SBS

Decoding MLI

SBS AND COMPANY LLP
CHARTERED ACCOUNTANTS

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FOREWORD

It is indeed a privilege to write foreword to the first edition of ‘Decoding MLI’, by Sri Harsha, Designated Partner.

I am also happy that this book is one of the concept centric books, in the series of books from our organisation, and in this book, the Author dwells into the genesis, structure, intricate, complex definitions and a detailed analysis of the articles of Multilateral Instrument (MLI), and India’s position on the same.

MLI is a multilateral treaty that enables jurisdictions to swiftly modify their bilateral tax treaties to implement measures designed to better address multinational tax avoidance. These measures were developed as part of the OECD/G20 Base Erosion and Profit Shifting (BEPS) project.

All are aware that Multilateral Instrument (‘MLI’) has come into effect in India from April 2020. With respect to a specific bilateral tax treaty, the measures will only enter into effect after both parties to the treaty have deposited their instrument of ratification of the MLI and a specified time has passed.

This book dissecting the various aspects of MLI, along with the appropriate illustrations and examples, will help its readers understand the nitty-gritties of MLI. The readers will have a really good time, going through the complex topic, presented concisely by the Author, in a simplified manner.

I appreciate the Author for his sincere efforts in bringing this book.

My best wishes to the Author.

Suresh Babu S
Founder & Chairman
23rd Aug 2020

PREFACE

I am glad to have an opportunity to pen down one of the first concept centric books of our organisation. I thank our chairman for the trust and support extended. I also take this as an opportunity to thank D V K Phanindra, for his support in coming up with this edition.

When we read the fine print of the Multilateral Convention for the first time, we understood that a book is to be written specifically on this aspect for the very reason, being, the complexity involved and the role that MLI is going to play by amending all the DTAAs. We thought an article or paper would not be sufficient to dwell the issues covered by MLI and a book would be the perfect fit.

The ideology behind this book is to help the readers transition from the current DTAAs to the CTAs. This being an important phase in the journey of tax treaties, where the tax treaties can be stated to be reaching adolescence, understanding at this juncture how the tax treaties behave would immensely help and guide the reader his/her way forward. Missed this phase, it will be definitely an uphill task to catch upon the later dynamic and rapid developments in this particular area.

I am sure that there is so much to be covered on MLI than what is being contributed in this edition. In fact, each article would require a separate book by itself because of the depth involved therein. To get started, to reach into the depths and details, this book, I believe, would be a great source. Also, this book helps the readers who have only a preliminary understanding about the DTAAs, and provides them more clarity at the rationale as to why amendments are being carried out to the existing DTAAs.

MLI looks at various aspects and tries to achieve the action items of BEPS Project. The novelty of MLI is that it bunks the traditional approach of amending the bi-lateral treaties saving time for every stakeholder and also puts plans into action before they become redundant.

The change in preamble to the tax treaties making the treaties specifically spell out that the intention was not to create opportunities for non-taxation or reduced taxation through tax evasion or avoidance can be stated as one of the significant achievements of MLI. The introduction of PPT into the treaties is also a significant aspect and how the businesses and tax authorities start applying the same would be a sure thing to watch in future. Coupled with GAAR, the tax authorities will be armed with greater powers and only a sound commercial consideration would save the businesses. The justification of investment vehicles, the choice of jurisdiction, the choice of investment into Indian Entities, the timing of exit and various other aspects would come for a tighter scrutiny in light of the amended treaties by virtue of MLI.

It would be an exciting and challenging time for professionals who would be advising clients on the structuring of the investments and other connected aspects after the advent of MLI. Since, it is new for everyone in the room, how this entire thing pans out, how the courts see it and how are businesses going to take it, only future can answer. What can be said at the moment is, a thriller in a future is guaranteed.

I once again thank the entire team of SBS for their constant support in making this book possible. I also want to thank my family for their constant support. Drop your feedback at harsha@sbsandco.com

Sri Harsha
Designated Partner
23rd Aug 2020

INTRODUCTION

'Education is the best economic policy there is' - Tony Blair

I am immensely happy to write an introduction to the First edition of the book "Decoding MLI". Having read the book, there is no doubt that the Author has put in an unprecedented amount of painstaking research, with reference to the Articles (forming the Multilateral Instrument - MLI) which were developed as part of Action 15 of the OECD/G20 BEPS project.

MLI has come into force in India on 01.10.2019 and has come into effect in India from 01.04.2020. MLI provides solutions to the contracting jurisdictions to plug in lacunas and loopholes in international tax treaties by superimposing the provisions into bilateral tax treaties.

MLI allows the contracting jurisdictions to implement agreed minimum standards so that all the countries should find it easy to adopt and amend their bilateral treaties by reserving from applicability of certain articles and choosing the options from set of options, to counter treaty abuse, and to improve dispute resolution mechanisms while providing flexibility to accommodate specific tax treaty policies.

The Author has made a sincere effort to put in to one place the convention, and the explanatory statement to the convention, appropriately stated, crisply and precisely explained with the help of appropriate illustrations for the understanding of the user.

I did not intend to hijack the reader from the out of the world experience, which they will under go by reading this book, but I cannot resist myself on giving some briefs on the contents of this book.

A proper understanding has been provided in respect of the concepts like Reservations, Notifications, Compatibility clauses, and definitions like Entry into Force and Entry into Effect, without the proper understanding of which, one cannot understand the true essence of MLI.

Concepts like the Principal Purpose Test (PPT), Limitation of Benefit (LOB), under Article 7, to prevent abuse of Tax Treaty, and the definition of 'Qualified Person', to access the treaty benefits, have been very craftly explained with illustrations, for better understanding of the reader. The interplay of Article 7 with that of the Domestic Tax provisions viz., GAAR, have also been spelt out lucidly.

The abuse strategy of artificial avoidance of PE status of an enterprise by establishing a commissionaire model (Article 12), Specific Contract exemptions, Anti-Fragmentation Rule (Article 13), Splitting-up of Contracts (Article 14), explained in Action 7 Report of BEPS project, which forms part of the very essence of Article 7 of MLI has been brought out appropriately, for the understanding of the reader.

The concept of Mutual Agreement procedure under Article 16 of MLI, dealt by Action 14 Report of the BEPS project, has been presented in a tabulated form, for the better understanding of the concept by the reader.

India's standpoint on the Articles of MLI, vis-à-vis, other contracting jurisdiction, have been appropriately stated. This book gives a holistic approach of understanding MLI, and I appreciate the Author for his sincere efforts in bringing this book, for the better understanding of the other-wise, not so appeasing topic. My best wishes to the Author, and thanks for making me part of this piece of Art.

D.V.K.Phanindra
Practicing Company Secretary
23rd Aug 2020

OVERVIEW

The harmful and aggressive international tax practices adopted by large multi-national enterprises (for brevity MNEs) often lead countries involved to think methods and measures for placing necessary infrastructure to restrict such practices to protect the tax base from erosion. Even though such practices adopted by them are within the corners of the law in form, the substance is often questionable. Such practices adopted by large multi-national enterprises also provoke thoughts in the minds of managements of medium and small multi-national enterprises, spreading the aggressive tax practice all over the globe.

Such aggressive international tax practices lead to base erosion and profit shifting (for brevity 'BEPS'). BEPS relates to instances where the interaction of different tax rules lead to double non-taxation or less than single taxation. BEPS also relates to arrangements that achieve no or low taxation by shifting profits away from the jurisdictions where the activities creating those profits take place. Non-action of BEPS lead to aggressive tax rules by countries for protection of their tax base. Then situation moves from double non-taxation to double taxation, which would significantly affect the world trade.

Hence, G20 along with Committee on Fiscal Affairs (for brevity 'CFA') of Organisation for Economic Co-operation and Development (for brevity 'OECD') has come up with BEPS Package to address various issues arising because of BEPS. G20 and OECD has worked with multiple countries in a co-ordinated and comprehensive manner to arrive such BEPS Package with objectives of identification action needs to address BEPS, setting of deadlines to implement the actions and identification of the resources needed and the methodology to implement the actions.

In light of such objectives, the BEPS Package was announced with Action Plans and timelines to achieves such action plans were announced. The initial BEPS Action Plan was endorsed by G20 Leaders in September 2013. After two years of work, CFA, including all OECD and G20 countries working on equal footing, produced the final package which was approved by G20 leaders in November 2015. The Final BEPS Package has 15 Actions to ensure that profits are taxed where economic activities generating the profits are performed and where value is created, while at the same time giving businesses greater certainty by reducing disputes over the application of international tax rules and standardising compliance requirements. The list of Action Plans conceived by BEPS Project are as under:

Actions	Description
1	Address the Tax Challenges of Digital Economy
2	Neutralise the effect of hybrid mismatch arrangements
3	Strengthen Controlled Foreign Company Rules
4	Limit Base Erosion via Interest Deduction and other Financial Payments
5	Counter Harmful Tax Practices more effectively, taking into account transparency and substance
6	Prevent Treaty Abuse
7	Prevent the Artificial Avoidance of PE Status
8	Assure Transfer Pricing Outcomes are in line with value creation – Intangibles
9	Assure Transfer Pricing Outcomes are in line with value creation – Risks and Capital
10	Assure Transfer Pricing Outcomes are in line with value creation – Other High Transactions
11	Establish methodologies to collect and analyse data on BEPS and actions to address it
12	Require taxpayers to disclose their aggressive tax planning arrangements
13	Re-examine Transfer Pricing documentation
14	Make Dispute Resolution Mechanisms more effective
15	Develop a Multilateral Instrument

Majority of the results that above Actions intend to achieve, can be achieved by making amendments to various bi-lateral treaties. The results of balance Action Plans deals with Transfer Pricing issues have to be addressed in a different manner.

In this note, we are only dealing with such Action Plans which are intended to be addressed through treaty route. The Action Plans dealing with Transfer Pricing issues do not form part of this detailed note. Except Actions 8 to 12 above, all other can be addressed through the treaty route by adopting the Action 15, which deals with develop a multilateral instrument (for brevity 'MLI'). Accordingly, in this piece of note,

OBJECTIVE

Adoption of the measures as part of BEPS Package needs amendments to various bilateral tax treaties among different countries. It is well known that a significant amount of time gets consumed (due to the bureaucratic process, political instability and various other reasons in both the jurisdictions) for carrying an amendment of one bilateral tax treaty. Imagine what would be the time required for amending more than 3,000 plus tax treaties across the globe. Such an attempt would be an herculean task and by the time the amended treaties address the issues, the business operations would have dynamically changed and all the measures which are thought of being addressed by the amendments would go useless.

Hence, in order to save countries from such a time-consuming exercise and make sure that the measures proposed by BEPS Package are relevant, it is necessary that an innovative approach has to be brought in for making changes to the bilateral tax treaties. Accordingly, Action 15 was conceived to develop MLI.

By developing MLI and accepting the same, the countries which have bilateral tax treaties in place, need not go through their conventional method of amending the tax treaties for incorporating the tax measures proposed by BEPS Package.

This simplifies the entire procedure and saves substantial amount of time. Hence, MLI is the saviour!

GENESIS

Action 15 – 'Developing a Multilateral Instrument to Modify Bilateral Tax Treaties' has concluded that the MLI is an innovative approach to enable countries to swiftly modify their bilateral tax treaties to implement measures developed in the course of BEPS Package and helps the countries to better negotiate in a time bound manner.

The said Action Report was developed with the assistance of a group of experts in public law and international tax law. An adhoc group for development of MLI was approved by CFA and endorsed by G20 countries in February 2015. A total of 99 countries participated in Adhoc group as members. The group also has four non-state jurisdictions and seven international organisations as observers. The Chair of Adhoc group was Mr Mike Williams of United Kingdom. A separate sub-group was also formed on Arbitration in light of Action 14 'Making Dispute Resolution Mechanism More Effective'.

STRUCTURE OF MLI

With the above background about the genesis and the objective behind development of MLI, now let us proceed to understand in detail the various articles of MLI. The entire MLI is divided into seven parts and has 39 articles. The significant articles are as under:

FRAMEWORK OF MLI

MLI can be better understood only if the framework is understood. As stated earlier, since MLI achieves to amend the global tax treaties that are existing between various countries, it requires a lot of flexibility built in to make the adoption of the convention and consequent amendment successful. It is essential to understand that MLI does not aim at amending the tax treaty between India and other countries alone. It aims at help in amending the tax treaties between various other countries across the globe.

Hence, certain articles of MLI would be having provisions that may be aimed at amending the existing articles between United Kingdom – Japan Treaty, which may be completely irrelevant to India – United Kingdom Treaty or India – Japan Treaty. In all such instances, India has to be given a flexibility to state its intention that such provisions of MLI are not applicable to those treaties which India has concluded. Also, in certain instances, the provisions of MLI would be giving multiple options to choose with to achieve the objective intended by specific Action of BEPS. In such instances, India has to be given an opportunity in choosing the necessary option. In certain other instances, India do not want to apply certain provisions of MLI to its tax treaties for various reasons. Hence, India has to be given an option to state that a particular provision of MLI is not to be applicable for its tax treaties.

From the above it is evident, that the entire framework of MLI has to be ultra-flexible so that it works for India-Other Countries treaties and Other Countries – Other Countries treaties. Hence, MLI is developed in a flexible manner aimed at providing flexibility to make sure the adoption to MLI is easier and successful. Before proceeding further, it is necessary to understand certain phrases:

COVERED TAX AGREEMENT

The Covered Tax Agreement (for brevity 'CTA') means an agreement for the avoidance of double taxation with respect to taxes on income (whether or not other taxes are also covered) that is in force between two or more parties and with respect to which each such party[1] has made a notification to the Depositary[2] listing the agreement.

