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## India's BEPS MLI Positions

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Introduction

India recently signed the [Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting](#) , otherwise referred to as the Multilateral Instrument or [MLI](#) . The provisions of the MLI allow amendment of existing bilateral tax treaties to ensure certain minimum standards. The implications of this development are significant for businesses and investors with cross border operations and structures, especially those that seek to avail tax benefits under India's network of bilateral tax treaties.

While the signatories to the MLI include some of India's strategically important trading partners such as the United Kingdom, Canada, Germany, Japan and France, some countries, like the United States and Brazil, have chosen to not sign the MLI. Other countries, like Mauritius and Germany, while signing the MLI have not made it applicable to their tax treaty with India.

Potentially, the [MLI](#) will result in over 1100 treaties being subject to change and a thorough understanding of the impact of MLI on conduct of business is essential not only for future operations and investments but also to re-assess the availability of treaty benefits for existing structures arrangements.

This paper analyzes the MLI positions adopted by India and some of its key trading and treaty partners, and assesses the impact on India's existing treaties with these jurisdictions.

## Mechanism

Upon coming into effect, the MLI will not replace existing bilateral tax treaties entirely. Instead it will apply alongside the existing tax treaties and either supplement, complement, supersede or modify their application to bring them in line with the measures set out in the BEPS Action Reports.

*Signatories or Parties to the MLI.* The MLI will apply only to those countries that have:

- (1.) Signed the MLI
- (2.) Ratified it in accordance with domestic law (where such ratification, acceptance or approval is required) and deposited such instrument of ratification with the OECD depositary ("Depositary")
- (3.) 3 months have passed from the date five instruments of ratification have been deposited with the Depositary, thereby bringing the MLI into force.

*Notification of Covered Tax Agreements.* Once the MLI comes into force, it will not automatically apply to all the treaties of a country that is a party to the MLI ("Party" / "Parties") but will apply only to those tax treaties where both Parties to such tax treaty have conveyed their intention (by way of a notification) for such treaty to be covered by the MLI. Treaties intended to be covered by the MLI are referred to as "Covered Tax Agreements" ("CTAs"). In other words, the MLI will be applicable to a bilateral tax treaty only if both parties to such treaty notify it as a CTA.

*Mandatory Minimum Standards under MLI.* Upon qualifying as a CTA, a tax treaty will be required to meet certain prescribed minimum standards i.e., the minimum standard for the prevention of treaty abuse under BEPS Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances) and the minimum standard for the improvement of dispute resolution under BEPS Action 14 (Making Dispute Resolution More Effective). Signatories to the MLI will have little (almost none) leeway to opt out of adherence to the minimum standards.

Where an MLI provision reflects a BEPS minimum standard, Parties can opt out of such provision only in limited situations such as where the CTA already meets the minimum standards. Tax treaty partners ("Treaty Partners" / "Contracting Jurisdictions") may also choose to opt out of a provision reflecting a minimum standard if they decide to reach a mutually satisfactory solution which is consistent with the minimum standard in some cases. Whether a CTA meets the minimum standards will be determined in the course of the review and monitoring process within the inclusive framework on BEPS.

Signatories to the MLI have however been afforded the flexibility to opt out (by way of reservations) of provisions that do not set a minimum standard.

*Reservations with Respect to Non-Mandatory or Optional Provisions.* A party to the MLI may reserve the right for provisions of the MLI to not apply:

- (a) to its covered tax treaties in their entirety; or
- (b) a subset of its covered tax treaties.

Where one of the Parties reserves the right for provisions of the MLI to not apply to a CTA, the relevant provisions of the MLI will not apply to the CTA irrespective of whether the Treaty Partner has made a similar reservation. Where a Party chooses to reserve the right for provisions of the MLI to not apply to a subset of its CTAs, such Party is required to provide a list of the existing provisions within the relevant sub-set of treaties falling within the scope of the reservation. For example, Article 4(2) of the MLI provides Parties the option to reserve the right to not apply Article 4, which deals with "Dual Resident Entities", to those of its treaties which already provide that the tie-breaker test for residence of dual resident entities shall be decided by the competent authorities of both Treaty Partners through mutual agreement. Parties opting for this reservation would be required to notify their CTAs which already contain such a provision, in which case, Article 4 would not apply to such CTAs.

