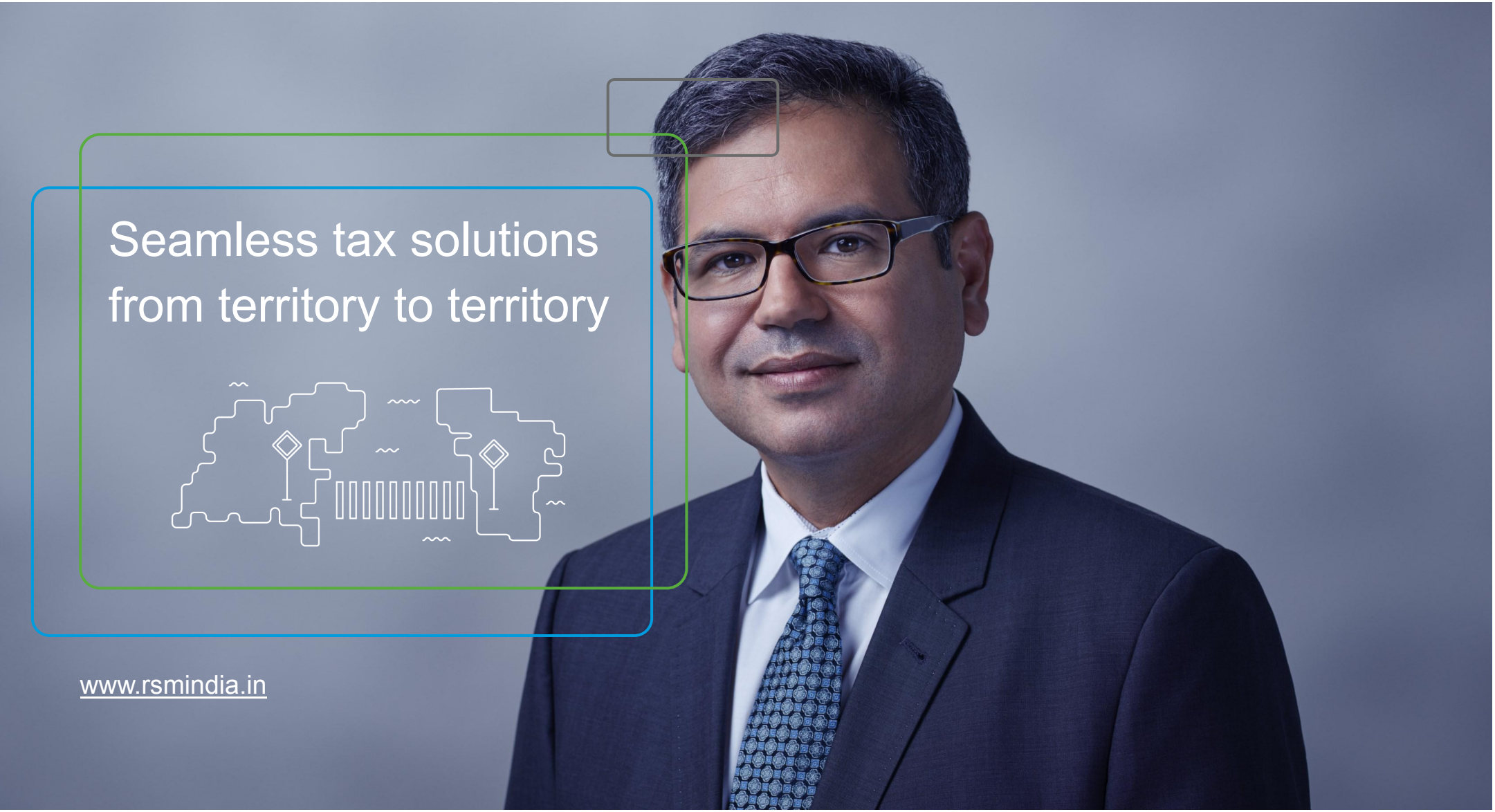

Newsflash: The OECD's Multilateral Instrument and its Potential Impact on Indian Tax Treaties - June 2017

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1.0 Background

On 7 June 2017, India became a signatory to the OECD's Multilateral Instrument on Tax Treaty (MLI) along with 67[1] other jurisdictions. MLI is a key outcome of the OECD/G20 Base Erosion and Profit Shifting (BEPS) project, which aims to ensure that multinationals pay tax in the jurisdiction where economic value is created or added.

The Multilateral Instrument is a multilateral treaty that will enable jurisdictions to swiftly modify their bilateral tax treaties to implement measures designed to better address multinational inter-jurisdictional tax avoidance. Treaty measures that will be covered in the MLI include those on hybrid mismatch arrangements, treaty abuse, permanent establishment, and mutual agreement procedures.

The text of the Multilateral Convention and the accompanying Explanatory Statement are available on the OECD website[2].

