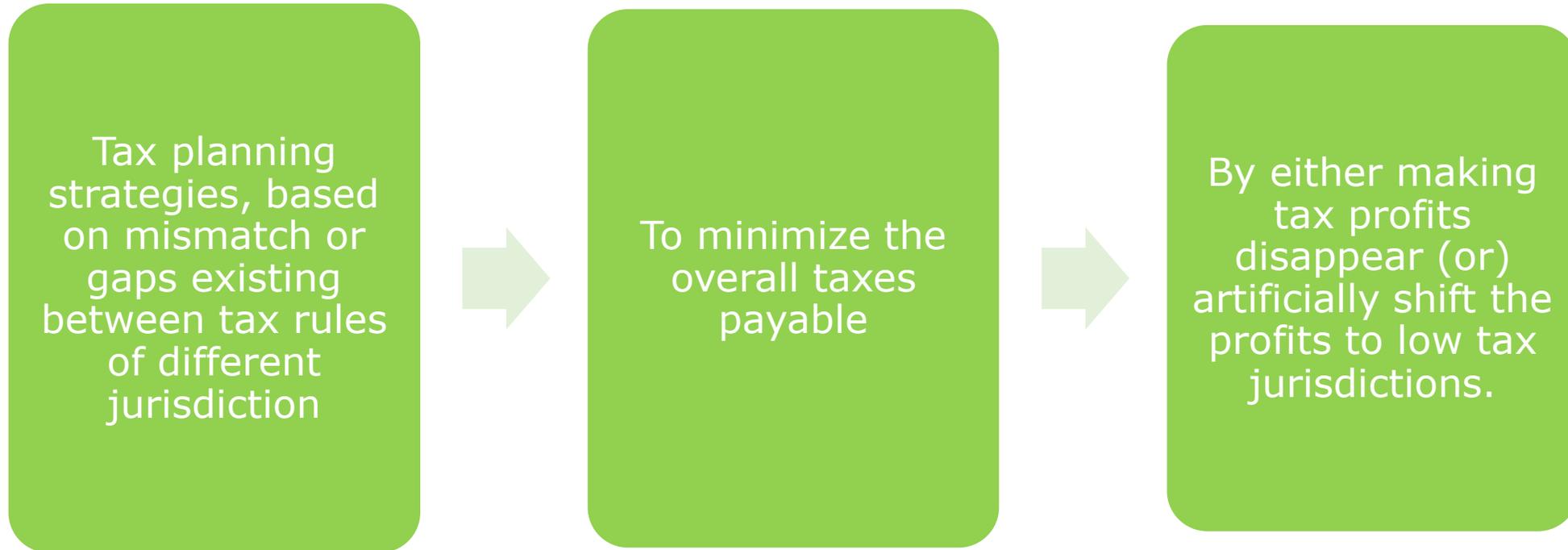




OVERVIEW OF BEPS ACTION PLAN

What is BEPS ?



BEPS Overview

Establishing coherence in corporate taxation

- action #2 hybrid mismatches
- action #3 CFC rules
- action #4 limit base erosion
- action #5 harmful practices

Turning tax policies into tax rules

- #15 develop multilateral instrument.