Further, the [MLI](#) also provides in most Articles that in the event a Treaty Partner:

- (a) neither reserves the applicability of a particular MLI provision,
- (b) nor notifies the relevant provisions of a bilateral tax treaty (where such notification is required);

then the respective MLI article will be added to the CTA and will prevail over the relevant provision of the CTA to the extent of such provisions are inconsistent.

*Optional Provisions.* In certain instances, the MLI permits a Party to choose among alternative provisions intended to address the same issue. A Party is required to notify the Depository of its choice. Unlike in the case of reservations, both Treaty Partners are required to choose the same option in order for such option to apply (except for Article 5 and 23(5) of the MLI). In the event that one Treaty Partner chooses a particular option, and the other Treaty Partner chooses to apply a different option or no option at all, then none of the options will apply to the relevant CTA. For Example, Article 13 of the MLI which deals with "Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions" provides for Parties to opt for either Option A or Option B to modify their CTAs. An option will apply to a CTA only when both Treaty Partners have elected that option.

*Notification clauses.* Where an MLI provision supersedes or modifies an existing provision of a CTA, the Parties are generally required to make a notification specifying which CTAs contain such provisions and identify the provisions. While Parties are expected to identify and notify such provisions on a best efforts basis, it is possible that a relevant existing provision is not identified by a Party. Accordingly, the concept of provisional notifications has been introduced to deal with situations where a signatory to the MLI accidentally omits to notify a provision of a CTA, or Treaty Partners disagree regarding whether a provision is superseded or modified by the MLI, or where both Treaty Partners agree that there is a relevant provision but disagree about which one it is. In such a situation, the exchange of provisional notifications with the other Treaty Partner will afford signatories an opportunity to discuss mismatches in the notifications and correct them prior to finalization of the lists.

The Parties to the MLI (India included) have filed provisional notifications with the Depository as allowed by the MLI at the time of signing of the treaty. More Parties could submit their provisional or revised provisional notifications at the time of submission of the instrument of ratification, acceptance or approval with the Depository of the OECD. The provisional MLI Position of each signatory indicates the tax treaties it intends to cover, the options it has chosen within those provided by the MLI and the reservations it has made. Further, even after ratification, Parties can choose to opt in with respect to optional provisions or to withdraw reservations.

*Compatibility Clauses.* The MLI contains compatibility clauses that define the relationship between the MLI and the provisions of a CTA. These are intended to address overlap or conflicts between the provisions of the MLI and the provisions of a CTA. In other words, the compatibility clauses serve to determine whether the provision of the MLI would replace or modify the provisions of the CTA.

Type of compatibility clause	When does it apply	What is the effect on existing provision	Notification Requirement
MLI Provision applies "in place of" existing CTA provision	Only when there is an existing provision in the CTA	MLI provision replaces the existing CTA provision	All Treaty Partners have to notify existing CTA provision
MLI Provision "applies to" or "modifies" existing CTA provision	Only when there is an existing provision in the CTA	MLI provision changes the application of an existing provision without replacing it	All Treaty Partners have to notify existing CTA provision
MLI Provision applies "in absence of" existing CTA provision	Only when the provision is absent in the CTA	MLI provision is added to the CTA	All Treaty Partners have to notify absence of provision in CTA
MLI Provision applies "in place of" or "in absence of" existing CTA provision	Whether existing provision is present in CTA or absent	It replaces or supersedes existing provision, or is added to CTA in absence of existing provision.	-Where both parties notify existing provision, the provision gets replaced. - Where one party notifies and other does not, the MLI provision supersedes CTA provision to the extent of incompatibility



Article 3 does not impact India's treaties since India has reserved against the application of Article 3 in its entirety. India's position, as enunciated in the *Schellenberg* ruling of the Authority for Advance Rulings, is that where members of a fiscally transparent entity are subject to tax on the income of the fiscally transparent entity, treaty benefits may be available to such members only where the language of the relevant bilateral treaty expressly provides for it.

#### Article 4: Dual Resident Entities

Article 4 provides that the state of residence (for treaty purposes) of a dual resident entity shall be determined by mutual agreement between the Treaty Partners. Treaty benefits are in principle withheld from the entity until such agreement is reached.

