - Mandatory
 - Optional
- MLI applies to a country only after **Entry into Force** for the country
- Effect on treaty only after **Entry into Effect**

***Entry into Force
&
Entry into Effect***

MLI – Steps to treaty modification



Entry into Force of MLI - Article 34(1)

Ratification by minimum 5 territories required

First 5 territories who ratified and deposited their final positions

Republic of
Austria
(22 Sept 2017),

The Isle of Man
(25 Oct 2017)

Jersey
(15 Dec 2017),

Poland
(23 Jan 2018)

Slovenia
(22 March
2018)



The MLI entered into force on 1 July 2018

For other countries - will depend upon date of ratification following expiration of 3 calendar months beginning on the date of deposit of instrument

Entry into Effect – Article 35(1)

- *Article 35(1)(a): For taxes withheld at source*
 - On or after the first day of the next taxable period beginning on or after the latest of the dates on which the MLI enters into force for each of the Contracting Jurisdictions to the CTA
- *Article 35(1)(b): For other taxes levied by the countries*
 - Taxable periods beginning on or after 6 calendar months from the latest of the dates on which the MLI enters into force for each of the Contracting Jurisdictions to the CTA

Entry into Effect is automatic if MLI enters into force for both treaty partners

MLI effective on treaty if

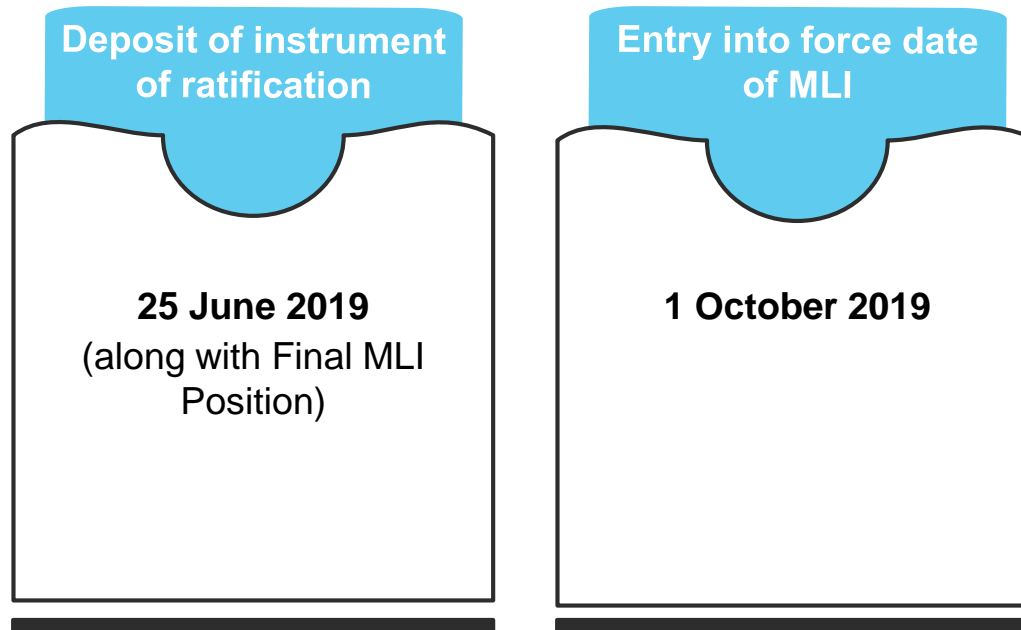
- India has listed the treaty in its Final MLI Position
- The treaty partner has also listed its treaty with India in its Final MLI Position
- MLI has entered into force for both treaty partners
- Entry into Effect rule as per Article 35(1) opted by the treaty partner also

Entry into Effect rule - exceptions

- Special rule applies if one of the treaty partner selects so (e.g. Russia, Sweden)
 - Entry into effect is not automatic
 - The country which opts for the special rule has to notify each of its treaty separately with the OECD after ratification
- Separate Entry into Effect rule for Article 16 – Mutual Agreement Procedure

India Perspective

Entry into Force of MLI - India



31 treaty partners from India's listed treaties have deposited their instruments of ratification as on 14 February 2020

India - Status

- India has listed 93 of its treaties in the final MLI Position – Treaty with China not included
- Normal Entry into Effect rule is chosen by India
- Entry into Effect for India's treaties
 - For treaty partners where ratification done before 30 June 2019 – timelines start from 1 October 2019
 - For treaty partners where MLI ratification done after 30 June 2019 – timelines start from the date of entry into force for the treaty partner
 - Different effective dates for withholding taxes and other taxes
- Notification dated 9 August 2019 under section 90 – notifying MLI and India's MLI position

MLI Framework and Reading

MLI Position

- List of treaties to be covered by MLI called 'Covered Tax Agreements'
- Reservations against provisions which a country wishes not to apply to its listed treaties
- Option selected with respect to provisions where alternative options are given
- Notifications regarding corresponding provisions in the existing treaties

Mandatory provisions

- Called as 'minimum standard'
- Action 6 – Preamble
- Article 7 – Treaty abuse
- Action 16 – Mutual Agreement Procedure
- Limited options of reservation

Optional Provisions

- Two types:
 - (a) Do not apply if reserved against – E.g. Article 3
 - (b) Apply only if specifically opted for – E.g. Article 13
- No option to select differently for different treaties
- Apply only if both treaty partners opt for same provisions

Compatibility clause

- Addresses conflict between the MLI and the existing provisions of CTA
- Various compatibility clauses
 - ‘in place of’
 - ‘applies to’ or ‘modifies’
 - ‘in the absence of’
 - ‘in place of or in the absence of’

MLI Provisions...