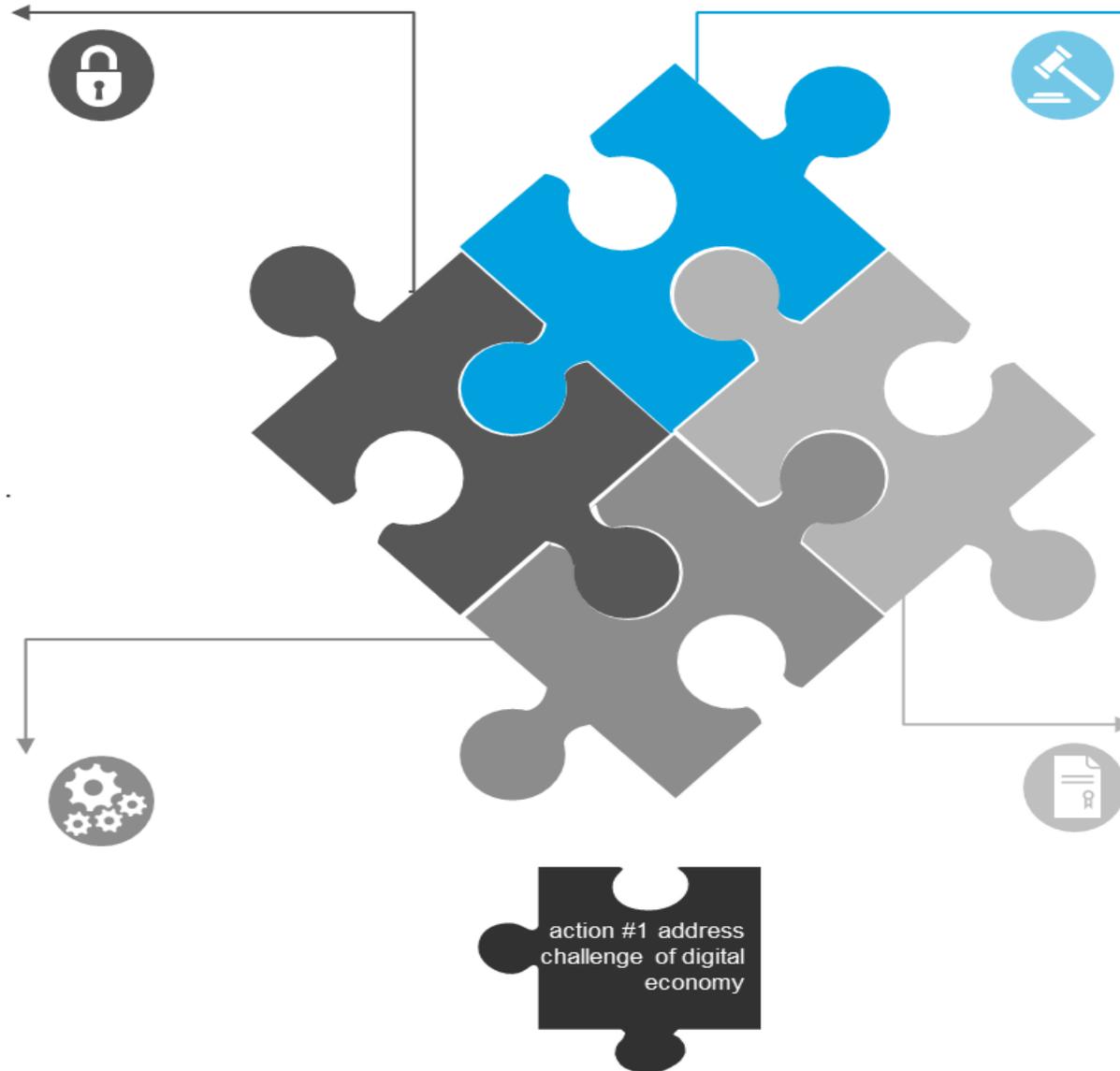
action #1 address challenge of digital economy

Restoring effects of international standards

- action #6 prevent treaty abuses
- action #7 artificial avoidance of PE
- action #8, 9, 10 value creation intangibles, risks and capital, high risks transactions

Ensuring transparency while promoting predictability

- action #11 data collection & analysis
- action #12 disclosure aggressive tax planning
- action #13 TP documentation & CbC reporting
- action #14 dispute resolution mechanisms