In simpler terms, the existing double taxation avoidance arrangement (for brevity 'DTAA') which a party notifies to Depositary for listing of the agreement, such agreement becomes a CTA. India has notified 93 of its DTAAs with Depositary. Such DTAA shall become a CTA only if the other party has also similarly notified DTAA with India to Depositary. In absence of such notification by other party, the DTAA remains DTAA and cannot be called as CTA and accordingly the provisions of MLI shall not be applicable to such DTAA.

For example, India has notified the DTAA with Mauritius with Depositary. However, Mauritius has not notified India. Hence, the none of the provisions of MLI would be applicable to India-Mauritius DTAA. Hong Kong is another example, where India has notified but the former has not notified.

There is another possibility a DTAA may not be a CTA, which is if both the parties do not notify to state their intent that they want to get covered by MLI. For example, neither India nor China has notified. Hence, the India-China DTAA shall not be called as CTA. Similar examples would be Belize, Burkina Faso, Gabon, Guernsey, Isle of Man and others.

Hence, the provisions of MLI shall be applicable only to CTAs and not to all agreements. Whether an agreement is CTA or not can be verified https://www.oecd.org/tax/beps/mli-matching-database.htm. On selection of India and another country (which you want to check), the website shall show whether the agreement is CTA or not. It is recommended to cross check the result with the MLI position of India before arriving at conclusion.

CONTRACTING JURISDICTION

The term 'Contracting Jurisdiction' (for brevity 'CJ') means a party[3] to a CTA. Once both the parties notify the DTAA to the Depositary, then both of them shall be called as CJs instead of 'Contracting State' or 'Contracting Party'.

The Explanatory Statement to the MLI states that usage of phrase 'Contracting Jurisdiction' is much safer than the commonly used 'Contracting State' and 'Contracting Party'. As stated earlier when dealing with the definition of 'CTA', the non-state jurisdiction can also be a party, hence usage of 'Contracting State' may mislead that non-state is not covered. On the other hand, since the phrase 'party' refers to party to the MLI, the usage of 'Contracting Party' would give raise to confusion and accordingly, 'Contracting Jurisdiction' is used to avoid any confusion.

1 Jurisdictions/Territories which are parties to an arrangement for whose international relations a party is responsible is also covered

2 The Secretary – General of OECD

3 'Party' means state / jurisdiction which has signed MLI and for which the convention is in force.

MINIMUM STANDARDS

Minimum Standards are those where all the countries which are part of the BEPS Inclusive Framework have agreed for. As stated earlier in the framework of MLI, that the said instrument gives lot of flexibility so that all the countries should find it easy to adopt and amend their bilateral treaties by reserving from applicability of certain articles and choosing the options from set of options. However, CJs cannot reserve from certain articles which are agreed to minimum standard. In other words, certain provisions of MLI which are agreed as minimum standards, the CJs cannot reserve from applicability of such articles. They have to mandatorily adopt such standards. However, a very little leeway, will be allowed only if the CJs intends to achieve the minimum standards by adopting a different methodology than what is stated in such articles. Such CJs will be subjected to peer review and monitoring mechanism to ensure that the objective as stated by minimum standards is being achieved through adoption of different methodologies.

The goal of minimum standards is to provide a level playing field to all the countries. The adoption of minimum standards are monitored through a monitoring mechanism in order to ensure that the commitments embodied in the minimum standards are effectively satisfied. The reviews will evaluate the legal framework provided by a jurisdiction's tax treaties and domestic law and regulations, the jurisdiction's Mutual Agreement Procedure (for brevity 'MAP') programme guidance and implementation of minimum standards in practice.

As part of BEPS Package, among the total fifteen action plans, four were agreed to be adopted as minimum standards. The following are the minimum standards to which each CJ would adopt:

Actions	Description
5	Counter Harmful Tax Practices
6	Prevent Treaty Abuse
13	Country-by-Country Reporting
14	Mutual Agreement Procedure

The minimum standards Article 6 and Article 14 are achieved by making them part of the convention and ensuring that the all CJs adopt the same to their CTAs.

RESERVATIONS

As stated earlier, since MLI achieves to amend the existing global treaties, it is important to provide a lot of flexibility in adopting the various articles of the convention (except those which deals with minimum standards). A party is generally given the flexibility to reserve/opt out:

- from the applicability of an article in its entirety
- from the applicability of part of an article instead of entirety
- from the applicability of an article because to preserve an existing article in CTA

Para 1 of Article 28 of MLI deals with reservations that can be made by parties under this convention. Unless expressly stated otherwise in the relevant articles of provisions of MLI, a reservation made shall:

- modify for the reserving party in its relations with another party qua such reservations and
- modify the provisions to same extent for other party in its relations with reserving party

In simpler words, once a CJ has reserved the article from applicability, then such article shall not come into play even if the other CJ opts for it. The article will come into play only if both the CJs notify the same. For example, India has placed its reservation from applicability of Article 3 of MLI, which means that the provisions as contained in Article 3 of MLI cannot alter the provisions of DTAA which India has with all the countries. This continues to be true, even if other CJ to India's DTAA has notified that it would opt for the provisions of Article 3. However, in some instances, asymmetric application of reservations are possible, if the article of MLI provides for the same. For example, refer to discussion on Article 7 in this note.

The general rule for making reservations is at the time of signature or depositing the instrument of ratification, acceptance or approval. However, there are certain exceptions to the general rule, where the convention itself allows a party to make reservations after the time of signature or deposit of instrument in specified instances[4]. Further, the reservations if made at the time of signature, they should be confirmed at the time of depositing the instrument of ratification, acceptance or approval. If the reservations at the time of signature are stated to be definitive, then there is no requirement for further confirmation at the time of deposit of the instrument[5]. If the reservations are not made at the time of signature, the party has to provide a provisional list of reservations at the time of depositing of the instrument. The provisional list would allow the other parties a preliminary indication as to what the first-mentioned party intends to do. The provisional list do not restrict the ability of that party to submit a modified list upon deposit of instrument. Further, the parties that has made reservations at the time of signing or deposit may at any time withdraw it or replace it with more limited reservation by notifying the Depositary and the effect of such withdrawal or replacement is guided by Article 28(9).

NOTIFICATIONS

Notifications relate to the choice of optional provisions and also include those a party make stating that their CTAs are within the scope of compatibility clauses for each of provisions of the convention. Article 29(1) of the convention lists out certain notifications which the parties should be making at the time of signing of the instrument. The list of notifications should be confirmed at the time of depositing the instrument unless the list of notification is stated to be definitive. If the party has not provided any list of notifications at the time of signature, the party has to provide a list of provisional notifications at the time of deposit. A party may also make an additional notification by making a notification to the Depositary. The effect of such notification is dealt by Article 29(6).

OPTIONAL AND ALTERNATIVE PROVISIONS:

In certain cases, provisions of MLI would have multiple options to address an issue. In some cases, there would a main provision which is supplemented with an additional provision. The convention incorporates a number of alternative and optional provisions which would apply only if all CJs to a CTA agree to choose them.

Here too, once an option is chosen and notified by a CJ, such option would come into play only if the other CJ to CTA also notifies the same option. For example, India has chosen Option C for implementation of Article 5 which deals with elimination of double taxation. If another CJ also opts for Option C, then the provisions of Option C as available in Article 5 shall alter the text of existing provisions in DTAA. If the other CJ instead of Option C has chosen other option, then both the options shall not be applicable to the said CTA.

4 A party can chose applicability of Part VI which deals with Arbitration after it has become Party to the convention. In such case, such Party can make reservations qua Arbitration Procedures at the time when it chooses to opt Part VI. Also, there are other instances, where a party can notify a new treaty as CTA at a later point of time and such notification would also allow making reservations qua such CTA.

5 Needless to state that even the reservations at the time of signature are stated as definitive, the party can very well make more reservations at a later point of time, which the convention itself allows.

COMPATIBILITY CLAUSES

In certain cases, provisions of MLI would have multiple options to address an issue. In some cases, there would a main provision which is supplemented with an additional provision. The convention incorporates a number of alternative and optional provisions which would apply only if all CJs to a CTA agree to choose them.

Here too, once an option is chosen and notified by a CJ, such option would come into play only if the other CJ to CTA also notifies the same option. For example, India has chosen Option C for implementation of Article 5 which deals with elimination of double taxation. If another CJ also opts for Option C, then the provisions of Option C as available in Article 5 shall alter the text of existing provisions in DTAA. If the other CJ instead of Option C has chosen other option, then both the options shall not be applicable to the said CTA.

The above captures the various clauses used by MLI to alter the text of CTA. We will deal with the above clauses in detail at respective articles.

Compatibility	Application	Functionality	Notification
in place of	This will apply only when there is an existing provision in MLI. In absence of existing provision, this does not have role to play.	Articles of MLI which uses the phrase 'in place of' aims at replacing the text of MLI instead of existing text of CTA.	This would apply only when all CJs notify the existing provision of CTA.
applies to or modifies	This will apply only when there is an existing provision in MLI. In absence of existing provision, this does not have role to play.	Articles of MLI which uses the phrase 'applies to or modifies' aims at amending the text of CTA with the text of MLI.	This would apply only when all CJs notify the existing provision of CTA.
in the absence of	This will apply only when there are no existing provisions in CTA dealing with such articles of MLI.	Articles of MLI which uses the phrase 'in the absence of' aims at intending the text of MLI would come into play in CTA only when CTA does not have a provision to deal with what is being stated by such article of MLI.	This would apply only when all CJs notify the absence of provision of CTA.
in place or in absence the of	This will apply in all cases, whether the provision exists or absent in CTA.	Articles of MLI which uses the phrase 'in place or in absence of' aims at intending the text of MLI would replace or supersedes existing provision or added in absence of provision. This is like combination of both 'applies to modifies or' and 'in absence of'.	If both the CJs notify an existing provision of CTA, then such provision will be replaced by provision of MLI. In all other cases namely where one CJ notifies and other CJ does not notify or where both the CJs not notify and also not reserve on applicability, the provisions of MLI would be superseded and replaced to the extent that they are not incompatible with the existing text of CTA.

ENTRY INTO FORCE

Entry into Force is dealt by Article 34 and states that the date by which such jurisdiction or state will be bound by the convention. The CTAs will be modified with effect from Entry into Effect as dealt by Article 35.

As per Article 34, the MLI will enter into force on the first day of month following the expiration of three calendar months beginning on the date of deposit of its fifth instrument of ratification, acceptance or approval. Accordingly, where the date of deposit of the fifth instrument of ratification, acceptance or approval takes place on the first day of a month, the MLI will enter into force, four months after the deposit of the instrument or instruments of ratification, acceptance or approval.

For each signatory ratifying, accepting or approving this convention after deposit of fifth instrument, the convention shall enter into force on the first day of month following the expiration of period of three calendar months beginning on the date of deposit by such signatory of its instrument of ratification, acceptance or approval.

ENTRY INTO EFFECT

Entry in to effect is dealt by Article 35, and the provisions of the convention shall have effect in each CJ with respect to a CTA as under:

- **with respect to withholding taxes:**
  - with respect to taxes withheld on amount paid or credited to non-residents, the first taxes for which the provisions of the MLI will enter in to effect are those for which the event giving rise to such taxes occurs on or first day of the next taxable period (India has chosen 'taxable period' instead of 'calendar year') that begins on or after the latest of the dates on which the convention enters into force for each of CJs to the CTA.
  - For example, if the entry into force for India is 1st March 19 and for Singapore is 1st November 19, then the entry into effect for India – Singapore CTA for India would be 01st April 20 and for Singapore would be 01st January 20 (since Singapore has opted calendar year), because this would be the first day of next taxable period/calendar year which begins after the latest of dates on which convention enters into force for each of CJs to CTA, which would be 1st November 19.

Events	Date
Entry Into Force - India	01st March 19
Entry Into Force - Singapore	01st November 19
Entry Into Force latest among the CJs	01st November 19
First Day of Next Taxable Period - India	01st April 20
First Day of Next Calendar Period – Singapore	01st January 20

  - If in the above example, if entry into force for Singapore is 01st July 20, then the entry into effect for India- Singapore CTA for India would be 01st April 21 and for Singapore would be 01st January 21. As stated earlier, this is only for the withholding taxes.

Events	Date
Entry Into Force - India	01st March 19
Entry Into Force - Singapore	01st July 20
Entry Into Force latest among the CJs	01st July 20
First Day of Next Taxable Period - India	01st April 21
First Day of Next Calendar Period – Singapore	01st January 21

- **with respect to all other taxes**
  - with respect to all other taxes levied by CJ, the first taxes for which the provisions of the MLI will enter in to effect are those which are levied with respect to taxable periods beginning on or after the expiration of period of six calendar months from the latest of the dates on which the convention enters into force for each of CJ to CTA.
  - For example, if the entry into force for India is 01st March 19 and for Singapore is 01st November 19, then the entry into effect for all taxes other than withholding will be for India would be 01st April 21 and Singapore would be 01st Jan 21, as detailed below:

Events	Date
Entry Into Force - India	01st March 19
Entry Into Force - Singapore	01st November 19
Entry Into Force latest among the CJs	01st November 19
End of 6 months form the latest Entry Into Force	01st May 20
Taxable Period beginning after expiry of 6 months - India	01st April 21
Taxable Period beginning after expiry of 6 months – Singapore	01st January 21

With the above understanding about the objective, genesis, framework and important phrases and concepts, let us now proceed to understand each article of MLI, the problem with which it is occupied and remedy provided by such article and India's position on such article. Before that, we would first see the reservations of India which has been communicated to Depositary.

