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Submission on the *OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Paris, 7 June 2017)*
8 September 2017

The Tax Justice Network Australia (TJN-Aus) welcomes this opportunity to make submission on the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (MLI). TJN-Aus supports the ratification of the treaty, although TJN-Aus would have preferred that the Australian Government had made alternative choices within some of the provisions in the treaty where States Parties are given options that they can select between.

TJN-Aus notes that the OECD has estimated the global revenue loss to governments from base erosion and profit shifting (BEPS) to be conservatively between US$100 billion and US$240 billion a year, or between 4% and 10% of global corporate income tax revenues. The MLI will assist governments in making updates to the tax treaty network that exists between them to address some aspects of multinational enterprise (MNE) tax avoidance and tax cheating.

TJN-Aus does not support the adoption of any Mandatory Binding Arbitration provisions under the Mutual Agreement Procedure.

While TJN-Aus is deeply supportive of the provisions in the MLI to address tax treaty abuse by MNEs, underlying all these techniques is one basic strategy: exploitation of the fiction of separate legal personality and the 'independent entity' principle. Ending these abuses could have been achieved far more easily and with greater coherence by clearly stating as a guiding principle that MNEs should be treated in accordance with the economic reality that they operate as integrated firms. This was implicit in the mandate from the G20 to reform the system so that MNEs could be taxed 'where economic activities occur and value is created'. Instead, the MLI will introduce a plethora of anti-abuse rules for revenue administrations to apply. This will require high levels of expertise and sophistication, which are often beyond the capacity of administrations in developed let alone developing countries. This approach is also a recipe for disagreements and conflicts, which will benefit only the legions of paid tax advisers, to the detriment in particular of developing countries, which do not have the capacity to successfully monitor and challenge potential exploitation of these anti-abuse rules by tax practitioners.[1]

[1] Sol Picciotto, Attiya Waris, Jeffery Kadet and Tommaso Faccio, 'Comments on the Public Discussion Draft on Development of a Multilateral Instrument to implement the Tax Treaty related BEPS measures', BEPS Monitoring Group, June 2016, p. 2.

TJN-Aus therefore encourages the Australian Government to be guided by the broader G20 mandate to achieve taxation reflecting 'where economic activities occur and value is created' and reassess in the future the simplifying recognition of the integrated nature of MNEs.

Article 3
TJN-Aus supports the Australian Government's adoption of Article 3(5)(d).

Article 4
TJN-Aus supports the Australian Government's adoption of Article 4(3)(e) that will allow the Australian Government to exclude the rule that allows the competent authorities to allow treaty benefits in the absence of reaching an agreement on the country of residence of the entity. TJN-Aus welcomes in such cases that the treaty benefits would be denied. There are no shortage of examples of governments that have been willing to grant special tax benefits to entities, often to the detriment of other governments. Such jurisdictions that have been exposed include Ireland, the Netherlands, Singapore and Luxembourg, just to name a few.

Article 6
TJN-Aus supports the Australian Government's adoption of Article 6(1) across all its covered tax agreements, including the additional text about the enhancement of cooperation in tax matters. TJN-Aus strongly supports that tax treaties should not create opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the treaty for the indirect benefit of residents in third jurisdictions). Global cooperation between governments to eliminate tax evasion, tax avoidance and tax cheating generally is highly desirable.

Article 7
TJN-Aus supports the Australian Government's adoption of the Principle Purpose Test to deny treaty benefits where obtaining the benefit was one of the principle purposes of the arrangement unless granting the treaty benefits would be in accordance with the object and purpose of the relevant provisions of the treaty. TJN-Aus supports the Australian Government not adopting the optional PPT consultation rule to avoid unnecessary negotiation before being able to reject an entity's request for treaty benefits. TJN-Aus also agrees that the Australian Government does not need to adopt a Simplified Limitation of Benefits rule in relation to treaties that already contain a detailed limitation of benefits rule.

Article 8
TJN-Aus supports the Australian Government's adoption of Article 8 without reservation across all of its covered tax agreements to deter non-resident shareholders abusing concessional tax rates on non-portfolio intercorporate dividends. It is desirable to have a standardised holding period rule for non-portfolio intercorporate dividends in Australia's tax treaties for the sake of consistency and simplicity.

Article 9
TJN-Aus supports the Australian Government adoption of Article 9(6)(e) across all its covered tax agreements, which would not implement Article 9 in relation to treaties that already include comparable interests. TJN-Aus supports measures to stop foreign residents seeking to avoid taxation of capital gains by contributing other assets to a land rich entity, so that it is no longer land-rich, shortly before disposing of their interests in the entity.

Article 10
TJN-Aus believes that the Australian Government should adopt Article 10 without reservation to further deter the use of secrecy jurisdictions as a means of avoiding paying tax in the place where the actual business is taking place and where value is being created. As noted by the OECD this article is to address "potential abuses that may result from the transfer of shares, debt-claims, rights or property to permanent establishments set up solely

for that purpose in countries that offer preferential treatment to the income from such assets."[2] TJN-Aus is deeply disappointed the Australian Government has decided not to adopt this Article.