Developments in domestic law so far

Concept of POEM introduced vide Finance Act, 2015



Equalisation levy, introduced in 2016



Limitation of Interest deduction introduced vide Finance Act, 2017



GAAR implementation w.e.f AY 2018-19



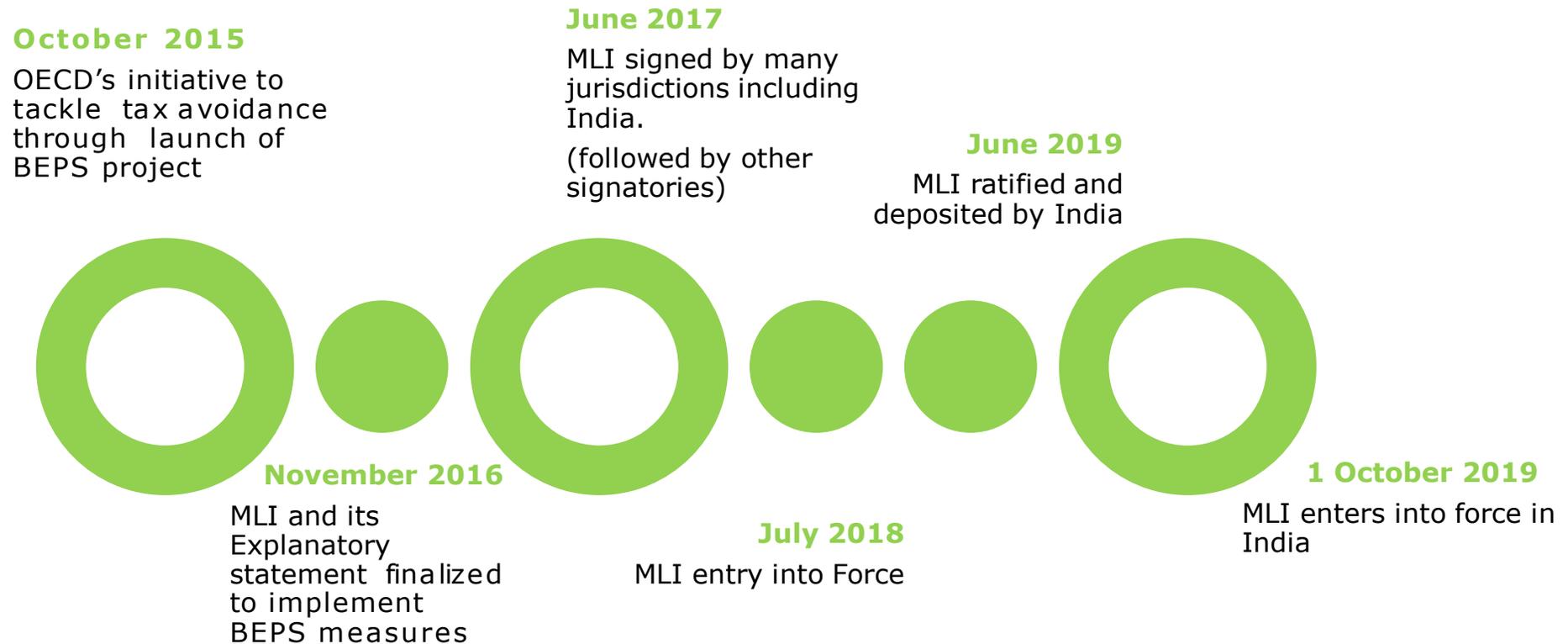
Significant Economic Presence, Digital PE concept introduced vide Finance Act, 2018



INTRODUCTION TO MLI

MLI and its evolution

MLI is an instrument to implement agreed changes in a synchronized manner across the network of existing agreements without the need to bilaterally renegotiate each such agreement.



MLI

- Have signatories listed all their existing tax treaties ?
- Does MLI permit the jurisdictions to make treaty by treaty choices ?
- Does MLI replace the provisions of DTAA ?
- Is this the end for bilateral treaties ?
- Jurisdictions who are Signatories and MLI is entered into force?

Broad Architecture of MLI

MLI consists of 39 Articles:



Articles 1 and 2 set out the scope of MLI and the interpretation of terms used therein



Articles 3-17 deal with BEPS tax treaty measures



Articles 18-26 cover provisions related to mandatory binding arbitration



Articles 27-39 contain procedural provisions such as provisions relevant to adoption and implementation of the MLI including ratification, entry into force and entry into effect dates etc



UNDERSTANDING FEW TERMS

Few important terms

Covered tax Agreement (CTA)

- An agreement for avoidance of double taxation with respect to taxes on income between two jurisdictions and both the parties have notified the same.

Minimum Standards

- Jurisdictions that sign the MLI are required to adopt MLI provisions forming part of the agreed minimum standards:
- Articles 6 and 7 reflect the minimum standard for prevention of treaty abuse under BEPS action plan 6
- Article 16 reflects the minimum standard for improvement of dispute resolution under BEPS action plan 14

Optional Provisions

- Adoption of such MLI provisions is at the will of each jurisdiction. Each jurisdiction has an option to adopt or reserve its right from application of such provision.

Few important terms

Substantive provision

- Articles 3 to 17 of the MLI are the substantive provisions reflecting the tax treaty related measures presented in the BEPS package.

Notification

- This is a process of identifying the provisions that match with those which have been adopted by the other contracting jurisdictions and notify those provisions.