2.0 Key Features of MLI

2.1 Signing of MLI is the first step in the process of expressing consent to be bound by the MLI

67 other jurisdictions also signed the Convention including 50 of India's bilateral tax treaty partners. Major countries which have so far not signed the MLI include the USA, Brazil, Thailand, Malaysia, Mauritius, UAE, Saudi Arabia, Oman and Qatar. However, the MLI is still open for additional signatories. Mauritius is likely to sign the MLI by 30th June 2017. Notably, MLI based on the current list of signatories at present covers 1105 bilateral tax treaties (which is about 1/3rd of all global tax treaties).

2.2 Each jurisdiction is required to provide a list of reservations (opting out of provisions or parts of provisions) and notifications called as "MLI Position"

At the point of signing the MLI in June 2017, India along with other countries have provided a provisional list of the DTAAs that they would like to amend using the MLI, as well as their provisional positions on the MLI provisions. This provisional list may be amended and will only be confirmed upon ratification of the MLI.

1. Andorra, Argentina, Armenia, Australia, Austria, Belgium, Bulgaria, Burkina Faso, Canada, Chile, China, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Fiji, Finland, France, Gabon, Georgia, Germany, Greece, Guernsey, Hungary, Hong Kong (represented by China), Iceland, India, Indonesia, Ireland, Isle of Man, Israel, Italy, Japan, Jersey, Korea, Kuwait, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Monaco, Netherlands, New Zealand, Norway, Pakistan, Poland, Portugal, Romania, Russia, San Marino, Senegal, Serbia ,Seychelles, Slovak Republic, Slovenia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, Uruguay

2. http://www.oecd.org/tax/multilateral-instrument-for-beps-tax-treaty-measures-the-ad-hoc-group.htm

2.3 Each country has flexibility to decide which of its DTAAs to be amended by MLI, which is technically known as "Covered Tax Agreement" (CTA)

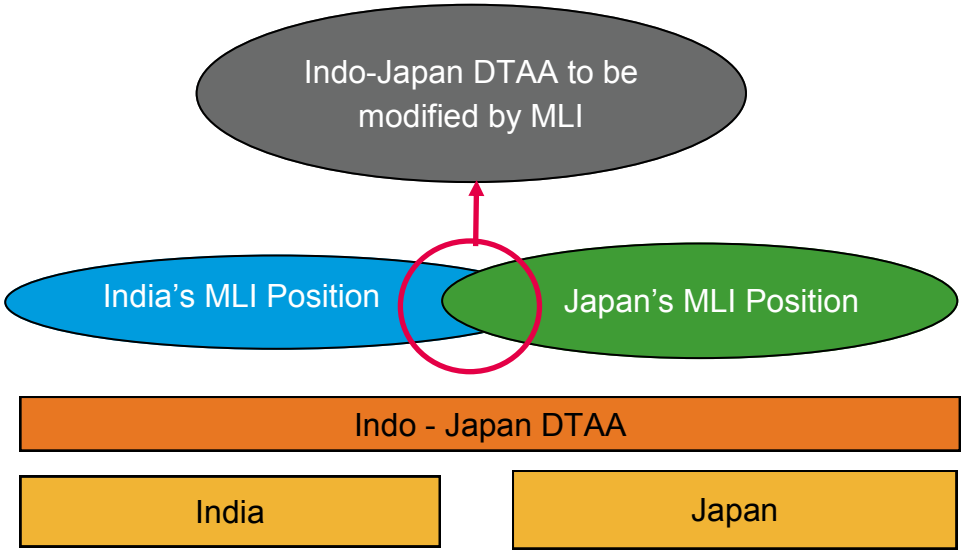
India included all of its 93 DTAAs currently in effect as "covered tax agreements" under the MLI. China and Germany have chosen not to include their treaty with India as a covered tax agreement and Norway has not yet concluded on its list of covered tax agreements. Thus, as of now it seems that India-China DTAA and India-Germany DTAA shall not be impacted by MLI provisions and the same will be amended through bilateral negotiations.

For example: If both India and Jurisdiction X have signed the MLI, the DTAA between India and Jurisdiction X will be amended only if both India and Jurisdiction X indicate that they would like to amend their bilateral DTAA using the MLI. It is to be done by making a notification to the Secretary General of the OECD i.e. the Depositary.

2.4 Countries have the flexibility to opt out of the "provisions" which are not "minimum standard"

MLI includes both mandatory provisions (referred as "minimum standards" such as improved dispute resolution mechanism, New Preamble language) as well as non-mandatory provisions. Countries may apply alternative mechanisms with respect to the non-mandatory provisions, if there are multiple ways to address the BEPS standard (e.g. Article 7 of the MLI provides with choices involving the Principal Purpose Test (PPT), Simplified LOB or the detailed LOB).

For example: A "provision" in the DTAA between India and Japan will be amended by an MLI provision only if both, India and Japan have taken the same position regarding that "provision" in the MLI. One such example is the adoption of provision on 'artificial avoidance of permanent establishment' status through splitting-up of contracts. This provision will be included in India's DTAA with Japan, only if Japan also chooses to adopt this provision. However, Japan has opted out of this provision and accordingly, this MLI provision shall not be relevant in context of India-Japan tax treaty.