<b>Options &amp; Reservations</b>	<b>MLI Section</b>	<b>IND</b>	<b>USA</b>	<b>MA U</b>	<b>LUX</b>	<b>SW E</b>	<b>SG</b>	<b>UK</b>	<b>JAP</b>	<b>CAN</b>	<b>FRA</b>	<b>NED</b>	<b>IRE</b>
Applies paragraph 1	4(1)	✓	NA	X	X	X	X	✓	✓	X	X	✓	✓
Reserves the right not to apply paragraph 1 to treaty provisions that already require resolution of dual residence by mutual agreement.	4(2)(b)	X	NA	X	X	X	X	X	X	X	X	X	✓
Reserves the right not to apply the paragraph 1 to treaty provisions that deny treaty benefits in cases of dual residence without requiring the competent authorities to reach mutual agreement	4(2)(c)	X	NA	X	X	X	X	X	X	X	X	X	X
Replaces the last sentence of paragraph 1 with the sentence, "In the absence of such	4(2)(e)	X	NA	X	X	X	X	X	✓	X	X	X	X

agreement, such person shall not be entitled to any relief or exemption from tax provided by the Covered Tax Agreement."													
Amendment to tax treaty with India?			X	X	X	X	X	✓	✓	X	X	✓	✓

India has chosen to apply Article 4. However, given the reservations of other treaty partners, it will amend only the treaty with the UK, Japan, Netherlands and Ireland. In practice, as a consequence of the introduction of the POEM test to determine residence under India's domestic tax, there is likely to be a higher incidence of the treaty tie-breaker provision being applied e.g., where a foreign company is rendered resident of India (as a result of POEM), and a resident of its country of establishment (since such country attaches importance to the place of incorporation of the company). It is unlikely that India will readily concede to the jurisdiction of residence of a dual resident entity being determined in favour of any country other than India. In such a scenario, it is likely that the competent authorities may be unable to reach an agreement on the residence of a dual resident entity, and accordingly, such entity would not be entitled to any benefits under the treaty, except to the extent agreed between India and the respective country.

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

Article 5 provides three options to countries with respect to elimination of double taxation that may exist where countries follow the exemption method to eliminate double taxation: (a) disallow the exemption method for income that is exempt or subject to a reduced treaty rate in the other jurisdiction, (b) disallow the exemption method for dividends that are deductible in the other jurisdiction and (c) solely apply the credit method.









Simplified LOB to apply the Simplified asymmetrically	b)												
Amendment to tax treaty with India (PPT)?			X	X	✓	✓	✓	✓	✓	✓	✓	✓	✓
Amendment to tax treaty with India (Simplified LOB)?			X	X	X	X	X	X	X	X	X	X	X

<sup>1</sup> Mauritius has expressed a statement that while Mauritius accepts the application of Article 7(1) alone as an interim measure, it intends where possible to adopt a limitation on benefits provision, in replacement of Article 7(1), through bilateral negotiation.

<sup>2</sup> Ibid

In its provisional notification, India has chosen to apply the PPT with the Simplified LOB across all its Notified Treaties. So far as the PPT is concerned, being a default test, it should apply across the board in all of India's treaties irrespective of the other position adopted by the other countries. Since India is only one among 12 countries to have chosen to apply the SLOB, only a PPT is likely to apply to India's CTAs since India has not chosen a reservation to negotiate a detailed LOB with those Treaty Partners who have not chosen the SLOB. Further, most of its other Treaty Partners (including several European countries) have chosen not to allow a one sided symmetric or asymmetric application of the SLOB, thereby resulting in application of only a PPT to those treaties.

Further, the PPT under the MLI in some cases could potentially be broader in ambit than the General Anti-Avoidance Rule ("GAAR") under India's domestic tax laws as the latter gets triggered only if the "main purpose" of the arrangement is to obtain a tax benefit. Further, in order for GAAR to get triggered, one of the other tainted elements also needs to be satisfied, i.e., creation of rights or obligations that are not at arm's length, abuse of ITA, lack of commercial substance, or lack of bona fides. Therefore, it may be unlikely for GAAR to get triggered if the PPT is met, except in situations where the PPT is avoided on the ground that the benefit was in accordance with the object and purpose of the treaty provision. GAAR may still get triggered in such situations as it does not provide for such a carve out.

## Article 8: Dividend Transfer Transactions

Article 8 provides that a reduced rate of source state taxation on dividends pursuant to a tax treaty only applies if a minimum ownership threshold required by the tax treaty is met throughout a retrospective 365-day testing period. This provision applies only where both contracting states have notified the relevant provision in their CTA.