MLI Articles		BEPS Action Plans	
Part I: Scope and Interpretation of Terms		-	-
Scope of MLI	Article 1	-	-
Interpretation of MLI	Article 2	-	-
Part II: Hybrid Mismatches	-	-	-
Transparent Entities	Article 3	Action Plan 2	Neutralising the Effects of Hybrid Mismatch Instruments
Methods for elimination of double taxation	Article 5		
Dual Resident Entities	Article 4	Action Plan 6	Preventing the Granting of Treaty Benefits in Inappropriate Circumstances
Part III: Treaty Abuse	-		
Purpose of CTA (Preamble)	Article 6		
Prevention of Treaty Abuse	Article 7		
Dividend transfer transaction	Article 8		
Capital Gains from alienation of share/interest deriving value from Immovable Properties	Article 9		

...MLI Provisions

MLI Articles		BEPS Action Plans	
Anti-abuse rule for PE in third state	Article 10	Action Plan 6	Preventing the Granting of Treaty Benefits in Inappropriate Circumstances
Taxing rights for own residents	Article 11		
Part IV: Avoidance of PE Status through	-	Action Plan 7	Preventing the Artificial Avoidance of Permanent Establishment Status
Commissionaire Arrangements	Article 12		
Specific Activity Exemptions	Article 13		
Splitting up of Contracts	Article 14		
Definition of closely related persons	Article 15		
Part V: Improving Dispute Resolution (Mutual Agreement Procedure)	Article 16 and 17	Action Plan 14	Making Dispute Resolution Mechanisms More Effective
Part VI: Arbitration	Article 18 to 26	-	-
Part VII: Final Provisions	Article 27 to 39		

India's MLI Position...

MLI Articles		India's position
-	Part I: Scope and Interpretation of Terms	-
Article 1	Scope of MLI	-
Article 2	Interpretation of MLI	-
-	Part II: Hybrid Mismatches	-
Article 3	Transparent Entities	Not adopted
Article 5	Methods for elimination of double taxation	Adopted – Opted for Option C
Article 4	Dual Resident Entities	Adopted
-	Part III: Treaty Abuse	-
Article 6	Purpose of CTA (Preamble)	Adopted – Preamble in Article 6(1)
Article 7	Prevention of Treaty Abuse	Adopted PPT + SLOB
Article 8	Dividend transfer transaction	Adopted
Article 9	Capital Gains from alienation of share/interest deriving value from Immovable Properties	Adopted – chosen para 4

... India's MLI Position

MLI Articles		India's Position
Article 10	Anti-abuse rule for PE in third state	Adopted
Article 11	Taxing rights for own residents	Adopted
-	Part IV: Avoidance of PE Status through	-
Article 12	Commissionaire Arrangements	Adopted
Article 13	Specific Activity Exemptions	Adopted - Option A
Article 14	Splitting up of Contracts	Adopted
Article 15	Definition of closely related persons	Adopted
Article 16 and 17	Part V: Improving Dispute Resolution (Mutual Agreement Procedure)	Adopted
Article 18 to 26	Part VI: Arbitration	Not adopted
Article 27 to 39	Part VII: Final Provisions	Procedural Articles

Available Tools

MLI reading – necessary documents

Bare treaty read with bare provisions of MLI

‘Synthesised text’ of the treaty if available

Explanatory Statement to the MLI

Commentary in the Final Report on the BEPS Action Plan to which the provision relates

OECD Commentary on the same provision (if OECD has the same or similar language)

Guide to MLI reading – Key links

- Explanatory statement to the MLI: <https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf>
- Signatories to the MLI: <https://www.oecd.org/tax/treaties/beps-mlt-signatories-and-parties.pdf>
- OECD MLI Matching database: <https://www.oecd.org/tax/treaties/mlt-matching-database.htm>
- Synthesised Texts for India's treaties released by the CBDT: <https://www.incometaxindia.gov.in/Pages/international-taxation/dtaa.aspx>

Synthesised texts

- ▶ MLI provisions read with the treaty provision
- ▶ OECD released “Guidance for the development of synthesized texts” in November 2018
 - ▶ a suggested approach – No obligation under MLI to develop synthesised texts
- ▶ A number of countries including India, UK, Japan have released the synthesised texts of their treaties
- ▶ The ‘synthesised text’ of MLI and the treaty will only serve as reference documents – MLI & the treaty are the only legal instruments

Thank you!

Disclaimer:

This material contains matter of general guidance and does not constitute professional advice.