Reservation

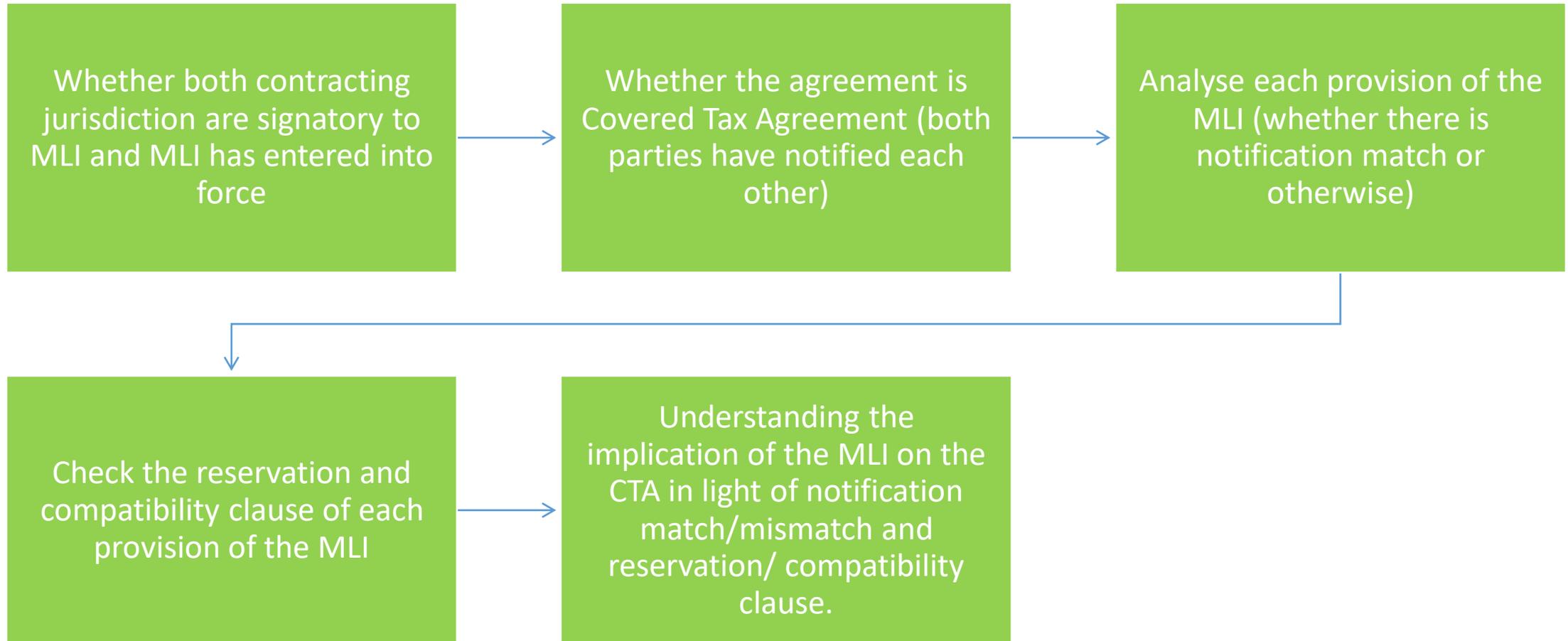
- Where a contracting jurisdiction uses a reservation to opt out of the provision entirely / partly.

Few important terms- Compatibility Clause

Type of compatibility clause	When does it apply	Effect on existing provision	Notification Requirement
Applies "in place of" existing CTA provision	When there is an existing provision in the CTA	MLI provision replaces the existing CTA provision	Both contracting jurisdiction have to notify existing CTA provision
"applies to" or "modifies" existing CTA provision	When there is an existing provision in the CTA	MLI provision changes the application of an existing provision without replacing it	Both contracting jurisdiction have to notify existing CTA provision
Applies "in absence of" existing CTA provision	When the provision is absent in the CTA	MLI provision is added to the CTA	Both contracting jurisdiction have to notify absence of provision in CTA
Applies "in place of" or "in absence of" existing CTA provision	Whether 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 jurisdiction notify existing provision, the provision gets replaced. Where there is a notification mismatch, MLI provision supersedes CTA to the extent it is incompatible.



Working mechanism of MLI



List of jurisdictions that have notified tax treaty with India as CTA and have deposited their ratification instruments with OECD Secretariat by 30 September 2019

Austria	Georgia	Luxembourg	Russia	Sweden	Ukraine
Australia	Ireland	Malta	Serbia	United Kingdom	Denmark
Belgium	Israel	Netherlands	Singapore	UAE	Iceland
Finland	Japan	New Zealand	Slovak Republic	Canada	
France	Lithuania	Poland	Slovenia	Norway	