INDIA'S RESERVATIONS IN ENTIRETY

India has placed reservation on the following articles. Accordingly, such articles of MLI would not affect the tax agreements.

Article	Description	Date
3	Transparent Entities	Entirety
18-26	Arbitration & Related Articles	Entirety

DETAILED ANALYSIS ON ARTICLES

ARTICLE 4: DUAL RESIDENT ENTITIES

This article deals with addressing residency issues pertaining to persons other than individuals, where they may be considered as residence for more than one jurisdiction. Normally the tax treaties have tie-breaker test to address the issues arising of dual residency. However, there would be certain tax treaties which would not have the tie-breaker rule and accordingly, such persons would be denied tax benefit or exemption in both the CJs. In order to address such issues, Article 4 tries to bring in methodology to treat with residence arising from more than one jurisdiction by looking at place of effective management, place of incorporation and other relevant factors.

Where by reasons of provisions of CTA, a person other than an individual is resident of more than one contracting state, then the competent authorities of CJs shall endeavour to arrive at a mutual agreement to determine the residence of such person other than individual by resorting to place of effective management, place of incorporation and other relevant factors.

In absence of such agreement, the person shall not be entitled to any relief or exemption as provided in CTA except to the extent such CJs may agree to provide. However, a CJ can choose to deny such person any tax relief or benefit as laid down in CTA in absence of agreement. This would come into play only if the other CJ to such CTA also notifies the same.

For example, Indo-Japan Treaty states that the in absence of agreement between the competent authorities, the person other than individual would not be able to access any benefits of CTA if the competent authorities do not reach any agreement. The relevant text of Article 4(2) of Indo-Japan DTAA is as under:

Whereby the reasons of the provisions of Paragraph 1 of Article 4 of the Convention a person other than individual is a resident of both Contracting States, the competent authorities of the Contracting State shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. *In absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by the Convention.*

INDIA'S POSITION:

Article 4 not being a minimum standard, any party to CJ can reserve its right not to apply the subject article. Further, to preserve the original version in the tax treaties, a CJ can choose not to apply Article 4 if it has already a clause which already address the objective that Article 4 intends to achieve. In both such situations, Article 4 will not apply qua such CJ to all its CTAs.

The compatibility clause used for Article 4 is 'in place of or in the absence of'. Hence, once a CJ intends to opt for the provisions of Article 4 and notifies the para and Article to the Depositary and other CJ also notifies the same para and Article, the provisions of Article 4 of MLI would be replaced with the existing provisions of CTA. In all other cases, the text of Article 4 shall supersede the existing text to the extent that text of Article 4 is incompatible with existing text.

Since India has not placed any reservation from applicability of Article 4 and chose to replace the last line of Article 4(1) to deny benefits of CTA in absence of any agreement about residency, the language of Article 4(1) gets suitably modified by Article 4(3)(e) as appearing in the above extracted text from CTA. If the other CJ has also not reserved the Article from application as done by Japan qua India, then the provisions of Article 4(1) as amended by Article 4(3)(e) would be replaced for the existing language of article in CTA. Australia, Canada are some examples of this category. Cyprus has reserved its right not to apply the provisions of Article 4. Hence, for the India-Cyprus CTA, the provisions of Article 4 shall not be applicable. Belgium, Albania are some examples of this category.

ARTICLE 5:

APPLICATION OF METHODS FOR ELIMINATION OF DOUBLE TAXATION

This article deals with application of methods for elimination of double taxation. It is known that certain parties would adopt a territorial based taxation, which would mean that all incomes earned outside that state would be exempted from the domestic tax. The said income would only be considered for determining the rate of tax and not to levy tax. Parties which would adopt this method of taxation, also extend the tax credit to its residents on an assumption that those incomes or capital were subjected to tax in the source state leading to BEPS concerns.

Parties located in such states have started transferring income or capital to states where there is no tax or low tax and claimed credits in the resident state. In order to curb such practices, the convention gives various options to deal with methods for elimination of double taxation, which principally are based on tax credit method instead of exemption method.

The said article provides CJs to opt for any of the three options (Option A/Option B/Option C) or also choose not to opt any of the options. Where each CJ to CTA chooses a different option or where one CJ choose to apply one option and the other chooses no option, the option chosen by each CJ shall apply with respect to its own residents. Further, a CJ can reserve its right from application of the treaty in its entirety to one or more CTA or all CTAs.

OPTION A:

This option aims at using the tax credit method for eliminating the double taxation where the current article uses an exemption method. Under the exemption method, the income which is subjected to tax in the source country is generally exempted from the total income in the resident country in a way to ensure that there would not be any juridical double taxation. However, there might be instances where an income may also be not be subjected to tax in the source country by reasons of provisions of CTA. Because of that, such income under exemption method, gets not subjected to tax both in resident country and source country, thereby leading to double non-taxation.

In order to address the double non-taxation issue, the option states that where a resident country adopts exemption method as a method to eliminate double taxation in the treaty and such income or capital is also exempt in the source country by virtue of provisions of CTA or subject to a reduced rate of taxes, in such case, the resident country instead of adopting the exemption method should adopt a tax credit method for eliminating double taxation. The tax credit that will be allowed as deduction shall not however exceed that part of tax, as computed before the deduction is given, which is attributable to income or capital which is taxed in the source country.

Option A shall be applicable only when the CTA states that the exemption method is being used for elimination of double taxation and once a CJ opts for this option, then the provision of Option A shall be updated accordingly.

OPTION B:

This option address the situation where an income is treated as dividend in the resident country but gives rise to a deduction (one reason being that such payment may be treated as interest in source country because of the hybrid nature of instrument) in the source country. The option states that where a CTA provides for exemption of income derived by its resident because such income is in the nature of dividend should not apply where the same income gives rise to a deductible expenditure for the purposes of payment of tax in the source country. The option states that the resident country should adopt a tax credit method instead of exemption method for the purposes of elimination of double taxation. The tax credit that will be allowed as deduction shall not however exceed that part of tax, as computed before the deduction is given, which is attributable to income which is taxed in the source country.

Option B shall be applicable only when the CTA states that the exemption method is being used for elimination of double taxation and once a CJ opts for this option, then the provision of Option B shall be updated accordingly.

OPTION C:

This option states that where a resident of CJ derives an income or owns capital which may be taxed in the other CJ in accordance with the provisions of CTA, the resident country shall give credit of tax paid in the source country by allowing deduction from the tax payable in the resident country. However, such deduction shall not exceed that part of tax on income or capital, as computed before deduction of tax, which is attributable to the income or capital which may be taxed in source country. Further, the option also states that where for any reasons the income or capital is exempted in the resident country, the tax paid in the source country should be taken into account for the purposes of deduction with respect to tax on the remaining income or capital in the resident country.

Option C shall replace the existing language used in the CTA if any CJ chooses to opt it. Further, a party that does not choose to apply Option C may reserve the right, with respect to one or more CTA or with all CTAs not to permit the other CJs to apply Option C.

INDIA'S POSITION:

India has chosen Option C with respect to the following countries Bulgaria, Egypt, Greece and Slovak Republic. Hence, Option C would be applicable only if the above countries also notify Option C. Bulgaria has reserved its right to not to apply the provisions of Article 5, hence for India-Bulgaria treaty, the provisions of Article 5 shall not apply despite the fact that India has chosen to apply Article 5 and Option C. Egypt has not notified its reservation nor has chosen any option. Since the compatibility clause used is 'in place of or in the absence of', the provisions of Article 5, Option C shall supersede the text of India-Egypt CTA to the extent there is no incompatibility to the existing text.

Further, a CJ can reserve its right to not to apply the provisions of Article 5 in entirety. In such cases, the provisions of Article 5 such CJ qua India shall not be applicable. For example, Cyprus has reserved right to not to apply Article 5. Hence, for India-Cyprus treaty, the provisions of Article 5 shall not apply.

ARTICLE 6:
PURPOSE OF CTA

Article 6 of MLI springs out from Action 6 of BEPS Package. Article 6 of BEPS Package identifies treaty abuse, and in particular treaty shopping, as one of the most important sources of BEPS concerns. Treaty shopping and other tax treaty abuse strategies would lead to loss of tax revenues to countries which extend benefits to residents of other jurisdiction, where residents of other jurisdictions are not otherwise eligible to access such treaty benefits, because of the reason that they are not seriously resident of such jurisdictions.

Countries have therefore agreed to include anti-abuse provisions in their tax treaties, including a minimum standard to counter treaty shopping. However, it is left to each country's discretion to identify a methodology to ensure that there are certain tests in tax treaties which counter the abusive tax strategies resulting in achievement of such minimum standard. The Action Report on Article 6 suggests the approach to be adopted as under:

- A clear statement that the states that enter a tax treaty intend to avoid creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements should be included in the tax treaties.

- After that, a specific anti-abuse rules, the limitation of benefits (for brevity LOB) rule, that limits the availability of treaty benefits to entities that meet certain conditions has to be brought into place. These conditions, which are based on the legal nature, ownership in and general activities of the entity, seek to ensure that there is a sufficient link between the entity and state of its residence.

- In order to cover such other forms of treaty abuse which would not be covered by LOB rule, a more general anti-abuse rule based on the principal purposes of transactions or arrangements (principal purpose test or PPT rule) has to be in place. Under the PPT Rule, if one of the principal purposes of transaction or an arrangement is to obtain treaty benefits, these benefits would be denied unless it is established that granting these benefits would be in accordance with the object and purpose of the provisions of the CTA.

The first objective is achieved through Article 6 of MLI and the rest two objectives are achieved through Article 7 of MLI. In order to achieve the first objective, Article 6 of MLI deals with the modification of the preamble of a CTA to indicate the purpose of a CTA which would be as under:

> **"Intending to eliminate double taxation with respect to taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions)"**

A CJ can reserve a right not to apply the above preamble only if the existing preamble in their CTA already contains preamble language describing the intent of the CJ to eliminate double taxation without creating opportunities for non-taxation or reduced taxation for the indirect benefits of resident of third jurisdiction. Such CJ has to notify the depository about such reservation and list of CTAs which contain the preamble language. In case of all other CJs, the provisions of Article 6(1) shall whether they notify to the depository or not regarding their choice because of the usage of compatibility clause 'in place of or in the absence of'.

ARTICLE 7:

PREVENTION OF TREATY ABUSE

As discussed earlier, out of three objectives which are intended to be achieved by Action 6 Report, two objectives which deal with treaty abuses are being addressed in this Article 7. This article can be referred as core article of MLI because it starts with non-obstinate clause. In other words, what other provisions of CTA may state, if the provision of Article 7 when translated into respective articles of CTA, then the benefit of a CTA shall be available only on satisfaction of the provisions contained in respective articles of CTA qua Article 7.

Pardon us for repeating, the treaty abuse is one of the main concerns and each CJ wants to address such treaty abuse to protects its tax base. The treaty abuse related to treaty shopping can be prevented by adopting of Simplified LOB [‘SLOB’] Rule. Since, there are other treaty abusive methods other than treaty shopping, the same cannot be ruled out by adopting specific anti-abuse provision like the SLOB Rule.

To counter such treaty abusive methods like conduit financing arrangements, a more general anti-abuse provision is required, which can be in the form of PPT Rule. The convention allows any CJ to opt for any of the following alternatives to restrict the treaty abuse:

- Only PPT Rule
- PPT + LOB (Simple or Detailed)
- Detailed LOB + Mutually Negotiated Anti-Conduit Route

Where SLOB Rule is specific to the facts, the PPT Rule is on objective basis. Also, where a CJ opts both SLOB and PPT rules and notifies the same, then a benefit enshrined in the CTA would not be given to the person accessing it just because it satisfies the SLOB Rule. Such benefit should also pass the mandate of PPT Rule and only on satisfaction of the later, such benefit gets available. This is also clear from the non-obstinate clause used in Article 7(1) which deals with PPT rules. The reverse may not be true because a person which fails the SLOB rule may not be called as ‘resident’ of such CJ and accordingly the requirement to satisfy the PPT rule would not arise. Hence, PPT rule would be a supplement to the SLOB rule but not vice-versa. Now, let us proceed to understand the concept of PPT Rule and SLOB Rule and then understand how the said concepts would affect the CTAs when CJs opted for the same.

PPT RULE

Article 7(1) deals with PPT Rule. It states that notwithstanding any provisions of CTA, a benefit under CTA shall not be granted in respect of an item of income or capital it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of relevant provisions of CTA.

Let us understand the above by taking an example from the various examples used in Action 6 Report.

T Co, a company resident of State T, owns shares of S Co, a company listed in State S. State T and State S do not have a tax convention and therefore any dividend paid by S Co to T Co is subject to withholding tax on dividends of 25% in accordance with domestic law of State S. Under the State R – State S tax convention, however there is no withholding tax on dividends paid by a company resident of Contracting State and beneficially owned by a company resident of other state. T Co enters into an agreement with R Co, an independent financial institution resident of State R, pursuant to which T Co assigns to R Co the right to payment of dividends that have been declared but have not yet been paid by S Co.

In the above example, in the absence of other facts and circumstances showing otherwise, it would be reasonable to conclude that one of the principal purposes for the arrangement under which T Co assigned the right to payment of dividend to R Co was for R Co to obtain the benefit of exemption from source taxation of dividends provided for by the State R – State S convention and it would be contrary to the object and purpose of the tax convention to grant the benefit of that exemption under this treaty-shopping arrangement.

