



Cabinet

Summary

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Approval for Signature and Ratification

Portfolio	Revenue
Purpose	This paper seeks approval of the text and agreement to sign the <i>Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting</i> (the MLI).
Previous Consideration	In February 2017, EGI noted that there is significant global media and political concern about base erosion and profit shifting (BEPS), and agreed to the release of an officials' issues paper on <i>New Zealand's Implementation of the Multilateral Convention to Prevent BEPS</i> [EGI-17-MIN-0005].
Summary	<p>Double tax agreements (DTAs) are bilateral international treaties which are designed to reduce tax impediments to cross-border services, trade, and investment without creating opportunities for non-taxation or reduced taxation through tax avoidance or evasion. DTAs also enable tax administrations to support each other in the detection and prevention of tax evasion and avoidance.</p> <p>The MLI (attached as Annex 1) proposes to quickly and efficiently amend a significant number of DTAs to take into account new treaty standards relating to treaty abuse and dispute resolution resulting from the OECD and G20's 15 point Action Plan on base erosion and profit shifting. New Zealand's MLI will cover 34 DTAs (i.e. those New Zealand holds with jurisdictions who are also signing the MLI). New Zealand's MLI position is discussed in paragraphs 18-24.</p> <p>Submissions on the officials' issues paper concerning BEPS identified issues relating to the need for a New Zealand-specific approach (as the MLI is broadly drafted), the need for additional guidance and administrative resources to help taxpayers apply DTAs as modified by the MLI, and domestic law updates to support a smooth implementation of the MLI (discussed in paragraph 29).</p>
Regulatory Impact Analysis	The Regulatory Impact Analysis and tax strategy teams at the Treasury consider that the National Impact Statement meets quality assurance criteria.
Baseline Implications	Data limitations prevent an accurate estimation of the impact on net tax revenue, though it is expected that the overall impact will be positive. There will be some administrative costs to IRD, which are expected to be small.

Legislative Implications	The Income Tax Act 2007 provides for the regulation and giving of effect to DTAs. An Order in Council will give effect to the MLI.
Timing Issues	The MLI signing ceremony is 7 June 2017. An Instrument of Full Powers will need be obtained from the Minister of Foreign Affairs to enable the Minister of Revenue to sign the MLI.
Announcement	National communications relating to this matter will be managed by the office of the Minister of Revenue. The text of the MLI, New Zealand's notifications and reservations, and the NIA will be tabled in the House of Representatives for Parliamentary treaty examination, as the MLI it is subject to ratification.
Proactive Release	None proposed.
Consultation	Paper prepared by Inland Revenue. MBIE and MFAT were consulted. The Minister of Revenue indicates that discussion is not required with the government caucus, or with other parties represented in Parliament.

The Minister of Revenue recommends that Cabinet:

- 1 note that the Income Tax Act 2007 authorises the negotiation of, and giving effect to double tax agreements (DTAs) with other jurisdictions;
- 2 note that officials participated in the negotiation of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the MLI), the text of which was formally adopted in November 2016;
- 3 note that the MLI will quickly and efficiently amend the majority of New Zealand's DTAs to include the recommended changes to tax treaties arising out of the OECD/G20 15 point Action Plan on base erosion and profit shifting;
- 4 approve the text of the MLI attached to the paper under CAB-17-SUB-0241 as Annex A, subject to any minor technical changes resulting from the process of translation or legal verification;
- 5 note that officials have finalised New Zealand's expected notifications and reservations in relation to the choices available in the MLI;
- 6 approve New Zealand's expected notifications and reservations attached to the paper under CAB-17-SUB-0241 as Annex B;
- 7 authorise the Minister of Finance and Minister of Revenue to approve any changes to the notifications and reservations as a result of developments in other jurisdictions' positions and any other minor technical changes;
- 8 agree that New Zealand sign the MLI;

- 9 note that an Instrument of Full Powers will need to be obtained from the Minister of Foreign Affairs to enable the Minister of Revenue to sign the MLI, and that the Ministry of Foreign Affairs and Trade will prepare this Instrument and arrange for its signature;
- 10 approve the extended National Interest Analysis (NIA) attached to the paper under CAB-17-SUB-0241 as Annex D;
- 11 note that the content of the NIA may change as a result of developments in other jurisdictions' positions between now and Parliamentary treaty examination;
- 12 note that the government will present any international treaty that is the subject of ratification to the House of Representatives for Parliamentary treaty examination, in accordance with Standing Order 397;
- 13 agree that, following signature, the text of the MLI, New Zealand's notifications and reservations, and the NIA be tabled in the House of Representatives for Parliamentary treaty examination, in accordance with Standing Order 397;
- 14 note that the MLI will be incorporated into New Zealand domestic law through an Order in Council with overriding effect made pursuant to section BH 1 of the Income Tax Act 2007;
- 15 invite the Minister of Revenue to instruct the Parliamentary Counsel Office to draft the Order in Council to give effect to the MLI, following signature and completion of the Parliamentary treaty examination process;
- 16 authorise officials, following signature, completion of the Parliamentary treaty examination process, and promulgation of the Order in Council, to bring the MLI into force by depositing New Zealand's instrument of ratification and list of confirmed notifications and reservations with the OECD Depository.

Jenny Vickers
for Secretary of the Cabinet

Hard-copy distribution:
The Cabinet

Signature and ratification of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

Proposal

1. This paper proposes that Cabinet authorises New Zealand's signature of, and the steps necessary to ratify and bring into force, the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* ("the Multilateral Instrument" or "MLI"). The full text of the MLI is attached as Annex A and a full list of New Zealand's proposed notifications and reservations to be submitted at the time of signature and confirmed upon ratification is attached as Annex B. A table showing the MLI's coverage of New Zealand's double tax agreement ("DTA") network is attached as Annex C.

Executive summary

2. DTAs are bilateral international treaties designed to reduce tax impediments to cross-border services, trade and investment without creating opportunities for non-taxation or reduced taxation through tax avoidance or evasion. DTAs also enable tax administrations to assist each other in the detection and prevention of tax evasion and avoidance. Section BH 1 of the Income Tax Act 2007 provides for the negotiation of and giving of effect to DTAs with other countries. New Zealand currently has 40 DTAs in force, primarily with major trading and investment partners.

3. The MLI is a multilateral international treaty that proposes to quickly and efficiently amend a significant number of DTAs around the world to take into account new treaty standards relating to treaty abuse and dispute resolution that have arisen out of the Organisation for Economic Co-operation and Development (OECD) and G20's 15-point Action Plan on base erosion and profit shifting ("BEPS"). It allows New Zealand to update the majority of its 40 DTAs without entering into bilateral negotiations with each of its treaty partners.

4. In May 2016, Cabinet considered the MLI as part of the New Zealand Government's response to BEPS (CAB-16-MIN-0218 refers). In February 2017, Cabinet approved the release of an officials' issues paper seeking submissions on New Zealand's implementation of the MLI (EGI-17-MIN-0005, CAB-17-MIN-0041 refers).

5. This paper seeks Cabinet approval for New Zealand to sign the MLI at a signing ceremony arranged by the OECD to be held in Paris on 7 June 2017. As the MLI is subject to ratification it must be presented to the House of Representatives for Parliamentary treaty examination in accordance with Standing Order 397, this paper also proposes that Cabinet approves the text of an extended National Interest Analysis ("NIA") for submission to Parliament. The extended NIA is attached as Annex D. This paper also proposes that Cabinet authorises the steps necessary to give effect to the provisions of the MLI under New Zealand

law and, after those steps have been successfully completed, authorise officials to ratify the MLI by depositing an instrument of ratification, along with New Zealand's list of confirmed notifications and reservations, with the MLI Depository (the OECD).

Background

6. DTAs are bilateral international treaties designed to reduce tax impediments to cross-border services, trade and investment without creating opportunities for non-taxation or reduced taxation through tax avoidance or evasion. DTAs also enable tax administrations to assist each other in the detection and prevention of tax evasion and avoidance. Section BH 1 of the Income Tax Act 2007 provides for the negotiation of and giving of effect to DTAs with other countries. New Zealand currently has 40 DTAs in force, primarily with major trading and investment partners.

7. While DTAs are beneficial for taxpayers, investors and governments themselves, there is the potential for these bilateral agreements to be misused to reduce or eliminate a multinational's worldwide tax. Misuse of DTAs in this way has been a feature of a number of cross-border tax avoidance arrangements.

8. The misuse of DTAs forms part of a wider problem referred to as BEPS, which has been the focus of significant global media and political attention since late 2012, following evidence suggesting that some multinationals pay little or no tax anywhere in the world.

9. BEPS is a global problem as many BEPS strategies exploit technical differences between different countries' tax rules, so New Zealand has been working with the OECD and G20 to develop a co-ordinated global solution to address BEPS through the 15-point OECD/G20 BEPS Action Plan.

10. A number of the items on the OECD/G20 BEPS Action Plan address the misuse of DTAs and can only be implemented through changes to DTAs themselves. These are:

- preventing the granting of treaty benefits in inappropriate circumstances (Action 6);
- preventing the artificial avoidance of permanent establishment status (Action 7);
- neutralising the effects of hybrid mismatch arrangements that have a treaty aspect (Action 2); and
- providing improved mechanisms for effective dispute resolution (Action 14).

11. Some of these solutions are "minimum standards" that countries that commit to solving BEPS are expected to adopt. Other provisions are optional, but are DTA "best practice" and now form part of the OECD Model Tax Convention following adoption of the OECD/G20 BEPS Action Plan.

12. Countries, including New Zealand, were presented with the difficulty of how to quickly and efficiently implement these measures without requiring the bilateral renegotiation of several thousand existing DTAs, which could take several years (or even potentially decades). For this reason, the Multilateral Instrument was developed under Action 15 of the OECD/G20 BEPS Action Plan to swiftly amend the DTAs of all participating jurisdictions.

The Multilateral Instrument

13. The MLI is a multilateral international treaty that proposes to quickly and efficiently amend a significant number of DTAs around the world to take into account new treaty standards relating to treaty abuse and dispute resolution that have arisen out of the OECD/G20 BEPS Action Plan, as outlined in paragraph 10. It allows New Zealand to update the majority of its 40 DTAs without entering into bilateral negotiations with each of its treaty partners.

14. New Zealand's treaty negotiation resources are limited and to update New Zealand's entire DTA network would take several years, if not decades, particularly as many of New Zealand's treaty partners would likely place greater importance on updating more significant treaties. This would limit New Zealand's likelihood of being able to meet the OECD minimum standard in a timely fashion.

15. The text of the MLI was developed by the OECD Ad Hoc Group consisting of officials from more than 100 participating jurisdictions, including New Zealand, and was formally adopted by the OECD in November 2016. Experts in both international tax and public international law participated in the OECD Ad Hoc Group that developed the MLI to ensure that it works as intended.

16. The MLI is flexible and allows jurisdictions to choose:

- which of their existing DTAs they wish to modify through the MLI;
- alternative ways of meeting BEPS minimum standards on treaty abuse and dispute resolution; and
- whether they want to adopt the OECD-recommended provisions for non-minimum standards.

17. Within some of these provisions, there are alternative ways of addressing BEPS concerns and the ability for countries to enter a variety of reservations.

New Zealand's proposed MLI positions

18. To make the best use of the MLI, New Zealand's proposed strategy is to include the majority of its DTAs within the scope of the MLI and to adopt as many of the MLI provisions as possible, where they are in line with New Zealand's overall treaty policy. This will give New Zealand the best chance of strengthening its DTAs with as many jurisdictions as possible and will introduce consistency across New Zealand's treaty network.

19. Of New Zealand's 40 in-force DTAs, New Zealand has nominated 34 to be covered by the MLI. Many of these DTAs were concluded in the 1970s and 1980s and do not reflect modern treaty standards, even before the work on BEPS was completed. The six DTAs that have not been listed are with jurisdictions who will not be signing the MLI. To be modified by the MLI, both New Zealand and the other jurisdiction must elect for the MLI to apply to the DTA (if there is a match, then the DTA is a "covered tax agreement"). Based on current draft notifications, New Zealand is expected to have 28 covered tax agreements. See Annex C. While this list is not final, it provides a fairly good indication of the likely coverage of the MLI. Final coverage will not be confirmed until each jurisdiction deposits its instrument of ratification with the OECD Depository.

20. As noted in paragraph 18, New Zealand's proposed strategy is to adopt as many of the MLI provisions as possible. This is because they are base protection measures that are in line with New Zealand's existing treaty policy (which has a greater source state emphasis than the OECD Model Tax Convention on which the New Zealand negotiating model is based). For example, New Zealand generally takes a broader approach in its DTAs than the current OECD Model Tax Convention in determining whether a permanent establishment exists. This means that the recommendations under Action 7 (preventing the artificial avoidance of permanent establishment status) of the OECD/G20 BEPS Action Plan which are contained in Articles 12 to 15 of the MLI are not contrary to New Zealand's general treaty policy and, in New Zealand's view, represent an improvement to the OECD Model Tax Convention.