ARTICLE WISE ANALYSIS –INDIA'S MLI POSITION

MLI Article	Brief description of the Article	India's position
Article 2: Interpretation of terms	Notification of tax treaties covered by MLI	India has notified 93 tax treaties. Mauritius, China and Germany have not notified treaties with India as CTAs
Article 3: Transparent entities	Tax treaty benefits to be allowed to fiscally transparent entities for the income earned to the extent that such income is taxed in the jurisdiction in which the entity is a resident. Compatibility clause : "In the place of or in the absence of"	India has made a reservation and thus, this article shall not apply to its CTAs
Article 4: Dual resident entities (other than individuals)	Competent Authorities of both jurisdictions to mutually agree on the manner to determine the residential status of dual resident non-individuals considering place of effective management, place of incorporation or constitution, and any other relevant factors. In the absence of such agreement, treaty benefits to be denied to such a person (unless otherwise agreed by Competent Authorities). Compatibility clause : "In the place of or in the absence of"	India has opted for such provision; This provision shall apply to all its CTAs (unless reservation is made by other CTA partner)

Note: 1. Relevance of concept of POEM in the context of domestic law.

2. Jurisdiction like Australia and Japan have taken a position that in the absence of agreement between Competent Authorities, treaty benefits shall be denied.

Compatibility clause/ reservation clause

2. Paragraph 1 shall apply in place of or in the absence of provisions of a Covered Tax Agreement that provide rules for determining whether a person other than an individual shall be treated as a resident of one of the Contracting Jurisdictions in cases in which that person would otherwise be treated as a resident of more than one Contracting Jurisdiction. Paragraph 1 shall not apply, however, to provisions of a Covered Tax Agreement specifically addressing the residence of companies participating in dual-listed company arrangements.

3. A Party may reserve the right:

- a) for the entirety of this Article not to apply to its Covered Tax Agreements;
- b) for the entirety of this Article not to apply to its Covered Tax Agreements that already address cases where a person other than an individual is a resident of more than one Contracting Jurisdiction by requiring the competent authorities of the Contracting Jurisdictions to endeavour to reach mutual agreement on a single Contracting Jurisdiction of residence;
- c) for the entirety of this Article not to apply to its Covered Tax Agreements that already address cases where a person other than an individual is a resident of more than one Contracting Jurisdiction by denying treaty benefits without requiring the competent authorities of the Contracting Jurisdictions to endeavour to reach mutual agreement on a single Contracting Jurisdiction of residence;
- d) for the entirety of this Article not to apply to its Covered Tax Agreements that already address cases where a person other than an individual is a resident of more than one Contracting Jurisdiction by requiring the competent authorities of the Contracting Jurisdictions to endeavour to reach mutual agreement on a single Contracting Jurisdiction of residence, and that set out the treatment of that person under the Covered Tax Agreement where such an agreement cannot be reached;
- e) to replace the last sentence of paragraph 1 with the following text for the purposes of its Covered Tax Agreements: “In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by the Covered Tax Agreement.”;
- f) for the entirety of this Article not to apply to its Covered Tax Agreements with Parties that have made the reservation described in subparagraph e).

MLI Article	Brief description of the Article	India's final position
<p>Article 5: Application of methods to eliminate double taxation</p>	<p>Recommends three options for elimination of double taxation inter-alia including "Option C", which prescribes application of credit method</p> <p>Compatibility clause: "in place of"</p>	<p>India has chosen to apply Option C (i.e., credit method); the said option to apply to all its CTAs for its own residents</p> <p>Indian tax treaties generally contains credit method except in select cases (For e.g., tax treaty with Bulgaria, Greece, Egypt, Slovak Republic that contains exemption method). Therefore, exemption method in such select cases to be replaced by "credit method"</p>

Note:1. If both the jurisdiction agree for the same option eg. Option C, then Option C shall apply to its CTA.

2. If other contracting jurisdiction applies different option or does not choose any option then, option chosen by India (Option C) shall apply to its residents –Article 5(1).

3. As on date only Slovak Republic has also opted for Option C.

<p>Article 6: Purpose of CTA (minimum standard)</p>	<p>Introduces preamble text in CTA stating that the jurisdictions intend to avoid creation of opportunities for non-taxation or reduced taxation through tax evasion or avoidance, and through treaty shopping</p>	<p>India is silent on its position. Being minimum standard, such MLI provision to apply to all its CTAs</p>
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Note: Since India is silent on the position, such preamble shall be included in addition to the existing preamble.