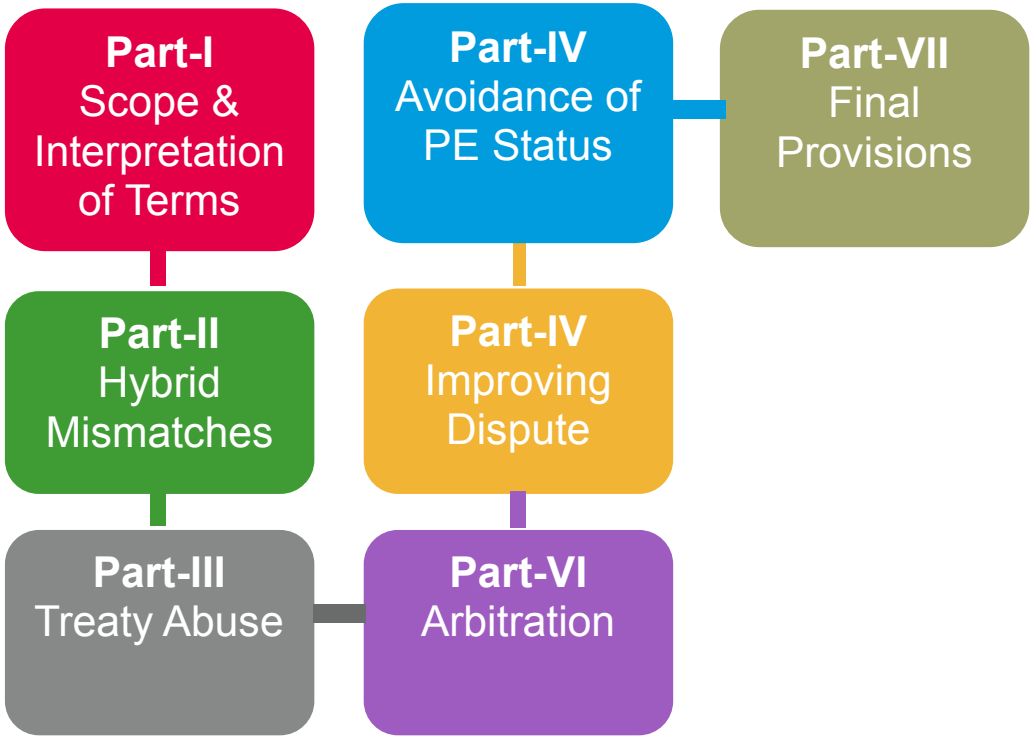


2.5 MLI has to be read together with a particular DTAA

MLI will not function in the same way as an amending Protocol to a single DTAA, which would directly amend the text of that particular DTAA. Instead, it will be applied alongside existing DTAAs, modifying their application in order to implement the BEPS measures.

2.6 Countries are free to make subsequent amendments to their modified tax treaties through bilateral negotiation.

3.0 Structure of MLI



4.0 MLI Articles Overview – Mandatory Standards vis-a-vis Optional Standards

This section provides an overview of the MLI articles and the corresponding BEPS Actions / the underlying OECD Model articles & the nature of such MLI Articles (Mandatory / Optional). Minimum Standard as referred below means the Mandatory provisions that are to be applied by all signatories to the MLI.

MLI Article	Equivalent BEPS Action	Equivalent OECD Model Convention Article	Minimum Standards, i.e. Mandatory?
Article 3 - Transparent Entities	Action 2 (Hybrid mismatches)	1. Persons Covered 23A. Exemption Method and 23B. Credit Method	✗
Article 4 - Dual resident entities	Action 2	4. Resident	✗
Article 5 - Application of Methods for Elimination of Double Taxation	Action 2	23A. Exemption Method	✗
Article 6 - Purpose of a Covered Tax Agreement	**Action 6 (Treaty abuse)**	**Preamble**	√
Article 7 - Treaty Anti-abuse Rules	**Action 6**	**No equivalent**	√
Article 8 - Dividend Transfer Transactions	Action 6	10. Dividends	✗
Article 9 - Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property	Action 6	13. Capital Gains	✗
Article 10 - Anti-abuse Rules for Permanent Establishments Located in Third Jurisdictions	**Action 6**	**No equivalent**	✗

MLI Article	Equivalent BEPS Action	Equivalent OECD Model Convention Article	Minimum Standards, i.e. Mandatory?
Article 11 - Application of Agreements to Restrict a Party's Right to Tax its Own Residents	**Action 6**	**No equivalent**	✗
Article 12 - Artificial Avoidance of Permanent Establishment Status through Commissionnaire Arrangements and Similar Strategies	Action 7 (PE status)	5. Permanent Establishment	✗
Article 13 - Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions	Action 7	5. Permanent Establishment	✗
Article 14 - Splitting up of Contracts	Action 7	5. Permanent Establishment	✗
Article 15 - Definition of a Person Closely Related to an Enterprise	Action 7	No equivalent	✗
Article 16 - Mutual Agreement Procedure	**Action 14 (Dispute resolution)**	**25. Mutual Agreement Procedure (MAP)**	√
Article 17 - Corresponding Adjustments	Action 14	9. Associated Enterprises	✗
Article 18-26 - Arbitration	Action 14	25. MAP	✗