Article 8 is unlikely to have a significant impact on the distribution of dividends. This is because India does not impose a withholding tax on dividend distributions, preferring instead to impose a Dividends Distribution Tax (DDT) on corporate profits out of which dividends are distributed in the hands of the company making such distribution. Hence, any limitation on the availability of treaty benefits with respect to taxes on dividends is unlikely to have an impact on the DDT or the distributions made by Indian companies.

Options & Reservations	MLI Section	IND	USA	MAU	LUX	SW E	SG	UK	JAP	CAN	FRA	NED	IRE
Applies article?	8(1)	✓ <sup>3</sup>	NA	X	X	X	X	X	X	X	✓	✓	✓
Reserves the right for the paragraph not to apply to its CTAs to the extent that the provisions referred to in paragraph 1 already include a minimum holding period	8(3(b))	✓ <sup>4</sup>	NA	X	X	X	X	X	X	X	X	X	X
Amendment to tax treaty with India?			X	X	X	X	X	X	X	X	X	X	X

<sup>3</sup> In its list of provisional notifications, of the countries considered, India has only notified Singapore and Canada.

<sup>4</sup> In its list of provisional notifications, of the countries considered, India has only notified Singapore and Canada.

## Article 9: Capital Gains on Shares in Real Estate Companies

Article 9 introduces a retrospective 365-day testing period with respect to a value threshold in the definition of 'real estate company' in a tax treaty and/or includes 'ownership interests comparable to shares' in CTAs that already includes provisions to tax capital gains derived from shares in real estate companies, or (optionally) replaces existing Covered Tax Agreement provisions entirely with the new art. 13(4) of the OECD Model as per the final BEPS Action 6 report, or adds this provision to Covered Tax Agreements currently lacking a provision on real estate companies.

Since India has chosen to apply the Optional Provision under paragraph 4, it would apply only in cases where the other Treaty Partner has also chosen to apply paragraph 4. In all other cases, the provisions notified under paragraph 7 shall be modified in such a manner that paragraph 1 shall apply to the CTAs where the Treaty Partner has not reserved the applicability of this Article. Hence, the applicability of this Article is dependent on the positions adopted by other Treaty Partners.

Options & Reservations	MLI Section	IND	USA	MAU	LUX	SW E	SG	UK	JAP	CAN	FRA	NED	IRE
Applies the retrospective 365-day testing period to existing provisions on real estate companies	9(1)(a)/9(6)(d)	✓	NA	X	X	X	X	X	✓	X	✓	✓	✓
Applies the inclusion of interests comparable to shares to existing provisions on real estate companies	9(1)(b)/9(6)(e)	✓	NA	X	X	X	X	X	✓	X	✓	✓	X
Chooses to replace or add provision on real estate companies	9(4)	✓	NA	X	X	X	X	X	✓	X	✓	X	✓
Amendment to tax treaty with India?			X	X	X	X	X	X	✓	X	✓	✓	✓

### Article 10: Third-country PE

Article 10 denies treaty benefits for income that the state of residence of the taxpayer attributes to a low-taxed permanent establishment (PE) of the taxpayer in a third country, unless an active trade or business is carried out in that PE.

India has not reserved the applicability of this Article. However, it has also not notified any provisions in the CTA to which this Article should apply to. Therefore, this Article should apply to India's tax treaties, except where the respective Treaty Partner has reserved against the applicability of this Article, or has not notified its treaty with India as a CTA.

Options & Reservations	MLI Section	IND	USA	MAU	LUX	SW E	SG	UK	JAP	CAN	FRA	NED	IRE
Applies article? - 10(3)	10(1)	✓	NA	X	X	X	X	X	✓	X	X	✓	X
Relevant provisions of India treaty amended to the extent not compatible with paragraph 1?			X	X	X	X	X	X	✓	X	X	✓	X

### Article 11: Savings Clause

Article 11 allows a state to tax its own residents notwithstanding the provisions of a tax treaty.

India has not expressly reserved the applicability of Article 11 in its provisional notification. However, in the absence of an express reservation, the provisions of Article 11 will apply to India's CTAs, except where a reservation has been made by one of India's treaty partners.