Article 11
TJN-Aus supports the Australian Government adoption of Article 11 without reservation.

Article 12
TJN-Aus is deeply disappointed that the Australian Government has decided to not adopt Article 12, which is a reversal from the initial position of adopting the Article that was in the Treasury consultation paper. approach to adopt Article 12 would assist to further curb foreign MNEs seeking to interpose agency arrangements to artificially avoid creating a permanent establishment, thus preventing the host government from taxing those business profits.

Article 13
TJN-Aus supports the Australian Government adoption of Option A of Article 13, allowing for the reservation that it does not apply for treaties that already explicitly require that each specific activity exemption is 'preparatory or auxiliary' contained in Article 13(6)(b), together with the anti-fragmentation rule, across all the covered tax agreements. TJN-Aus believes it is important to stifle the ability of MNEs to try and avoid having a permanent establishment in a jurisdiction by miscategorising or fragmenting activities to fall within the listed exemptions to the permanent establishment definition.

Article 14
TJN-Aus supports the Australian Government adoption of Article 14 across its covered tax treaties, allowing for the reservation permitted by Article 14(3)(b) to exclude bilateral treaty rules that deem a PE to exist in relation to exploration for or exploitation of natural resources. It is important to combat attempts to avoid a permanent establishment through contract splitting by deeming permanent establishment provisions for building sites, construction or installation projects, or supervisory or consultancy activities in connection with such sites or projects.

Article 15
TJN-Aus supports the Australian Government adoption of Article 15 without reservation across all its covered tax agreements, which will define when a person is closely related to an enterprise for the purpose of Articles 12, 13 and 14 of the MLI.

Article 16
TJN-Aus supports the Australian Government adoption of Article 16 without reservation across its covered tax agreements. An improvement of the mutual agreement procedure (MAP) is clearly needed, not least due to the likelihood that the extensive changes to international tax rules resulting from the BEPS project will create divergent interpretations and hence uncertainty and potential conflicts. To this end we particularly support the provision in article 16(3) of the MLI for competent authorities to 'consult together and try to resolve all difficulties and doubts arising as to the interpretation or application of the convention'. We hope that this procedure for 'interpretive mutual agreements' will be widely adopted and much greater use made of it, as a means of reducing uncertainty.

TJN-Aus urges the Australian Government to adopt the Best Practice recommendation 2 in the report on BEPS Action 14 (p. 29) to 'have appropriate procedures in place to publish' agreements reached under this procedure 'that affect the application of a treaty to all taxpayers or to a category of taxpayers'. However, we regret that this Best Practice

[2] OECD, 'Preventing the Granting of Treaty Benefits in Inappropriate Circumstances. Action 6: 2015 Final Report', p. 75.

recommendation limits such publication by (i) excluding specific taxpayer MAP cases, (ii) restricting publication to agreements which 'provide guidance that would be useful to prevent future disputes', and (ii) requiring both tax authorities to 'agree that such publication is consistent with principles of sound tax administration'. In our view there should be a strong presumption that such interpretations should be published. Indeed, it seems inconsistent with the principles of tax administration for them to be kept secret, and for tax authorities to have the power to decide for themselves whether and when they should be published.

Articles 18 – 26

TJN-Aus opposes the adoption of Mandatory Binding Arbitration in relation to Mutual Agreement Procedures. Tax treaty provisions are binding in domestic law, and can be enforced through national tribunals. Accordingly, MNEs should not be given further privileges over other taxpayers. The MAP is an 'amicable procedure', and it is not appropriate to try to convert it into a supranational dispute settlement procedure. It is contrary to the due process of law, and indeed in many countries regarded as unconstitutional, for contentious interpretations of legal provisions to be made by secret and unaccountable administrative procedures, rather than by courts or tribunals in an open legal process. To make it mandatory for all conflicting interpretations to be resolved would provide a guarantee that aggressive tax planning would be riskless, and create an incentive to continue BEPS behaviour. The main cause of the increase in tax disputes is the subjective basis of the transfer pricing rules, and it is inappropriate to expect the MAP to resolve issues which negotiators have failed to deal with in a principled manner.[3]