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22. In addition to the proposed changes to the concept of a permanent establishment, it is proposed that New Zealand signs up to the provisions that relate to the following common problems identified with the OECD Model Tax Convention:

- Fiscally transparent entities (like trusts or partnerships) create arbitrage opportunities because they are treated differently for tax purposes by different countries. The provision in Article 3 clarifies that treaty benefits will only be allowed to the extent to which the item of income is taxed in the state in which the entity is resident.
- Dual resident entities can be used to take advantage of arbitrage opportunities by manipulating the current "place of effective management" test. The proposed provision in Article 4 will require competent authorities to agree the residence status of a dual resident entity. If there is no agreement, then treaty benefits will be denied, or only granted to the extent to which the competent authorities can agree.
- In the OECD Model Tax Convention and in many of New Zealand's modern treaties, a lower withholding tax rate is available where the shareholder owns more than a certain proportion of the company's shares. The MLI provision in Article 8 requires shares to be held for a minimum of 365 days for the shareholder to be entitled to reduced withholding tax rates on dividends. This prevents shareholders buying shares and holding them temporarily in order to access lower withholding rates.
- Investors can hold land through companies and dispose of the shares in the company to avoid paying tax on the disposal of that land. Many treaties contain a "land-rich company rule" which allows the source jurisdiction to tax income derived from land when the majority of a company's assets consist of land. To prevent artificial and temporary dilution of the amount of land held by a company just before sale, the provision in Article 9 requires the threshold for the amount of land ownership which triggers the rule to be measured on every day in the 365 day period leading up to the sale of the shares and extends the rule to interests in other entities such as partnerships and trusts.
- Permanent establishments can be established in third states to exploit low tax rates and branch exemptions. Article 10 of the MLI introduces a provision that denies treaty benefits in the case of income derived by a permanent establishment of one of the parties to the DTA, where that permanent establishment is situated in a low tax third state.

- Article 11 introduces a provision that preserves a jurisdiction’s right to tax its own residents. For example, this provision would prevent a New Zealand resident who is engaged in a tax avoidance arrangement from claiming that a DTA prevents New Zealand from using its domestic general anti-avoidance rule to impose tax.

23. In addition to addressing these specific BEPS concerns, Article 6 of the MLI proposes to amend the preamble to DTAs to confirm that they are not intended to be used to generate double non-taxation, and under Article 7, New Zealand has selected the option of adding a principal purpose test to its DTAs. The principal purpose test is a general anti-abuse rule that applies to the whole DTA. Both Articles 6 and 7 form part of the OECD minimum standard.

24. In addition to these base protection measures, New Zealand is signing up to taxpayer friendly measures relating to the mutual agreement procedure (“MAP”) and the availability of arbitration as a form of dispute resolution. These measures are a result of the work on Action 14 of the G20/OECD BEPS Action Plan relating to the improvement of mechanisms for effective dispute resolution. The key provisions are as follows:

- Article 16 of the MLI introduces a provision allowing taxpayers to request MAP where they believe taxation is not in accordance with the treaty. This is a new OECD minimum standard. While the majority of New Zealand’s DTAs contain MAP provisions, the MLI will amend these provisions to allow taxpayers to approach the competent authority of either jurisdiction (currently they only permit a case to be presented to the competent authority of the taxpayer’s country of residence).
- Article 16 also creates a new minimum standard regarding time limits for bringing a case to MAP and time limits for implementing a solution.
- Article 17 requires contracting states to make appropriate corresponding adjustments in transfer pricing cases. This provision is already found in most of New Zealand’s DTAs except for New Zealand’s oldest treaties.
- New Zealand has also opted to apply Part VI of the MLI, which will introduce arbitration as a means of dispute resolution. If a solution cannot be reached under MAP, taxpayers have the ability to request that unresolved issues can be taken to arbitration. New Zealand has already agreed to arbitration in its treaties with Australia and Japan. New Zealand’s experience is that the arbitration facility is very rarely used, but it acts as an incentive for the competent authorities of two jurisdictions to come to an agreement within the required time period for MAP.

Implementation issues and consultation

25. The main difficulty in implementing the provisions of MLI compared with amending protocols stems from the fact that the provisions in the MLI have been drafted more broadly than they otherwise would for an amending protocol to take account of the fact that the MLI must be able to apply to not one DTA, but several thousand.

26. This means that there can be some ambiguity in how the MLI applies to a particular DTA. This ambiguity is mitigated in many cases as a MLI provision will only replace the corresponding existing provision if both treaty partners notify the same provision. However, compliance costs may still be incurred as taxpayers will need to consider the DTA and MLI alongside both jurisdictions’ notifications and reservations.

27. While officials generally do not consult on the content of tax treaties, due to the unusual nature of the MLI, public feedback was sought on potential implementation issues related to the Multilateral Instrument. An officials' issues paper titled *New Zealand's implementation of the multilateral convention to implement tax treaty related measures to prevent BEPS* was released on 3 March 2017. Submissions closed on 7 April 2017 and 5 were received (from EY, KPMG, PwC, Corporate Taxpayers Group ("CTG") and Chartered Accountants Australia and New Zealand ("CA ANZ")). Two stakeholder workshops were held on 27 and 28 March 2017 with CTG and CA ANZ to enable officials to better understand practitioners' concerns.

28. Two of the submissions supported the adoption of the MLI as the most effective way to implement the treaty related BEPS recommendations. One submission acknowledged that the New Zealand Government has the constitutional ability to decide New Zealand's tax treaty position and it therefore makes sense to achieve this in the shortest time at the least cost through the MLI. One submission acknowledged that participating in OECD and G20 initiatives to target BEPS is a key focus for the government, while not explicitly supporting the adoption. The final submission did not express an overall view on adoption, but submitted that New Zealand should not adopt all of the optional provisions.

29. The main issues raised in submissions relate to:

- a. **substantive positions taken by New Zealand.** Although consultation was intended to focus on implementation issues, submitters did comment on the substance of the new provisions in the MLI. Most submitters were generally supportive of New Zealand's adoption of the MLI and a number supported the proposals to take up most of the MLI provisions as an efficient way to amend our treaty network, but some submitters raised concerns about specific provisions. One point of contention among submitters was the proposal to adopt Article 4 of the MLI, relating to dual-resident entities (refer paragraph 22 above). However, this new rule is being adopted by many countries as a means of curbing certain forms of treaty abuse. It is also consistent with the position New Zealand has taken in a number of bilateral treaties. Officials are exploring ways to reduce compliance costs associated with this provision. Another concern related to one aspect of the new permanent establishment provisions which might lead to more taxation of New Zealanders operating offshore. However, New Zealand's adoption of this provision would be consistent with both the proposals contained in the recent Government discussion document titled *BEPS – Transfer pricing and permanent establishment avoidance* and the long-term direction of New Zealand's tax treaty policy.
- b. **requests for additional guidance and administrative resources** to help taxpayers apply DTAs as modified by the MLI (including requests for Inland Revenue to produce consolidated versions of New Zealand's DTAs as modified by the MLI). New Zealand officials have already been working with their Australian counterparts to scope what administrative guidance could be jointly developed to assist taxpayers. Publishers may produce consolidated texts as they currently do with amending protocols and original DTAs. In addition to this, New Zealand Inland Revenue officials are continuing discussions with overseas counterparts to determine what additional certainty the competent authorities may be able to provide (for example, through a memorandum of understanding which sets out in more detail how each MLI provision applies to the DTA).

- c. **technical domestic law changes** needed to implement the MLI smoothly. Officials are considering these suggestions and will report separately to Ministers on what domestic law changes may be required before the MLI comes into effect.

Next steps

30. Subject to Cabinet's approval for New Zealand to sign the MLI, we propose that the Minister of Revenue signs the MLI at a signing ceremony arranged by the OECD to be held in Paris on 7 June 2017. At the signing ceremony, New Zealand will also need to present its expected notifications and reservations.

31. An Instrument of Full Powers will need to be obtained from the Minister of Foreign Affairs to enable the Minister of Revenue to sign the MLI. The Ministry of Foreign Affairs and Trade will prepare this Instrument and arrange for its signature.

32. Standing Order 397 provides that the Government will present any international treaty that is the subject of ratification by New Zealand to the House of Representatives for treaty examination by Select Committee. Accordingly, after signature, it is proposed that the MLI be submitted to the House of Representatives for Parliamentary treaty examination. For this purpose, an extended NIA has been drafted and is attached at Annex D. This paper seeks Cabinet approval of the extended NIA so that it can be submitted to Parliament as part of the Parliamentary treaty examination process.

33. The MLI will be implemented by an Order in Council made pursuant to section BH 1 of the Income Tax Act 2007 which has overriding effect in relation to other legislation relating to tax and the exchange of information that relates to tax. Subject to satisfactory completion of Parliamentary treaty examination, this paper also seeks Cabinet approval for me to issue drafting instructions for an Order in Council to implement the MLI into New Zealand domestic law.

34. Article 34 provides that the MLI will enter into force for New Zealand once New Zealand has deposited its instrument of ratification. New Zealand will be in a position to deposit its instrument of ratification following the completion of all domestic procedures for entry into force. Subject to the successful promulgation of an Order in Council, this paper seeks Cabinet approval for officials to ratify the MLI by depositing New Zealand's instrument of ratification with the MLI Depository. New Zealand will also need to confirm its final notifications and reservations at this point in time.

Consultation

35. Tax policy officials and the Ministry of Foreign Affairs and Trade were consulted in the preparation of this Cabinet paper.

36. In addition, an officials' issues paper titled *New Zealand's implementation of the multilateral convention to implement tax treaty related measures to prevent BEPS* was released on 3 March 2017. Submissions closed on 7 April 2017 and 5 were received. Officials met with interested stakeholders. These submissions and views are summarised in paragraphs 26 to 29 above.

Financial implications

37. Normally, new DTAs or amending protocols constrain New Zealand from taxing certain income and limit the rate at which tax on passive income (dividends, interest, and royalties) can be imposed and therefore result in the reduction of New Zealand tax. This upfront revenue cost is then typically offset by other factors (for example, through reduced need to allow foreign tax credits).

38. The MLI differs in that its provisions are typically base protection measures which increase New Zealand's ability to tax inbound investment and equips New Zealand with a whole-of-treaty anti-abuse rule to prevent tax avoidance through the use of DTAs. This may result in more tax paid by non-residents in New Zealand. However, as the provisions are reciprocal, the MLI may increase the amount of foreign income tax paid by New Zealand residents with investments and business operations overseas. This could decrease the amount of New Zealand income tax paid on that foreign income as a foreign tax credit is provided for foreign income tax paid.

39. Data limitations prevent officials from accurately estimating the actual impact on net tax revenue. However, as New Zealand is a capital importer and the MLI covers the majority of New Zealand's DTA network, it is expected that overall impact on tax revenue will be positive.

40. In terms of costs borne by Inland Revenue, there will be costs associated in administering the arbitration provisions of the MLI and some of the provisions that require competent authority agreement. However, these are expected to be relatively small. The existence of arbitration provides a strong incentive for tax authorities to resolve issues under the mutual agreement procedure before arbitration can be triggered. New Zealand's DTAs with Australia and Japan already provide for arbitration and New Zealand's experience is that very few cases have been brought by taxpayers under the mutual agreement procedure and almost all of these have been settled within the required time period, regardless of whether the DTA provides for arbitration.

Human rights

41. No inconsistencies with the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993 have been identified.

Legislative implications

42. The MLI must be given effect by Order in Council, pursuant to section BH 1 of the Income Tax Act 2007.

43. Accordingly this paper seeks approval for an Order in Council to be drafted and submitted to Cabinet following the signing of the MLI and the completion of the Parliamentary treaty examination process.

Regulatory impact analysis

44. As this proposal has regulatory implications (it requires an Order in Council), the Regulatory Impact Analysis (RIA) requirements apply. However, as this paper relates to an international treaty, an extended NIA has been prepared (see Annex D) rather than a separate Regulatory Impact Statement.

45. The extended NIA was prepared by Inland Revenue. The extended NIA was circulated with this paper to the Treasury and the Ministry of Foreign Affairs and Trade for departmental consultation.

46. As this proposal has regulatory implications (it requires an Order in Council), the Regulatory Impact Analysis (RIA) requirements apply. However, as this paper relates to an international treaty, an extended NIA has been prepared (see Annex D) in accordance with the RIA requirements.

47. The extended NIA was prepared by Inland Revenue. The extended NIA was circulated with this paper to the Treasury and the Ministry of Foreign Affairs and Trade for departmental consultation.

48. The Regulatory Impact Analysis Team (RIAT) and the tax strategy team in the Treasury have jointly reviewed the extended NIA prepared by Inland Revenue and associated supporting material, and considers that the information and analysis summarised in the extended NIA meets the quality assurance criteria.

49. The extended NIA compares the benefits and costs of signing the treaty relative to taking no action or other potential approaches to amending DTAs, and provides sufficient analysis to support the proposals.

50. In part because provisions in the MLI are drafted broadly it has been difficult to project the revenue and compliance impacts from the treaty. RIAT recommends ongoing monitoring and evaluation of the impacts of the MLI as part of the Government's response to BEPS to ensure that any unintended consequences are known.

Publicity

51. It is proposed that New Zealand participates in the signing ceremony arranged by the OECD to be held in Paris on 7 June 2017. Appropriate media statements and announcements will be arranged once details have been finalised. The text of the MLI and New Zealand's notifications and reservations will be publicly available on Inland Revenue's Tax Policy website. The extended NIA will be publicly available on the Parliamentary website following Parliamentary treaty examination.

52. It is expected that the OECD will also arrange its own publicity for the signing ceremony and will make all signatories' reservations and notifications publicly available following the signing ceremony.