From the above example, it is evident that the action of T Co transferring its right to receive dividend from S Co only to R Co, only because the State R and State S has a tax convention which allows no or lower rate of withholding taxes on dividend, then certainly the arrangement of T Co transferring its right to R Co would be to obtain the no or lower tax deduction on dividends declared by S Co would be principally for the purposes of accessing treaty benefits and accordingly the said benefit can be denied by the State S.

Having understood the broad contours of Article 7, let us now proceed to understand the meaning and scope of phrases used in Article 7 to understand what is sought to be achieved by Article 7. In this connection, let us pick up certain important phrases that make up Article 7.

BENEFIT UNDER CTA

Article 7(1) states that a benefit under CTA shall not be granted if the principal purpose of transaction or arrangement is to obtain such benefit. Hence, the phrase 'benefit' assumes quite a significance for the reason the same is denied if it stands out the principal purposes is to obtain the benefit.

The term 'benefit' has not been defined in the convention. Hence, a way to understand the said phrase is to look at Action 6 Report. Page 56 of said Report vide Para 7 states that the term 'benefit' includes all limitations namely tax reduction, exemption, deferral or refund on taxation imposed by source state under Article 6 to Article 22 of CTA, the relief from double taxation provided by Article 23, and the protection offered to residents and nationals of CJ under Article 24 or any other similar limitations.

The Action 6 Report further states that limitation on taxing rights of a CJ in respect of dividends, interest or royalties arising in that state and paid to a resident of the other state under Article 10, 11 or 12 are also included in the term 'benefit'. It also includes limitation on taxing rights of a CJ over a capital gain derived from the alienation of movable property located in that state by resident of the other state under Article 13. When a tax convention includes other limitations such as tax sparing provision, the term benefit would also include such a benefit.

RESULTED DIRECTLY OR INDIRECTLY IN THAT BENEFIT

The said phrase usage indicates to include such situations where the person who claims the application of benefits under a tax treaty may do so with respect to a transaction that is not that one that was undertaken for one of the principal purposes of obtaining the treaty benefit. Action 6 Report illustrates the said concept by the below example:

T Co, a company resident of State T, has acquired all the shares and debts of S Co, a company resident of State S, that were previously held by S Co's parent company. These include a loan made to S Co at 4 percent interest payable on demand. State T does not have a tax convention with State S and, therefore, any interest paid by S Co to T Co is subject to a withholding tax on interest at a rate of 25 percent in accordance with the domestic law of State S. Under the State R-State S tax convention, however, there is no withholding tax on interest paid by a company resident of a Contracting State and beneficially owned by a company resident of the other State also, that treaty does not include provisions similar to paragraphs 1 to 6[6]. T Co decides to transfer the loan to R Co, a subsidiary resident of State R, in exchange for three promissory notes payable on demand on which interest is payable at 3.9 per cent.

[6] SLOB Rule

In this example, whilst R Co is claiming the benefits of the State R – State S Treaty with respect to a loan that was entered into for valid commercial reasons, if the facts of the case show that one of the principal purposes of T Co in transferring the loan to R Co was for R Co to obtain the benefit of the State S – State R Treaty, then the provision would apply to deny that benefit as that benefit would result indirectly from the transfer of the loan.

ARRANGEMENT OR TRANSACTION

The phrase 'arrangement' or 'transaction' also assumes significance, because that was being tested for PPT Rule. However, the MLI does not define the above phrases. We can get an understanding of such terms with the help of Action Report 6. The said report states that 'arrangement' or 'transaction' should be interpreted broadly and include any agreement, understanding, scheme, transaction or series of transactions, whether or not they are legally enforceable. They also include creation, assignment, acquisition or transfer of the income itself, or property or right in respect of which income accrues. The ambit of these terms would also include activities encompassing arrangements concerning the establishment, acquisition or maintenance of a person who derives the income, including the qualification of that person as a resident of one of the CJs, and includes steps that persons may take themselves in order to establish residence. The Action Report further states that an example of an 'arrangement' would be where steps are taken to ensure that meetings of the board of directors of a company are held in different country in order to claim that company has changed its residence.

Further, Article 2(2) of MLI states that any term not defined in the convention, unless the context otherwise requires, have the meaning that it has at that time under the relevant CTA. Hence, for understanding the term 'benefit', 'transaction' or 'arrangement', it is important to understand how they are defined in respective CTA. For example, India does not define such terms under its tax treaties, however, the terms which are not defined in tax treaties, the terms would derive their definition from the domestic law concerning the taxes to which the treaties applies. On such basis, if one refers to the Indian Income Tax Act, 1961, Chapter XA with the provisions of General Anti-Avoidance Rules (for brevity 'GAAR') which almost try to achieve what PPT tries to achieve.

Such GAAR provisions also have definitions of terms 'tax benefit' and 'arrangement'. Whilst GAAR and PPT have certain differences, since the objective intended to achieve by both of them are similar, one could use such definitions especially in case where the respective CTAs were silent.

REASONABLE TO CONCLUDE

Article 7(1) states that where it is reasonable to conclude that the principal purpose of an arrangement or benefit is to obtain a benefit, then such a benefit shall be denied. Action 6 Report states that it is not necessary to find conclusive proof of the intent of a person concerned with an arrangement or transaction, but it must be reasonable to conclude, after an objective analysis of the relevant facts and circumstances, that one of the principal purposes of an arrangement or transaction was to obtain the benefits of tax convention. Where an arrangement can only be reasonably explained by a benefit that arises under a treaty, it may be concluded that one of the principal purposes was to obtain benefit. In other words, looking merely at the effect would not be sufficient to call such arrangement was to obtain a benefit under treaty. Further, the Action 6 Report also states that all the evidence must be weighed to determine whether it is reasonable to conclude that an arrangement or transaction was undertaken or arranged for such purpose. The determination requires reasonableness, suggesting that possibility of different interpretations of the events must be objectively considered.

[7] The definition of terms which came into the domestic law subsequent to signing of DTAA may be taken for the purposes of undefined phrases in DTAA subject to a condition that it passes an additional test laid by Courts qua Article 26 and Article 31 of The Vienna Convention on the Law of Treaties'

BENEFIT UNDER CTA

Article 7(1) states if one of the principal purposes of a transaction or arrangement is to obtain benefit, then such a benefit shall be denied. In other words, obtaining a benefit need not be the main purposes of the arrangement or benefit, it falls under the ambit of PPT rule, even if one of the purposes is to obtain such a benefit. A purpose will not be treated as principal purpose when it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining benefit was not a principal consideration. An example from Action 6 Report would help us to understand when a purpose would not be treated as principle purpose.

R Co , a company resident of State R, is in the business of producing electronic devices and its business is expanding rapidly. It is now considering establishing a manufacturing plant in a developing country in order to benefit from lower manufacturing costs. After a preliminary review, possible locations in three different countries are identified. All three countries provide similar economic and political environments. After considering the fact that State S is the only one of these countries with which State R has a tax convention, the decision is made to build the plant in that state.

In this example, whilst the decision to invest in State S is taken in the light of the benefits provided by the State R-State S tax convention, it is clear that the principal purposes for making that investment and building the plant are related to the expansion of R Co's business and the lower manufacturing costs of that country. In this example, it cannot reasonably be considered that one of the principal purposes for building the plant is to obtain treaty benefits. In addition, given that a general objective of tax conventions is to encourage cross-border investment, obtaining the benefits of the State R-State S convention for the investment in the plant built in State S is in accordance with the object and purpose of the provisions of that convention.

Hence, from the reading of all the above, it becomes evident that a person has to prove that one of the principal purposes of an arrangement or transaction is not to obtain benefit in order to pass the PPT rule. As evident, the above is an objective rule which would may place the tax payers in genuine hardships if not implemented efficiently. Further, once an arrangement or benefit does not get through the PPT rule, the treaty benefit sought out would be denied. Unlike in GAAR, the arrangement would not be recharacterized.

SLOB RULE

Article 7(6) deals with SLOB Rule. The provisions which detail the SLOB Rule are contained in Article 7(8) to 7(13). SLOB Rule states that the resident of a CJ shall not be entitled to a benefit that would otherwise be accorded by CTA unless such resident is a 'qualified person' at the time that the benefit would be accorded. However, the SLOB rule carves out certain exceptions for extending certain benefits even though the resident does not become a 'qualified person'. Such exceptions would be as under:

- to determine the residence of a person other than an individual which is a resident of more than one CJs by reason of the CTA that defines a resident of CJ
- which provide that a CJ will grant to an enterprise of that CJ a corresponding adjustment follow ing an initial adjustment made by other CJ, in accordance with CTA, to the amount of tax charged in first-mentioned CJ on the profits of the associated enterprise
- which allows residents of a CJ to request that the competent authority of that CJ consider cases of taxation not in accordance with CTA.

A resident of CJ to a CTA shall be a qualified person at a time when a benefit would otherwise be accorded by CTA if, at that time, the resident is:

- an individual
- that CJ, or a political subdivision or local authority thereof, or an agency or instrumentality of any CJ, political subdivision or local authority
- a company or other entity, if the principal class of its shares is regularly traded on one or more recognised stock exchanges
- a person, other than individual, that is a non-profit organisation of a type that is agreed to by the CJs through an exchange of diplomatic notes or
- a person, other than individual, that is an entity or arrangement established in that CJ that is treated as a separate person under the taxation laws for specified persons
- a person, other than individual, if, on at least half the days of a twelve-month period that includes the time when the benefit would otherwise be accorded, persons who are residents of that CJ and that are entitled to benefits of CTA under above mentioned paras own, directly or indirectly at least 50% of the shares of that person

Only if a person satisfies the definition of 'qualified person', then only they shall be considered as 'resident' of such state and accordingly be in a position to access the treaty benefits.

NOT A QUALIFIED PERSON – BUT RESIDENT IS ENGAGED IN ACTIVE CONDUCT OF BUSINESS:

However, a resident of CJ to a CTA with respect to an item of income derived from other CJ shall be eligible for treaty benefits despite of the fact that he does not satisfy the definition of 'qualified person', if such resident is engaged in active conduct of business in the first-mentioned CJ and the income derived from other CJ emanates from, or is incidental to, that business. However, the phrase 'active conduct of business' shall not include the following activities or any combination thereof:

- operating as a holding company
- providing overall supervision or administration of a group of companies
- providing group financing (including cash pooling) or
- making or managing investments except entity is bank, insurance company or security dealer

Action 6 Report states that an entity generally will be considered to be engaged in active conduct of business only if persons through whom the entity is acting (such as officers or employees of a company) conduct substantial managerial and operational activities.

However, as stated above, the phrase 'active conduct of business' cannot be applied for entities which are operating as holding company or a company which provides overall supervision or administration of a group of companies or company which engage in group financing activities. All these activities do not qualify the active conduct test and accordingly may be denied treaty benefit if such companies could not demonstrate eligibility to treaty benefits under other alternatives.

NOT A QUALIFIED PERSON, NO ACTIVE CONDUCT OF BUSINESS – BUT RESIDENT ENGAGED IN SUBSTANTIAL OR COMPLIMENTARY THROUGH CONNECTED PERSONS:

Further, if a resident of a CJ to a CTA derives an item of income from a business activity conducted by that resident in the other CJ, or derives an item of income arising in other CJ from a **connected person**[8] , the resident would be deemed to be in active conduct of business with respect to such item only if the business activity carried on by the resident in the first-mentioned CJ to which the item is related is substantial in relation to the same activity or a complimentary business activity carried on by the resident or such connected person in the other CJ. In such case, the activities conducted by connected person shall be deemed to be conducted by the resident of the first-mentioned CJ.

A business activity generally will be considered to form part of business activity conducted in state of source if the two activities involve the design, manufacture or sale of same products or type of products or for provision of similar services. Let us understand the said concept by referring to certain examples provided in Action 6 Report:

Eg #1	***A Co operates a large research and development facility in State A that licenses intellectual property to affiliates worldwide, including B Co. A Co owns 100 per cent of the shares of B Co, a company resident of State B. B Co and other affiliates then manufacture and market the A Co designed products in their respective markets. Since the activities conducted by A Co and B Co involve the same product lines, these activities are considered to form a part of the same business.***
Eg #2	***C Co is a company resident of State C that operates an international airline. D Co is a wholly-owned subsidiary of C Co resident of State D. D Co operates a chain of hotels in State D that are located near airports served by flights operated by C Co. C Co frequently sells tour packages that include air travel to State D and lodging at D Co's hotels. Although both companies are engaged in the active conduct of a business, the businesses of operating a chain of hotels and operating an airline are distinct businesses. Therefore D Co's business does not form a part of C Co's business. D Co's business, however, is considered to be complementary to C Co's business because these two businesses are part of the same overall industry (travel) and the links between these activities tend to make them interdependent.***
Eg #3	***E Co is a company resident of State E. E Co produces and sells flowers in State E and other countries. E Co owns all the shares of F Co, a company resident of State F. F Co is a holding company that is not engaged in a business. F Co owns all the shares of three companies that are resident of State F: G Co, H Co and I Co. G Co distributes E Co's flowers under the E Co trademark in State F. H Co markets a line of lawn care products in State F under the E Co trademark. In addition to being sold under the same trademark, G Co's and H Co's products are sold in the same stores and sales of each company's products tend to generate increased sales of the other's products. I Co imports fish from State E and distributes it to fish wholesalers in State F. The business of G Co forms a part of the business of E Co, the business of H Co is complementary to the business of E Co, and the business of I Co is neither part of nor complementary to that of E Co.***

[8] Para 13 (e) states that two persons shall be 'connected persons' if one owns directly or indirectly, at least 50% of beneficial interest in the other (or in case of company, at least 50% of aggregate vote and value of company's share) or another person owns, directly or indirectly, at least 50% of beneficial interest (or in case of company, at least 50% of aggregate vote and value of company's share) in each person, in any case, a person shall be connected to another if, based on all relevant facts and circumstances, one has control of other or both are under control of same person or persons.