5.0 Multilateral instrument and its potential impact on Indian Tax Treaties

Detailed Particulars	Did India adopt?	India's Initial position	Position of Other Countries	Potential Impact on Indian treaties
Article 3 - Treaty Benefit to Fiscally transparent entities (FTEs) like Trusts or Partnerships				
FTEs create arbitrage opportunities because they are treated differently for tax purposes by different countries. The MLI provision clarifies that treaty benefits will only be allowed to the extent to which the item of income is taxed in the state in which the entity is resident.	No	This is not as per India's preferred treaty practice to provide tax treaty benefit to the income derived by or through fiscally transparent entities. Only few DTAAs like India-USA, India-UK specifically provide treaty benefit to Fiscally transparent entities. Thus, it was no surprising that **India has made reservation against this proposal.**	Therefore, from India perspective, it is not necessary to find out the position of other countries in this regard.	As a result, while treaty benefit with countries such as USA, UK shall continue to apply, uncertainty with regards to treaty benefit being granted to transparent entities shall continue under other treaties. The AAR in the case of Schellenberg Wittmer [2012] 24 taxmann.com 299 denied tax treaty benefit to a Swiss Partnership firm under the India Switzerland DTAA
Article 4 - Dual resident entities (DREs) (other than Individual)				
The MLI amends a dual resident entity (DRE) tie breaker provision. Like FTEs, DREs can be used to take advantage of arbitrage opportunities. The proposed provision will require Competent Authorities (CAs) to agree the residence status of a DRE (applying POEM and other factors) and the DRE will only be entitled to such treaty benefits as the CAs agrees.	Yes	This is a significant change from India's perspective as most of India's tax treaties; generally follow a place of effective management as tie breaker rule for non-individuals.	India likely to apply MLI provision across all its treaties. Therefore it is important to look at the position of the other countries. **Countries which have made reservations:** Cyprus, Singapore, Luxembourg, Sweden, Canada, France	As a result, treaties with Cyprus, Singapore, Sweden, Luxembourg, Canada, and France will not be impacted and the existing tie-breaker rule will continue to apply. For instance, in case of treaty with Singapore, the tie-breaker rule is based on POEM. In India, POEM test is applied for determining the tax residency of foreign company and thus, it is likely that Indian tax authorities will interpret it differently based on its domestic Guidelines.

Detailed Particulars	Did India adopt?	India's Initial position	Position of Other Countries	Potential Impact on Indian treaties
			Countries which have not made their reservations: UK, Netherlands, Australia, Japan and Ireland.	Whereas tie-breaker under treaties with UK, Netherlands, Australia, Japan and Ireland will be modified and it will be determined by CAs following MAP procedure.
Article 5 - Relief of double taxation				
The MLI allows countries to strengthen their application of the exemption method to relieve double taxation.	No	India chose to reserve on Article 5 as this article deals with the exemption method of eliminating double taxation. As India operates a credit mechanism, it has opted out this MLI provision.	Other Countries' MLI position is not relevant	Not applicable
Article 6(1) and (2) of the MLI - Preamble language – Minimum Standard (Mandatory Standard)				
The MLI will amend the preamble to DTAAs to emphasise that the treaty shall also aim to prevent opportunities for non-taxation, reduced taxation or tax avoidance.	Yes	India will adopt this Article.	Since it is a part of minimum standard, other signatories have also adopted this Article.	Tax treaties are interpreted in their context and in light of their object and purpose. In this respect, preamble will guide interpretation particularly in cases of aggressive tax planning.

Detailed Particulars	Did India adopt?	India's Initial position	Position of Other Countries	Potential Impact on Indian treaties
Article 7 of the MLI - Treaty anti-abuse rules				
The MLI requires jurisdictions to introduce an anti-abuse rule into DTAs. Jurisdictions can meet this minimum requirement in one of three ways: 1. **a principal purpose test (PPT) alone;** 2. **a PPT plus a "simplified limitation of benefits" (S-LOB) clause. The LOB is a mechanical provision that seeks to identify, whether a person is genuinely entitled to the benefits of a DTA; or** 3. **enter into bilateral negotiations to include a detailed LOB provision plus a PPT or anti-conduit rules.**	Yes	In this case, India has adopted PPT along with S-LOB. India is among 12 countries which have adopted S-LOB. PPT seeks to deny DTAA benefits in cases where one of the principal purposes of the arrangements or transactions is to secure a benefit under the DTAA in a manner that is contrary to the object and purpose of the DTAA. **Note: S-LOB Clause** Purpose of Simplified Limitation of Benefit clause is to grant treaty benefits only to specified 'qualified persons' (*individuals, government entities, listed companies, non-profit organisations, pension funds, entities engaged in active business or entities that meet specified ownership requirements*).	Australia, Canada, Cyprus, France, Ireland, Japan Netherlands, Luxembourg, UK, Singapore, Sweden, have adopted only PPT.	The "one of the principal purposes" PPT rule appears broader than the domestic Indian General Anti-Avoidance rule (GAAR), which targets arrangements with a "main purpose" of avoiding tax. There is concern that it could be used to deny DTAA benefits for many arrangements which, while primarily commercially motivated, were also structured in order to gain access to optimal treaty relief e.g. lower withholding tax on interest, FTS etc. Recently amended India-Singapore DTAA through Protocol includes specific articles reserving India's ability to apply the GAAR. In fact, PPT is not new to India's DTAAs. It is already present in many of India's DTAAs such as UK. Further, many DTAAs contain LOB clauses, such as Singapore, Mauritius, etc. (*Refer **para 7.0** for discussion regarding the impact on recently amended India's treaty with Singapore, Mauritius and Cyprus*).