Options & Reservations	MLI Section	IND	USA	MAU	LUX	SW E	SG	UK	JAP	CAN	FRA	NED	IRE
Applies article?	11(1)	✓	NA	X	X	X	X	✓	X	X	X	X	X
Relevant provisions of India treaty amended to the extent not compatible with paragraph 1?			X	X	X	X	X	✓	X	X	X	X	X

#### Article 12: Artificial Avoidance of PE Status - Commissionaire Arrangements

Article 12 lowers the threshold for the existence of a dependent agent PE to include foreign persons acting on behalf of a taxpayer that habitually play a principal role in the conclusion of contracts on behalf or by the taxpayer.

Keeping in mind that several of India's treaties already provide for some of the recommended provisions under Article 12 (or a similar version), it is no surprise that India has not chosen to exercise its right of reservation and has accordingly notified all its treaties with respect to both paragraphs 1 and 2 of Article 12. By making this choice India has effectively sought to bring all its treaties in line with the MLI. However, it should be noted that these provisions will only apply to a particular tax treaty to the extent that India's relevant treaty partner has similarly not exercised its right of reservation, and notified India with respect to Article 12. Therefore, where both Treaty Partners have notified Article 12 as being applicable, instances where commissionaire arrangements exist would now constitute a PE, such as in the case of the Netherlands.



Options & Reservations	MLI Section	IND	USA	MAU	LUX	SW E	SG	UK	JAP	CAN	FRA	NED	IRE
Applies article?	12(1) and 12(2) <sup>5</sup>	✓	NA	X	X	X	X	X	✓	X	✓	✓	X
Amendment to tax treaty with India?				X	X	X	X	X	✓	X	✓	✓	

<sup>5</sup> These provisions apply only where both parties to a treaty have notified the treaty with respect to this provision.

#### Article 13: Artificial Avoidance of PE Status - Specific Activity Exemption

Article 13 stipulates that: (a) the specific activity exemption in the treaty definitions of a PE applies *only* to activities of an auxiliary or preparatory character or (b) the specific activity exemption in the treaty definitions of a PE applies *irrespective* of whether an activity is of an auxiliary or preparatory character. The anti-fragmentation rule aggregates activities carried on by closely related enterprises for purposes of determining the existence of a PE.

Options & Reservations	MLI Section	IND	USA	MAU	LUX	SW E	SG	UK	JAP	CAN	FRA	NED	IRE
Applies Option A (specific activity exemption applies only to activities of auxiliary or preparatory character)	13(2)	✓	NA	X	X	X	X	X	✓	X	X	✓	X
Applies Option B (specific activity exemption applies irrespective of whether activity is of	13(3)	X	NA	X	✓	X	✓	X	X	X	✓	X	✓

auxiliary or preparatory character)													
Applies anti-fragmentation rule	13(4)	✓	NA	X	X	X	✓	✓	✓	X	✓	✓	✓
Amendment to tax treaty with India?			X	X	X	X	X	X	✓	X	X	✓	X
Anti-fragmentation rule applicable to tax treaty with India			X	X	X	X	✓	✓	✓	X	✓	✓	✓

While Parties to the MLI have been given the right to reserve the applicability of Article 13 in its entirety, or reserve against only paragraph 2 or paragraph 4, India has chosen to notify Option A and not exercise its right to reservation with respect to paragraph 4. This essentially means that India's tax treaties will be modified to replace existing provisions with respect to specific activity exemptions with the language of Option A, but only to the extent that India's treaty partner has also notified Option A. In the event that a treaty partner reserves Article 13 or chooses to notify Option B, the tax treaty between India and such country will remain unchanged. Further, by not actively exercising its right to reserve the applicability of paragraph 4, India has agreed to apply the provision to its treaties. However, the change will only take place between India and its treaty partners if such treaty partner also refrains from exercising its right to reserve and has notified its treaty with India for this purpose.

Options & Reservations	MLI Section	IND	USA	MAU	LUX	SW E	SG	UK	JAP	CAN	FRA	NED	IRE
Applies article?	14(1)	✓	NA	X	X	X	X	X	X	X	✓	✓	✓
Reserves the right not to apply provision with respect to existing treaty provisions relating to the exploration for or exploitation of natural resources	14(3) (b)	X	NA	X	X	X	X	X	X	X	X	✓	✓
Amendment to tax treaty with India?				X	X	X	X	X	X	X	✓	✓	✓

## Article 14: Splitting-up of Contracts

Article 14 provides that for the determination if a building site, or construction or installation project constitutes a PE, (i) activities carried on during one or more periods of time that, in the aggregate, exceed 30 days and (ii) connected activities carried on by closely related enterprises, are aggregated.