Recommendations

53. We recommend that the Cabinet:

1. **note** that the Income Tax Act 2007 authorises the negotiation of, and giving effect to double tax agreements ("DTAs") with other jurisdictions;

2. **note** that officials participated in the negotiation of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the “MLI”), the text of which was formally adopted in November 2016;
3. **note** that the MLI will quickly and efficiently amend the majority of New Zealand’s DTAs to include the recommended changes to tax treaties arising out of the OECD/G20 15 point Action Plan on base erosion and profit shifting;
4. **approve** the text of the MLI attached to the Cabinet paper as Annex A (subject to any minor technical changes resulting from the process of translation or legal verification);
5. **note** that officials have finalised New Zealand’s expected notifications and reservations in relation to the choices available in the MLI;
6. **approve** New Zealand’s expected notifications and reservations attached to the Cabinet paper as Annex B;
7. **delegate** to the Minister of Finance and Minister of Revenue the authority to approve any changes to the notifications and reservations as a result of developments in other jurisdictions’ positions and any other minor technical changes;
8. **agree** that New Zealand sign the MLI;
9. **note** that an Instrument of Full Powers will need to be obtained from the Minister of Foreign Affairs to enable the Minister of Revenue to sign the MLI. The Ministry of Foreign Affairs and Trade will prepare this Instrument and arrange for its signature;
10. **approve** the extended National Interest Analysis (“NIA”) attached to the Cabinet paper as Annex D;
11. **note** the content of the NIA may change as a result of developments in other jurisdictions’ positions between now and Parliamentary treaty examination;
12. **note** that the Government will present any international treaty that is the subject of ratification to the House of Representatives for Parliamentary treaty examination, in accordance with Standing Order 397;
13. **agree** that, following signature, the text of the MLI, New Zealand’s notifications and reservations, and the NIA be tabled in the House of Representatives for Parliamentary treaty examination, in accordance with Standing Order 397;
14. **note** that the MLI will be incorporated into New Zealand domestic law through an Order in Council with overriding effect made pursuant to section BH 1 of the Income Tax Act 2007;
15. **invite** the Minister of Revenue to instruct the Parliamentary Counsel Office to draft the Order in Council to give effect to the MLI, following signature and completion of the Parliamentary treaty examination process;

16. **authorise** officials, following signature, completion of the Parliamentary treaty examination process, and promulgation of the Order in Council to bring the MLI into force by depositing New Zealand's instrument of ratification and list of confirmed notifications and reservations with the OECD Depositary.

<p>Hon Steven Joyce Minister of Finance</p> <p>____/____/____</p> <p>Date</p>	<p>Hon Judith Collins Minister of Revenue</p> <p>____/____/____</p> <p>Date</p>
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Annex A

Text of the MLI

Annex B

New Zealand's notifications and reservations.

Annex C

New Zealand has 40 DTAs currently in force. The table below shows the coverage of the MLI across New Zealand's treaty network (as at 9 May 2017).

DTA	
Covered tax agreements	1. Australia
	2. Belgium
	3. Canada
	4. Chile
	5. China
	6. Czech Republic
	7. Denmark
	8. Finland
	9. France
	10. Germany
	11. Hong Kong (China)
	12. India
	13. Indonesia
	14. Ireland
	15. Italy
	16. Japan
	17. Malaysia
	18. Mexico
	19. Netherlands
	20. Poland
	21. Russia
	22. Singapore
	23. South Africa
	24. Spain
	25. Sweden
	26. Turkey
	27. United Kingdom
	28. Korea
Not modified by the MLI	29. Switzerland
	30. Viet Nam
	31. Thailand
	32. Philippines
	33. Norway
	34. Austria
	35. United Arab Emirates
	36. Papua New Guinea
	37. Samoa
	38. Taiwan
	39. Fiji
	40. United States

Annex D

Extended NIA

Annex A – Text of the Multilateral Instrument

The text of Multilateral Instrument is available on OECD's website at <http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm>

New Zealand

Status of List of Reservations and Notifications at the Time of Signature

This document contains a provisional list of expected reservations and notifications to be made by New Zealand pursuant to Articles 28(7) and 29(4) of the Convention.

Article 2 – Interpretation of Terms

Notification - Agreements Covered by the Convention

Pursuant to Article 2(1)(a)(ii) of the Convention, New Zealand wishes the following agreements to be covered by the Convention:

No	Title	Other Contracting Jurisdiction	Original/ Amending Instrument	Date of Signature	Date of Entry into Force
1	Convention between Australia and New Zealand for the avoidance of double taxation with respect to taxes on income and fringe benefits and the prevention of fiscal evasion	Australia	Original	26-6-2009	19-03-2010
2	Agreement between New Zealand and the Republic of Austria with respect to taxes on income and on capital	Austria	Original	21-09-2006	01-12-2007
3	Convention Between the Government of New Zealand and the Government of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income	Belgium	Original	15-09-1981	08-12-1983
			Amending Instrument (a)	07-12-2009	N/A
4	Convention between New Zealand and Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income	Canada	Original	03-05-2012	26-06-2015
			Amending Instrument (a)	12-09-2014	26-06-2015
5	Convention between New Zealand and the Republic of Chile for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income	Chile	Original	10-12-2003	21-06-2006
6	Agreement between the Czech Republic and New Zealand for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income	Czech Republic	Original	26-10-2007	29-08-2008
7	Convention between the Government of New Zealand and the Government of the Kingdom of Denmark for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income	Denmark	Original	10-10-1980	22-06-1981
			Amending Instrument (a)	12-03-1985	22-07-1985
8	Convention between the Government of New Zealand and the Government of Finland for the	Finland	Original	12-03-1982	22-09-1984
			Amending Instrument	05-12-1986	08-05-1988

	avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income		(a)		
9	Convention between the Government of New Zealand and the Government of the French Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income	France	Original	30-11-1979	19-03-1981
10	Agreement between New Zealand and the Federal Republic of Germany for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and certain other taxes	Germany	Original	20-10-1978	21-12-1980
11	Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of New Zealand for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income	Hong Kong	Original	01-12-2010	09-11-2011
12	Convention between the Government of New Zealand and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income	India	Original	17-10-1986	03-12-1986
			Amending Instrument (a)	29-08-1996	09-01-1997
			Amending Instrument (b)	21-06-1999	17-12-1999
			Amending Instrument (c)	26-10-2016	N/A
13	Agreement between the Government of New Zealand and the Government of the Republic of Indonesia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income	Indonesia	Original	25-03-1987	24-06-1988
14	Convention between the Government of New Zealand and the Government of Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains	Ireland	Original	19-09-1986	26-09-1988
15	Convention between the Government of New Zealand and the Government of the Republic of Italy for the avoidance of double taxation with respect to taxes on income and the prevention of fiscal evasion	Italy	Original	06-12-1979	23-03-1983

16	Convention between New Zealand and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income	Japan	Original	10-12-2012	25-10-2013
17	Agreement between the Government of New Zealand and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income	Malaysia	Original	19-03-1976	02-09-1976
			Amending Instrument (a)	14-07-1994	01-07-1996
			Amending Instrument (b)	06-11-2012	12-01-2016
18	Agreement between the Government of New Zealand and the Government of the United Mexican States for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income	Mexico	Original	16-11-2006	16-06-2007
19	Convention between the Government of New Zealand and the Government of the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income	Netherlands	Original	15-10-1980	18-03-1981
			Amending Instrument (a)	20-12-2001	22-08-2004
20	Convention between New Zealand and the Kingdom of Norway for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Certain other Taxes	Norway	Original	20-04-1982	31-03-1983
			Amending Instrument (a)	16-06-1998	16-07-1998
21	Convention between the Government of New Zealand and the Government of the Republic of the Philippines for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income	Philippines	Original	29-04-1980	14-05-1981
			Amending Instrument (a)	21-02-2002	02-10-2008
22	Agreement between New Zealand and the Republic of Poland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income	Poland	Original	21-04-2005	16-08-2006
23	Agreement between the Government of New Zealand and the Government of the Russian Federation for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income	Russian Federation	Original	05-09-2000	04-07-2003
24	Agreement Between The Government Of New Zealand And	Singapore	Original	21-08-2009	12-08-2010

	The Government Of The Republic Of Singapore For The Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect To Taxes On Income				
25	Agreement between the Government of New Zealand and the Government of the Republic of South Africa for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income	South Africa	Original	06-02-2002	23-07-2004
26	Agreement between the Government of New Zealand and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income	Spain	Original	28-07-2005	31-07-2006
27	Convention between the Government of New Zealand and the Government of Sweden for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income	Sweden	Original	21-02-1979	14-11-1980
28	Convention between New Zealand and the Swiss Confederation for the avoidance of double taxation with respect to taxes on income	Switzerland	Original	06-06-1980	21-11-1981
29	Agreement between the Government of New Zealand and the Government of the Kingdom of Thailand for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income	Thailand	Original	22-10-1998	14-12-1998
30	Agreement between the Government of New Zealand and the Government of the Republic of Turkey for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income	Turkey	Original	22-04-2010	28-07-2011
31	Convention between the Government of New Zealand and the Government of the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains	United Kingdom	Original	04-08-1983	16-03-1984
			Amending Instrument (a)	22-12-1983	22-12-1983
			Amending Instrument (b)	04-11-2003	23-07-2004
			Amending Instrument (c)	07-11-2007	28-08-2008
32	Agreement between the	Viet Nam	Original	05-08-2013	05-05-2014

	Government of New Zealand and the Government of the Socialist Republic of Viet Nam for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income				
33	Agreement between the Government of New Zealand and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income	China	Original	16-09-1986	17-12-1986
			Amending Instrument (a)	7-10-1997	22-03-2000
34	Convention between the Government of New Zealand and the Government of the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income	Republic of Korea	Original	6-10-1981	22-04-1983
			Amending Instrument (a)	14-07-1997	10-10-1997

Article 3 – Transparent Entities

Notification of Existing Provisions in Listed Agreements

Pursuant to Article 3(6) of the Convention, New Zealand considers that the following agreements contain a provision described in Article 3(4)

Listed Agreement Number	Other Contracting Jurisdiction	Provision
1	Australia	Article 1(2)
5	Chile	Article 4(4)
16	Japan	Article 4(5)

Article 4 – Dual Resident Entities

Notification of Existing Provisions in Listed Agreements

Pursuant to Article 4(4) of the Convention, New Zealand considers that the following agreements contain a provision described in Article 4(2). The article and paragraph number of each such provision is identified below.

Listed Agreement Number	Other Contracting Jurisdiction	Provision
1	Australia	Article 4(3)
2	Austria	Article 4(3)
3	Belgium	Article 4(3)
4	Canada	Article 4(5)
5	Chile	Article 4(3)
6	Czech Republic	Article 4(3)
7	Denmark	Article 4(3)
8	Finland	Article 4(3)
9	French Republic	Article 4(3)
10	Germany	Article 4(3)
11	Hong Kong (China)	Article 4(3)
12	India	Article 4(3)
13	Indonesia	Article 4(3)
14	Ireland	Article 4(3)
15	Italy	Article 4(3)
16	Japan	Article 4(3); Protocol (3)
17	Malaysia	Article 3(3)
18	Mexico	Article 4(4)
19	Netherlands	Article 4(3)
20	Norway	Article 4(3)
21	Philippines	Article 4(3)
22	Poland	Article 4(4)
23	Russian Federation	Article 4(4)
24	Singapore	Article 4(3)
25	South Africa	Article 4(3)
26	Spain	Article 4(3)
27	Sweden	Article 3(3)
28	Switzerland	Article 4(3)
29	Thailand	Article 4(4)
30	Turkey	Article 4(3)
31	United Kingdom	Article 4(3)
32	Viet Nam	Article 4(3)
33	China	Article 4(3)
34	Republic of Korea	Article 4(3)

Article 6 – Purpose of a Covered Tax Agreement

Notification of Existing Preamble Language in Listed Agreements

Pursuant to Article 6(5) of the Convention, New Zealand considers that the following agreements are not within the scope of a reservation under Article 6(4) and contain preamble language described in Article 6(2). The text of the relevant preambular paragraph is identified below.

Listed Agreement Number	Other Contracting Jurisdiction	Preamble Text
1	Australia	Desiring to conclude a Convention for the avoidance of double taxation with respect to taxes on income and fringe benefits and the prevention of fiscal evasion,
2	Austria	desiring to conclude an Agreement with respect to taxes on income and on capital,
3	Belgium	Desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
4	Canada	DESIRING to conclude a convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
5	Chile	desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income;
6	Czech Republic	Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
7	Denmark	Desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
8	Finland	Desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
9	French Republic	desiring to conclude a convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
10	Germany	Desiring to conclude an Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Certain Other Taxes,
11	Hong Kong (China)	Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
12	India	Desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
13	Indonesia	Desiring to conclude an Agreement for the avoidance of

		double taxation and the prevention of fiscal evasion with respect to taxes on income,
14	Ireland	Desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains;
15	Italy	desiring to conclude a convention for the avoidance of double taxation with respect to taxes on income and the prevention of fiscal evasion.
16	Japan	Desiring to conclude a new Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
17	Malaysia	Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
18	Mexico	Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
19	Netherlands	Desiring to conclude a convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
20	Norway	Desiring to conclude a Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on income and certain other taxes,
21	Philippines	Desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
22	Poland	Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
23	Russian Federation	Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
24	Singapore	Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
25	South Africa	Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
26	Spain	desiring to conclude an Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income,
27	Sweden	Desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
28	Switzerland	Desiring to conclude a Convention for the avoidance of double taxation with respect to taxes on income
29	Thailand	Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
30	Turkey	desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with

		respect to taxes on income,
31	United Kingdom	Desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains;
32	Viet Nam	Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,
33	China	Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income;
34	Republic of Korea	Desiring to conclude a Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income,

Article 7 – Prevention of Treaty Abuse

Notification of Choice of Optional Provisions

Pursuant to Article 7(17)(b) of the Convention, New Zealand hereby chooses to apply Article 7(4).