Detailed Particulars	Did India adopt?	India's Initial position	Position of Other Countries	Potential Impact on Indian treaties
Article 8 of the MLI - Dividend withholding tax				
The MLI introduces a provision that requires shares to be held for a minimum of 365 days for the shareholder to be entitled to the reduced withholding tax (WHT) rates on dividends. This is to stop shareholders buying shares temporarily to access the reduced WHT rates and then immediately selling them.	Yes, except Portugal treaty	Currently some Indian treaties provide benefit of lower withholding tax on dividend if certain minimum percentage of shares is held in the dividend paying company. However, there is no minimum holding period except in case of Portugal tax treaty wherein the period is 2 years. Otherwise, India has given the list of 21 countries wherein minimum shareholding criteria is there but minimum holding period is not specified and pursuant to this MLI provision, now the period shall be incorporated.	**Countries which have expressed reservations:** Canada, Cyprus, Japan, Luxembourg, Singapore, UK	It has less practical relevance considering that the company paying dividend pays DDT in India and the dividend is not subject to withholding tax under domestic tax law of India.

Detailed Particulars	Did India adopt?	India's Initial position	Position of Other Countries	Potential Impact on Indian treaties
Article 9 of the MLI - Capital gains on sale of shares in real property-rich companies				
The MLI introduces a treaty provision that strengthens the anti-abuse test (with respect to transfer of shares of entities deriving their value principally from immovable property). **To prevent artificial and temporary dilution of the amount of immovable property held by a company just before sale, the MLI provision requires the threshold for the amount of immovable property ownership which triggers the rule to be measured on every day in the 365 day period leading up to the sale of the shares.** **The MLI provision also ensures the same rule applies to other investment vehicles such as partnerships and trusts.**	Yes	Under India's current tax treaties practice, this right generally exists where the value test is met at the time transfer takes place. With the adoption of this MLI provision, Article on Capital gains in Indian tax treaties would be amended subject to condition that there is a matching position.	**Countries which have expressed reservations:** Canada, Cyprus, Luxembourg, Singapore, Sweden, UK, **Countries which have not made their reservations:** Australia, France, Japan, Netherlands, Ireland	Barring countries which have expressed reservation, MLI provision would strengthen the right to tax in the source country as it would apply where the value threshold is met at any time during a 365-day period preceding the sale. In addition, the rule would be extended from shares of a corporation to also include, as in many of India's existing treaties, other equity interests (such as interests in partnerships or trusts).

Detailed Particulars	Did India adopt?	India's Initial position	Position of Other Countries	Potential Impact on Indian treaties
Article 10 of the MLI - Third-Country PE rules				
The MLI introduces a treaty provision that denies treaty benefits in the case where an entity which is a resident of one country derives 'passive' income from the other country through PE located in a third country and that income is exempt in the hands of entity in the home country and subject to lower tax rate (less than 60% of home country rate) in the third country.	Yes	India has not expressed any reservation regarding this provision and accordingly, it would apply to all the Indian tax treaties subject to matching position.	**Countries which have expressed reservations**: Australia, Cyprus, Canada France, Ireland, Singapore, Luxembourg, Sweden, UK. **Countries which have not made any reservations:** Netherlands, Japan	As of now, none of India's existing treaty includes this provision. Going forward, countries which have not made reservation, this provision shall be applicable to those treaties.
Article 11 of the MLI- Right to tax own residents				
Most tax treaty rules are intended to restrict a country's right to tax income derived (from within that country) by foreign residents. However, it has been argued that some treaty rules limit a country's right to tax its own residents. The MLI contains a 'saving clause' that clarifies that the treaty does not restrict a country's right to tax its own residents, except with respect to certain treaty provisions.	Yes	India has not expressed any reservation regarding this provision and accordingly, it would apply to all the Indian tax treaties subject to matching position.	**Countries which have expressed reservations**: Canada, Cyprus, Singapore	This MLI provision codifies a well- recognised principle that treaty does not restrict a country's right to tax its own residents.

