THE MULTILATERAL INSTRUMENT

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The Multilateral Instrument: A Pillar of International Tax Collaboration

The Multilateral Instrument (MLI) stands as a significant achievement within the OECD/G20 Base Erosion and Profit Shifting (BEPS) project. It represents a novel approach to tackling tax treaty abuse, fostering international cooperation on a large scale. Over 100 jurisdictions have come together to develop the MLI, demonstrating a global commitment to a more robust international tax framework. This instrument remains open for signature by any country, reflecting its inclusive nature. Notably, a vast majority of developed and developing economies have signed the MLI, signifying its widespread appeal. As of today, nearly 94 countries have formally signed on, with roughly half actively implementing its provisions. This growing adoption highlights the MLI's potential to reshape the global tax landscape.

Curbing Base Erosion and Profit Shifting (BEPS)

Prior to the MLI, a web of bilateral tax treaties existed between countries to eliminate double taxation on foreign income. However, these treaties sometimes contained unintended gaps or inconsistencies. Multinational Enterprises, with their global reach and sophisticated tax planning techniques, could exploit these loopholes to artificially shift profits to low-tax jurisdictions, minimizing their overall tax burden. This phenomenon, known as Base Erosion and Profit Shifting (BEPS), led to significant revenue losses for governments worldwide.

The MLI's Approach: Streamlined Efficiency

Unlike traditional approaches that involve amending individual bilateral tax treaties through protocols, the MLI operates as a distinct type of treaty. It functions alongside existing bilateral agreements, acting as an overlay that modifies their application to incorporate BEPS-related measures. This innovative approach streamlines the process by avoiding the need for numerous, bilateral renegotiations. The Explanatory Statement to the MLI clarifies that it does not directly amend the text of existing treaties, but rather serves as a supplementary instrument that influences their interpretation and application in light of BEPS recommendations. Here's a breakdown of its key aspects:

- **Multilateral Framework**: Unlike traditional bilateral treaties, the MLI involves multiple countries agreeing to a common set of rules. This creates a more standardized approach to tax treaty interpretation and application.
- **Optional Provisions**: Countries have the flexibility to choose which provisions of the MLI they want to incorporate into their existing bilateral treaties. This allows them to tailor the MLI's impact to their specific needs and tax policies.
- **Bilateral Activation**: For a specific MLI provision to take effect, both countries involved in a bilateral treaty need to have opted into that provision. This avoids situations where one country unilaterally imposes new tax rules on the other.

India and the MLI: A Calculated Embrace

India's story with the MLI showcases a strategic approach to tax reform. Signing early in 2017, India meticulously evaluated its existing tax treaties before strategically selecting MLI provisions for ratification in 2019. This tailored approach ensures alignment with domestic tax policies.

India's participation unlocks the MLI's benefits i.e., streamlined treaty modification and a level playing field for its businesses. By adopting BEPS measures, India aligns with global best practices, potentially attracting foreign investment.

India's continued engagement with the MLI signifies its commitment to a transparent and efficient global tax environment.

How MLI Operates?

The Multilateral Instrument (MLI) stands as a game-changer in international tax reform. Prior to its emergence, modifying tax treaties between countries was a tedious affair, requiring bilateral negotiations for each update. This resulted in a fragmented system with inconsistencies across the globe. The MLI offers a much-needed solution by establishing a unified platform for streamlining tax treaty revisions.

Here’s a breakdown of how MLI Operates:

The MLI requires countries to designate existing tax treaties they want MLI provisions to apply to. These designated treaties they want MLI provisions to apply to. These designated treaties become **Covered Tax Agreements (CTAs)** , but only if both parties to the original treaty agree to this decision.

MLI provisions impact a specific tax treaty only after **both CTA parties deposit their ratifications with the OECD Secretariat.**

The MLI sets minimum standards for all CTAs, including:
- **Combating Abuse** (Article 6 & 7)
- **Improved Dispute Resolution** (Article 16)

The MLI provides flexibilty for BEPS implementation:
- **Optional and Alterntaive Provisions**: Countries pick the most suitable approach for thier needs.
- **Reservations**: Tailored adoption by opting out of non - essential provisions.