Notification of Existing Provisions in Listed Agreements

Pursuant to Article 7(17)(a) of the Convention, New Zealand considers that the following agreements are not subject to a reservation under Article 7(15)(b) and contain a provision described in Article 7(2). The article and paragraph number of each such provision is identified below.

Listed Agreement Number	Other Contracting Jurisdiction	Provision
1	Australia	Article 10(9); Article 11(9); Article 12(7); Article 14(5), second sentence
4	Canada	Article 10(9); Article 11(10); Article 12(7)
5	Chile	Article 22(2)
11	Hong Kong	Article 10(8); Article 11(10); Article 12(7)
14	Ireland	Article 13(7); Article 14(7)
16	Japan	Article 23
24	Singapore	Article 10(6); Article 12(7)
31	United Kingdom	Article 11(6); Article 12(9); Article 13(7); Article 21A(5); Article 22(5)
32	Viet Nam	Article 10(6); Article 11(7); Article 12(7)
33	China	Article 4(1)(a) of (a)

Article 8 – Dividend Transfer Transactions

Notification of Existing Provisions in Listed Agreements

Pursuant to Article 8(4) of the Convention, New Zealand considers that the following agreements contain a provision described in Article 8(1) that is not subject to a reservation described in Article 8(3)(b). The article and paragraph number of each such provision is identified below.

Listed Agreement Number	Other Contracting Jurisdiction	Provision
1	Australia	Article 10(2)(a) and (3)
4	Canada	Article 10(2)(a)
11	Hong Kong	Article 10(2)(a) and (3)
16	Japan	Article 10(3)
18	Mexico	Protocol (9)
24	Singapore	Article 10(2)(a)
30	Turkey	Article 10(2)(a)
32	Viet Nam	Article 10(2)(a)

Article 9 – Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property

Notification of Choice of Optional Provisions

Pursuant to Article 9(8) of the Convention, New Zealand hereby chooses to apply Article 9(4).

Notification of Existing Provisions in Listed Agreements

Pursuant to Article 9(7) of the Convention, New Zealand considers that the following agreements contain a provision described in Article 9(1). The article and paragraph number of each such provision is identified below.

Listed Agreement Number	Other Contracting Jurisdiction	Provision
1	Australia	Article 13(4)
2	Austria	Article 13(4)
4	Canada	Article 13(4)
6	Czech Republic	Article 13(4)
9	French Republic	Article 13(4)
10	Germany	Protocol (5)(a), first sentence
11	Hong Kong (China)	Article 13(4)
12	India	Article 13(4)
14	Ireland	Article 15(2)
15	Italy	Article 13(3)
16	Japan	Article 13(2)
18	Mexico	Article 13(4)
20	Norway	Article 13(5)
21	Philippines	Protocol (7)
22	Poland	Article 13(4)
24	Singapore	Article 13(4)
25	South Africa	Article 13(4)
26	Spain	Article 13(4)
27	Sweden	Article 12(a)(ii) and (b)(ii)
30	Turkey	Article 13(4)
31	United Kingdom	Part of Article 14(1), but only the following words “or from the alienation of shares in a company deriving their value or the greater part of their value directly or indirectly from such property”
32	Viet Nam	Article 13(4)

Article 10 – Anti-abuse Rule for Permanent Establishments Situated in Third Jurisdictions

Notification of Existing Provisions in Listed Agreements

Not applicable

Article 11 – Application of Tax Agreements to Restrict a Party’s Right to Tax its Own Residents

Notification of Existing Provisions in Listed Agreements

Pursuant to Article 11(4) of the Convention, New Zealand considers that the following agreements contain a provision described in Article 11(2). The article and paragraph number of each such provision is identified below.

Listed Agreement Number	Other Contracting Jurisdiction	Provision
4	Canada	Article 27(1) and (2)
21	Philippines	Article 1(2); Protocol (9)
16	Japan	Protocol (1)

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

Notification of Existing Provisions in Listed Agreements

Pursuant to Article 12(5) of the Convention, New Zealand 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	Australia	Article 5(8)(a)
2	Austria	Article 5(6)
3	Belgium	Article 5(6)
4	Canada	Article 5(8)(a)
5	Chile	Article 5(8)
6	Czech Republic	Article 5(6)
7	Denmark	Article 5(6)
8	Finland	Article 5(6)
9	French Republic	Article 5(6)
10	Germany	Article 5(5)
11	Hong Kong (China)	Article 5(8)(a)
12	India	Article 5(4)(a)
13	Indonesia	Article 5(5)(a)
14	Ireland	Article 5(6)
15	Italy	Article 5(5)
16	Japan	Article 5(8)(a)
17	Malaysia	Article 4(5)(a)
18	Mexico	Article 5(7)
19	Netherlands	Article 5(6)
20	Norway	Article 5(6)
21	Philippines	Article 5(4)
22	Poland	Article 5(7)
23	Russian Federation	Article 5(6)(a)
24	Singapore	Article 5(7)(a)
25	South Africa	Article 5(8)
26	Spain	Article 5(6)
27	Sweden	Article 4(5)(a)
28	Switzerland	Article 5(6)
29	Thailand	Article 5(8)(a)
30	Turkey	Article 5(7)
31	United Kingdom	Article 5(5)
32	Viet Nam	Article 5(8)(a)
33	China	Article 5(5)
34	Republic of Korea	Article 5(6)

Pursuant to Article 12(6) of the Convention, New Zealand considers that the following agreements contain a provision described in Article 12(3)(b). The article and paragraph number of each such provision is identified below.

Listed Agreement Number	Other Contracting Jurisdiction	Provision
1	Australia	Article 5(9)
2	Austria	Article 5(7)
3	Belgium	Article 5(7)
4	Canada	Article 5(9)
5	Chile	Article 5(9)
6	Czech Republic	Article 5(7)
7	Denmark	Article 5(7)
8	Finland	Article 5(7)
9	French Republic	Article 5(7)
10	Germany	Article 5(6)
11	Hong Kong (China)	Article 5(9)
12	India	Article 5(5)
13	Indonesia	Article 5(6)
14	Ireland	Article 5(7)
15	Italy	Article 5(6)
16	Japan	Article 5(9)
17	Malaysia	Article 4(6)
18	Mexico	Article 5(8)
19	Netherlands	Article 5(7)
20	Norway	Article 5(7)
21	Philippines	Article 5(5)
22	Poland	Article 5(8)
23	Russian Federation	Article 5(7)
24	Singapore	Article 5(8)
25	South Africa	Article 5(9)
26	Spain	Article 5(7)
27	Sweden	Article 4(6)
28	Switzerland	Article 5(7)
29	Thailand	Article 5(9)
30	Turkey	Article 5(8)
31	United Kingdom	Article 5(6)
32	Viet Nam	Article 5(9)
33	China	Article 5(6)
34	Republic of Korea	Article 5(7)

Article 13 – Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions

Notification of Choice of Optional Provisions

Pursuant to Article 13(7) of the Convention, New Zealand hereby chooses to apply Option A under Article 13(1).

Notification of Existing Provisions in Listed Agreements

Pursuant to Article 13(7) of the Convention, New Zealand considers that the following agreements contain a provision described in Article 13(5)(a). The article and paragraph number of each such provision is identified below.

Listed Agreement Number	Other Contracting Jurisdiction	Provision
1	Australia	Article 5(7)
2	Austria	Article 5(5)
3	Belgium	Article 5(4)
4	Canada	Article 5(7)
5	Chile	Article 5(7)
6	Czech Republic	Article 5(5)
7	Denmark	Article 5(4)
8	Finland	Article 5(4)
9	French Republic	Article 5(4)
10	Germany	Article 5(4)
11	Hong Kong (China)	Article 5(7)
12	India	Article 5(3)
13	Indonesia	Article 5(4)
14	Ireland	Article 5(5)
15	Italy	Article 5(3)
16	Japan	Article 5(7)
17	Malaysia	Article 4(3)
18	Mexico	Article 5(6)
19	Netherlands	Article 5(4)
20	Norway	Article 5(4)
21	Philippines	Article 5(3)
22	Poland	Article 5(6)
23	Russian Federation	Article 5(5)
24	Singapore	Article 5(6)
25	South Africa	Article 5(7)
26	Spain	Article 5(3)
27	Sweden	Article 4(3)
28	Switzerland	Article 5(4)
29	Thailand	Article 5(7)
30	Turkey	Article 5(6)
31	United Kingdom	Article 5(4)
32	Viet Nam	Article 5(7)
33	China	Article 5(4)
34	Republic of Korea	Article 5(4)

Article 14 – Splitting-up of Contracts

Notification of Existing Provisions in Listed Agreements

Pursuant to Article 14(4) of the Convention, New Zealand considers that the following agreements contain a provision described in Article 14(2) that is not subject to a reservation under Article 14(3)(b). The article and paragraph number of each such provision is identified below.

Listed Agreement Number	Other Contracting Jurisdiction	Provision
1	Australia	Article 5(6)
2	Austria	Protocol (2)
4	Canada	Article 5(6)
5	Chile	Article 5(6)
11	Hong Kong (China)	Article 5(6)
13	Indonesia	Protocol (With reference to Article 5)(b), second sentence and third sentence
16	Japan	Article 5(6)
18	Mexico	Article 5(5)
20	Norway	Article 22(2)
22	Poland	Article 5(5)
23	Russian Federation	Protocol (2)
24	Singapore	Article 5(5)
25	South Africa	Article 5(6)
26	Spain	Article 5(5)
29	Thailand	Article 5(6)
30	Turkey	Protocol (2)
32	Viet Nam	Article 5(6)
33	China	Article 5(3)(c)(ii)

Article 16 – Mutual Agreement Procedure

Notification of Existing Provisions in Listed Agreements

Pursuant to Article 16(6)(a) of the Convention, New Zealand considers that the following agreements contain a provision described in Article 16(4)(a)(i). The article and paragraph number of each such provision is identified below.

Listed Agreement Number	Other Contracting Jurisdiction	Provision
1	Australia	Article 25(1), first sentence
2	Austria	Article 24(1), first sentence
3	Belgium	Article 24(1), first sentence
4	Canada	Article 23(1), first sentence
5	Chile	Article 24(1), first sentence
6	Czech Republic	Article 22(1), first sentence
7	Denmark	Article 23(1), first sentence
8	Finland	Article 24(1), first sentence
9	French Republic	Article 24(1), first sentence
10	Germany	Article 24(1), first sentence
11	Hong Kong (China)	Article 23(1), first sentence
12	India	Article 25(1), first sentence
13	Indonesia	Article 24(1), first sentence
14	Ireland	Article 26(1), first sentence
15	Italy	Article 24(1), first sentence
16	Japan	Article 26(1), first sentence
17	Malaysia	Article 21(1), first sentence
18	Mexico	Article 23(1), first sentence
19	Netherlands	Article 23(1), first sentence
20	Norway	Article 25(1), first sentence
21	Philippines	Article 24(1), first sentence
22	Poland	Article 23(1), first sentence
23	Russian Federation	Article 24(1), first sentence
24	Singapore	Article 22(1), first sentence
25	South Africa	Article 23(1), first sentence
26	Spain	Article 23(1), first sentence
27	Sweden	Article 25(1), first sentence
28	Switzerland	Article 23(1), first sentence
29	Thailand	Article 25(1), first sentence
30	Turkey	Article 24(1), first sentence
31	United Kingdom	Article 24(1)
32	Viet Nam	Article 24(1), first sentence
33	China	Article 25(1), first sentence
34	Republic of Korea	Article 24(1), first sentence

Pursuant to Article 16(6)(b)(i) of the Convention, New Zealand considers that the following agreements contain a provision that provides that a case referred to in the first sentence of Article 16(1) must be presented within a specific time period that is shorter than three years from the first

notification of the action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement. The article and paragraph number of each such provision is identified below.

Listed Agreement Number	Other Contracting Jurisdiction	Provision
13	Indonesia	Article 24(1), second sentence
15	Italy	Article 24(1), second sentence
21	Philippines	Article 24(1), second sentence

Pursuant to Article 16(6)(b)(ii) of the Convention, New Zealand considers that the following agreements contain a provision that provides that a case referred to in the first sentence of Article 16(1) must be presented within a specific time period that is at least three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement. The article and paragraph number of each such provision is identified below.

Listed Agreement Number	Other Contracting Jurisdiction	Provision
1	Australia	Article 25(1), second sentence
2	Austria	Article 24(1), second sentence
3	Belgium	Article 24(1), second sentence
4	Canada	Article 23(1), second sentence
5	Chile	Article 24(1), second sentence
6	Czech Republic	Article 22(1), second sentence
7	Denmark	Article 23(1), second sentence
8	Finland	Article 24(1), second sentence
9	French Republic	Article 24(1), second sentence
11	Hong Kong (China)	Article 23(1), second sentence
12	India	Article 25(1), second sentence
14	Ireland	Article 26(1), second sentence
16	Japan	Article 26(1), second sentence
18	Mexico	Article 23(1), second sentence
19	Netherlands	Article 23(1), second sentence
20	Norway	Article 25(1), second sentence
22	Poland	Article 23(1), second sentence
23	Russian Federation	Article 24(1), second sentence
24	Singapore	Article 22(1), second sentence
25	South Africa	Article 23(1), second sentence
26	Spain	Article 23(1), second sentence
28	Switzerland	Article 23(1), second sentence
29	Thailand	Article 25(1), second sentence
30	Turkey	Article 24(1), second sentence
32	Viet Nam	Article 24(1), second sentence
33	China	Article 25(1), second sentence
34	Republic of Korea	Article 24(1), second sentence

Notification of Listed Agreements Not Containing Existing Provisions

Pursuant to Article 16(6)(c)(i) of the Convention, New Zealand considers that the following agreements do not contain a provision described in Article 16(4)(b)(i).