NOT A QUALIFIED PERSON, NO ACTIVE CONDUCT OF BUSINESS, NO SUBSTANTIAL/COMPLIMENTARY – RESIDENT IS QUALIFIED THROUGH EB TEST – DERIVATIVE BENEFITS:

Further, a resident of CJ to CTA that is not a qualified person shall also be entitled a benefit that would otherwise be accorded by CTA with respect to an item of income if, on at least half of days of any 12 month period that includes the time when the benefit would otherwise be accorded, persons that are **equivalent beneficiaries**[9] own, directly or indirectly, at least 75% of the beneficial interest of resident.

The resident can claim the treaty benefit, if it can demonstrate that if the equivalent beneficiaries were entitled for such treaty benefits in absence of such resident. The term equivalent beneficiaries to mean such persons who are entitled to treaty benefits if they are incorporated in the said CJ but for the resident who is trying to claim the treaty benefit. If such EB owns directly or indirectly at least 75% of the beneficial interest of resident for at least half of days of any 12-month period, then such resident would be eligible for claiming treaty benefits.

Action 6 Report also stipulates the base erosion test in addition to the ownership test. However, the provisions of MLI do not opt them. Hence, if the resident qualifies for ownership test, then it can access the treaty benefit.

NOT A QUALIFIED PERSON, NO ACTIVE CONDUCT OF BUSINESS, NO SUBSTANTIAL/COMPLIMENTARY, NO DERIVATIVE BENEFITS – RESIDENT IS ELIGIBLE THROUGH MAP – DISCRETIONARY RELIEF:

If a resident of CJ to CTA is neither a qualified person nor entitled to benefit by virtue of active conduct of business or equivalent beneficiary, the competent authority of the other CJ may nevertheless, grant the benefits of CTA or benefits with respect to certain item of income, taking into the account of object and purpose of CTA, but only if such resident demonstrates to the satisfaction of such competent authority that it satisfies the PPT rule.

The resident failing all the tests laid above can still access benefit of a treaty if it can demonstrate that the granting of such benefit is one of the purposes of CTA. However, the resident has to demonstrate that it clears the PPT rule and accordingly be eligible for such treaty benefit.

SUMMING UP:

From the above discussion, it is evident that the resident of a CJ, the resident has to adopt the following steps to access the treaty benefits under SLOB rule:

- Evaluate whether it is a ‘qualified person’ or not. If it satisfies the definition of ‘qualified person’, then it can access the treaty benefits subject to passing of PPT Rule.

- If it does not satisfies to be a ‘qualified person’, then it has to examine, whether it can demonstrate that it is engaged in active conduct of business in that CJ and the income derived from other CJ is incidental to such business. Then, it can access the treaty benefit [Active Conduct of Business Test]

- If it does not satisfies the active conduct of business test but it can demonstrate that the income derived from other CJ is from a connected person from a business activity and such business activity is substantial the same activity or complimentary activity to the business carried on by the resident [Active Conduct of Business Test]

- If it cannot demonstrate that it is engaged in active conduct of business or income is from connected persons relating to substantially the same activity, then it can access the treaty benefit if it is held by equivalent beneficiaries at least to the tune of 75% for a period not less than half of days in 12-month period [Derivative Benefit Test]

[9] Para 13(c) defines ‘equivalent beneficiary’ (EB) means any person who would be entitled to benefits with respect to an item of income accorded by CJ to a CTA under domestic tax law of that CJ, the CTA or any other international instrument which are equivalent to, or more favourable than, benefits to be accorded to that item of income under CTA, for purposes of determining whether a person is an EB with respect to dividends, the person shall be deemed to hold the same capital of company paying dividends as such capital the company claiming the benefit with respect to dividends holds.

- If it is not held by the equivalent beneficiaries for a specified time limit, then the resident has only option to avail the treaty benefit by reaching out to competent authorities that the grant of such benefit is within the purposes and object of CTA subject to satisfaction of PPT rule [Discretionary Relief Test]

- If the same cannot be demonstrated by resident, then it cannot access the treaty benefit since it has failed to pass the SLOB rule.

INTERPLAY OF ARTICLE 7 VIS-À-VIS CTA

Now that we have understood the PPT rule and SLOB rule, let us proceed to examine how Article 7 interacts with existing provisions of CTA and India's position on the same.

Article 7 has 17 paras. Para 1 to Para 5 deal with PPT Rule. Para 6 to Para 14 deal with SLOB Rule. Para 15 to Para 17 deal with notification and reservations on PPT and SLOB Rule.

INDIA'S POSITION ON PPT RULE:

Para 15(a) states that a CJ can reserve its right not to apply Article 7(1) to its CTA on the basis that it intends to adopt a combination of DLOB provision and either rules to address conduit financing structures or a PPT, thereby meeting the minimum standard for preventing treaty abuse during their bilateral negotiations. Para 15(b) states that a CJ can reserve its right not to apply Article 7(1) or 7(4) to its CTA that already contains provisions that deny all benefits that would otherwise be provided under CTA where principle purpose or one of the principal purposes of any arrangement or transaction is to obtain a benefit[10] .

India has not reserved any right in application of provisions of Article 7(1). However, since Para 17(a) allows a party making a notification include a statement that while such party accepts the application of Article 7(1) alone as an interim measure, it intends where possible to adopt a LOB provisions, in addition to or replacement of PPT envisaged in Article 7(1).

As stated earlier, India has notified the depository that it intends to opt for Article 7(1) as interim measure and it intends where possible to adopt a LOB provision, in addition or replacement of Article 7(1), through bilateral negotiation. Article 7(2) states that the provisions of Article 7(1) will apply in place or in absence of provisions of CTA that deny all or part of the benefits that would otherwise be provided if principal purpose is not to obtain benefit. Article 7(17)(a) states that each CJ which do not make reservation in terms of Para 15(a) shall notify the depository, whether each of such CTAs which contain provisions as stated in Article 7(2) along with such para numbers. Where all CJs have notified the same para of the CTAs, then the provisions of such para shall be replaced with text of Article 7(1)[11] . In other cases, the language of Article 7(1) would supersede the provisions of CTA only to the extent of incompatibility with Article 7(1)[12] .

CJs making a notification that provisions of Article 7(1) would be applicable for CTAs can also choose to opt for the provisions of Article 7(4), which states that a resident having failed to PPT rule can invoke MAP to seek the benefit offered by CTA if it can demonstrate that granting of such benefit is within the purpose of CTA. However, India has not notified the provisions of Article 7(4) and accordingly discretionary relief qua PPT rule is not possible. However, if the other CJ makes a notification of Article 7(4), the resident of that CJ can reach out to their competent authorities for grant of benefits which are in the nature of foreign tax credits. For example, Singapore has chosen to opt for Article 7(4), whereas India has not chosen. Hence, resident of Singapore can reach out to their competent authorities for discretionary relief which Singapore as a resident state can provide. However, such resident cannot approach the competent authorities for grant of any benefit under discretionary relief, since India has not chosen Article 7(4).

[10] See Italy's position on MLI – It uses Para 15(b) to reserve its right to apply Article 7(1) in entirety for specific CTAs on the premise that such CTAs do contain PPT rule. Some of the specific CJs Italy notifies are Hongkong, Iceland, Kuwait, Saudi Arabia, Qatar.
[11] See India – Finland Treaty for example.
[12] See India – Singapore Treaty for example.
[13] Russia has reserved its right to apply SLOB qua China, US and Ecuador using the Para 15(c). Italy reserve its right qua US.

INDIA'S POSITION ON SLOB RULE:

As stated earlier, Article 7(6) deals with SLOB provisions. Any CJ which wants to opt SLOB can notify the depository under Para 17(c). Since SLOB is an optional provision, it shall apply only if both the CJs opt for it. Further, a CJ can notify the depository that pursuant to provisions of Para 15(c) that SLOB shall not be applicable since the CTAs already have similar provisions .

Para 16 states that a CJ which has opted for SLOB can reserve its right in not applying the entire Article 7 with other CJ which has not chosen to opt for SLOB. In other words, a CJ which has opted for both PPT and SLOB can chose not to apply PPT qua other CJ, if the other CJ does not opt for SLOB. However, the other CJ can opt for the arrangement as mentioned in Para 7(a) or Para 7(b) and be entitled for PPT.

Para 7(a) states that SLOB provisions shall be applicable to all CJs if they notify the depository that they would opt under such provision. Hence, all CJs which opt for Article 7(a), the SLOB provisions would apply and accordingly PPT and SLOB shall continue to apply. This is as good as the CJs has opted for application of SLOB vide Article 6.

Para 7(b) provides that CJs can continue not to opt for SLOB provision, if they allow other CJs to opt for SLOB. This is also called asymmetrical application. In this method, the CJ which opts for PPT and SLOB shall apply both the tests and CJs which opt only for PPT shall apply only PPT.

By opting to any of the above methods, the CJ can ensure that other CJ will not block from applicability of PPT by using Article 16.

India has opted for SLOB provision pursuant to Article 6 and from Article 8 through Article 13. Accordingly, all CJs which have opted either under Para 7(a) or Para 7(b) of Article 7 or Article 6 against India, the SLOB provisions along with PPT would apply. As stated earlier certain CJs can opt out from SLOB (if the other CJ does not notify the non-applicability of entire Article 7 because the first-mentioned CJ has not opted for SLOB, there would be no harm since PPT can be applied) and in such cases, SLOB shall not be applicable.

To put it simple, SLOB will apply in the following circumstances:

- Both the CJs have opted for Article 6 – SLOB shall apply[14]
- CJ has opted for Article 6 and other CJ opted for Para 7(a) – SLOB shall apply for both CJs[15]
- CJ has opted for Article 6 and other CJ opted for Para 7(b) – SLOB shall apply for opted CJ[16]

SLOB shall not apply in the following circumstances:

- CJ has opted for Article 6 and other CJ has not opted for Article 6/Para 7(a)/(b) – SLOB shall not apply[17]

[14] Russia has opted for SLOB for CJs other than China, Ecuador and US.
[15] Denmark, Iceland
[16] Greece
[17] Singapore, Poland, Albania, Australia, Belgium, Canada, Cyprus, Finland, Israel, Italy, Japan, Korea, UK

INTERPLAY OF ARTICLE 7(1) WITH DOMESTIC TAX PROVISIONS

Article 7(1) deals with PPT rule. As stated earlier, India has opted for PPT Rule. Hence, residents of other jurisdictions claiming the treaty benefit has to pass the PPT rule and then only then can access the treaty benefit. Let us assume, a resident of State M is trying to access the treaty benefit between India and M. Further assuming that such resident has satisfied the PPT Rule as per India – M Tax Treaty. Will this would be enough to grant the resident of State M such treaty benefit? Or Will such resident also satisfy the domestic anti-abuse provisions namely GAAR? In other words, would a resident be asked to pass both the PPT and GAAR or is any one among them would do? Let us proceed to examine this.

Section 90 of ITA deals with powers of Central Government to enter into an agreement with Government of any country outside India for granting the relief from double taxation. Section 90(2) states that where Central Government has entered into an agreement with Government of any country outside India for granting the relief or avoidance of double taxation, then, in relation to assessee to whom such an agreement applies, the provisions of ITA shall apply to the extent they are beneficial to him. In other words, a resident of CJ can choose the provisions of domestic tax law or tax treaty whichever is beneficial to him. Further, detailing, in our example above, resident of State M can choose the PPT or GAAR whichever is beneficial to him in light of Section 90(2) of ITA. This would have been the possibility if there is no Section 90(2A). Section 90(2A) has been inserted with effective from 1st April 2016 stating that notwithstanding anything contained in Section 90(2), the provisions of Chapter X-A (GAAR) shall apply to the assessee even if such provisions are not beneficial to him.

In light of the specific restriction envisaged vide Section 90(2A), it becomes not possible for the resident of State M to only satisfy PPT and leave GAAR. Hence, such resident has to satisfy both PPT and GAAR. The next question would be, whether GAAR is wider than PPT? Let us proceed to examine the same.

GAAR under the ITA states that notwithstanding to anything contained in the ITA, an arrangement entered by assesse may be declared to be an impermissible avoidance arrangement and the consequence in relation to tax arising therefrom may be determined accordingly. An impermissible avoidance arrangement means an arrangement, the main purpose of which is to obtain tax benefit and it contains one of the four tainted elements.

When GAAR is juxtaposed with PPT, it is evident that whilst GAAR deals with 'main purpose' of an arrangement is to obtain benefit, PPT deals with 'one of the principal purposes'. Hence, the fight is between 'main purpose' vis-à-vis 'one of the principal purposes'. Hence, it would be evident that PPT is much wider than GAAR and an arrangement or transaction which normally gets through PPT should also normally go through GAAR except the tax authorities in India tend to see it differently. The next question would be what would be the consequences if an arrangement gets through PPT but not GAAR? Let us proceed to examine this.