As India has neither stated its reservation with respect to Article 14, nor do any of its treaties have existing language with respect to the splitting up on contracts, Article 14 should be applicable to all of India's tax treaties where it's relevant treaty partner has also not specified a reservation. This is likely to have an impact on works contracts and the formation of service PEs in India.

Options & Reservations	MLI Section	IND	USA	MAU	LUX	SW E	SG	UK	JAP	CAN	FRA	NED	IRE
Applies article?	15(1)	✓	NA	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Reserves the right for the entirety of Article 15 not to apply to the Covered Tax Agreement to which the reservations described in Article 12(4), Article 13(6)(a) or (c), and Article 14(3)(a) apply.	15(2)	X	NA	✓	✓	✓	✓	X	X	✓	X	X	X
Amendment to tax treaty with India?				X	X	X	X	✓	✓	X	✓	✓	✓

Article 15: Definition of 'Closely Related Persons'

Article 15 provides that persons are closely related if one has control of the other or both are under the control of the same person. A close relationship is deemed to exist in case a threshold of 50% of vote and value in a company is met.

India has not exercised its right of reservation with respect to Article 15, and all its treaties stand modified to include this provision to the extent that its relevant treaty partner has also not made such reservation.

Article 16: Mutual Agreement Procedure

Options & Reservations	MLI Section	IND	USA	MAU	LUX	SW E	SG	UK	JAP	CAN	FRA	NED	IRE
Applies article?	16(1) - 16(3)	✓	NA	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Reserves the right not to apply the first sentence of 16(1): "Where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, that person may, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, present the case to the competent authority of either Contracting Jurisdiction."	16(5) (a)	✓	NA	X	X	X	✓	X	X	✓	X	X	X

Reserves the right not to apply the second sentence of 16(2): "Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting Jurisdictions."	16(5) (c)	X	NA	X	X	X	X	X	X	✓	X	X	X
First sentence of para 1 applicable to India treaty?				X	X	X	X	X	X	X	X	X	X
Amendment to tax treaty with India?			X	X	✓	✓	✓	✓	✓	✓ <sup>6</sup>	✓	✓	✓

<sup>6</sup> Except second sentence of 16(2)

Article 16 implements the BEPS minimum standard for mutual agreement procedures which is intended to ensure an effective and timely resolution of treaty-related disputes. The BEPS minimum standard is complemented by optional best practices.

India has made a specific reservation against the first sentence of Article 16(1) on the basis that it intends to meet the minimum standard required under the BEPS Action Plan 14. India has not made any additional reservations, and has notified the relevant CTAs with respect to the remaining provisions under Article 16. Keeping in mind that India does not have a reservation against the second sentence of Article 16(1) and that the provision is applicable in the in place of or in the absence of the relevant provision, all of India's CTA should be modified to the extent that the relevant treaty party has not made a reservation with respect to the same.

Options & Reservations	MLI Section	IND	USA	MAU	LUX	SW E	SG	UK	JAP	CAN	FRA	NED	IRE
Applies article?	17(1)	✓	NA	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Reserve applicability against treaties which already contain similar provision	17(3) (a)	✓	NA	X	X	✓	X	X	X	✓	X	X	✓
Change to India treaty?			X	X	X	✓	X	X	X	X	✓	X	X

## Article 17: Corresponding Adjustments

Article 17 requires jurisdictions to make an adjustment to the profits of a taxpayer in its jurisdiction if the other contracting jurisdiction makes an arm's length pricing adjustment to the profits of a taxpayer in that other contracting jurisdiction. Any increase or decrease in that other jurisdiction would be mirrored by a corresponding adjustment to the profits of the taxpayer in the first jurisdiction.

<b>Types of Taxes</b>	<b>Entry into effect</b>	<b>Applicability of MLI by India</b>	
Taxes which are required to be withheld on overseas payments	Event giving rise to the withholding tax takes place on or after the 1st day of the next year (calendar year or tax year) that begins on or after the CTA Date.	September 2018	Event taking place on or after April 1, 2019
Other Taxes	Levied with respect to taxable periods beginning on or after an expiry of 6 calendar months from the CTA Date.	September 2018	Financial year 2019-20

India has reserved the right for the entirety of Article 17 not to apply to its Covered Tax Agreements that already contain a provision described in paragraph 2 of Article 17 of the MLI.

