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PREMIER TAX EVENT OF THE YEAR  
**NATIONAL TAX CONFERENCE**  
**2020**

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**VIA LIVE STREAMING**

Speaker:

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TOPIC 4:  
**BEPS & MULTILATERAL  
INSTRUMENTS**

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2. How does the MLI work ?
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# **1. Introduction on BEPS and MLI**

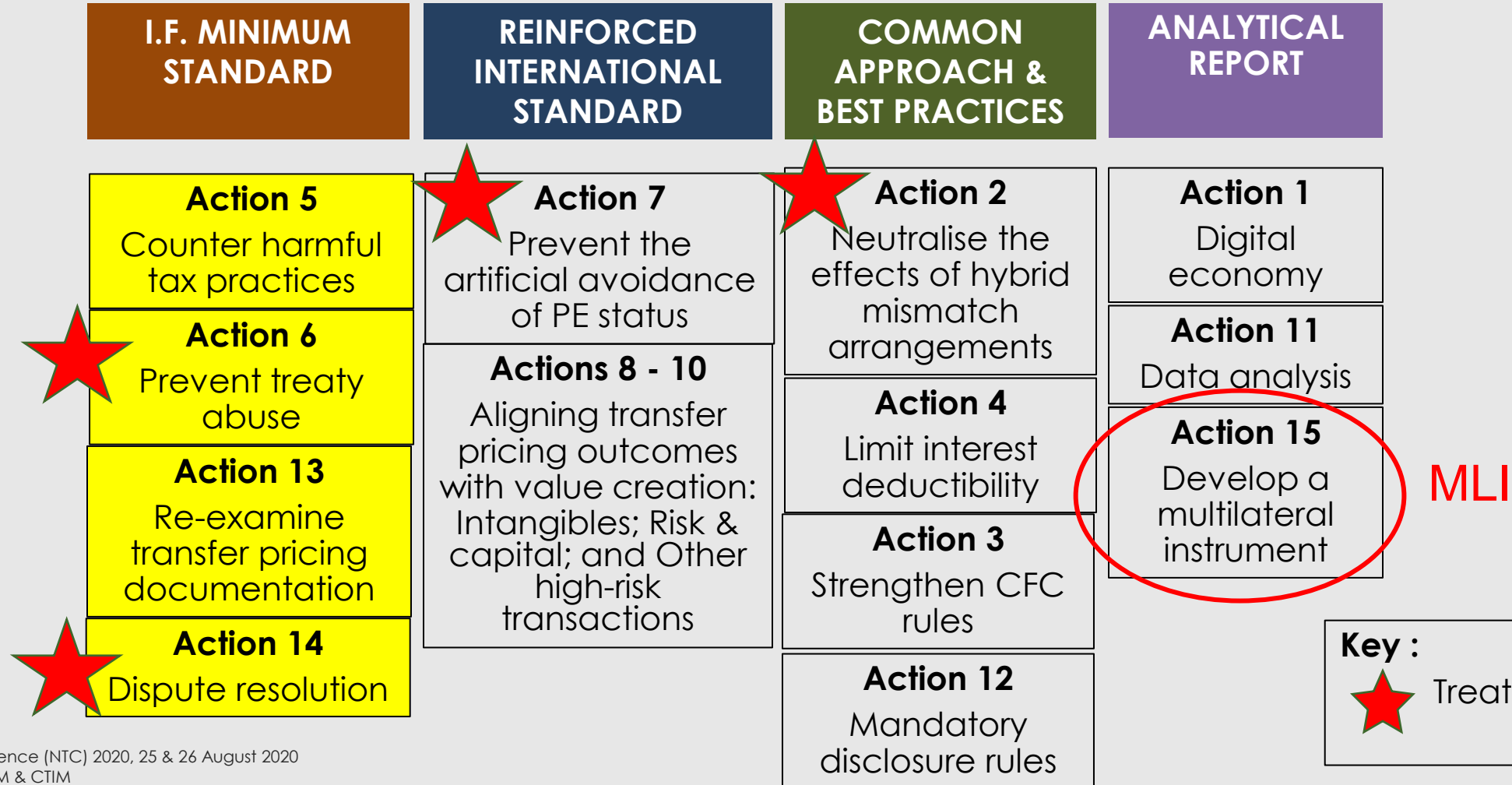
# Base Erosion and Profit Shifting (BEPS)

- Factors contributing to BEPS :
  - Gaps and mismatches in the current international tax rules
  - Profits “disappearing” for tax purposes : Shifted to no- or low-tax jurisdictions
- OECD mandated by G20 to recommend solutions to prevent BEPS
- Final BEPS report released in 2015.