Detailed Particulars	Did India adopt?	India's Initial position	Position of Other Countries	Potential Impact on Indian treaties
Articles 12 and 15 of the MLI-Commissionaire arrangements and similar strategies – Agency PE clause				
Currently, Agency PE threshold would generally be triggered where a non-resident of a country had a dependent agent in the source country who would habitually exercise their authority to conclude contracts on behalf of the non-resident. **Adopting MLI would lower the threshold of Agency PE. It would lower Agency PE threshold by shifting the test from a dependent agent 'concluding contracts' to a test of where a dependent agent "habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise**	Yes	India has adopted this provision. and as a result, it is likely that foreign companies will have to face increased taxation on PE front in future years due to dilution of Agency PE threshold.	**Countries which have expressed reservations**: Australia, Canada, China, Cyprus, France, Ireland, Japan, Luxembourg, Netherlands, Singapore, Sweden, UK **Countries which have not expressed reservations:** Netherlands, Japan, France	Until now, Indian Courts have upheld establishment of Agency PE where on facts it was found that though agents were not entering into contracts literally, they were actually involved in substantial/decisive negotiation. Now this aspect seems to have been accepted in the MLI provision However, use of the words "Principal role" may cause interpretation difficulty as there can be different ways to look at it (e.g. taking final agreed document for signatures, attending document signing ceremony, merely acting as spokesperson seeking specific direction etc.) Many countries (such as Australia, China which were initially supportive of expanded Agency PE clause have made reservation against it as of now for below reasons: – OECD's guidelines on profit attribution are still in work in progress and thus it is difficult to gauge as to how much profit will be allocated on account of having agency PE

Detailed Particulars	Did India adopt?	India's Initial position	Position of Other Countries	Potential Impact on Indian treaties
Articles 12 and 15 of the MLI-Commissionaire arrangements and similar strategies – Agency PE clause				
				– New standard based on habitual playing of the principal role is subjective and likely to cause uncertainty.
Articles 13 and 15 of the MLI- Specific activity exemptions – preparatory and auxiliary qualification- Anti-fragmentation rule				
Most of the tax treaties include a list of exceptions to the PE definition (such as storing goods or stock maintained for display or delivery). **The MLI proposes clarification that the specific carve-outs listed in the DTAA must be subject to an additional requirement that they be "preparatory and auxiliary" in nature.**	Yes	India has adopted Option A (i.e. all the specific activity exemptions must be of a preparatory or auxiliary character)	**Countries which have expressed their reservations include:** Canada, Cyprus, France, Ireland, Luxembourg, Netherlands, Singapore, Sweden, UK **Countries which have not expressed their reservations include:** Australia, Japan	Except for those countries that have made reservations, treaty would require that all the specific activity exemptions are preparatory or auxiliary in nature. This would result in increased PE exposure for businesses with limited foreign operations in India.

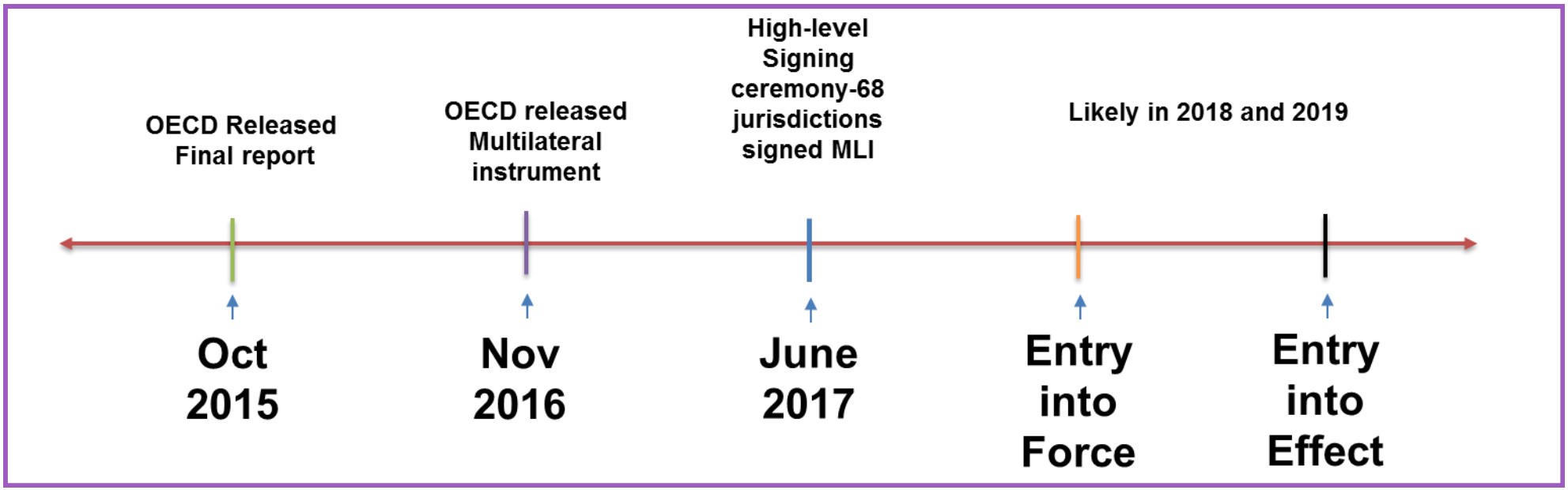
Detailed Particulars	Did India adopt?	India's Initial position	Position of Other Countries	Potential Impact on Indian treaties
There are two options for dealing with these issues – Option A which subjects all of the existing specific activities to an explicit "preparatory and auxiliary" test, and Option B, which requires that some but not all the specific activity exemptions must of a preparatory or auxiliary character. **Also, the MLI introduces an "anti-fragmentation" rule that will prevent an enterprise from dividing up all of its activities so that related parties each carry on a separate part of the business (that fall within the PE exceptions), but taken together they constitute a PE.**				
Articles 14 and 15 of the MLI - Anti-contract splitting rule				
Currently a construction, installation or building project does not constitute a PE unless it last for more than specified period (e.g. 12 months). This rule at times are circumvented by dividing contracts into several parts (typically among related parties) with each contract not exceeding the specified period. **The new "anti-contract splitting" rule will aggregate related projects period to prevent PE avoidance.**	Yes	India has not expressed any reservation regarding this provision and accordingly, it would apply to all the Indian tax treaties subject to matching.	**Countries which have expressed their reservations include:** Canada, Cyprus, Japan Luxembourg, Singapore, Sweden, UK, **Countries which have not expressed their reservations include:** Netherlands, France, Australia, Ireland	It will be applicable where foreign resident enterprise prevent constitution of PE by circumventing the deemed PE threshold. However, this would not affect the well settled legal position that time spent on unconnected as opposed to "interconnected" or independent (as opposed to 'interdependent") site or projects is not to be