If an arrangement gets through PPT but not GAAR, the tax authorities apart from denying the treaty benefit, may tend to recharacterize the arrangement and subject the same to tax accordingly. However, the above is subjected to certain approvals and satisfaction of threshold conditions. While an arrangement which would not satisfy PPT would be denied at the most treaty benefit, may have larger consequences or implications if it fails to get through GAAR.

[18] Because GAAR is forming part of domestic tax law
[19] Section 96 of ITA

ARTICLE 8:
DIVIDEND TRANSFER TRANSACTIONS

Dividend Transfer Transactions are also one of the treaty abusive provisions which are widely used by MNEs. The abuse which happens through these provisions is that a resident will be created in a CJ, where such CJ has treaty benefit of no dividend withholding or lower withholding from the source CJ. By interposing a resident in the first-mentioned CJ, the beneficiary will be in a position to access the no or low rate of withholding tax which is otherwise not eligible. In order to counter such abusive practices, Article 8 of MLI would come into play.

Article 8(1) states that where provisions of CTA that exempts dividend paid by company which is a resident of CJ from tax or that limit the rate at which such dividends may be taxed, provided that the beneficial owner or recipient is a company which is resident of another CJ and which owns, holds or controls more than certain amount of capital, shares, stock, voting power, voting rights or similar ownership interests of company paying dividend, shall apply only if ownership conditions described in those provisions are met throughout a 365 day period that includes the day of payment of dividend.

The only exception to the 365-day rule is that no account shall be taken of changes in ownership that would directly result from the corporate reorganisation, such as merger or divisive reorganisation, of the company that holds shares or pays dividends.

Article 8(3) states that a CJ can reserve its right in entirety not to apply the provisions of Article 8 to its CTA. The convention also vide Article 8(3)(b) gives right to CJ from reserving the applicability of entirety of this article if the CTA has already a provision which include:

- A minimum holding period or
- A minimum holding period shorter than 365-day period or
- A minimum holding period longer than 365-day period.

INDIA'S POSITION:

India has notified reservation qua Portugal Treaty vide Article 8(3)(b)(iii), since such treaty vide Article 10(2) contains much longer minimum period than 365 days. Further, India notifies that for the CJs namely Bangladesh, Canada, Denmark, Italy, Nepal, Singapore, USA and others, the provisions of Article 8(1) shall be made applicable. If the other CJs also notify the same provision, then the provision of Article 8(1) shall be applicable[20] . If not, the provisions of Article 8(1) shall not apply[21].

[20] Canada, Denmark are some examples for CJs which have notified India for the purposes of Article 8(1).
[21] Italy, Singapore are some example for CJs which have reserved for non-applicability of Article 8.

ARTICLE 9:

CG FROM ALIENATION OF SHARES/INTERESTS OF ENTITIES DERIVING THEIR VALUE PRINCIPALLY FROM IMMOVABLE PROPERTY

This article also addresses the treaty abuse. Article 9(1) states that the provisions of a CTA which provides that any gains derived by resident of CJ from the alienation of shares or other rights of participation in an entity may be taxed in the other CJ provided that the shares or rights derived more than a certain part of their value from immovable property (real property) situated in other CJ or provided that more than a certain part of property of the entity consists of such immovable property (real property):

- shall apply if the relevant value threshold is met at any time during the 365 days preceding the alienation and
- shall apply to shares or comparable interests, such as interest in a partnership or trust (to the extent such shares or interests are not already covered) in addition to any shares or rights already covered by provisions.

The convention also allows for a CJ to choose the threshold as 50% in place of 'more than certain part of property the entity consists of such immovable property' vide Article 9(4). A CJ which opts for Article 9(4) shall notify the depository and shall be applicable only if the other CJ has also notified the same. Once both the CJs notify the applicability of Article 9(4), then provisions of Article 9(1) shall not apply. Further, the CJ can also reserve its right from non-applicability of these provisions if the CTAs already contain similar provision.

A CJ may reserve its right from applicability of the entire article and notify the depository the same. In such cases, the provisions of Article 9 shall not be applicable[22]. Further, the CJ can also reserve its right from non-applicability of provision containing the 365-day test and notify the depository of the same. Also, CJ can reserve right stating that already their CTAs contain a provision that includes a period for determining whether relevant value threshold was met. In such case, the provisions of Article 9(1)(a) shall not be applicable. The CJ can similarly reserve the right of non-applicability of provisions to entities other than companies. Also, CJ can reserve right stating that already their CTAs contain a provision as described in Para 1(b).

INDIA'S POSITION:

India has chosen for option under Article 9(4). Accordingly, CJs which have notified the same provision qua India, then accordingly provisions of Article 9(4) shall apply[23] and provisions of Article 9(1) shall not apply in such cases. In other cases, where CJ has opted for Article 9(4) but has not specified the provision, the provisions of Article 9(4) shall supersede with the existing provisions[24].

For almost 71 CJs, India has opted to apply Article 9(1) and the provisions of Article 9(1) shall be replaced if other CJs also notify the same provision[25]. Otherwise, the provisions of Article 9(1) shall supersede the provisions of existing article.

22 Qatar has reserved from applicability of entire Article 9. Hence, for India-Qatar, Article 9(1) or 9(4) would not apply.
23 Singapore is also reserved from applicability of entire Article 9.
24 Italy has also chosen Article 9(4). Accordingly, for India – Italy treaty, Article 9(4) shall be applicable. Article 9(1) shall not apply. Other examples would be Canada.
25 Russia has opted for Article 9(4) but has not notified any provisions. Hence, for India – Russia provisions of Article 9(4) supersede the existing language in CTA. Australia has notified the same provision qua India. Accordingly, for India – Australia treaty, Article 9(1) shall apply.

ARTICLE 10:
ANTI-ABUSE RULE FOR PEs SITUATED IN THIRD JURISDICTIONS

This article deals with double non-taxation or low taxation for certain incomes which are derived from PEs situated in third jurisdiction. Resident of CJs plan to transfer certain incomes to a PE which is situated in a source jurisdiction which offers no or low rate of tax. Said income from PE would be exempted in the resident jurisdiction (generally and primarily on the belief that the said income is taxable in the source jurisdiction and for the purposes of elimination of double taxation the method chose by resident jurisdiction is exemption method as against tax credit method). However, since the incomes are transferred to PEs in jurisdiction with no or low tax, there would be no or very low tax in the source jurisdiction. By adopting this, the income is not taxable or less taxable in both the jurisdictions leading to treaty abuse.

In order to prevent such treaty abuse, the Article 10 states that where an enterprise of CJ to CTA derives income from the other CJ and the first mentioned CJ treats such income as attributable to PE of enterprise situated in a third jurisdiction and profit attributable to PE are exempt from tax in the first-mentioned CJ, the benefits of CTA shall not apply to any item of income on which the tax in third jurisdiction is less than 60% of the tax that would be imposed in the first mentioned CJ on that item of income if that PE were situated in the first mentioned CJ. In such case, any income to which provisions of this paragraph apply shall remain taxable according to domestic law of the other CJ, notwithstanding to any other provisions of CTA.

However, the above provision shall not be applicable if the income derived from other CJ is derived in connection with or is incidental to the active conduct of business carried on through the PE (other than those items which are excluded from the active conduct of business test while dealing with SLOB Rule). Further, the CJ shall also be eligible for accessing the treaty benefit even the tax rate is less than 60% of the tax rate which would otherwise applicable to such income in resident CJ, if it reaches out to competent authority of other CJ. The competent authorities may grant such benefit if they think granting such benefit is justified.

The article allows a CJ to reserve the right from non-applicability of this article in entirety to its CTA. The CJ can also reserve right for non-applicability if CTAs already contain such provisions. Further, CJs can also reserve the right for this article to apply only to its CTA which contains the provisions contained in this Article.

INDIA'S POSITION:

India has not notified its position on this article. Hence, any CJ which has opted for provisions of Article 10(1), the same shall be applicable qua India and the provisions of Article 10(1) to 10(3) shall stands superseded and accordingly applicable. Also, a CJ which has notified its position on the applicability of provision, the provisions of Article 10(1) to Article 10(3) shall be applicable[26].

[26] Japan, Kenya, Mexico are some examples.

ARTICLE 11:

APPLICATION OF TAX AGREEMENTS TO RESTRICT A PARTY'S RIGHT TO TAX ITS OWN RESIDENTS

This article aims to remove any doubt which certain provisions of CTA would suggest that the treaty restricts the right of CJ to tax its residents. Hence, Article 11 acts as 'saving clause' preserving the right of CJ to tax its own residents.

Accordingly, Article 11(1) states that a CTA shall not affect the taxation of CJ of its residents, except with respect to benefits granted under provisions of CTA which are as under:

- which require the CJ to grant to an enterprise of that CJ a correlative or corresponding adjustment following an initial adjustment made by the other CJ, in accordance with CTA, to the amount of tax charged in the first mentioned CJ on the profits of a PE or associated enterprise
- which may affect how that CJ taxes an individual who is a resident of that CJ if that individual derives income in respect of services rendered to other CJ or a political subdivision or local authority or other comparable thereof
- which may affect how that CJ taxes an individual who is a resident of that CJ if that individual is also a student, business apprentice or trainee or a teacher, professor, lecturer, instructor, research scholar who meets the conditions of CTA
- which require that CJ to provide a tax credit or tax exemption to residents of that CJ with respect to income that the other CJ may tax in accordance with the CTA (including profits that are attributable to a PE situated in that other CJ in accordance with CTA)
- which protects residents of that CJ against certain discriminatory taxation practices by that CJ
- which allows residents of CJ to request that the competent authority of that or either of CJ consider cases of taxation not in accordance with the CTA
- which may affect how CJ taxes an individual who is a resident of that CJ when that individual is a member of diplomatic mission, government mission or consular post of the CJ
- which provides that pensions and similar payments, annuities, alimony payments or other maintenance payments arising in the other CJ shall be taxable only in that other CJ or
- which other expressly limit a CJ's right to tax its own residents or provide expressly that the CJ in which an item of income arises has the exclusive right to tax that item of income.

The above are generally specified in Paragraph 3 of Article 1 of OECD Model Convention. Apart from the above restrictions, there cannot be any restrictions which might restrict the CJs right to tax its own residents. A CJ can reserve the right of non-applicability of entire Article to its CTAs. Alternatively, CJ can reserve if the CTAs already contain the provisions reflecting the same as contained above.

INDIA'S POSITION:

India has not notified its position to depository. Accordingly, Article 11 shall apply where other CJs have also not notified[27] or notified but not mentioned any of the existing provisions qua India[28], then the provisions of Article 11 shall be applicable. If any of the CJs has notified its reservation from the applicability of Article 11, then provisions of Article 11 shall not apply qua India[29].

[27] Armenia has also not notified its position. Accordingly, provisions of Article 11 shall supersede existing provisions in CTA to the extent that they are incompatible with language of Article 11(1).

[28] Australia has notified certain CJ which contain similar language as stated in Article 11(1). India is not one among them.

[29] Albania has reserved its right from applicability of Article 11 in entirety. Accordingly, for India – Albania Treaty, the provisions of Article 11 shall not apply.

ARTICLE 12:

ARTIFICIAL AVOIDANCE OF PE STATUS THROUGH COMMISSIONAIRE ARRANGEMENTS AND SIMILAR STRATEGIES

This article deals with artificial avoidance of PE status of an enterprise by establishing a commissionaire model. The damage this abuse strategy can inflict is explained by OECD in its Action 7 Report by taking an example.

X Co is a company resident of X. It specialises in the sale of medical products. Unitl 2000, these products are sold to clinics and hospitals in State Y by Y Co, a company resident of State X. X Co and Y Co are members of the international group.

In 2000, the status of Y Co is changed to that of commissionaire following the conclusion of a commissionaire contract between the two companies. Pursuant to the contract, Y Co transfers to X Co its fixed assets, its stock and its customer base and agrees to sell in State Y the products of X Co in its own name, but for the account of and at the risk of X Co.

As a consequence, the taxable profits of Y Co in State Y are substantially reduced.

From the above example, it is evident by simply entering the commissionaire agreement, the profits of Y Co are substantially reduced from the normal profits to the commission income that it may earn from the X Co despite of the fact that activities prior and post the commissionaire agreement are same. By adopting this, X Co makes sure that tax burden has been reduced leading to erosion of base in State of Y.

In order to curb the above practices, Article 12 aims to amend the definition of PE. Article 12(1) states that notwithstanding the provision of CTA which define the term 'PE', where a person is acting in CJ on behalf of an enterprise and, in doing so, habitually conclude contracts, or habitually plays the principal role leading to the conclusion that are routinely concluded without material modification by the enterprise, and these contracts:

- in the name of the enterprise or
- for the transfer of ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use or
- for the provision of services by that enterprise

that enterprise shall be deemed to have a PE in that CJ in respect of any activities which that person undertakes for the enterprise unless these activities, if they were exercised by the enterprise through fixed place of business does not amount to constitute PE for such enterprise.

Further, the Article 12 vide Para 2 states that Para 1 shall not be applicable to a person who acting on behalf of another enterprise in another CJ and carries on business in his CJ as an independent agent and acts for the enterprise in the ordinary course of that business. However, a person who acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related[30], that person shall not be considered to be an independent agent.

30 Definition of a 'Person Closely Related to an Enterprise' is as per Article 15 of MLI.

Hence, from the above, it is evident that, in the following situations, the commissionaire arrangement would trigger a PE status in other CJ:

- Person who acts on behalf of an enterprise
- Person who does for other enterprise
    - habitually conclude contracts
    - habitually play the principal role leading to conclusion of contracts
- If activities are to constitute PE if other enterprise conducts the same activities qua fixed place
- Person who does not act an independent agent in his ordinary course of business

Let us now proceed to understand each of the situation in detail as under.