Listed Agreement Number	Other Contracting Jurisdiction
18	Mexico
27	Sweden

Pursuant to Article 16(6)(c)(ii) of the Convention, New Zealand considers that the following agreements do not contain a provision described in Article 16(4)(b)(ii).

Listed Agreement Number	Other Contracting Jurisdiction
5	Chile
7	Denmark
10	Germany
13	Indonesia
14	Ireland
17	Malaysia
18	Mexico
21	Philippines
27	Sweden
28	Switzerland
31	United Kingdom

Pursuant to Article 16(6)(d)(i) of the Convention, New Zealand considers that the following agreements do not contain a provision described in Article 16(4)(c)(i).

Listed Agreement Number	Other Contracting Jurisdiction
9	French Republic
27	Sweden

Pursuant to Article 16(6)(d)(ii) of the Convention, New Zealand considers that the following agreements do not contain a provision described in Article 16(4)(c)(ii).

Listed Agreement Number	Other Contracting Jurisdiction
3	Belgium
5	Chile
6	Czech Republic
10	Germany
11	Hong Kong
15	Italy
22	Poland
23	Russian Federation
24	Singapore
25	South Africa
27	Sweden
29	Thailand
31	United Kingdom

Article 17 – Corresponding Adjustments

Notification of Existing Provisions in Listed Agreements

Pursuant to Article 17(4) of the Convention, New Zealand considers that the following agreements contain a provision described in Article 17(2). The article and paragraph number of each such provision is identified below.

Listed Agreement Number	Other Contracting Jurisdiction	Provision
1	Australia	Article 9(3)
2	Austria	Article 9(2)
3	Belgium	Article 9(2) (after amendment by Article 4 of (a))
4	Canada	Article 9(2)
5	Chile	Article 9(2)
6	Czech Republic	Article 9(2)
7	Denmark	Article 9(2)
11	Hong Kong (China)	Article 9(2)
12	India	Article 9(2) and (3)
14	Ireland	Article 11(2)
16	Japan	Article 9(2)
18	Mexico	Article 9(2)
19	Netherlands	Article 9(2)
21	Philippines	Article 9(2)
22	Poland	Article 9(2)
23	Russian Federation	Article 9(2)
24	Singapore	Article 9(2)
26	Spain	Article 9(2)
29	Thailand	Article 9(3)
30	Turkey	Article 9(2)
31	United Kingdom	Article 22(4)
32	Viet Nam	Article 9(2)
33	China	Article 9(2)

Article 18 – Choice to Apply Part VI

Notification of Choice of Optional Provisions

Pursuant to Article 18 of the Convention, New Zealand hereby chooses to apply Part VI.

Article 19 – Mandatory Binding Arbitration

Reservation

Pursuant to Article 19(12) of the Convention, New Zealand reserves the right for the following rules to apply with respect to its Covered Tax Agreements notwithstanding the other provisions of Article 19:

- a) any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for by the Convention shall not be submitted to arbitration, if a decision on this issue has already been rendered by a court or administrative tribunal of either Contracting Jurisdiction;
- b) if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting Jurisdictions, a decision concerning the issue is rendered by a court or administrative tribunal of one of the Contracting Jurisdictions, the arbitration process shall terminate.

Article 23 – Type of Arbitration Process

Reservation

Pursuant to Article 23(7) of the Convention, New Zealand reserves the right for Part VI not to apply with respect to all Covered Tax Agreements for which the other Contracting Jurisdiction makes a reservation pursuant to Article 23(6).

Notification of Choice of Optional Provisions

Pursuant to Article 23(4) of the Convention, New Zealand hereby chooses to apply Article 23(5).

Article 24 – Agreement on a Different Resolution

Notification of Choice of Optional Provisions

Pursuant to Article 24(1) of the Convention, New Zealand hereby chooses to apply Article 24(2).

Reservation

Pursuant to Article 24(3) of the Convention, New Zealand reserves the right for Article 24(2) to apply only with respect to its Covered Tax Agreements for which Article 23(2) applies.

Article 26 – Compatibility

Reservation

Not applicable

Notification of Existing Provisions in Listed Agreements

Pursuant to Article 26(1) of the Convention, New Zealand considers that the following agreements are not within the scope of a reservation under Article 26(4) and contain a provision that provide for arbitration of unresolved issues arising from a mutual agreement procedure case. The article and paragraph number of each such provision is identified below.

Listed Agreement Number	Other Contracting Jurisdiction	Provision
1	Australia	Article 25(6) and (7)
16	Japan	Article 26(5);Protocol (16)

Article 28 – Reservations

Reservation Formulated for Scope of Arbitration

Pursuant to Article 28(2)(a) of the Convention, New Zealand formulates the following reservation with respect to the scope of cases that shall be eligible for arbitration under the provisions of Part VI.

1. New Zealand reserves the right to exclude a case presented under the mutual agreement procedure article of its Covered Tax Agreements from the scope of Part VI (Arbitration) to the extent that any unresolved issue involves the application of New Zealand's general anti-avoidance rule contained in section BG 1 of the Income Tax Act 2007.

**NATIONAL INTEREST ANALYSIS:
Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base
Erosion and Profit Shifting**

Executive summary

1. On [_____] in [_____], New Zealand signed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the Multilateral Instrument or MLI).
2. The MLI is a multilateral international treaty that proposes to quickly and efficiently amend a significant number of double tax agreements (DTAs) around the world to take into account new treaty standards relating to treaty abuse and dispute resolution. The MLI cannot in and of itself allocate taxing rights between two jurisdictions; it is effective by modifying pre-existing DTAs. For it to modify a particular DTA, both jurisdictions must be parties to the MLI and must have included the DTA in their lists of notifications and reservations provided at the same time their instruments of ratification are deposited.
3. The negotiation of, and giving of effect to, DTAs (and the MLI) is provided for by section BH 1 of the Income Tax Act 2007.
4. DTAs are bilateral international treaties that are principally designed to encourage growth in economic ties between countries. They do this by reducing tax impediments to cross-border services, trade and investment. New Zealand has 40 DTAs in force, primarily with New Zealand's major trading and investment partners.
5. While DTAs are beneficial for taxpayers, investors and governments themselves, there is the potential for these bilateral agreements to be misused to reduce or eliminate a multinational's worldwide tax. Misuse of DTAs in this way has been a feature of a number of cross-border tax avoidance arrangements.
6. The misuse of DTAs forms part of a wider problem referred to as base erosion and profit shifting (BEPS), which has been the focus of significant global media and political attention since late 2012, following evidence suggesting that some multinationals pay little or no tax anywhere in the world.
7. BEPS is a global problem as many BEPS strategies exploit technical differences between different countries' tax rules, so New Zealand has been working with the Organisation for Economic Co-operation and Development (OECD) and G20 to develop a co-ordinated global solution to address BEPS through the 15-point OECD/G20 BEPS Action Plan.
8. A number of the items on the BEPS Action Plan address the misuse of DTAs and can only be implemented through changes to DTAs themselves. Some of these solutions are "minimum standards" that countries that commit to solving BEPS are expected to adopt.

Other provisions are optional, but are DTA “best practice” and now form part of the OECD Model Tax Convention following adoption of the OECD/G20 BEPS Action Plan.

9. Countries, including New Zealand, were presented with the difficulty of how to quickly and efficiently implement these measures without requiring the bilateral renegotiation of several thousand existing DTAs, which could take several years (or even potentially decades). For this reason, the Multilateral Instrument was developed under Action 15 of the OECD/G20 BEPS Action Plan to swiftly amend the DTAs of all participating jurisdictions.

10. To make the best use of the MLI, New Zealand’s strategy has been to include the majority of its DTAs within the scope of the MLI and has chosen to adopt as many of the MLI provisions as possible, as they are in line with New Zealand’s overall treaty policy. This gives New Zealand the best chance of strengthening its DTAs with as many jurisdictions as possible.

Nature and timing of the proposed treaty action

11. New Zealand signed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the Multilateral Instrument or MLI) on [____] in [____]. The text of the Multilateral Instrument is attached as Annex A.

12. The proposed treaty action is to ratify the Multilateral Instrument into force by depositing New Zealand’s instrument of ratification with the Depository of the Multilateral Instrument, the Secretary-General of the OECD, in accordance with Articles 27 and 34 of the Multilateral Instrument, after the necessary domestic procedures for entry into force have been completed. At the same time New Zealand’s instrument of ratification is deposited, New Zealand must also provide its list of confirmed notifications and reservations. This is attached as Annex B.

13. Before ratification can occur, the MLI must undergo Parliamentary treaty examination, in accordance with Parliament’s Standing Order 397, and must successfully be given the force of law in New Zealand by an Order in Council made pursuant to section BH 1 of the Income Tax Act 2007.

14. In general, the MLI will enter into force for New Zealand on the first day of the month following the expiration of a period of three calendar months after the date New Zealand’s instrument of ratification is deposited. However, the MLI itself will only enter into force once five jurisdictions have deposited their instruments of ratification. The procedure for entry into force of the MLI is set out in Article 34 of the MLI.

15. The MLI cannot in and of itself allocate taxing rights between two jurisdictions; it is effective by modifying pre-existing DTAs. As DTAs are bilateral agreements negotiated by two jurisdictions, Article 35 of the MLI provides that the provisions of the MLI will only have effect in relation to a particular DTA once the MLI has entered into force for both parties to that DTA where both jurisdictions have nominated the DTA to be covered by the MLI by

including the DTA in their list of confirmed notifications and reservations submitted at the time the instrument of ratification is deposited (i.e. it is a covered tax agreement).

16. As with New Zealand's DTAs more generally, Zealand's signature of the Multilateral Instrument does not extend to Tokelau.

Reasons for New Zealand becoming party to the treaty

General reasons for New Zealand concluding double tax agreements

17. New Zealand began entering into DTAs in 1947, and currently has a network of 40 DTAs in force, predominantly with New Zealand's main trading and investment partners.

18. DTAs are bilateral international treaties that are principally designed to encourage growth in economic ties between countries. DTAs do this by reducing tax impediments to cross-border services, trade and investment. Some impediments to cross-border economic activity can be addressed unilaterally. For example, New Zealand generally relieves double taxation by unilaterally allowing tax residents who derive foreign-sourced income to credit foreign tax paid against their New Zealand tax liability. New Zealand also unilaterally reduces withholding taxes on certain forms of inbound investment. However, unilateral solutions cannot address all of the issues that arise from cross-border activity. Moreover, the country applying unilateral measures must then bear the full cost of the relief. DTAs address these problems by facilitating bilateral solutions. DTAs enable a wider range of issues to be addressed than is possible unilaterally, and also enable the parties to a DTA to share the cost of providing relief.

19. DTA networks make an important contribution to the expansion of world trade and to the development of the world economy, which are key objectives of the OECD. Internationally, the OECD has therefore assumed a leading role in promoting the use of DTAs. In particular, the OECD has produced a Model Tax Convention, and a comprehensive commentary, for member and non-member countries to use as a basis for concluding DTAs. As a member of the OECD, New Zealand is subject to an express recommendation issued by the OECD Council in 1997¹ for all member countries:

1. to pursue their efforts to conclude bilateral tax conventions ... with those member countries, and where appropriate with non-member countries, with which they have not yet entered into such conventions ...

2. when concluding new bilateral conventions or revising existing bilateral conventions, to conform to the Model Tax Convention, as interpreted by the Commentaries thereon.

20. New Zealand's negotiating model is based on the OECD Model Tax Convention, with some differences that take into account New Zealand's status as a small capital importing

¹ The recommendation follows similar OECD Council recommendations that have been in place since before New Zealand joined the OECD.

nation and other unique features of New Zealand's economy, for example, the importance of primary industries. Therefore, the OECD Model Tax Convention and its associated commentary play an important role in New Zealand's overall treaty policy and New Zealand's DTA network.

Reasons for New Zealand becoming party to the Multilateral Instrument

21. While DTAs are beneficial for taxpayers, investors and governments, there is the potential for these bilateral agreements to be misused to reduce or eliminate a multinational's worldwide tax. Misuse of DTAs in this way has been a feature of a number of cross-border tax avoidance arrangements.

22. The misuse of DTAs forms part of a wider problem referred to as base erosion and profit shifting (BEPS), which has been the focus of significant global media and political attention since late 2012, following evidence suggesting that some multinationals pay little or no tax anywhere in the world.

23. BEPS is a global problem as many BEPS strategies exploit technical differences between different countries' tax rules, and New Zealand has been working with the OECD and G20 to develop a co-ordinated global solution to address BEPS through the 15-point OECD/G20 BEPS Action Plan. The New Zealand Government has confirmed its commitment to resolving BEPS on a number of occasions.²

24. A number of the items on the OECD/G20 BEPS Action Plan address the misuse of DTAs and can only be implemented through changes to DTAs themselves. These are:

- preventing the granting of treaty benefits in inappropriate circumstances (Action 6);
- preventing the artificial avoidance of permanent establishment status (Action 7);
- neutralising the effects of hybrid mismatch arrangements that have a treaty aspect (Action 2); and
- providing improved mechanisms for effective dispute resolution (Action 14).