Detailed Particulars	Did India adopt?	India's Initial position	Position of Other Countries	Potential Impact on Indian treaties
				aggregated even though different contracts may be entered into by the same customer with the contractor or even though projects may be simultaneous or consecutive.
Articles 15 of the MLI -Definition of a Person Closely Related to an Enterprise				
Article 15 defines when a person is closely related to an enterprise for the purposes of Articles 12, 13 and 14 of the MLI.	Yes	India has not expressed any reservation regarding this provision and accordingly, it would apply to all the Indian tax treaties subject to matching.	Article 15 is necessary for the coherent operation of Articles 12, 13 and 14.	Not applicable
Article 16 of the MLI -MAP – access to the CAs of either jurisdiction – Minimum Standard (Mandatory Standard)				
In covered tax agreements that do not already have it, the MLI will introduce a provision allowing taxpayers to request mutual agreement procedure (MAP) in cases where they believe taxation is not in accordance with the treaty. If a MAP provision is already contained in a DTAA, the MLI will amend it to allow taxpayers to approach the CA of *either* jurisdiction to resolve uncertainty as to how the DTAA applies	Yes	India has adopted Article 16 but not the rule allowing a case to be presented to either CA of the jurisdiction. Instead it will implement this through a bilateral notification or consultation process.	Since it is a minimum standard, no country has expressed reservation while manner of implementation could be different.	This will provide business with a more effective tax-treaty based dispute resolution procedure.

Detailed Particulars	Did India adopt?	India's Initial position	Position of Other Countries	Potential Impact on Indian treaties
Article 17 of the MLI -MAP – corresponding adjustment				
Requires contracting states to make appropriate corresponding adjustments in transfer pricing cases.	Yes	India has adopted this Article.	**Countries which have not expressed their reservations include:** Japan, Singapore	This MLI provision is consistent with India's preferred treaty practice of including corresponding adjustment provisions in its bilateral treaties to alleviate potential double taxation in transfer pricing cases. India's 90 treaties out of 93 treaties contain a corresponding adjustment provision. Three countries (Belgium, France, Sweden) where corresponding adjustment is absent, will now be modified by MLI
Articles 18 – 26 of the MLI- Arbitration				
If, under the MAP process, the CAs do not agree on the correct interpretation of the DTAA, the CAs can submit the matter to an independent arbitrator (or a panel of three arbitrators) for decision. The arbitrators will decide which of the CAs is correct.	No	India has expressed reservation against this Article.	25 countries such as Australia, Singapore has opted for the mandatory binding arbitration.	While this provision could have provided more certainty to taxpayers that treaty-related disputes will be resolved within a specified timeframe, India has chosen not to adopt this measure.

6.0 When will the modifications become effective?

It is likely that the first modifications to covered treaties will become effective in the course of 2018/2019. The timing of entry into effect of the modifications is linked to the completion of the ratification procedures in the countries that are parties to the covered tax treaty. The MLI provisions will generally have effect in the Contracting Jurisdictions with respect to a Covered Tax Agreement at different moment with respect to taxes withheld at source and with respect to all other taxes levied by a Contracting Jurisdiction.