TJN-Aus understands the fears of business that there may be a further increase in disputes between tax authorities following implementation of the BEPS proposals. The underlying reason for this is the faulty approach adopted towards revision of the Transfer Pricing Guidelines (TPGs). This approach has retained the requirement that all analysis is based on the fictions of 'independent entity' and the contracts and arrangements between related parties devised by tax planners, while strengthening the powers of tax authorities to recharacterise those arrangements. The subjective, and indeed arbitrary, nature of the judgments involved in this process will inevitably continue to produce conflicts. However, it is entirely inappropriate to seek to resolve these conflicts in an administrative process held behind closed doors. The attempt to coerce tax authorities to abandon their own judgments and interpretations by compelling them to reach agreement through the threat of mandatory binding arbitration is even more inappropriate. MNEs have the same remedies open to them as do all taxpayers in relation to a disputed tax assessment, of referring the issue to domestic tribunals and courts. Indeed, they have the special advantage that tax treaty provisions are generally automatically applied in domestic law, creating a special legal regime for cross-border business on which they can rely. This includes not only the treaty provisions, but also their related commentaries, and even the Transfer Pricing Guidelines and other reports. Domestic tax courts can and do very commonly refer to and apply these rules.[4]

MNEs may well complain of delays and other difficulties with court procedures, but all citizens suffer from such defects in public administration, the causes of which include pressures on government revenues. Mandatory Binding Arbitration is also likely to exploit the imbalance between the capacity of OECD countries' tax authorities and developing

[3] Sol Picciotto, Attiya Waris, Jeffery Kadet and Tommaso Faccio, 'Comments on the Public Discussion Draft on Development of a Multilateral Instrument to implement the Tax Treaty related BEPS measures', BEPS Monitoring Group, June 2016, pp. 1-2.
[4] Sol Picciotto, Attiya Waris, Jeffery Kadet and Tommaso Faccio, 'Comments on the Public Discussion Draft on Development of a Multilateral Instrument to implement the Tax Treaty related BEPS measures', BEPS Monitoring Group, June 2016, p. 5.

countries' tax authorities, solely to the benefit of OECD resident taxpayers. TJN-Aus is therefore opposed to the adoption of Mandatory Binding Arbitration as proposed in the MLI.

The provisions of the MLI in effect give an MNE a right to choose between pursuing a remedy in domestic courts and through the MAP. This even allows the MNE to suspend a legal claim while the MAP proceeds, and if dissatisfied by the MAP outcome, to reject it and proceed with the legal claim.

There is an overwhelming demand from public opinion for greater transparency in international tax matters. It will not be regarded as acceptable to the vast majority for further decisions, involving often hundreds of millions of dollars in taxes, to be taken behind closed doors, and by applying criteria which can only be described as discretionary. There has already been significant media and public concern about cases settled in secret between MNEs and the ATO in which there is a concern the ATO has been willing to accept only a fraction of the tax owed in order to achieve that settlement. Such suspicions, even if in substance they are not true, erode the moral of other people paying their taxes as they should. What is proposed in the MLI is arbitration held in total secrecy, so that not even the existence or the nature of the issue would be known beyond the participants and their advisers. Indeed, Part VI of the MLI adopts as the default a procedure that specifically prohibits the arbitrators from formulating reasons for their decision, but requires them only to choose between the 'last best offer' tabled by the parties. Not only is the decision kept secret, it may not be referred to in later disputes. Under this approach, arbitration will always remain ad hoc.

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Background on the Tax Justice Network Australia

The Tax Justice Network Australia (TJN-Aus) is the Australian branch of the Tax Justice Network (TJN) and the Global Alliance for Tax Justice. TJN is an independent organisation launched in the British Houses of Parliament in March 2003. It is dedicated to high-level research, analysis and advocacy in the field of tax and regulation. TJN works to map, analyse and explain the role of taxation and the harmful impacts of tax evasion, tax avoidance, tax competition and tax havens. TJN's objective is to encourage reform at the global and national levels.

The Tax Justice Network aims to:

(a) promote sustainable finance for development;
(b) promote international co-operation on tax regulation and tax related crimes;
(c) oppose tax havens;
(d) promote progressive and equitable taxation;
(e) promote corporate responsibility and accountability; and
(f) promote tax compliance and a culture of responsibility.

In Australia the current members of TJN-Aus are:

- ActionAid Australia
- Aid/Watch
- Australian Council for International Development (ACFID)
- Australian Council of Social Service (ACOSS)
- Australian Council of Trade Unions (ACTU)
- Australian Education Union
- Australian Services Union
- Anglican Overseas Aid
- Baptist World Aid
- Caritas Australia
- Columban Mission Institute, Centre for Peace Ecology and Justice
- Community and Public Service Union
- Evatt Foundation
- Friends of the Earth
- GetUp!
- Global Poverty Project
- Greenpeace Australia Pacific
- International Transport Workers Federation
- Jubilee Australia
- Maritime Union of Australia
- National Tertiary Education Union
- New South Wales Nurses and Midwives' Association
- Oaktree Foundation
- Oxfam Australia
- Save the Children Australia
- Save Our Schools
- SEARCH Foundation
- SJ around the Bay
- Social Policy Connections
- Synod of Victoria and Tasmania, Uniting Church in Australia
- TEAR Australia
- The Australia Institute
- Union Aid Abroad – APHEDA
- UnitedVoice
- UnitingWorld

- Victorian Trades Hall Council
- World Vision Australia