25. Some of the solutions under these Action items are "minimum standards" that countries that commit to solving BEPS are expected to adopt. Other provisions are optional, but are DTA "best practice" and now form part of the OECD Model Tax Convention following the adoption of the OECD/G20 BEPS Action Plan.

26. Given the important role the OECD Model Tax Convention plays in informing New Zealand's treaty policy, as well as New Zealand's commitment to resolving BEPS more generally, New Zealand is committed to including these minimum standards as well as the

² See for example, the BEPS Cabinet Paper released in June 2016 <http://taxpolicy.ird.govt.nz/sites/default/files/2016-other-cabinet-paper-beps-update.pdf> and the Government press release welcoming the release of the Multilateral Instrument on 28 November 2016 <https://www.beehive.govt.nz/release/oecd-multilateral-instrument-counter-beps>.

optional best practice provisions in its DTAs, where they are in line with overall New Zealand treaty policy.

27. New Zealand's treaty negotiation resources are limited and to update New Zealand's entire DTA network would take several years, if not decades, particularly as many of New Zealand's treaty partners would likely place greater importance on updating more significant treaties. This would limit New Zealand's ability to meet the OECD minimum standard in a timely fashion.

28. Finding resources to update DTAs is a common problem faced by many countries, not just New Zealand. The development of the Multilateral Instrument under Action 15 of the OECD/G20 BEPS Action Plan takes into account the existence of several thousand DTAs around the world and allows participating jurisdictions to quickly and efficiently amend their DTAs to counter BEPS. The text of the MLI was developed by the OECD Ad Hoc Group consisting of officials from more than 100 participating jurisdictions including New Zealand and was formally adopted by the OECD in November 2016.

29. The MLI is flexible and allows countries to choose:

- which of their existing DTAs they wish to modify through the MLI;
- alternative ways of meeting BEPS minimum standards on treaty abuse and dispute resolution; and
- whether they want to adopt the OECD-recommended provisions for non-minimum standards. Within some of these provisions, there are alternative ways of addressing BEPS concerns and the ability for countries to enter a variety of reservations.

30. To make the best use of the MLI, New Zealand's strategy has been to include the majority of its DTAs within the scope of the Multilateral Instrument and has chosen to adopt as many of the MLI provisions as possible. This gives New Zealand the best chance of strengthening its DTAs with as many jurisdictions as possible.

31. New Zealand's list of notifications and reservations can be found in Annex B. This document lists the DTAs New Zealand wishes to be covered by the MLI and the provisions New Zealand has indicated it will adopt. This document must be submitted at the time instrument of ratification is deposited and will be considered "confirmed" at that point in time. There is limited ability to amend New Zealand's notifications and reservations following entry into force, which is discussed in further detail the section titled *Subsequent protocols and/or amendments to the treaty and their likely effects*.

32. Of New Zealand's 40 in-force DTAs, New Zealand has nominated 34 to be covered by the MLI. Many of these DTAs were concluded in the 1970s and 1980s and do not reflect modern treaty standards, even before the work on BEPS was completed. The six DTAs that have not been listed are with jurisdictions who will not be signing the MLI. To be modified by the MLI, both New Zealand and the other jurisdiction must elect for the MLI to apply to the DTA (if there is a match, then the DTA is a "covered tax agreement"). Based on current

draft notifications, New Zealand is expected to have 28 covered tax agreements. See Annex C. While this list is not final, it provides a fairly good indication of the likely coverage of the MLI. Final coverage will not be confirmed until each jurisdiction deposits its instrument of ratification with the OECD Depository.

33. As noted above, New Zealand's strategy in formulating its notifications and reservations has been to adopt as many of the MLI provisions as possible. This is because they are base protection measures that are in line with New Zealand's existing treaty policy (which has a greater source state emphasis than the OECD Model Tax Convention) or are taxpayer friendly measures that provide improved access to dispute resolution. For example, New Zealand generally takes a broader approach in its DTAs than the current OECD Model Tax Convention in determining whether a permanent establishment exists. This means that the recommendations under Action 7 (preventing the artificial avoidance of permanent establishment status) of the OECD/G20 BEPS Action Plan which are contained in Articles 12 to 15 of the MLI are not contrary to New Zealand's general treaty policy and, in New Zealand's view, represent an improvement to the OECD Model Tax Convention.

34. The optional provisions New Zealand has chosen cover the following issues:

- Fiscally transparent entities (like trusts or partnerships) create arbitrage opportunities because they are treated differently for tax purposes by different countries. The provision in Article 3 clarifies that treaty benefits will only be allowed to the extent to which the item of income is taxed in the state in which the entity is resident.
- Dual resident entities can be used to take advantage of arbitrage opportunities by manipulating the current "place of effective management" test. The proposed provision in Article 4 will require competent authorities to agree the residence status of a dual resident entity. If there is no agreement, then treaty benefits will be denied, or only granted to the extent to which the competent authorities can agree.
- In the OECD Model Tax Convention – and in many of New Zealand's modern treaties – a lower withholding tax rate is available where the shareholder owns more than a certain proportion of the company's shares. The MLI provision in Article 8 requires shares to be held for a minimum of 365 days for the shareholder to be entitled to reduced withholding tax rates on dividends. This prevents shareholders buying shares and holding them temporarily in order to access lower withholding rates.
- Investors can hold land through companies and dispose of the shares in the company to avoid paying tax on the disposal of that land. Many treaties contain a "land-rich company rule" which allows the source jurisdiction to tax income derived from land when the majority of a company's assets consist of land. To prevent the artificial and temporary dilution of the amount of land held by a company just before sale, the provision in Article 9 requires the threshold for the amount of land ownership which triggers the rule to be measured on every day in the 365 day period leading up to the sale of the shares and extends the rule to interests in other entities such as partnerships and trusts.

- Permanent establishments can be established in third states to exploit low tax rates and branch exemptions. Article 10 of the MLI introduces a provision that denies treaty benefits in the case of income derived by a permanent establishment of an enterprise resident in one of the parties to the DTA, where that permanent establishment is situated in a low tax third state and the residence state exempts the permanent establishment's income.
- Article 11 introduces a provision that preserves a jurisdiction's right to tax its own residents. For example, this provision would prevent a New Zealand resident who is engaged in a tax avoidance arrangement from claiming that a DTA prevents New Zealand from using its domestic general anti-avoidance rule to impose tax.
- A source jurisdiction generally cannot tax the business profits of a resident of the other contracting state unless there is a permanent establishment in the source state. The provisions in Articles 12 to 15 of the MLI introduce changes to counter common strategies used to avoid permanent establishment status.

35. In addition to addressing these specific BEPS concerns, Article 6 of the MLI proposes to amend the preamble to DTAs to confirm that they are not intended to be used to generate double non-taxation. Under Article 7, New Zealand has selected the option of adding a principal purpose test to its DTAs. The principal purpose test is a general anti-abuse rule that applies to the whole DTA. Both Articles 6 and 7 form part of the OECD minimum standard.

36. In addition to these base protection measures, New Zealand is signing up to taxpayer friendly measures relating to the mutual agreement procedure (MAP) and the availability of arbitration as a form of dispute resolution. These measures are a result of the work on Action 14 of the OECD/G20 BEPS Action Plan relating to improving mechanisms for effective dispute resolution. They recognise the fact that measures to counter BEPS should not lead to unnecessary uncertainty for compliant taxpayers and to unintended double taxation. Improving dispute resolution mechanisms is therefore an integral component of the work on BEPS issues.

37. Article 16 of the MLI introduces a provision allowing taxpayers to approach the competent authorities of either party to the DTA to request MAP where they believe taxation is not in accordance with the treaty. This is a new OECD minimum standard. While the majority of New Zealand's DTAs contain MAP provisions, the MLI will amend these provisions to allow taxpayers to approach the competent authority of either jurisdiction (currently they only permit a case to be presented to the competent authority of the taxpayer's country of residence). In addition, Article 16 creates a new minimum standard regarding time limits for bringing a case to MAP and for implementing a solution.

38. Article 17 requires contracting states to make appropriate corresponding adjustments in transfer pricing cases. This provision is already found in most of New Zealand's DTAs except for New Zealand's oldest treaties, which were concluded before the OECD Model Tax Convention included such a provision.

39. New Zealand has also opted to apply Part VI of the MLI, which will introduce arbitration as a means of dispute resolution. If a solution cannot be reached under MAP, taxpayers have the ability to request that unresolved issues can be taken to arbitration. New Zealand has already agreed to arbitration in two of its treaties (with Australia and Japan). New Zealand's experience is that the arbitration facility is very rarely used, but it acts as an incentive for the competent authorities of two jurisdictions to come to an agreement within the required time period for MAP.

40. Note that while New Zealand has indicated that it will sign up to many of the optional provisions, these will only apply to a DTA if New Zealand's treaty partner also signs the MLI, includes their DTA with New Zealand in their list of notifications and reservations and chooses to apply the same option as New Zealand.

Advantages and disadvantages to New Zealand of the Multilateral Instrument entering into force and not entering into force for New Zealand

41. The standard process for making amendments to DTAs is to renegotiate a new agreement or to negotiate a protocol that amends specific parts of the existing DTA (an amending protocol). In absence of the MLI, New Zealand would be expected to enter into bilateral negotiations with each of its treaty partners in order to meet the new OECD minimum standard. The advantages and disadvantages of bringing the MLI into force are therefore considered in relation to the status quo and also in relation to this bilateral negotiation approach.

42. The MLI is a novel approach to modifying DTAs, but it is not unprecedented in international law. Experts in both international tax and public international law participated in the OECD Ad Hoc Group that developed the MLI to ensure that it works as intended.

43. The provisions in the MLI have been drafted more broadly than they otherwise would for an amending protocol to take account of the fact that the MLI must be able to apply to not one DTA, but several thousand. This, combined with a limited ability to customise the MLI's provisions, means that the interaction between the MLI and DTAs is not as straightforward as an amending protocol.

44. This complication is one of the most significant trade-offs, but despite this, ratifying the MLI is expected to be in New Zealand's overall interests.

Advantages of the Multilateral Instrument entering into force for New Zealand

45. The main advantage in the MLI entering into force for New Zealand is that it would reduce the ability of multinationals and other investors to misuse DTAs to reduce both their New Zealand tax and their worldwide tax, or in other words, it resolves BEPS issues that relate to tax treaties. This is achieved through changes to specific provisions found in DTAs,

as well as through more general changes, such as a new preamble and the introduction of a general treaty anti-abuse rule.

46. Many of New Zealand's treaties already contain pre-cursors to some of the MLI provisions, which will also feature in the updated OECD Model Tax Convention (for example, a principal purpose test, or a land-rich company rule that extends to interests in other entities). However, the drafting of these provisions often differs from treaty to treaty with no or little OECD commentary to rely on. By signing up to the relevant MLI provisions and replacing existing provisions, New Zealand will have consistency across its treaty network and will also be able to rely on the new OECD commentary relating to those provisions.

47. While the resolution of treaty-related BEPS issues and the introduction of improved mechanisms for dispute resolution could also occur in absence of the MLI, in order to do this New Zealand would be required to enter into bilateral negotiations with each of its treaty partners.

48. The main advantage of the MLI compared with the bilateral negotiation approach is that the MLI process is much faster and more efficient. Based on current projections it is possible that the MLI could enter into effect for New Zealand in 2019. Bilateral negotiations, on the other hand, could take several years or potentially decades to complete. No additional negotiations or discussions with treaty partners are required for the MLI to apply to a DTA. This is because jurisdictions have been required to provide draft notifications and reservations at various stages of the MLI project, which has provided clarity as to jurisdictions' positions. In addition, "speed matching" sessions were arranged by the OECD in late February – early March 2017 so that bilateral treaty partners could meet to discuss any issues with the application or implementation of the MLI, either in general or with regard to specific provisions.

49. In addition to the time it would take to complete bilateral negotiations, each individual amending protocol would need to be ratified according to each jurisdiction's domestic law requirements, as opposed to ratifying the single MLI. This could add further time to the process and create bottlenecks in parliamentary processes, as other jurisdictions may place greater importance on ratifying amending protocols with more significant economies than New Zealand.

50. In this respect, the main advantages of the MLI compared with entering into individual bilateral negotiations are that the BEPS solutions will be incorporated into New Zealand's DTAs as soon as possible and resources (from both a policy perspective and a Parliamentary perspective) will be freed up to work on other priorities.

51. New Zealand's tax system operates on the principle of voluntary compliance, which relies on taxpayers understanding their tax obligations and how the wider tax system works. An important part of this is that, overall, the tax system is seen to be fair. If the view persists that multinationals do not pay their fair share of tax, this could undermine the integrity of the

tax system. Therefore, New Zealand's ratification of the MLI and the resolution of treaty-related BEPS issues in a timely manner support the overall integrity of the New Zealand tax system. This is discussed in further detail in the section titled *Economic, social, cultural and environmental costs and effects of the treaty action*.