# The Inclusive Framework on BEPS

- The Inclusive Framework (IF) on BEPS established in June 2016 : platform for co-operation between OECD and non-OECD members.
- Malaysia joined in 2017
- Currently 137 IF members

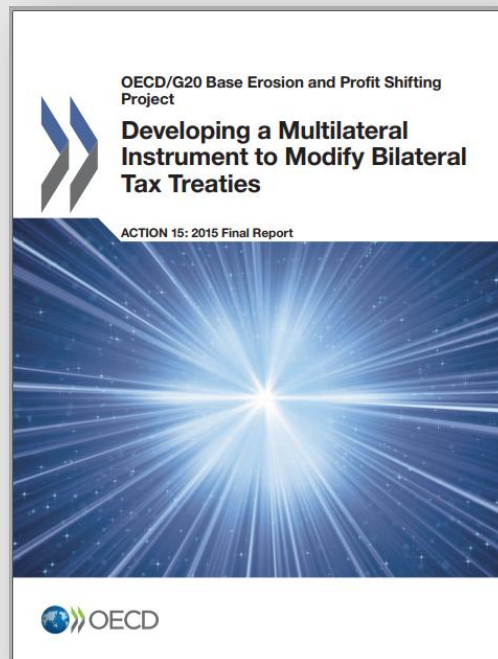
# BEPS ACTION PLAN



# Minimum Standard Provisions in Treaties

- BEPS ACTION 6 – Prevent Treaty Abuse
  - Preamble
  - Treaty anti-abuse rule
  
- BEPS ACTION 14 – Mutual Agreement Procedure (MAP)
  - Paragraphs 1 to 3 of MAP Article (DTA Article 25)

# BEPS Action 15 Report : “Developing a Multilateral Instrument to Modify Bilateral Tax Treaties”



- Innovative approach to swiftly modify treaties
- Synchronised and efficient
- Ultimately, enables the BEPS Action Plan treaty item measures to be implemented quicker

## **2. How does the MLI work ?**

# MLI Features

- Minimum Standards
  - Compulsory implementation
- Depositary
  - OECD as Depositary
  - Notify parties and signatories
  - Maintain publicly available information
- Flexible Instrument
  - Covered Tax Agreements
  - Mechanism of reservations and notifications

# Country Reservations

## Article 4 – Dual Resident Entities

### *Reservation*

Pursuant to Article 4(3)(a) of the Convention, Malaysia reserves the right for the entirety of Article 4 not to apply to its Covered Tax Agreements.

## Article 5 – Application of Methods for Elimination of Double Taxation

### *Reservation*

Pursuant to Article 5(8) of the Convention, Malaysia reserves the right for the entirety of Article 5 not to apply with respect to all of its Covered Tax Agreements

# Country Notifications

## Article 12 – Artificial Avoidance of Permanent Establishment Status through Commissionnaire Arrangements and Similar Strategies

### Notification of Existing Provisions in Listed Agreements

Pursuant to Article 12(5) of the Convention, Malaysia considers that the following agreements contain a provision described in Article 12(3)(a). The article and paragraph number of each such provision is identified below.

Listed Agreement Number	Other Contracting Jurisdiction	Provision
1.	Albania	Article 5(5)(a)
2.	Australia	Article 5(5)(a)
3.	Austria	Article 5(6)(a)
4.	Bahrain	Article 5(5)
5.	Bangladesh	Article 5(5)(a)
6.	Belgium	Article 5(5)(a)
7.	Bosnia Herzegovina	Article 5(6)(a)
8.	Brunei Darussalam	Article 5(5)(a)
9.	Canada	Article 5(5)(a)

# Explanatory Statement

- Clarifies how each MLI provision will affect Covered Tax Agreements, including :
  - descriptions of the types of bilateral treaty provisions that are intended to be covered
  - the ways in which they are intended to be modified.