Analysis of MLI Provision and India’s Post MLI Position

This analysis examines India's strategic engagement with the Multilateral Instrument (MLI) through the lens of specific MLI Provisions. Following its ratification, India has adopted a specific approach to these provisions, as evidenced by its chosen options, reservations, and notifications within its Covered Tax Agreements (CTAs).

Article	India’s Post MLI Tax Treaty Provision	Countries Who have Agreed to CTA With or Without Modification
Article 2 Interpretation of terms	India has notified 93 tax treaties Tax treaties not notified by India: China and Marshall Islands.	Albania, Australia, Belgium, Bulgaria, Canada, Colombia, Cyprus, Czechia, Denmark, Egypt, Estonia, Finland, Fiji, France, Georgia, Greece, Hong Kong, Hungary, Iceland, Indonesia, Israel, Japan, Jordan, Kazakhstan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Mongolia, Morocco, Netherlands, North Macedonia, Norway, Poland, Qatar, Romania, Russia, Saudi Arabia, Serbia, Singapore, Slovak Republic, Slovenia, South Africa, Sweden, UAE, Ukraine

Article 3 Transparent Entity	India has opted out of applying Article 3 entirely to its Covered Tax Agreements (CTAs). This means that regardless of what India's treaty partners choose, Article 3's provisions won't modify or amend India's bilateral tax treaties.	NOT APPLICABLE
Article 4 Dual Resident Entities	India has embraced a proactive approach to resolving the residency of dual resident non-individuals (entities not classified as individuals) for tax treaty purposes. Here's a breakdown: • **Full Adoption**: India has opted in to Article 4 of the MLI, applying it to all its Covered Tax Agreements (CTAs). • **Reciprocity Matters**: However, if a treaty partner has reservations against Article 4, it won't apply to their specific tax treaty with India. • **Replacing Existing Clauses**: By accepting Article 4, India identified clauses in its existing CTAs that address "place of effective management" (POEM). These clauses will be replaced by the MLI's "mutual agreement procedure" (MAP) for determining residency, provided the treaty partner also notifies the same clause. • **Partial Application**: If a treaty partner doesn't notify the same clause, the existing POEM clause in the bilateral treaty might still apply, but only if it doesn't conflict with Article 4. This approach ensures consistency and clarity in residency determination for dual resident non-individuals while respecting India's treaty partners' positions.	Armenia, Australia, Canada, Colombia, Denmark, Egypt, Fiji, Indonesia, Ireland, Israel, Japan, Kazakhstan, Mexico, Mongolia, Namibia, Netherlands, New Zealand, Norway, Poland, Romania, Russia, Serbia, Slovak Republic, Slovenia, South Africa

Article 5 Application of Methods of Elimination of Double Taxation	India has adopted a strategic approach to double non-taxation under the MLI by opting for **Option C - the credit method**. This preference aligns with India's existing tax treaties, which generally employ the credit method for most income categories.	Australia, Austria, Belgium, Bulgaria, Colombia, Denmark, Egypt, Estonia, Finland, Fiji, Georgia, Hong Kong, Ireland, Israel, Italy, Japan, Jordan, Kuwait, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Thailand, UAE
Article 6 Purpose of CTA (minimum standard)	India's position on Article 6 of the MLI, which sets a minimum standard for preventing treaty abuse, remains unclear. Here's a breakdown: · **Silent on MLI Preamble**: India hasn't explicitly adopted or rejected the specific preamble language introduced by Article 6. · **Potential Outcome**: Since India hasn't notified its intention to modify existing treaty preambles, the MLI preamble won't replace them entirely. Instead, it might be appended to the existing text in India's Covered Tax Agreements (CTAs). · **Impact on Treaty Partners**: This outcome would apply regardless of whether India's treaty partners notify their intention to adopt the MLI preamble for their treaties with India. · **Domestic Legal Backing**: India's Income Tax Act (Section 90) empowers the government to enter into tax treaties that prevent double taxation and promote information exchange. This legal framework allows India to implement measures aligned with the MLI's goals, even without explicitly adopting Article 6.	Albania, Armenia, Australia, Austria, Belgium, Bulgaria, Canada, Colombia, Croatia, Cyprus, Czechia, Denmark, Egypt, Estonia, Finland, Fiji, France, Georgia, Greece, Hong Kong, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Kuwait, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Mongolia, Morocco, Namibia, Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Qatar, Romania, Russia, Saudi Arabia, Serbia, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Thailand, Turkey, UAE, Ukraine