52. The advantages to New Zealand in becoming a party to the MLI (as compared to the bilateral negotiation approach) can therefore be summarised as follows:

- it significantly reduces the possibility of New Zealand's DTAs being misused to reduce or eliminate tax liabilities;
- it introduces taxpayer friendly measures relating to disputes resolution;
- it allows New Zealand to update the majority of its DTAs quickly and efficiently;
- the timely resolution of treaty related BEPS issues supports the overall integrity of the New Zealand tax system.

Disadvantages of the Multilateral Instrument entering into force for New Zealand

53. The main disadvantage of the MLI entering into force for New Zealand stems from the fact that the provisions in the MLI have been drafted more broadly than they otherwise would for an amending protocol to take account of the fact that the MLI must be able to apply to not one DTA, but several thousand.

54. This means that there can be some ambiguity in how the MLI applies to a particular DTA. This ambiguity is mitigated in many cases as a given MLI provision will only replace the corresponding DTA provision if both treaty partners notify the same provision.

55. Any residual ambiguity may give rise to compliance costs as taxpayers will need to consider the DTA alongside the text of the MLI and the confirmed notifications and reservations of both parties to the DTA. This would not occur if instead of ratifying the MLI, New Zealand entered into individual bilateral amending protocols with each of its DTA partners.

56. There are ways in which these upfront compliance costs may be mitigated. Publishers may produce consolidated texts as they currently do with amending protocols and original DTAs. In addition to this, New Zealand Inland Revenue officials are continuing discussions with overseas counterparts to determine what additional certainty the competent authorities may be able to provide (for example, through the mutual agreement procedure in DTAs, competent authorities can produce a memorandum of understanding to resolve any difficulties or doubts arising as to the interpretation or application of the MLI with respect to a specific DTA). New Zealand officials may also consider producing informal consolidated versions of New Zealand's DTAs in response to submissions requesting this.

57. This complication is one of the most significant trade-offs, but despite this, bringing the MLI into force is expected to be in New Zealand's overall interests. Any upfront compliance costs associated with determining how the MLI modifies a particular DTA and

the administrative costs associated with producing guidance on the application of the MLI would be offset by the savings made from not having to enter into bilateral negotiations with each DTA partner and then having to bring each amending protocol into force.

58. There are also compliance and administrative costs that would still arise if instead of ratifying the MLI, New Zealand entered into individual amending protocols with each of its DTAs partners, for example in the context of competent authority agreements to determine the residence of dual resident entities or in challenge the application of specific anti-avoidance provisions.

59. The issue of compliance and administrative costs is discussed in further detail in the section titled *The costs to New Zealand of compliance with the treaty*. While we are unable to quantify these compliance and administrative costs, we expect them to be modest and through consultation officials are working on ways to minimise these further.

60. Another disadvantage is the uncertainty of outcomes for each individual DTA. Note that while New Zealand has indicated that it will sign up to many of the optional provisions, these will only apply to a DTA if New Zealand's treaty partner also signs the MLI, includes their DTA with New Zealand in their list of notifications and reservations and chooses to apply the same option as New Zealand. As stated, notifications and reservations are considered to be in draft form until the instrument of ratification is deposited. Therefore, the modifications to a specific DTA will not be completely certain until both parties have completed their domestic procedures for entry into force and deposited their instruments of ratification. Notwithstanding this uncertainty, New Zealand can control its own position and only choose provisions that it believes are principled and will enhance New Zealand's DTA network. If countries choose to sign up to fewer MLI provisions than New Zealand, then the DTA will still be strengthened to the extent there is a match. New Zealand believes the provisions in the MLI are principled improvements on the current OECD Model Tax Convention and therefore supports the inclusion of the provisions in its treaties so far as it is possible.

61. Some stakeholders have raised issues about the inability to consider a set and certain package of measures on a treaty-by-treaty basis (as DTAs are usually a negotiated package, tailored to the specific circumstances of the jurisdictions involved and their bilateral relationship). For example, they have suggested it may be ideal to combine the new strengthened permanent establishment rules or the principal purpose test with the counterbalancing taxpayer-friendly measure of binding arbitration.

62. Some countries may choose only to adopt the former provisions and not the latter, particularly as the inclusion of a principal purpose test is one way of meeting the minimum standard on treaty abuse under Article 7, while arbitration is optional. Theoretically it would be possible to exclude from the scope of the MLI DTAs with jurisdictions who have indicated in their draft notifications that they will not be signing up to arbitration. However, this would reduce the efficacy of the MLI in enabling New Zealand to meet the OECD minimum standard as New Zealand would have to endeavour to undertake bilateral negotiations with

these excluded jurisdictions, which could represent about half of New Zealand's DTAs, based on current draft notifications. This is undesirable for the reasons outlined above. It would also mean that – until bilateral negotiations can take place – the DTAs excluded on this basis would remain vulnerable to the BEPS techniques the MLI is designed to address. On balance it is in New Zealand's interest to obtain the stronger DTA provisions, even if it is without the optional arbitration provisions. We also note that many of New Zealand's DTAs already include a principal purpose test and broader permanent establishment rules, but no ability to pursue arbitration. Therefore this combination is already a feature of some of our existing DTAs and, from New Zealand's perspective, is not problematic.

63. Some of the provisions in the MLI (for example, the dual resident entity provision) require taxpayer engagement with competent authorities to determine their tax position. This will increase compliance and administrative costs in these cases. These provisions are used sparingly and are generally confined to areas where tax avoidance arrangements have been prevalent. However, there will be a need to put in place administrative measures to increase taxpayer certainty and minimise compliance costs as much as possible, particularly in bona fide cases where there is no mischief. Eight of New Zealand's DTAs already contain this provision and it has not, to our knowledge, been problematic. In addition, if instead of ratifying the MLI, New Zealand entered into individual bilateral amending protocols, these costs would still arise. This is discussed in the section titled *The costs to New Zealand of compliance with the treaty*.

64. As New Zealand is signing up to the optional arbitration provisions contained in Part VI of the MLI, costs will be incurred if a case is submitted for arbitration. However, as noted below in the section titled *The costs to New Zealand of compliance with the treaty*, the actual costs associated with administering the arbitration provisions are likely to be negligible as New Zealand's experience is that arbitration is very rarely used and would still arise if New Zealand agreed to include arbitration in its DTAs in individual bilateral amending protocols.

Advantages of the Multilateral Instrument not entering into force for New Zealand

65. It is an option not to ratify the MLI. In that case, the disadvantages identified above relating to implementation would not arise.

66. In the fullness of time, New Zealand would be able to negotiate amending protocols with each of its DTA partners and tailor the drafting of these protocols to suit the preferences and needs of the treaty partners. This would make it clearer to taxpayers, practitioners and tax authorities what the exact change to each DTA is.

67. In addition, the amending protocols would also be able to cover issues not included in the MLI.

Disadvantages of the Multilateral Instrument not entering into force for New Zealand

68. If New Zealand does not become a party to the MLI, there are two possible options.

69. The first is to leave New Zealand's DTAs as they are. This would mean that there would still be opportunities for New Zealand's DTAs to be misused to eliminate tax and New Zealand would not meet the new OECD minimum standard. As an OECD member country and a member of BEPS Inclusive Framework,³ this position is undesirable.

70. The second and more realistic option, given that New Zealand has indicated its commitment to the BEPS project is for New Zealand to begin bilateral negotiations with each of its DTA partners to incorporate the BEPS recommendations into its existing DTAs.

71. Bilateral negotiations, however, could take several years or decades to complete. In comparison, no additional negotiations or discussions with treaty partners would be required for the MLI to apply to a DTA. This is because jurisdictions have been required to provide draft notifications and reservations at various stages of the MLI project, which has provided clarity as to jurisdictions' positions. In addition, "speed matching" sessions were arranged by the OECD in late February and early March 2017 so that bilateral treaty partners could meet to discuss any issues with the application or implementation of the MLI, either in general or with regard to specific provisions.

72. In addition to the time it would take to complete bilateral negotiations, each individual amending protocol would need to be brought into force according to each jurisdiction's domestic law requirements, as opposed to bringing into force the single MLI. This could add further time to the process and create bottlenecks in parliamentary processes, as other jurisdictions may place greater importance on ratifying amending protocols with more significant economies than New Zealand.

73. This is problematic for several reasons. It leaves New Zealand's DTAs open to misuse for a much longer period of time, but it also has the potential to undermine the integrity of the tax system if there is a continued perception that multinationals do not pay their fair of tax in New Zealand. This is discussed in further detail in the sections titled *Advantages of ratifying the Multilateral Instrument* and *Economic, social, cultural and environmental costs and effects of the treaty action*. It would also mean that resources that could otherwise be used to progress other projects and government priorities would be tied up in negotiating and ratifying individual bilateral protocols.

74. Therefore, not becoming party to the MLI, and entering into bilateral negotiations with all of New Zealand's treaty partners would not be in New Zealand's overall interests. Of the options available, the proposed treaty action is the best policy option and will achieve the Government's policy objectives.

³ The Inclusive Framework is a group of over 90 jurisdictions that have committed to combatting BEPS. Members of the inclusive framework will develop a monitoring process for the four minimum standards as well as put in place the review mechanisms for other elements of the BEPS Package. One of the functions of the Inclusive Framework is to support the development of the toolkits for low-capacity developing countries.

Legal obligations which would be imposed on New Zealand by the treaty action, the position in respect of reservations to the treaty, and an outline of any dispute settlement mechanisms

75. DTAs cannot impose additional tax obligations beyond what is provided for under domestic law. This means that although the MLI consists largely of base protection measures that would allow the source country to impose tax where the existing DTA does not, these measures cannot go beyond what would otherwise be imposed in absence of a DTA.

76. The text of the MLI itself cannot be amended to suit each jurisdiction's preferences, but the MLI provides flexibility by allowing jurisdictions to opt into or reserve against certain provisions. The possible reservations are described in each Article and Article 28 provides that these are the only reservations that are able to be made. In the case of arbitration, free form reservations are permitted, but these must be accepted by the jurisdiction's treaty partner in order for the reservation to apply to a DTA.

77. To ensure the operation of the MLI is clear and transparent, signatories must notify the OECD Depository of which DTAs they wish to cover, which reservations they wish to enter, optional provisions they wish to choose and which provisions in their nominated DTAs will be modified by the MLI. The OECD will publish this information online and it will be readily accessible to the public.

78. These reservations must either be made at the time of signature of the MLI and confirmed at the time the instrument of ratification is deposited, or a provisional list of expected reservations must be provided at the time of signature and subsequently confirmed at the time the instrument of ratification is deposited. At the time of signature, New Zealand provided a provisional list of expected reservations and so New Zealand's confirmed notifications and reservations must be submitted at the time the instrument of ratification is deposited.

79. After a jurisdiction's choices and reservations are confirmed at the time the instrument of ratification is deposited, that jurisdiction is still able to add new DTAs to their list of treaties covered by the MLI and withdraw their reservations (or reduce the scope of their reservations), but are unable to enter new or broader reservations. The effect of this is that, following ratification, New Zealand (and other) jurisdictions can expand, but not narrow, the application of the MLI to their DTA network. This is provided for in Articles 28 and 29 of the Multilateral Instrument.

80. New Zealand's provisional notifications and reservations can be found in Annex B and the overall effect of New Zealand's options and reservations is discussed in the section titled *Reasons for New Zealand becoming party to the treaty*. As noted in that section, the MLI provisions will only apply to a DTA if the other treaty partner also chooses the same option. This means that the effect of the MLI could vary from treaty to treaty.

81. There is no dispute settlement mechanism for the MLI itself, but Article 32 provides that any questions arising as to the interpretation or implementation of the MLI may be addressed by a “Conference of the Parties”. Under Article 31 a Conference of the Parties can be convened to consider a proposed amendment at the request of one of the parties to the MLI, but only if one third of the parties to the MLI support the request within six calendar months of the request being communicated.

82. Note, however, that New Zealand is signing up to improved MAP provisions and arbitration, which will improve the dispute resolution mechanisms available in New Zealand’s existing DTAs that are being amended by the MLI.

Measures which the Government could or should adopt to implement the treaty action, including specific reference to implementing legislation

83. Subject to the successful completion of the Parliamentary treaty examination process, the MLI will be incorporated into domestic legislation by Order in Council pursuant to section BH 1 of the Income Tax Act 2007. Section BH 1 provides for the giving of overriding effect to DTAs by Order in Council. However, the override relates only to tax matters, and applies only in respect of the Inland Revenue Acts, the Official Information Act 1982 and the Privacy Act 1993.

84. The override of the Inland Revenue Acts is necessary to give effect to the core provisions of the MLI and New Zealand’s DTAs, which may provide relief from tax that would otherwise be imposed under domestic law. The override of the Official Information Act 1982 is necessary to ensure that confidential communications with the other jurisdiction do not have to be disclosed. The override of the Privacy Act 1993 is necessary to ensure that information regarding natural persons can be exchanged according to the terms of the treaty.

85. Article 34 of the MLI provides that the agreement itself will only enter into force once five jurisdictions have completed their domestic law requirements and have deposited their instruments of ratification. In particular, it will enter into force on the first day of the month following the expiration of a period of three calendar months beginning on the date of deposit of the fifth instrument of ratification. If New Zealand is one of the first five jurisdictions to ratify the MLI, it will enter into force for New Zealand on that date. If not, the MLI will enter into force for New Zealand on the first day of the month following the expiration of a period of three calendar months after the date New Zealand’s instrument of ratification is deposited.

86. New Zealand will be in a position to deposit its instrument of ratification with the Depository of the MLI, the Secretary-General of the OECD, once the Order in Council has entered into force, which will be 28 days after its publication in the *New Zealand Gazette*.