PERSON WHO ACTS ON BEHALF OF AN ENTERPRISE

Article 12(1) covers only commissionaire arrangements in which the other person acts on behalf of the enterprise. It does not cover situations where the agent acts on his own behalf. Hence, a person who acts as a distributor of products in a particular market and, in doing so, sells to customers products that it buys from an enterprise (may be also associated enterprise). In this case, it is neither acting on behalf of that enterprise nor selling property that is owned by that enterprise since the property sold to customers is owned by such person and not the enterprise. Hence, such distributors (unless it is a case of 'low-risk distributor') will not fall under the purview of Article 12(1).

PERSON WHO HABITUALLY CONCLUDES CONTRACTS FOR OTHER ENTERPRISE

Only such persons who habitually concludes the contract for the other enterprises are covered under the Article 12(1). The phrase 'concludes contract' has to be understood to mean how under the relevant law governing contracts, a contract is considered to have been concluded by a person. A contract may be concluded without any active negotiation of the terms of that contract, where the law governing contracts provide that a contract is concluded by reason of a person accepting, on behalf of enterprise, the offer made by a third party to enter into a standard contract with the enterprise. Further, a person who negotiates in a CJ all elements and details of contract in a way binding on the enterprise can be said to conclude the contract in that CJ even if that contract is signed by another person outside that CJ. Hence, it has to be evaluated whether such person is engaged in habitually concluding contract for other enterprise based on the understanding of the phrase 'concludes contract' in the above sense.

PERSON WHO HABITUALLY PLAY THE PRINCIPAL ROLE LEADING TO CONCLUSION OF CONTRACTS

The phrase 'habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by enterprise' is aimed at situations where conclusion of contract directly results from the actions that the person performs in a CJ on behalf of enterprise even though, under relevant law, contract is not concluded by that person in that CJ. As stated earlier, this is being done essentially to rule out the possibility of the PE status. Seen from the perspective of substance over form, the substance that conclusion of contract has essentially done by the person on behalf of enterprise, whereas the form was to conclude in the other CJ. Hence, going by the form, the person did not actually conclude the contract and was demonstrating the tax authorities and courts that he does not exercise the power to conclude the contracts. This was being addressed now by stating that if the person who habitually plays the principal role leading to conclusion of contracts that are routinely concluded without material modification by enterprise are deemed to give a meaning that the person has an authority to conclude contracts de facto to trigger the PE of the other enterprise. An example from Action 7 Report would give a complete picture what the amended definition of PE intends to do.

R Co, a company resident of State R, distributes various products and services worldwide through its websites. S Co, a company resident of State S, is a wholly-owned subsidiary of R Co. S Co's employees send emails, make telephone calls to, or visit large organisations in order to convince them to buy R Co's products and services and are therefore responsible for large accounts in State S; S Co's employees, whose remuneration is partially based on the revenues derived by R Co from the holders of these accounts, use their relationship building skills to try to anticipate the needs of these account holders and to convince them to acquire the products and services offered by R Co. When one of these account holders is persuaded by an employee of S Co to purchase a given quantity of goods or services, the employee indicates the price that will be payable for that quantity, indicates that a contract must be concluded online with R Co before the goods or services can be provided by R Co and explains the standard terms of R Co's contracts, including the fixed price structure used by R Co, which the employee is not authorised to modify. The account holder subsequently concludes that contract online for the quantity discussed with S Co's employee and in accordance with the price structure presented by that employee. In this example, S Co's employees play the principal role leading to the conclusion of the contract between the account holder and R Co and such contracts are routinely concluded without material modification by the enterprise. The fact that S Co's employees cannot vary the terms of the contracts does not mean that the conclusion of the contracts is not the direct result of the activities that they perform on behalf of the enterprise, convincing the account holder to accept these standard terms being the crucial element leading to the conclusion of the contracts between the account holder and RCO.

IF ACTIVITIES ARE TO CONSTITUTE PE IF OTHER ENTERPRISE CONDUCTS THE SAME ACTIVITIES QUA FIXED PLACE

The article has also an exclusion to such arrangements where if the same activities are conducted by the enterprise itself from a fixed place of PE, the same would not trigger a PE. In other words, certain activities which are conducted by an enterprise through a fixed place of PE would not constitute an agency qua such fixed place PE. Such activities are generally mentioned in Article 5(3) of OECD Model Convention like the preparatory or auxiliary activities. Hence, if the commissionaire arrangement is aimed at receiving such services, then the amended definition of PE would not include such arrangements in the definition of PE. This is to ensure that if the activities of enterprise in another CJ does not trigger an agency PE qua certain activities, the same has to be the rule even such activities are intended to be done through commissionaire arrangements.

PERSON WHO DOES NOT ACT AN INDEPENDENT AGENT IN HIS ORDINARY COURSE OF BUSINESS

Article 12(2) states that the provisions of Article 12(1) shall not apply if the person acting on behalf of another enterprise is acting in the capacity of independent agent in his ordinary course of business. The status of independent agent gets impaired if such agent performs services exclusively or almost exclusively on behalf of one enterprise or closely related enterprises. Whether an agent is dependent or independent depends on the extent of obligations which the person has vis-à-vis the enterprise. If the person commercial activities for enterprise are subjected to comprehensive control by it, then the independence is doubtful. Further, the other test that can be applied is, whether the person has actually taken the risk that would arise from the entire activity or the risk is completely mitigated by the enterprise. In the latter situation, it would be clear that the independence would not exist. One more factor would be number of principals the agent is representing. The fact that the agent represents number of principals would be one of the convincing factors regarding his independency. However, the conclusion whether an agent is dependent or independent cannot be concluded based on single factor. A complete study of the facts and circumstances should be taken into account to understand whether the services provided are in the capacity of dependent or independent.

Further, the status of independent is qualified if the agent provides exclusively or almost exclusively services to associated persons. The article does not state the quantum that would put the agent in the almost exclusively status to be out of the independent status. However, Action Report 7 of OECD hints that if an agent concludes for the enterprise to which it is not closely related represents less than 10% of all sales that it concludes as an agent acting for other enterprises, that agent should be viewed as acting 'exclusively or almost exclusively' on behalf of closely related enterprises.

INDIA'S POSITION:

Article 12(4) provides a CJ a right to reserve from the applicability of the entire provisions of Article 12. India has not opted for the same. Hence, the provisions of Article 12 shall be applicable if the other CJs also has opted for the same.

Further, India has notified 93 CJs and if the other CJs also notify the same provision, then the provisions of Article 12(1) shall be replaced to reflect the language of Article 12(1)[31]. If not, Article 12 (1) does not apply[32].

[31] Japan has notified the same provision. Hence, India – Japan Treaty, Article 12(1) and 12(2) gets replaced.
[32] Australia has reserved its right regarding applicability of Article 12. Hence, for India-Australia Treaty, Article 12 does not apply.

ARTICLE 13:

ARTIFICIAL AVOIDANCE OF PE STATUS THROUGH THE SPECIFIC ACTIVITY EXEMPTIONS

This article aims at elimination of artificial avoidance of PE status through the specific activity exemptions. Article 5(4) of 2014 OECD Model Convention/2011 UN Model Convention enlists certain activities according to which a fixed place of business in other CJ would not constitute a PE as long as such fixed place is used for carrying out said specific activities. The list of specific activities (referred commonly as 'specific activity exemption') are as under:

- the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the other enterprise
- the maintenance of stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery
- the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise
- the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise
- the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for other activities which have preparatory or auxiliary character for the enterprise

Hence, an enterprise when carries out any of the above activity or activities, the said enterprise does not fall under the definition of PE under the provisions of CTA. When the above list was first introduced, the activities covered above were generally considered to be of preparatory or auxiliary nature. Since activities which are preparatory or auxiliary in nature would not give raise to profits in other CJ, it was intended to exclude such activities from the definition of PE.

However, the way the business was conducted has significantly undergone a change after the advent of digitalisation. Post digitalisation, the activities which are listed above assumed the nature of core activities instead of the nature of preparatory or auxiliary. Let us take an example to understand the above.

X Co, a resident of State X is engaged in business of sale of electronic goods. Since X Co used to receive many orders from residents of State Y, X Co has opened up a warehouse in State Y and used to maintain the goods for the purposes of delivery. Such activity of X Co in opening of warehouse was considered as preparatory or auxiliary in nature and such warehouse would not constituted a PE for X Co in State Y.

Now, after X Co went digital, it can predict the orders from various countries and accordingly can plan the production and delivery. Following this, now X Co takes a warehouse in State Z in contemplation of huge demand from State Z. The said warehouse is large and employs number of employees so that the orders can be delivered in no time to residents of State Z, who orders such goods on online portal of X Co. Now, because of the digitisation of business of X Co and changed business model that bets on quicker delivery, the activity of warehousing which used to be preparatory or auxiliary activity has now become core activity which gives raise to profits. However, X Co may still state that such activities are in the nature of preparatory or auxiliary activities and continue to fit in the specific activity exemption, which would give raise to BEPS concerns.

Further, another problem that would arise because of the specific activity exemption is that fragmentation of the activities. When seen each activity in isolation, the said activity would be in the nature of preparatory or auxiliary. However, when seen on a cohesive basis, the activity may appear like core activity. The ease with which MNEs can fragment the activities making the source jurisdiction believe such activities are in the nature of preparatory or auxiliary which are in true form the core activities. By adopting to the fragmentation technique, MNEs escape from taxation in source jurisdiction which gives raise BEPS concerns.

Hence, in order to address the above issues, Article 13 stipulates the change of text to specific activity exemption stating that the overall activities should be in preparatory or auxiliary in nature and also proposes the anti-fragmentation rule. However, some CJs are of the view that the activities mentioned in specific activity exemption are intrinsically in the nature of preparatory or auxiliary nature and should not be subjected to the condition that they should be in the nature of preparatory or auxiliary and any inappropriate usage by CJ to such treaty can be handled through anti-fragmentation test. Considering the different viewpoints, Article 13 suggests selection of any two options namely Option A or Option B.

Option A is based on the test of Article 5(4) of 2014 OECD Model Convention/2011 UN Model Convention, whereas Option B is based on Para 30.1 of Commentary on Article 5.

Anti-Fragmentation Rule

Further, the Article also specifies that specific activity exemption which are deemed that they do not constitute PE shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same CJ and

- That place or other place constitute a PE for enterprise or closely related enterprise under the provisions of a CTA defining a PE or
- The overall activity resulting from the combination of the activities carried on by two enterprises at the same place, or by the same enterprise or closely related enterprise[33] at two places, is not of preparatory or auxiliary character

provided that business activities carried on by two enterprises at the same place, or by the same enterprise or closely related enterprise at the two places, constitute complementary functions that are part of a cohesive business operation.

INDIA'S POSITION:

India has opted for Option A and notified 93 CJs with respective provisions in the CTA, before the Depository.

A CJ can reserve its right from applicability of provisions of Article 13 in entirety. Accordingly, qua such CJs the provisions of Article 13 shall not be applicable[34]. Also a CJ can reserve its right to application of Option A to its CTAs that explicitly state that a list of specific activities shall be deemed not to constitute PE only if each of activities is of a preparatory or auxiliary character. Further, a CJ can also reserve its right from applicability of anti-fragmentation rule to its CTAs.

Option A or Option B once opted by the CJ and also notified by other CJ, the provisions gets replaced with respective options in place of language in existing CTAs[35]. However, if one CJ opts one option and other CJ opts another option, then the provisions of Article 13 shall not be applicable[36]. A CJ can opt for anti-fragmentation rule even it has not opted for any option under Article 13(1). If other CJ also opts for anti-fragmentation rule and notifies the depository, the said anti-fragmentation rule replaces the text in the CTAs. In other cases, the anti-fragmentation rule does not apply.

[33] Definition of a 'Person Closely Related to an Enterprise' is as per Article 15 of MLI.
[34] Even though India has notified Option A qua Canada, the latter has reserved its right from applicability of Article 13 on entirety. Hence, for India – Canada Treaty, the provisions of Article 13 shall not be applicable. Finland, Greece, Iceland, Korea are some examples of this type.
[35] India and Denmark have opted for Option A. Hence, provisions of Article 5(3) shall be replaced with Article 13(2). Egypt, Italy, Japan, Korea, New Zealand are some examples of this type.
[36] France has opted for Option B, whereas India has opted for Option A. Hence, none of the Options shall apply. Singapore is one more example for this kind.

ARTICLE 14:
SPLITTING-UP OF CONTRACTS

Splitting-Up of contracts is one of the treaty abusive strategy adopted by MNEs. For example, if a CTA specifies that a building site for a period more than 12 months would constitute a PE and to avoid such triggering of PE, a person who has received contract which would take 20 months, splits such contract with its subsidiary and award a part of the contract which would take 9 months. Hence, when seen in isolation, the holding company spent 11 months and subsidiary spent 9 months and none of them have exceeded the time limit of 12 months in the other CJ to trigger the building PE. However, when seen comprehensively, the time spent by subsidiary stands included in the time spent by holding and accordingly the total time spent would be 20 months which exceeds the 12-month threshold specified by CTA to trigger the PE. By adopting the split-up of contracts, the holding company resorts to avoid the trigger of PE which gives raise to BEPS concerns.