# **3. How will the MLI impact us ?**

# Structure of the MLI

Part	Articles	Subject
Preamble	-	
I	1 – 2	Scope and Interpretation of Terms
II	3 – 5	Hybrid Mismatches
III	6 – 11	Treaty Abuse
IV	12 – 15	Avoidance of Permanent Establishment Status
V	16 – 17	Improving Dispute Resolution
VI	18 – 26	Arbitration
VII	27 – 39	Final Provisions

# Overview of Malaysia's Position

Article	Malaysia
Article 3	√
Article 6 Min. Standard	√
Additional preamble	X
Article 7 Min. Standard	√
Additional PPT	X
Article 12	√
Article 13	√
Anti fragmentation	√
Article 16	√

# Malaysia's Position on Article 6

- Preamble : object and purpose of treaties
- Typical pre-MLI Preamble :  
*“Desiring to conclude an agreement for the avoidance of double-taxation and the prevention of double taxation with respect to taxes on income”*
- Article 6 amends Preamble to :  
*“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)”*

# Malaysia's Position on Article 7

- Inclusion of a general anti-abuse rule based on the principal purpose test (PPT) of transactions or arrangements :

*“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 ....”*

# Malaysia's Position on Article 12

- Tackles the artificial avoidance of PE status through commissionnaire arrangements and similar strategies
- Article 12(1) : *“where a person is acting...on behalf of an enterprise and, ... habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are:*
  - a) in the name of the enterprise; or*
  - b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use; or*
  - c) for the provision of services by that enterprise,**that enterprise shall be deemed to have a permanent establishment ...”*

# Malaysia's Position on Article 12 (cont'd)

- Article 12(2) : *“Paragraph 1 shall not apply where the person acting in a Contracting Jurisdiction to a Covered Tax Agreement on behalf of an enterprise of the other Contracting Jurisdiction carries on business in the first-mentioned Contracting Jurisdiction as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.”*

# Malaysia's Position on Article 13

- In the Model DTA, the listed preparatory or auxiliary (PoA) activities do not create a PE. Example : warehouses
- Article 13 responds to the recent significant change in business models. Some PoA activities may now be part of the core business. Example : a warehouse for an online retailer
- Article 13(2) : “.....the term “permanent establishment” shall be deemed not to include.... the activities specifically listed in the Covered Tax Agreement... provided that such activity .....is of a preparatory or auxiliary character.”

# Malaysia's Position on Article 13 (cont'd)

- “Anti-fragmentation rule” - Article 13 also disallows business structures to avoid PE status by breaking up (fragmenting) a cohesive business operation into several small P&A units.
- Para 13(4) : “....constitute complementary functions that are part of a cohesive business operation.”

# Malaysia's Position on Article 16

- Enhances dispute resolution for the benefit of taxpayers.
- Para 16(1) : The taxpayer “...*may, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, present the case to the competent authority of either Contracting Jurisdiction. The case must be presented within three years from the first notification of the action...*”

# Matching of MLI Articles with selected ASEAN countries

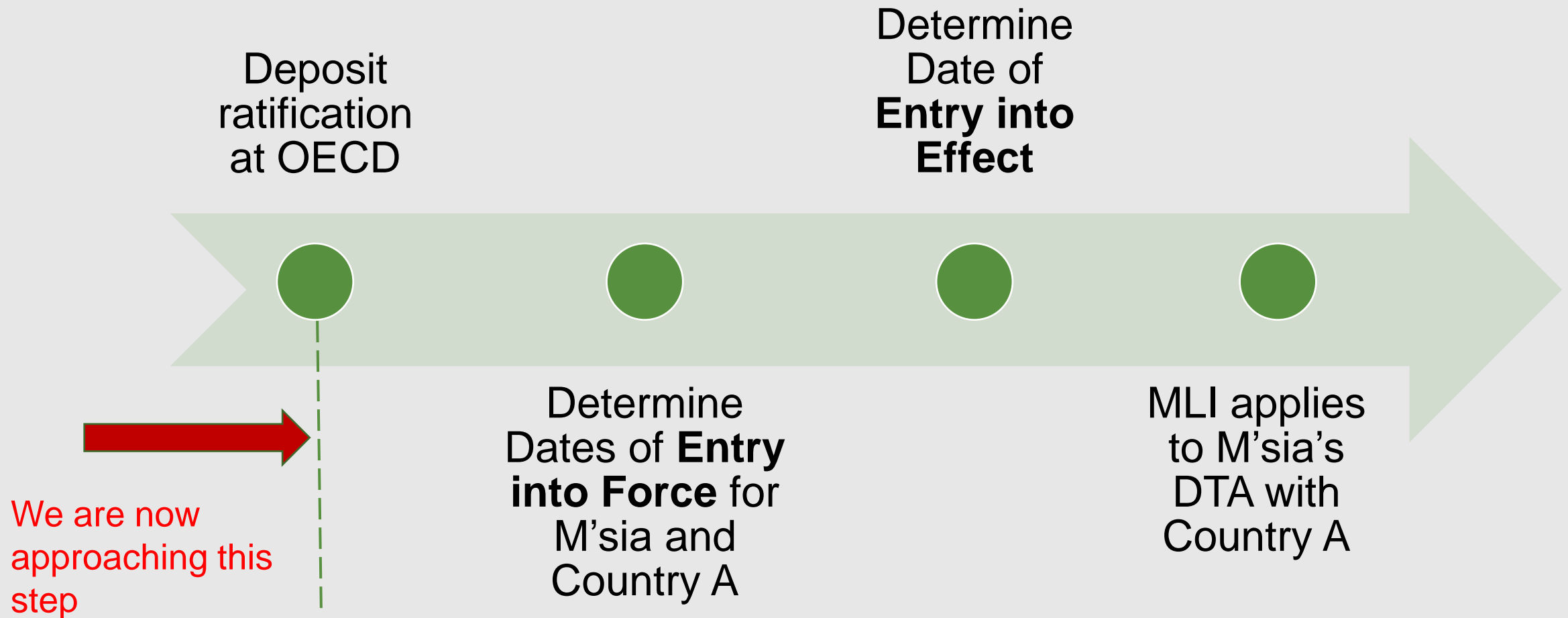
Article/Country	Malaysia	Singapore	Indonesia	Vietnam *
Article 3	✓	X	X	X
Article 6 (Min. Standard)	✓	✓	✓	✓
Additional preamble	X	✓	X	✓
Article 7 (Min. Standard)	✓	✓	✓	✓
Additional PPT	X	✓	X	X
Article 12	✓	X	✓	✓
Article 13	A	B	A	A
Anti fragmentation	✓	X	✓	✓
Article 16	✓	✓	✓	✓