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<td>Article 7

Prevention of treaty abuse (minimum standard</td>
<td>India fights tax treaty abuse with a two-step punch:
Main Purpose Test (PPT): Stops tax breaks if the goal is dodging taxes, not real business. This applies to all India's tax treaties.
Limited Benefits Maybe (SLOB): India might add stricter rules on who gets tax breaks (SLOB) but only if its treaty partner agrees.
India isn't using a specific MLI option for dealing with fake companies set up to avoid taxes.</td>
<td>Albania, Armenia, Australia, Austria, Belgium, Bulgaria, Canada, Colombia, Croatia, Cyprus, Czechia, Denmark, Egypt, Estonia, Finland, Fiji, France, Georgia, Greece, Hong Kong, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Kuwait, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Mongolia, Morocco, Namibia, Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Qatar, Romania, Russia, Saudi Arabia, Serbia, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Thailand, Turkey, UAE, Ukraine</td>
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<td>Article 8

Dividend Transfer Transactions</td>
<td>India Embraces Minimum Holding Period for Dividend Tax Benefits (MLI with Nuances):
The MLI introduces a minimum 365-day holding period for shareholders to qualify for tax benefits (exemption or reduced rate) on dividends. India has chosen to adopt this provision for most of its Covered Tax Agreements (CTAs).
Key Points:
Broad Application: This minimum holding period will apply to all India's CTAs except the one with Portugal, which already has a similar provision.
Room for Exceptions: However, even for other CTAs, the provision might not apply if the treaty partner has reservations against it.</td>
<td>Albania, Armenia, Australia, Belgium, Canada, Colombia, Denmark, Egypt, Fiji, France, Japan, Mexico, Mongolia, Namibia, Netherlands, New Zealand, North Macedonia, Norway, Portugal, Romania, Russia, Serbia, Slovak Republic, Slovenia</td>
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Article 9 Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property	India has chosen to implement a provision in its Capital Gains Tax Agreements (CTA) that applies a minimum holding period and a minimum value derivation criterion. This provision will only be applicable when the other contracting party under the CTA has also opted to implement the same provision.	Albania, Armenia, Australia, Austria, Belgium, Bulgaria, Canada, Colombia, Croatia, Cyprus, Czechia, Denmark, Egypt, Estonia, Finland, Fiji, France, Georgia, Greece, Hong Kong, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Japan, Kazakhstan, Korea, Kuwait, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Mongolia, Morocco, Namibia, Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Qatar, Romania, Russia, Saudi Arabia, Serbia, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Thailand, Turkey, Ukraine
Article 10 Anti-abuse rule for PE in third jurisdiction	India has not made any reservations in respect of this article. This rule may not have any impact if India is the residence state, as the domestic law permits India to tax global income of residents, including income attributable to PE.	Albania, Austria, Denmark, Fiji, Israel, Japan, Kazakhstan, Mexico, Mongolia, Namibia, Netherlands, New Zealand, Russia, Slovak Republic, Slovenia, Spain, Ukraine
Article 11 Application of tax agreements to restrict a party's right to tax its own residents	India has not made any reservations or notified any CTA in respect of this article. Therefore, the applicability of this article to CTA depends on the position adopted by the treaty partner. This means India's right to tax its resident’s remains unrestricted by the treaty, even for income earned through a permanent establishment (PE) in another country.	Australia, Belgium, Colombia, Croatia, Denmark, Fiji, Indonesia, Mexico, Mongolia, Namibia, New Zealand, Norway, Poland, Portugal, Russia, Slovak Republic, South Africa

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<td>Article 12

Artificial avoidance of PE status through commissionaire and similar strategies</td>
<td>India has not made any reservations in respect of this article and has notified all 93 CTA to adopt this article.</td>
<td>Albania, Armenia, Belgium, Bulgaria, Colombia, Croatia, Denmark, Egypt, Fiji, France, Indonesia, Israel, Japan, Jordan, Kazakhstan, Lithuania, Malaysia, Mexico, Mongolia, Namibia, New Zealand, North Macedonia, Norway, Russia, Saudi Arabia, Serbia, Slovak Republic, Slovenia, Spain, Thailand, Turkey, Ukraine</td>
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<td>Article 13