Note: More countries are further likely to sign the MLI and the above is only reflective of the current status

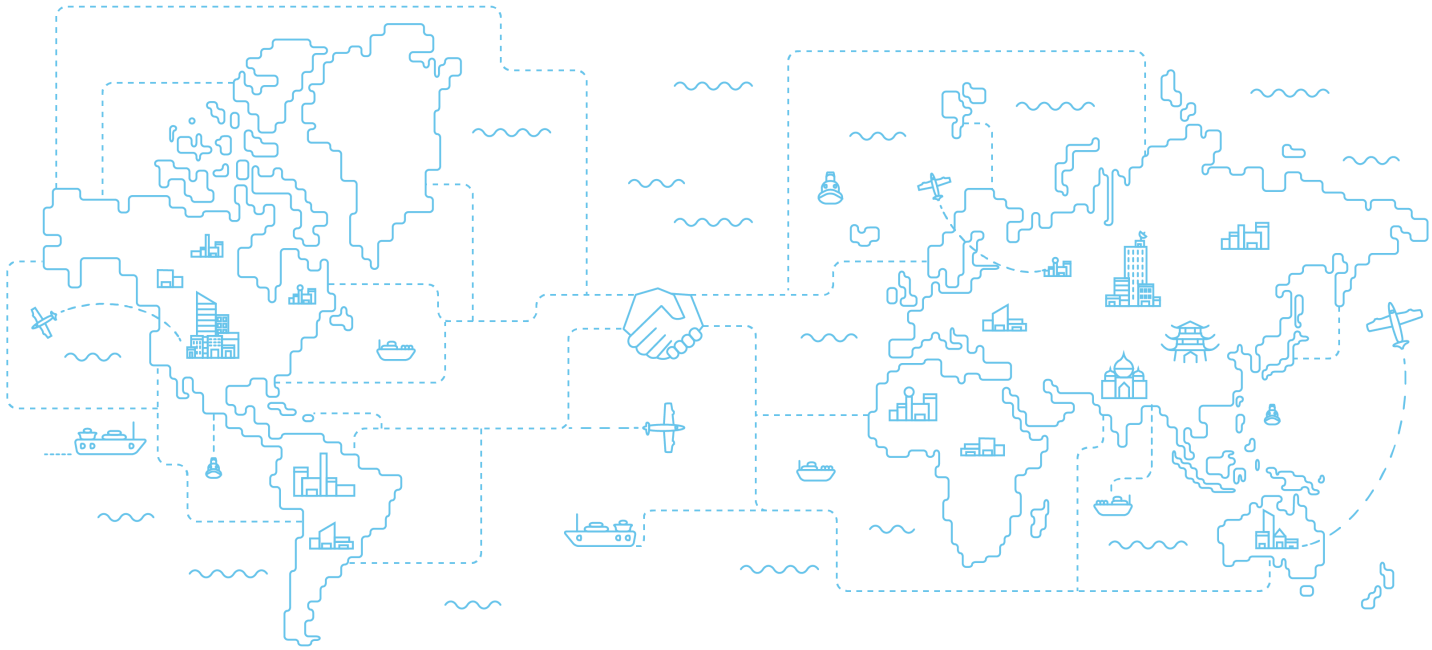
7.0 What will be the impact on grandfathering provisions in treaties with Mauritius, Singapore, and Cyprus Post MLI?

First of all, India has intended to apply MLI provisions to all its tax treaties including Mauritius, Singapore and Cyprus. Further, Singapore and Cyprus have also signed the MLI on 7th June 2017. Mauritius is expected to sign by 30th June 2017.

MLI provisions are not amending the tax treaty provisions relating to capital gain article [except certain changes with regard to sale of shares of entities deriving their value principally from immovable property]. Thus, there is no direct impact as such. However, Article 6 of the MLI will insert a new preamble into covered tax agreements which expressly states that the purpose of the tax treaty is to eliminate double taxation 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 the treaty for the indirect benefit of residents in third jurisdictions). This is important because tax treaties are required to be interpreted in their context and in light of their object and purposes (including their preamble). Further, it introduces concept of Principal Purpose Test (PPT) and Simplified LOB clause.

As regards treaty with Mauritius, grandfathering provision has been provided in the protocol with respect to shares acquired before 1 April 2017. The taxing rights on capital gains arising on sale of shares acquired before 1 April 2017 rested with resident country i.e. Mauritius. Prior to the amendment, there was no LOB clause in the India-Mauritius DTAA. In this respect, there is a CBDT circular No.789 dated 13.4.2000 clarifying that any resident of Mauritius deriving income from alienation of shares of Indian companies will be taxable only in Mauritius. Also, there is a decision of the Hon'ble Supreme Court in UOI v/s Azadi Bachao Andolan [263 ITR 706] upholding the validity of the circular. The current LOB clause as introduced through the Protocol is applicable for capital gain arising between the period 1 April 2017 and 31 March 2019 on shares acquired on or after 1 April 2017 Though new Preamble language and Principal Purpose Test proposed to be introduced through MLI provisions have the wider coverage, it may not impact the capital gain arising on shares acquired before 1 April 2017 in case Mauritius excludes its treaty with India while submitting its MLI position and incorporate BEPS measures through bilateral consultation.

With respect to treaty with Singapore, first of all, it is to be noted that Singapore has covered India in its treaty list to apply MLI Provisions. Thus, it would be interesting to see how the similar treaty protection given under the protocol (i.e. exemption from tax on capital gain arising on sale of shares acquired before 1 April 2017) would evolve considering the wider coverage of anti-abuse Rules under the MLI. Similar inference can be drawn with respect to the Cyprus Protocol.



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