MLI Article	Brief description of the Article	India's final position
<p>Article 7: Prevention of treaty abuse</p> <p>(minimum standard)</p>	<p>Envisages following three anti-abuse measures to meet the minimum requirement:</p> <ul style="list-style-type: none"> A. Principle Purpose Test - PPT B. PPT supplemented with either SLOB or detailed LOB clause C. Detailed LOB provision, supplemented by a mutually negotiated mechanism to deal with conduit arrangements not already dealt with in CTA 	<p>India has opted for PPT + SLOB. PPT being minimum standard, it will apply to all its CTAs</p> <p>India has accepted to apply PPT as an interim measure and intends where possible to adopt LOB provision, in addition or replacement of PPT, through bilateral negotiations</p> <p>Not opted for competent authority route under Article 7(4) of MLI and thus, not applicable</p> <p>SLOB to be applicable only where other CTA partner has adopted it</p>
<p>Article 8: Dividend transfer transactions</p>	<p>Introduces additional criteria of "365 days minimum holding period" for the shareholder to avail concessional tax rates under CTA.</p> <p>Compatibility clause: "in place of or in absence of"</p>	<p>India has opted to apply such provision (except in case of India-Portugal tax treaty, which already contains similar provision)</p> <p>Thus, this MLI provision to apply to all other CTA (unless reservation is made by other CTA partner)</p>

MLI Article	Brief description of the Article	India's final position
<p>Article 9:</p> <p>Capital gains from alienation of shares or interest of entities deriving their value principally from immovable property</p>	<p>Introduces additional criteria of “365 days minimum holding period” in case of gains arising from alienation of shares or other participation rights if such shares or rights derive more than a specified percentage of their value from immovable property situated in the source jurisdiction.</p> <p>Optional provision of inserting a minimum value derivation criterion of more than 50 percent of their value directly or indirectly from immovable property</p> <p>Compatibility clause: “in place of or in absence of”</p>	<p>India has opted to apply minimum holding period threshold along with minimum value derivation criterion of more than 50 percent.</p> <p>The said provision to apply to CTA only if other CTA partner has chosen to apply the said provision</p>
<p>Article 10:</p> <p>Anti-abuse rule for PE in third jurisdiction</p>	<p>Addresses abuse of CTAs in a triangular situation</p>	<p>India is silent on its position; the said provision to apply to all its CTA (unless reservation is made by any other CTA partner)</p>

MLI Article	Brief description of the Article	India's final position
<p>Article 11: Application of tax agreement to restrict a party's right to tax its own residents</p>	<p>Preserves the right of jurisdiction to tax its own residents</p>	<p>India is silent on its position; the said provision to apply to all its CTA (unless reservation is made by any other CTA partner)</p>
<p>Note: As on date this article shall apply to Australia, Belgium, New Zealand, Poland, Russia, Slovak Republic, United Kingdom, Norway and Denmark .</p>		
<p>Article 12: Artificial avoidance of PE status through commissionaire and similar strategies</p>	<p>Widens the definition of PE given in tax treaties to include cases where a person habitually concludes contracts or plays a principal role in conclusion of contracts of another enterprise</p>	<p>India has opted to apply the said provision; the said provision to apply to a CTA only if any other CTA partner has chosen to apply the said provision</p>
<p>Article 13: Artificial avoidance of PE through specific activity exemptions</p>	<p>Provides two options to counter artificial avoidance of PE status through specific activity exemptions. "Option A" states that exemption from PE is available only if the activities carried on are of preparatory and auxiliary nature Additionally, it provides for anti-fragmentation rule</p>	<p>India has chosen to apply Option A; the said option to apply to CTA only if other CTA partner has chosen same option India has chosen to apply anti-fragmentation rule; the said rule to apply to a CTA only if other CTA partner has chosen to apply the said provision</p>

MLI Article	Brief description of the Article	India's final position
<p>Article 14: Splitting up of contracts</p>	<p>Addresses avoidance of PE by splitting the contracts between related enterprises to circumvent the threshold of PE creation</p> <p>Compatibility clause – in place of or absence of</p>	<p>India is silent on its position; the said provision to apply to all its CTA (unless reservation is made by any other CTA partner)</p>
<p>Article 15: Definition of a person "closely related to an enterprise"</p>	<p>Defines the term "person closely related", in the context of Articles 12, 13, and 14 of the MLI</p>	<p>India is silent on its position; the said provision to apply to all its CTA (unless reservation is made by any other CTA partner)</p>



INTERPLAY BETWEEN PPT AND GAAR

Interplay between PPT and GAAR

- PPT being minimum standard, most of the treaty partners of India have or would adopt PPT for prevention of treaty abuse. India has opted for PPT as an interim measure alongwith SLOB.
- General Anti-Avoidance Rules under the Income Tax Act, 1961 provides that GAAR provisions could override treaty provisions.
- Scope of PPT and GAAR

Main purpose v. one of the principal purpose

For applicability of **GAAR**, the requirement is that the **main purpose** of the arrangement should be to obtain tax benefit. However, for applying **PPT**, even if **one of the principal purpose** of the arrangement is to obtain tax benefit, treaty benefit could be denied.