# **4. When will the MLI apply to us ?**

# Ratification Process

- Malaysia signed the MLI Convention in Paris on 24<sup>th</sup> January 2018.  
Deposited a list of expected reservations and notifications pursuant to Articles 28(7) and 29(4) of the MLI (provisional list).
- MLI gazetted on 4<sup>th</sup> August 2020 [MLI Order P.U. (A) 224 2020]
- Next step : to deposit the instrument of ratification at the Depositary in OECD, Paris

# Further Steps After Ratification



# Entry into Force : Example

Art 34 (2) : “...on the **first day of the month following** the expiration of a period of **three calendar months** after the date of the deposit by such State or jurisdiction of its instrument of ratification....”

Example :



# Entry into Effect : Example

**STEP  
1**

Country	Date of Entry into Force
Country A	1 July 2018
Malaysia	1 Jan 2021

The **later date** on which the MLI enters into force for each of the two jurisdictions

**STEP  
2**

**1 Jan  
2021**

**For  
Withholding  
Taxes**

Determine the 1st day  
of the next calendar  
year on or after Enter  
Into Force date

MLI provisions  
have effect for  
an event  
occurring from:

**1  
JAN  
2021**

**For Other  
Taxes**

Expiration of a period  
of 6 months

Effect for taxes  
levied with respect  
to taxable periods  
beginning :

**1  
JULY  
2021**

# 5. Conclusion

# Post-MLI

- Bilateral negotiations on mismatch provisions
- Interpretation issues
- Guidance on how to read DTAs : Publication of synthesized texts

# Synthesized Text

The Government of Malaysia and the Government of the Republic of Singapore,  
[REPLACED by paragraph 1 of Article 6 of the MLI] *desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,*

The following paragraph 1 of Article 6 of the MLI replaces the text referring to an intent to eliminate double taxation in the preamble of this Agreement:

## ARTICLE 6 OF THE MLI- PURPOSE OF A COVERED TAX AGREEMENT

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),

# Further References :

## MLI in Hasil Portal :

[http://www.hasil.gov.my/bt\\_goindex.php?bt\\_kump=5&bt\\_skum=6&bt\\_posi=6&bt\\_unit=1&bt\\_sequ=3&bt\\_lgv=2](http://www.hasil.gov.my/bt_goindex.php?bt_kump=5&bt_skum=6&bt_posi=6&bt_unit=1&bt_sequ=3&bt_lgv=2)

## OECD website:

MLI : <http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm>

## Malaysia's position:

<http://www.oecd.org/tax/treaties/beps-mli-position-malaysia.pdf>

# THANK YOU