### Entry into Effect

*Entry into force.* The [MLI](#) enters into force on the first day of the month following the expiry of 3 calendar months from the date on which 5 signatories have deposited their instrument of ratification, acceptance or approval. Hence, for example, if the fifth instrument of ratification is deposited in July 2017, the MLI will come into force on November 1, 2017 and from that day, the 5 signatories shall become "Parties" to the MLI and shall be bound by it. For each country signing the MLI after the fifth instrument is deposited, the MLI shall come into force on the first day of the month following the

expiry of three months from the date of such deposit. Referring to the same example as above, if a country signs the MLI in August 2017, the MLI shall come into force for that country on December 1, 2017.

*Entry into effect.* The timelines for the MLI to come into effect with respect to a CTA differ based on the type of taxation to which the modifications apply.

- For taxes which are withheld at source on amounts paid to non-residents, such as royalties, interest, capital gains etc - MLI will enter into effect where the event giving rise to such withholding tax occurs on or after the first day of the next calendar year that begins on the later of the dates on which the MLI comes into force for each Treaty Partner ("CTA Date");
- For example, in case of India and Singapore, if the MLI enters into force for India on September 2017 and for Singapore on September 2018, the CTA Date is September 2018 and the MLI will come into effect for all withholding taxes under the India-Singapore tax treaty which relate to an event occurring on or after January 2019;
- For the purpose of its own application of MLI to withholding taxes, India has chosen to replace "taxable period" for "calendar year". Accordingly, in the above example, MLI will cover a withholding tax payable in India if the event giving rise to such tax takes place on or after April 1, 2019, while it will cover a withholding tax payable in Singapore if such event takes place on or after January 1, 2019;
- For all other taxes - MLI will come into effect for taxable periods beginning on or after an expiry of 6 calendar months from the CTA Date.
- Hence, referring to the above example, for taxes such as tax on business profits attributable to a PE, the MLI shall apply to such taxes levied in India from financial year 2019-20, whereas it will apply for the purpose of such taxes levied in Singapore on or after January 1, 2020.

*Entry into effect for MAP.* There is a separate rule provided for entry into effect of Article 16 on Mutual Agreement Procedure ("MAP"). Article 16 shall come into effect with respect to a CTA for a case presented to the competent authority of a Contracting Jurisdiction on or after the CTA Date irrespective of the taxable period to which the case relates. However, an exception is provided for cases that were not eligible to be presented for MAP as of the CTA Date under the treaty prior to its modification by [MLI](#) . The exception is intended to ensure that the MLI would not revive earlier cases which had been ineligible for MAP prior to entry into force of the MLI.

Therefore, it remains to be seen how the entry into effect of MLI for different income streams would practically play out for India vis-à-vis its Treaty

Partners. Developments relating to ratification of [MLI](#) by different Parties, entry into force of the MLI and entry into effect of MLI for each CTA should be closely followed and borne in mind while undertaking structuring exercises.

It should be noted that India has chosen to apply the 30 day rule. Accordingly references to CTA Date in the section above should be read as 30 days after the date of receipt by the Depository of the latest notification making a reservation to apply the 30 day rule under Article 35(7).

For a more detailed analysis of India's MLI position, please refer to the research paper by Nishith Desai Associates available at the following address: [http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research\\_Papers/India\\_s\\_MLI\\_Positions.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/India_s_MLI_Positions.pdf)

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<sup>1</sup> Mauritius has expressed a statement that while Mauritius accepts the application of Article 7(1) alone as an interim measure, it intends where possible to adopt a limitation on benefits provision, in replacement of Article 7(1), through bilateral negotiation.

<sup>2</sup> Ibid

<sup>3</sup> In its list of provisional notifications, of the countries considered, India has only notified Singapore and Canada.

<sup>4</sup> In its list of provisional notifications, of the countries considered, India has only notified Singapore and Canada.

<sup>5</sup> These provisions apply only where both parties to a treaty have notified the treaty with respect to this provision.

<sup>6</sup> Except second sentence of 16(2)