Article 14 addresses such concerns. Even though the above split-up can be avoided by resorting to PPT Rule (as stated in Article 7 of Convention), the CJs may want to adopt in such CTAs where there is no PPT Rule or where the CJ wants to make it absolutely clear. Further, the judicial principles developed in the source CJ may otherwise restrict the treaty benefit even in absence of Article 14 or Article 7, the CJs may choose the same for better clarity.

Article 14(1) states that for the sole purpose of determining whether period(s) referred to in a provision of CTA that stipulates a period(s) of time after which construction of building site, construction project, installation project or other specific project (for brevity ‘specific projects’) constitute a PE has been exceeded, the following period(s) shall be added to the aggregate period of time during which the first mentioned enterprise has carried on its activities for the specific projects or activities:

- where an enterprise carries on activities in the other CJ at a place that constitutes specific projects identified in CTA, or carries on supervisory or consultancy activities in connection with such a place, in the case of provision of CTA that refers such activities, and these activities are carried on during one or more periods of time that, in aggregate exceed 30 days without exceeding the period(s) referred to in relevant provisions of CTA and

- where connected activities are carried on in that other CJ at (or where, the relevant provisions of CTA applies to supervisory or consultancy activities, in connection with) the same building site, construction or installation project, or other place identified in relevant provision of CTA during different period of time, each exceeding 30 days, by one or more enterprises closely related[37] to the first-mentioned enterprise

INDIA’S POSITION:

Article 14(3)(a) provides a CJ to reserve its right from applicability of the provisions of Article 14. Unless such a notification is made by either of CJ, the provisions of Article 14 shall be applicable. If both CJs notify the same provision, the provision in the CTAs shall be replaced by the text of Article 14. If only one of the CJ has notified, then the provisions of Article 14 shall supersede the provisions of CTA only to the extent that those provisions are incompatible with Article 14.

India has not notified its position and has not reserved any right from applicability of Article 14. Hence, all CJs which has not reserved its right, the provisions of Article 14 shall be applicable by superseding[38]. Where CJs has reserved right from applicability of Article 14, the provisions of Article 14 shall not apply[39].

[37] Definition of a ‘Person Closely Related to an Enterprise’ is as per Article 15 of MLI.
[38] Australia, Denmark are some examples.
[39] Canada, Cyprus, Finland, Greece are some examples.

ARTICLE 16:
MUTUAL AGREEMENT PROCEDURE

Action 14 of BEPS Project deals with Mutual Agreement Procedure. This is a minimum standard for which every CJ has to agree and include in their CTAs. The said Action Report requires every jurisdiction to include Article 25 of OECD Model Convention in their tax treaties subject to the variations contained in the said Action Report. Article 16 would allow CJs to modify their CTAs, to incorporate the contents of Article 25(1) through (3) to the OECD Model Convention.

Article 16 contains 6 paras. Article 16(1) through (3) are based on text of Article 25(1) through 25(3) of OECD Model Convention which deals with minimum standard to allow a taxpayer to present a case to competent authority of either CJ. Para 4 deals with compatibility clauses, which reflect that members of the ad hoc group preferred to retain existing provisions relating to dispute resolution to the extent these provisions are consistent with Para 1 through 3, subject to reservations they may make in Para 5. Para 6 deals with notification to depository. The below table captures the Para 1 to Para 3 with compatibility clauses and reservations.

Para	Sentence	Deals	Compatibility	Reservation
1	1	Where a person considers that the actions of one or both CJ result or will result for that person in taxation not in accordance with CTA that person may, irrespective of remedies provided in domestic law of CJ, present the case to competent authority of either CJ.	in place or in absence of provisions of CTA that provides for Sentence 1 including provisions under which, if case presented by that person comes under provision of CTA relating to non-discrimination based on nationality, the case may be presented to competent authority of CJ which that person is national [Para 4(a)(i)]	A party can reserve right for Sentence 1 not to apply to its CTAs on basis that it intends to meet minimum standard for improving dispute resolution under BEPS Package by ensuring that its CTA provides for Sentence 1 and competent authority will implement a bilateral notification or consultation process with competent authority of other CJ for cases in which competent authority to which MAP case was presented does not consider the taxpayer's objection to be justified [Para 5(a)]
1	2	The case must be presented within 3 years from the first notification of action resulting in taxation not in accordance with provisions of CTA.	apply in place of provisions of CTA that provide that a case referred in Sentence 1 must be presented within a specific time period that is shorter than 3 years from first notification of action resulting in taxation not in accordance with provisions of CTA or in absence of provision of CTA describing time period within which such case must be presented. [Para 4(a)(il)]	Sentence 2 not to apply to its CTA that do not provide that the case referred in Sentence 1 must be presented within a specific time period on basis that it intends to meet the minimum standard for improving dispute resolution under BEPS Package by ensuring that for purposes of all such CTAs the person referred in Sentence 1 is allowed to present the case within a period of at least 3 years from first notification of action resulting in taxation not in accordance with CTA. [Para 5(b)]
2	1	The Competent Authority shall endeavour, if objection appear to it to be justified and if it is not itself able to arrive at satisfactory solution, to resolve the case by mutual agreement with the competent authority of other CJ with a view to the avoidance of taxation which is not in accord-	in absence of provisions in CTA that deals with Sentence 1 of Para 2.	

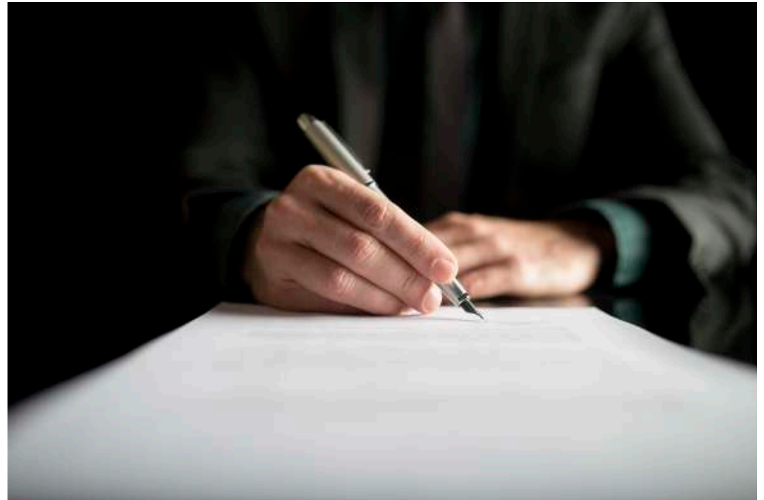
Para	Sentence	Deals	Compatibility	Reservation
2	2	Any agreement reached shall be implemented notwithstanding any time limits in domestic law of CJ.	In absence of provisions in CTA that deals with Sentence 2 of Para 2.	Sentence 2 of Para 2 not to apply to its CTAs on the basis that for purposes of all of its CTAs: • any agreement reached via MAP shall be implemented notwithstanding any time limits in domestic laws of CJ or • it intends to meet the minimum standard for improving dispute resolution under BEPS Package by accepting, in its bilateral treaty negotiations, a treaty provision • the CJ shall make no adjustment to profits that are attributable to PE of an enterprise of one of CJs after a period that is mutually agreed between both CJs from end of the taxable year in which profits would have been attributable to PE (not applicable in cases of fraud, gross negligence or wilful default) and • the CJ shall not include in profits of an enterprise and tax accordingly, profits that would have accrued but that by reason of conditions referred in provisions of CTA relating to associated enterprise have not so accrued, after a period that is mutually agreed between both CJs from end of the taxable year in which profits would have accrued to enterprise (not applicable in cases of fraud, gross negligence or wilful default)
3	1	The competent authorities of CJ shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of CTA.	In absence of provisions of CTA that deals with Sentence 1 of Para 3.	
3	2	They may also consult together for elimination of double taxation in cases not provided for in the CTA.	In absence of provisions of CTA that deals with Sentence 2 of Para 3.	

INDIA'S POSITION:

Para	Sentence	Effect of Compatibility Clause	India's Position
1	1	In place or in absence of : Each CJ that has not made any reservation in terms of Para 5(a), shall notify the depository of whether each of CTA contains the provisions as contained in Sentence 1 of Para 1. Where all CJs have notified the same article and paragraph, then the provisions of Sentence 1 of Para1 shall be applicable. In all other cases, the Sentence 1 of Para 1 shall supersede provisions of CTA only to the extent that those provisions are incompatible with that sentence.	India has reserved its right for Sentence 1 of Para 1 and accordingly such Sentence 1 of Para 1 shall not apply to all its CTAs. India intends to meet the minimum standard for improving dispute resolution. Accordingly for all CTAs the provisions of Sentence 1 of Para 1 shall not be applicable.
1	2	Apply in place of: Each CJ that has not made reservation described in Para 5(b) shall notify depository of list of CTAs which contain provision that provides that case referred to in Sentence 1 of Para 1 is shorter than three years	The provision of CTA shall be replaced by Sentence 2 of Para 1 where all CJs have made such notification with respect to that provision. In other cases, except for instances covered below, Sentence 2 of Para 1 shall supersede the provisions of CTA only to extent that those provisions are incompatible with Sentence 2 of Para 1. India has not reserved in terms of Para 5(b) and also has not notified any CTAs which for the purposes of Sentence 2 of Para 1. Accordingly, all CJs which has not made any reservation in terms of Para 5(b), the provisions of Sentence 2 of Para 1 shall supersede. For example, Greece has notified CTAs with Belgium, Italy and Portugal stating that those CTAs contain shorter period than three years. Accordingly, if all other CJs notify, the provisions shall be replaced. If not, they will supersede.
		list of CTAs which contain provision that provides that case referred in Sentence 1 of Para 1 must be presented at least three years	In this case, the Sentence 2 of Para 1 shall not apply to a CTA where any CJ has made such notification with respect to that CTA. India has not notified any CTA which contains such provision. For example, Greece has mentioned 57 CTAs which contain such clause. Accordingly, the provisions of such CTAs are protected and not replaced by Sentence 2 of Para 1.
2	1	In absence of: Each Party shall notify the depository of the list of CTAs which do not contain provision described in Sentence 1 of Para 2	The provisions shall be applicable to a CTA only where all CJs have made such a notification with respect to that CTA. India has notified Greece and Mexico stating that those CTAs do not contain Sentence 1 of Para 2. However, Greece has notified the CTA with India. Accordingly, the provisions for India- Greece Treaty the provisions of Sentence 1 of Para 2 shall not be applicable. Since Mexico has also notified CTA with India for purpose of Sentence 1 of Para 2, the provisions of Sentence 1 of Para 2 shall be replaced in the CTA.
2	2	In absence of: If the party has not made reservation described in Para 5(c), the list of CTAs which do not contain provision Sentence 2 of Para 2	Sentence 2 of Paragraph 2 shall apply to a CTA only where all CJs have made such a notification with respect to CTA. India has notified 10 CTAs. Accordingly, if all CJs notify India, then the provisions of Sentence 2 of Para 2 shall be applicable. For example, India has notified Egypt and Egypt also has notified. Accordingly, provisions of Sentence 2 of Para 2.
3	1	In absence of: Each party shall notify the depository list of CTAs which do not contain a provision described in Sentence 1 of Para 3	Sentence 1 of Para 3 shall apply to such CTAs only when all CJs have made such notification. India has notified the CTAs which Australia and Greece stating that they do not have provisions as contained in Sentence 1 of Para 3. Australia has notified and accordingly the provisions of Sentence 1 of Para 3 would apply for India – Australia Treaty. Greece also notified India and hence the provisions stands applicable.
3	2	Each party shall notify the depository list of CTAs which do not contain a provision described in Sentence 2 of Para 3	Sentence 2 of Para 3 shall apply to such CTAs only when all CJs have made such notification. India has notified Australia, Greece, Belgium, Philippines, Ukraine and UK. Except Ukraine all other CJs have notified. Philippines has not notified its MLI position as on date.

ARTICLE 17:
MUTUAL AGREEMENT PROCEDURE

Action 14 of BEPS Project deals with Mutual Agreement Procedure. This is a minimum standard for which every CJ has to agree and include in their CTAs. The said Action Report requires every jurisdiction to include Article 25 of OECD Model Convention in their tax treaties subject to the variations contained in the said Action Report. Article 16 would allow CJs to modify their CTAs, to incorporate the contents of Article 25(1) through (3) to the OECD Model Convention.



Article 16 contains 6 paras. Article 16(1) through (3) are based on text of Article 25(1) through 25(3) of OECD Model Convention which deals with minimum standard to allow a taxpayer to present a case to competent authority of either CJ. Para 4 deals with compatibility clauses, which reflect that members of the ad hoc group preferred to retain existing provisions relating to dispute resolution to the extent these provisions are consistent with Para 1 through 3, subject to reservations they may make in Para 5. Para 6 deals with notification to depository. The below table captures the Para 1 to Para 3 with compatibility clauses and reservations.

INDIA'S POSITION:

India has reserved the right for the entirety of Article 17(1) not to be applicable to certain CTAs which have already contain similar provision. Accordingly for 64 CJs, the provisions of Article 17(1) shall not apply since India has made reservation. Some examples are Canada, Denmark, Korea, Singapore.

Further, those CJs which India has not made any reservation, the provisions of Article 17(1) shall be replaced, if the other CJ has made notification. In all other cases, the provisions of Article 17(1) shall supersede the provisions of CTA only to extent that these provisions are incompatible. For example, Japan has notified India for the purposes of Article 17(1). Hence, for India-Japan Treaty, the provisions of Article 17(1) shall supersede to the existing provisions of CTA.

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