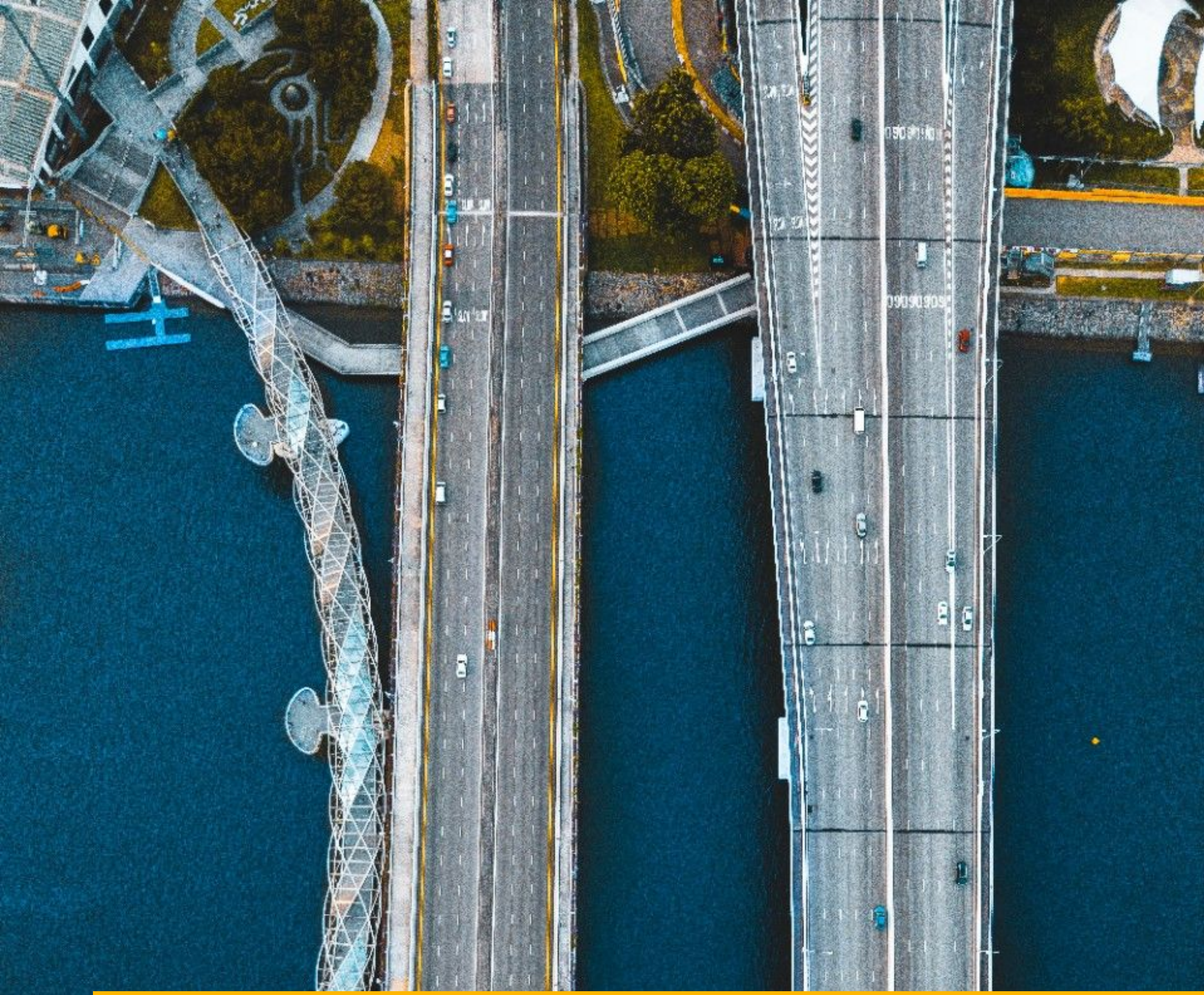

PwC Vietnam NewsBrief

Future of Vietnam DTAs post-MLI

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At a glance..