Artificial Avoidance of PE Status through the Specific Activity Exemptions</td>
<td>India has chosen a specific approach:

Adopted Option A: India opted for Option A, which grants exemptions only for activities that are purely preparatory or supportive (auxiliary) to the main business.
Conditional Application: However, India's implementation of Option A depends on its treaty partner. The new rule will only apply to a specific tax treaty if the other country also chooses Option A.
No Reservation: India has also agreed to apply an additional rule within Article 13 (paragraph 4) that restricts the use of exemptions when combined activities are substantial. This too, depends on the other country's choice.
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<td>Armenia, Australia, Austria, Belgium, Bulgaria, Colombia, Croatia, Denmark, Egypt, Fiji, France, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kuwait, Lithuania, Luxembourg, Malaysia, Mexico, Mongolia, Namibia, Netherlands, New Zealand, North Macedonia, Norway, Portugal, Russia, Saudi Arabia, Serbia, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Thailand, Turkey, Ukraine</td>
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<td>Article 14

Splitting-up of Contracts</td>
<td>India has neither made any reservation nor notified any countries in respect of this Article.</td>
<td>Armenia, Australia, Colombia, Denmark, Egypt, Fiji, Indonesia, Ireland, Israel, Jordan, Kazakhstan, Kuwait, Lithuania, Mongolia, Namibia, Netherlands, New Zealand, Norway, Russia, Saudi Arabia, Serbia, Slovak Republic, Thailand, Ukraine</td>
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Article 15 Definition of a Person Closely Related to an Enterprise	India is silent on its position; the said provision to apply to all its CTA (unless reservation is made by any other CTA partner).	Albania, Belgium, Bulgaria, Croatia, Denmark, Egypt, Fiji, France, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kuwait, Lithuania, Malaysia, Mexico, Mongolia, Namibia, Netherlands, New Zealand, North Macedonia, Slovak Republic, South Africa, Spain, Turkey
Article 16 Mutual agreement procedure	India isn't covered by this Article. Article 16(5) allows countries to agree on a separate notification or consultation process. This process would be used for cases where a taxpayer disagrees with a tax decision by their own country's authorities and appeals to the competent authority of the other involved country. However, India has chosen not to participate in such agreements.	Albania, Armenia, Australia, Austria, Belgium, Bulgaria, Canada, Colombia, Croatia, Cyprus, Czechia, Denmark, Egypt, Estonia, Finland, Fiji, France, Georgia, Greece, Hong Kong, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Kuwait, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Mongolia, Morocco, Namibia, Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Qatar, Romania, Russia, Saudi Arabia, Serbia, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Thailand, Turkey, UAE, Ukraine
Article 17 Corresponding adjustments	India has opted out of applying this article to its existing tax treaties (CTAs) that already have a similar provision for making corresponding adjustments.	Belgium, Bulgaria, France, Greece, Italy, Japan, Lithuania, Malaysia, Poland, Russia, Sweden, UAE

Article 18 – 26 Mandatory binding arbitration	India has not opted for mandatory arbitration.	NOT APPLICABLE
Article 35 Entry into effect	India has chosen to substitute "calendar year" with "taxable period" If other CTA partner opts for calendar year, date of applicability of MLI provision for such other CTA partner will differ via-a-vis as for India.	Albania, Armenia, Australia, Austria, Belgium, Bulgaria, Canada, Colombia, Croatia, Cyprus, Czechia, Denmark, Egypt, Estonia, Finland, Fiji, France, Georgia, Greece, Hong Kong, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Kuwait, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Mongolia, Morocco, Namibia, Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Qatar, Romania, Russia, Saudi Arabia, Serbia, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Thailand, Turkey, UAE, Ukraine

Conclusion

This report has examined the impact of the MLI on India's tax treaty network. India has adopted most MLI provisions, aiming to combat base erosion and profit shifting. However, India opted out of applying the mandatory arbitration clause and the provision on corresponding adjustments for existing treaties with similar provisions. These choices are expected to increase tax transparency and cooperation with treaty partners while maintaining some flexibility in dispute resolution.