Availment of tax benefit "directly or indirectly"

GAAR provisions do not provide that even in case where the tax benefit is obtained indirectly, GAAR could be invoked. However, PPT could be invoked even in cases where the tax benefit is obtained indirectly.

Escape route and Carve-outs

Though PPT could be triggered even if one of the purpose of the arrangement is to obtain tax benefit, treaty benefit could still be availed if it is established that granting the benefit of the treaty would be in accordance with the object and purpose of the relevant provisions of the treaty.

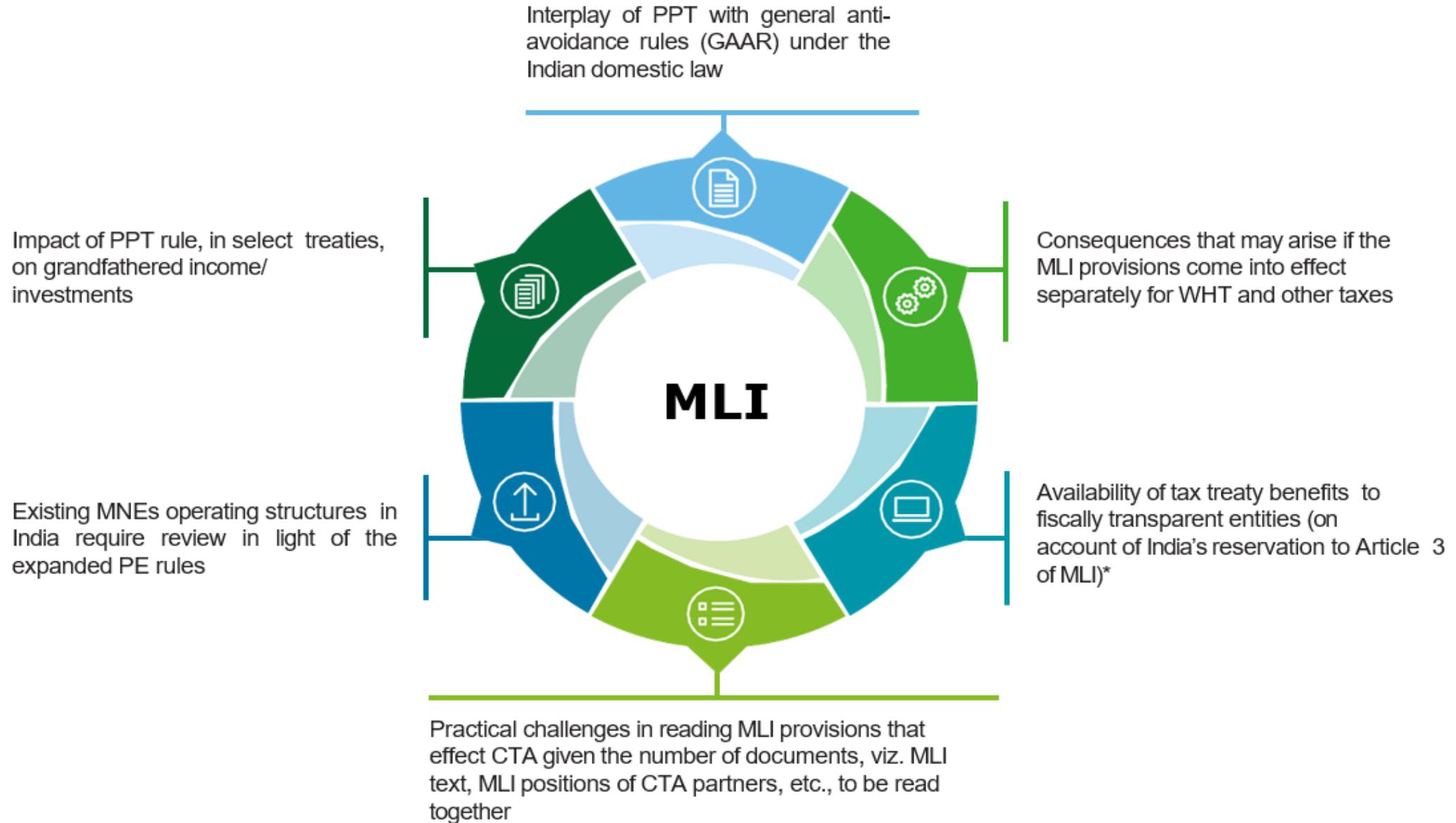
Under GAAR, there is no such escape route, but there are carve-outs such as monetary threshold.