On 9 February, Vietnam signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("the Convention" or "the MLI"), becoming the 99th jurisdiction to join the Convention.

This is a milestone in the course of the implementation of the BEPS Action Plan in Vietnam after Vietnam became the 100th member of the BEPS Inclusive Framework 5 years ago.

As a result, potentially 75 of Vietnam's double tax agreements ("DTAs") could be altered once the MLI comes into effect. Taxpayers should be aware of these potential changes to DTAs and the impact this may have on their plans for structuring their investments and transactions to claim treaty benefits in Vietnam.

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The MLI and what it does

What is the MLI?

Countries working on the OECD/G20 BEPS Project jointly developed 15 actions to tackle tax evasion and create a more transparent tax environment. The MLI is the tool which will implement the BEPS Project actions with regard to DTAs.

What does the MLI do?

The MLI aims to implement minimum standards for the existing 1800+ DTAs currently in force, to, amongst other things, counter treaty abuse and improve dispute resolution mechanisms.

Participating in the MLI allows governments not only to strengthen their tax treaties but also to mitigate the burden of renegotiating and modifying them in the traditional manner.

How does the MLI alter DTAs?

The MLI has now been signed by 99 countries including Vietnam. It entered into force on 1 July 2018 and started to take effect with respect to existing tax treaties (referred to as “covered tax agreements” or “CTAs”) of the jurisdictions that have ratified it. Vietnam needs to ratify the MLI before it can come into force and apply to Vietnam’s DTAs. This is expected to happen during 2022.

Countries which have signed the MLI identify the CTAs they wish to be modified using the MLI. They then agree with the counterparties to the DTAs which provisions of the MLI will be implemented in their DTAs using Reservations and Notifications. This is known as a country’s “MLI Position”.

Vietnam's MLI position

According to the List of Reservations and Notifications at the time of signature, 75 of Vietnam's DTAs will be covered by the MLI, including those signed with important trading partners such as China, South Korea, Japan and Germany.

The DTA between Vietnam and the United States of America has not yet been ratified and it is not one of the CTAs.

Amongst the details of Vietnam's MLI Position, three significant changes to CTAs relate to articles covering capital gains, permanent establishments ("PE"), and mutual agreement procedure ("MAP").

Capital Gains

Vietnam will have the chance to broaden its taxing rights over capital gains derived from direct and indirect transfers of shares in land-rich targets in Vietnam by introducing one new provision to its current article on capital gains in DTAs.

This new provision not only shortens the assessment period for determining if a company is land-rich (i.e. to within the 365 days preceding the transaction) but also proposes a new approach for determining the threshold to assign taxing rights to Vietnam.

Therefore, taxpayers planning to sell an entity in Vietnam in the short/medium term should assess whether this potential change to Vietnam DTAs could give rise to new/additional capital gains tax liabilities in Vietnam.

Vietnam’s MLI position

Avoidance of PE status

The MLI provides a number of ways to deal with the artificial avoidance of PEs.

Vietnam has opted to amend the PE article in its CTAs by:

- restricting the application of a number of exceptions to the definition of PE to activities that are preparatory or auxiliary in nature. This means that it will not be possible to take advantage of these exceptions by fragmenting a business into a number of smaller operations.
- amending the definition of an agency PE to ensure that where the activities that an intermediary exercises in Vietnam are intended to result in the regular conclusion of contracts to be performed by a foreign enterprise, the enterprise will be considered to have a taxable presence in Vietnam unless the intermediary is performing these activities in the course of an independent business.

Improving MAP

The Government has expressed their intention to meet the minimum standard for improving dispute resolution in accordance with the OECD’s BEPS package.

In light of this, new provisions for MAP following the MLI will be added to a number of DTAs including those with common investment hub jurisdictions like Singapore and The Netherlands. These new provisions will hopefully make MAP more accessible and practical for taxpayers by increasing the amount of time taxpayers have to make a claim under MAP, and brings the majority of Vietnam DTAs in line with the standard.

Contact us

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