87. As the MLI affects pre-existing DTAs that have been negotiated by two jurisdictions, Article 35 provides that the provisions of the MLI will only have effect in relation to a particular DTA once the MLI has entered into force for both parties to that DTA. For withholding tax, it will apply where the event giving rise to the tax occurs on or after 1

January of the next calendar year beginning on or after the latest date on which the MLI enters into force for each of the parties to the covered tax agreement. For income tax, it will apply to taxable periods (in New Zealand's case, income years) beginning on or after a 6 month period from the latest date on which the MLI enters into force for each of the parties to the covered tax agreement.

88. Some domestic law changes may be needed to facilitate the modifications to New Zealand's DTAs by the MLI. For example, officials anticipate there may need to be some amendments to the dispute procedures in Part 4A of the Tax Administration Act 1994 to enable cases to be submitted to arbitration without prejudicing taxpayer rights under the domestic law. There may also be changes needed to the time bar rules to allow arbitration decisions to be implemented notwithstanding domestic law time limits for amending assessments and providing taxpayer refunds.

89. As an alternative to the above Order in Council mechanism, the MLI could be given legislative effect by means of the enactment of a dedicated statute. However, this option would unnecessarily increase the amount of primary tax legislation and could be difficult to achieve in reality given the system for depositing notification and reservations, so it is not preferred or practical.

Economic, social, cultural and environmental costs and effects of the treaty action

90. With the political and media focus on BEPS in recent years, there has been a sentiment among the general public that multinationals are not paying their fair share of tax.

91. New Zealand's tax system operates on the principle of voluntary compliance, which relies on taxpayers understanding their tax obligations and how the wider tax system works. An important part of this is that, overall, the tax system is seen to be fair. If the view persists that multinationals do not pay their fair share of tax, this could undermine the integrity of the tax system and the ability to New Zealand to operate a tax system based on voluntary compliance and self-assessment.

92. The provisions that New Zealand is signing up to in the MLI are base protection measures which will strengthen New Zealand's ability to tax a multinational's income where there is a New Zealand source and will reduce the ability of multinationals to misuse those DTAs to eliminate tax in New Zealand.

93. Therefore, New Zealand's ratification of the MLI and the resolution of treaty-related BEPS issues in a timely manner will assist in supporting the overall integrity of the New Zealand tax system.

94. In addition, ratifying the MLI may enhance or reinforce New Zealand's reputation in the international community as a supporter of the OECD/G20 BEPS project.

95. From an economic impact perspective, the MLI, as a tool to resolve BEPS concerns that arise as a result of the misuse of DTAs, increases worldwide economic efficiency. This is because the use of BEPS techniques results in cross-border investments being subsidised relative to domestic investment. This leads to an inefficient allocation of investment internationally. Eliminating this misallocation would increase worldwide efficiency, leading to higher worldwide incomes.

96. One source of such inefficiency arises from the use of complex arrangements to benefit from certain provisions found in DTAs. The introduction of a whole-of-treaty anti-abuse rule (the principal purpose test in Article 7) through the MLI should have a dampening effect on taxpayers' appetites to use such complex arrangements.

97. However, there is a potential trade-off that should be noted - increasing the tax that New Zealand is able to impose under a DTA could have a negative impact on the level of foreign investment into New Zealand and on the cost of capital. This concern is not unique to the MLI and is a potential concern with any tax measure that increases the effective rate of tax on inbound investment. In June 2016, officials released a draft paper titled *New Zealand's taxation framework for inbound investment* which explores the issue in greater detail and can be found at www.taxpolicy.ird.govt.nz. In line with the analysis in this paper, our assessment is that any impact would likely be low and is acceptable in the overall context of the BEPS project. New Zealand is adopting the MLI alongside a number of likeminded countries who are implementing the BEPS measures broadly at the same time. Furthermore, the base protection measures included in the MLI are important to protect the New Zealand tax base and ensure that New Zealand is able to collect its fair share of revenues.

98. As stated in *New Zealand's taxation framework for inbound investment*:

"Taxes are necessary to fund government spending. New Zealand faces growing fiscal pressures with an ageing population. Maintaining robust tax bases is important to reduce upward pressures on tax rates and help maintain our coherent tax structure.

New Zealand levies tax on the profits of non-resident-owned firms that are sourced in New Zealand. These taxes should not be voluntary. Tax rules should not allow foreign-owned firms to sidestep paying taxes on their profits in New Zealand.

Almost all taxes are likely to have some negative effects on economic activity. In setting taxes on inbound investment there is a balance to be struck. Taxes should not unduly discourage inbound investment but we want the tax system to be robust. It is important that taxes are fair and seen to be fair.

...Deviations from normal tax rules, intended or otherwise, can lead to substitution of low-taxed investors for tax-paying investors, reducing national income without necessarily lowering the overall pre-tax cost of capital to New Zealand or increasing investment. Accordingly, base-maintenance provisions that ensure the intended level of tax is collected will often be in New Zealand's best interest."

99. Note that this is a secondary effect that arises from behavioural changes which officials are unable to quantify.

100. When resolving BEPS issues it is important that New Zealand remains an attractive place to base a business and invest. Taking a unilateral approach could harm New Zealand's reputation as a good place to do business, because New Zealand's tax treaty network could look less favourable relative to other countries' networks. However, a co-ordinated approach through the MLI minimises this risk by broadly simultaneously amending potentially several thousand treaties at the same time.

101. Regardless, the overall benefits of ratifying the MLI are expected to outweigh the costs.

The costs to New Zealand of compliance with the treaty

102. Normally, new DTAs or amending protocols constrain New Zealand from taxing certain income and limit the rate at which tax on passive income (dividends, interest, and royalties) can be imposed and therefore result in the reduction of New Zealand tax. However, this upfront revenue cost is typically offset by other factors (for example, through a reduced need for New Zealand to allow foreign tax credits for foreign income tax paid by New Zealand residents on foreign-sourced income).

103. The MLI differs in that its provisions are typically base protection measures which increase New Zealand's ability to tax inbound investment and equips New Zealand with a whole-of-treaty anti-abuse rule to prevent tax avoidance through the use of DTAs. This may result in more tax paid by non-residents in New Zealand.

104. However, as the provisions are reciprocal, the MLI may also increase the amount of foreign income tax paid by New Zealand residents with overseas investments and business operations. This could decrease the amount of net New Zealand income tax paid on that foreign income as a foreign tax credit is provided for foreign income tax paid.

105. Data limitations prevent officials from estimating the actual impact on net tax revenue. However, as New Zealand is a capital importer and the MLI covers the majority of New Zealand's DTA network, it is expected that the overall impact on tax revenue will be positive. A similar effect would be expected if instead of ratifying the MLI, New Zealand entered into individual amending protocols with each of its DTA partners.

106. In terms of costs borne by Inland Revenue, there will be costs associated in administering the arbitration and other competent authority agreement provisions contained in the MLI. However, these are expected to be small and would be the same if instead of ratifying the MLI, New Zealand entered into individual amending protocols with each of its DTA partners.

107. The existence of arbitration provides a strong incentive for revenue authorities to resolve issues under the MAP before arbitration can be triggered. New Zealand's DTAs with Australia and Japan already provide for arbitration and New Zealand's experience is that very few cases have been brought by taxpayers under the MAP and almost all of these have been settled within the required time period, regardless of whether the DTA provides for arbitration.

108. As mentioned above, there will be additional compliance and/or administrative costs associated with determining how the MLI modifies particular DTAs, producing guidance on the application of the MLI and using competent authority agreements to determine the treaty residence of dual-resident entities or challenging the application of specific anti-avoidance provisions such as the third state permanent establishment rule. While we are unable to quantify these compliance and administrative costs, we expect them to be modest and through consultation officials are working on ways to minimise these further.

109. Some of these compliance and administrative costs would still arise if instead of ratifying the MLI, New Zealand entered into individual amending protocols with each of its DTAs partners, for example in the context of competent authority agreements to determine the treaty residence of dual-resident entities or in challenging the application of specific anti-avoidance provisions.

110. Other costs are unique to the ratification of the MLI but would be offset by the benefits of the MLI. For example, the upfront compliance costs associated with determining how the MLI modifies particular DTA and the administrative costs associated with producing guidance on the application of the MLI would be offset by the savings made from not having to enter into bilateral negotiations with each DTA partner and then having to bring each amending protocol into force.

Completed or proposed consultation with the community and parties interested in the treaty action

111. The Treasury and the Ministry of Foreign Affairs and Trade were consulted about the content of this extended National Interest Analysis.

112. In addition, an officials' issues paper titled *New Zealand's implementation of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* was published in March 2017 and is available at www.taxpolicy.ird.govt.nz. While officials generally do not consult on the content of tax treaties, due to the complicated nature of the MLI, public feedback was sought on potential implementation issues related to the MLI. Two stakeholder workshops were held on 27 and 28 March 2017 with interested practitioners to enable officials to better understand practitioners' concerns. Submissions closed on 7 April 2017. Submissions received by that date were taken into account in the drafting of this extended National Interest Analysis, particularly in relation to the potential mitigation of identified disadvantages associated with New Zealand's ratification of the MLI.

Subsequent protocols and/or amendments to the treaty and their likely effects

113. After a jurisdiction's choices and reservations are confirmed at the time the instrument of ratification is deposited, that jurisdiction is still able to add new DTAs as DTAs covered by the MLI and withdraw their reservations (or reduce the scope of their reservations), but are unable to enter new reservations. The effect of this is that, following ratification, New Zealand (and other) jurisdictions can expand, but not narrow, the application of the MLI to their DTA network. This is provided for in Articles 28 and 29 of the MLI.

114. Article 33 provides that any party may propose an amendment to the MLI by submitting the proposed amendment to the Depository. Under Article 31 a "Conference of the Parties" could be convened to consider the proposed amendment at the request of the proposer, but only if one third of the parties to the MLI support the request within six calendar months of the request being communicated.

115. Article 38 provides that the MLI could be supplemented by one or more protocols. To become a party to such a protocol, one must be a party to the MLI, but parties to the MLI are not bound by such protocols unless they also become a party to that protocol.

116. New Zealand may enter into subsequent bilateral protocols which could supersede and replace the MLI provisions in a DTA.

117. Going forward, the MLI provisions are likely to form part of New Zealand's negotiating model and so will be generally incorporated into new DTAs.

Withdrawal or denunciation provision in the treaty

118. Article 37 provides that any party to the MLI may withdraw from the Multilateral Instrument at any time by notifying the Depository. The withdrawal is effective from the date of receipt of the notification by the Depository.

119. However, if the MLI has already entered into force for both parties to a DTA, then that DTA will remain modified by the Multilateral Instrument.

Agency Disclosure Statement

Inland Revenue has prepared this extended National Interest Analysis (NIA). Inland Revenue has analysed the issue of implementing the Multilateral Instrument, and the legislative and regulatory proposals arising from that implementation.

As part of that process, Inland Revenue considered the option of not entering into the MLI and instead retaining the status quo or entering into bilateral negotiations with each of New Zealand's DTA partners.

Inland Revenue is of the view that there are no significant constraints, caveats or uncertainties concerning the regulatory analysis. The policy aligns with the Government Statement on Regulation.

The provisional notifications and reservations lodged by New Zealand at the time of signature reflect the new OECD minimum and best practice standards relating to tax treaties. The position taken by New Zealand in the provisional notifications and reservations are consistent with the New Zealand negotiating model and will likely be incorporated into the New Zealand negotiating model going forward.

The revenue effect for New Zealand as a result of the changes under the MLI is expected to be negligible but potentially revenue positive due to New Zealand's status as a net capital importer.

An Order in Council will be required to give the MLI effect in New Zealand law. The Order in Council will override the Inland Revenue Acts, the Official Information Act 1982 and the Privacy Act 1993; this is provided for under section BH 1 of the Income Tax Act 2007 and is necessary to give effect to the terms of the MLI.

The Treasury and the Ministry of Foreign Affairs and Trade have been consulted about the content of this extended NIA. An officials' issues paper on implementation issues associated with the MLI was released in March 2017 and the submissions received informed the analysis in this extended NIA.

Inland Revenue's view is that the policy options considered will not impose material additional costs on business interests; nor impair private property rights, market competition, or the incentives for business to innovate and invest; nor override fundamental common law principles.

Carmel Peters
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9 May 2017

Annex A

Text of the MLI

Annex B

Notifications/reservations

Annex C

New Zealand has 40 DTAs currently in force. The table below shows the coverage of the MLI across New Zealand's treaty network (as at 9 May 2017).

DTA	
Covered tax agreements	1. Australia
	2. Belgium
	3. Canada
	4. Chile
	5. China
	6. Czech Republic
	7. Denmark
	8. Finland
	9. France
	10. Germany
	11. Hong Kong (China)
	12. India
	13. Indonesia
	14. Ireland
	15. Italy
	16. Japan
	17. Malaysia
	18. Mexico
	19. Netherlands
	20. Poland
	21. Russia
	22. Singapore
	23. South Africa
	24. Spain
	25. Sweden
	26. Turkey
	27. United Kingdom
	28. Korea
Not modified by the MLI	29. Switzerland
	30. Viet Nam
	31. Thailand
	32. Philippines
	33. Norway
	34. Austria
	35. United Arab Emirates
	36. Papua New Guinea
	37. Samoa
	38. Taiwan
	39. Fiji
	40. United States