Entry into force (EIF) and entry into effect (EIE)

Particulars	Time period
EIF	First day of the month after the expiry of 3 months from the date of Deposit. In the context of India – 1 October 2019
EIE	
Withholding Taxes	First day of the calendar year or taxable period (if specifically chosen) following the latest EIF.
Other Taxes	Taxable periods beginning 6 months after the latest EIF

India chooses to substitute “taxable period” for “calendar year” for the purpose of entry into effect of provisions relating to withholding taxes.

MLI Challenges and Review Areas





MATCHING OF RESERVATIONS AND NOTIFICATIONS AS PER OECD DATABASE – INDIA AND SINGAPORE TREATY

India and Singapore treaty

Article no.	Jurisdiction	Singapore	India
	Signature MLI	07-06-2017	07-06-2017
	Ratification instrument deposited	21-12-2018	25-06-2019
	Status of List	Definitive	Definitive
	Synthesised text published by Other Jurisdiction	Not available yet	
	Synthesised text published by India	Not available yet	
Article 2	Covered Tax Agreement	The agreement would be a 'Covered Tax Agreement'.	
Article 3	Transparent Entities	Article 3 would not apply.	
Article 4	Dual Resident Entities	Article 4 would not apply.	
Article 5	Application for methods for Elimination of Double Taxation	Article 5 would not apply.	
Article 6	Purpose of a Covered Tax Agreement	The preamble text described in Article 6(1) would be included in addition to the existing preamble language. Article 6(3) would not apply.	
Article 7	Prevention of Treaty Abuse	Article 7(1) would apply and supersede the provisions of the agreement to the extent of incompatibility. India has expressed acceptance of the PPT as an interim measure. Article 7(4) would not apply. The Simplified Limitation on Benefits Provision would not apply.	
Article 8	Dividend Transfer Transactions	Article 8 would not apply.	
Article 9	Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property	Article 9(1) would not apply. Article 9(4) would not apply.	

India and Singapore treaty

Article no.	Jurisdiction	India – Singapore treaty
Article 10	Anti-abuse Rule for Permanent Establishments Situated in Third Jurisdictions	Article 10 would not apply.
Article 11	Application of Tax Agreements to Restrict a Party's Right to Tax its Own Residents	Article 11 would not apply.
Article 12	Artificial Avoidance of Permanent Establishment Status through Commissionnaire Arrangements and Similar Strategies	Article 12 would not apply.
Article 13	Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions	Article 13(4) would not apply. Neither Option would apply.
Article 14	Splitting-up of Contracts	Article 14 would not apply.
Article 15	Definition of a Person Closely Related to an Enterprise	Article 15 would not apply.
Article 16	Mutual Agreement Procedure	The first sentence of Article 16(1) would not apply. The second sentence of Article 16(1) would not apply. The first sentence of Article 16(2) would not apply. The second sentence of Article 16(2) would not apply. The first sentence of Article 16(3) would not apply. The second sentence of Article 16(3) would not apply.
Article 17	Corresponding Adjustments	Article 17 would not apply.
Article 35	Entry into Effect MLI	For the purposes of the application by India, 'taxable period' would apply.
	in India with respect to taxes withheld	MLI shall have effect in India with respect to taxes withheld at source on amounts paid or credited to non-residents, where the event giving rise to such taxes occurs on or after the first day of the taxable period that begins on or after 1/10/2019.
	in India with respect to other taxes	MLI shall have effect in India with respect to all other taxes, for taxes levied with respect to taxable periods beginning on or after 1/4/2020.

Source Materials

- OECD released – Matching database (list of article wise break up of position taken by signatories to the MLI).
- OECD, Explanatory Statement To The Multilateral Convention To Implement Tax Treaty Related Measures to Prevent Base Erosion And Profit Shifting
- www.oecd.org/tax/treaties/beps-mli-position-india.pdf
- <http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf>
- Notification dated 9 August 2019 – India's position on the articles of MLI and the jurisdictions notified for the same.

THANK YOU