

The MLI's Mutual Agreement Procedure: India, Russia, and the United Kingdom

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In this article, the author examines article 16 of the OECD's multilateral instrument (which sets out the mutual agreement procedure) and the related reservations, specifically considering how the article alters the treaties between India, Russia, and the United Kingdom.

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To combat base erosion and profit-shifting practices and enhance cooperation in international taxation, the countries that have committed themselves to membership in the OECD inclusive framework on BEPS must follow the recommendations in the BEPS package. To ensure that the BEPS action plans are implemented at the country level, members of the inclusive framework must take steps to meet the minimum standards of the BEPS package, which include the OECD's 2015 action 14 final report.¹

¹ OECD, "Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report" (Oct. 2015).

In this regard, member countries must adopt the 2017 version of the OECD model tax treaty, which incorporates improvements to the dispute resolution mechanism, when they negotiate and conclude tax treaties.

Paragraph 1 of article 25 (mutual agreement procedure) of the model tax convention reads:

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of *either* Contracting State. [Emphasis added.]

For many years, tax agreements based on earlier versions of the OECD model tax convention, including the 2014 version, did not grant a person the option to present his MAP request to the competent authority of either of the contracting jurisdictions. Article 27(1) of the India-U.K. double tax agreement is a case in point, and it reads:

- Where a resident of a Contracting State considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with this Convention, he may, notwithstanding the remedies provided by the national laws of those States, present his case to the competent authority of the Contracting State *of which he is a resident*. [Emphasis added.]

Thus, article 27 of the India-U.K. tax treaty is at odds with the 2017 version of the MAP article of the OECD model convention, which incorporates the BEPS measures and implements the minimum standards for improving dispute resolution.

I. Multilateral Instrument

A. Article 16(1): The Basic Rule

Article 16(1) of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (multilateral instrument, or the MLI), which is aimed at closing the gaps in international tax rules in accordance with the OECD's 2015 action 15 final report,² replicates the wording of paragraph 3.1 of the action 14 final report. Subject to any reservations made, article 16(1) shall apply alongside the covered tax agreement (CTA) signed between the contracting states. The first sentence of article 16(1) of the MLI reads:

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. [Emphasis added.]

B. Article 16(5): The Alternative Rule

To offer flexibility and satisfy the minimum standard requirement, article 16(5)(a) of the MLI permits a party to reserve its right not to apply the first sentence of article 16(1) to its CTAs by adopting an alternative rule to the first sentence of article 16(1). Article 16(5) reads, in part:

A Party may reserve the right:

- a) for the first sentence of paragraph 1 not to apply to its Covered Tax Agreements on the basis that it intends to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS Package by ensuring that under each of its Covered Tax Agreements (other than a Covered Tax Agreement that permits a person to present a case to the competent authority of either Contracting

Jurisdiction), 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, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, that person may present the case to the competent authority of the Contracting Jurisdiction of which the person is a resident or, if the case presented by that person comes under a provision of a Covered Tax Agreement relating to non-discrimination based on nationality, to that of the Contracting Jurisdiction of which that person is a national; and the competent authority of that Contracting Jurisdiction will implement a bilateral notification or consultation process with the competent authority of the other Contracting Jurisdiction for cases in which the competent authority to which the mutual agreement procedure case was presented does not consider the taxpayer's objection to be justified.

Paragraph 5(a) of article 16 introduces an administrative remedy to ensure that an aggrieved person enjoys a right that is no less than that which would apply if he was taxed in accordance with a CTA that met the minimum standards under the BEPS inclusive framework.

II. The Application of the MAP Articles

In keeping with article 39 of the MLI, the OECD depositary retains and publishes information on the choices that contracting jurisdictions (that is, parties to the MLI) make regarding the MLI's optional provisions and reservations.

Table 1 shows the respective positions of India, the Russian Federation, and the United Kingdom on article 16(1) and article 35(4) based on extracts from notification that accompanied their ratification instruments in the OECD depositary's database as of December 18, 2020.³

²OECD, "Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 – 2015 Final Report" (Oct. 2015).

³In addition to the OECD's database, *Tax Notes* maintains a copy of the chart listing the signatories to the MLI and providing links to each signatory's reservations and notifications.

MAP Provisions and Positions of Select Jurisdictions

	Dispute Resolution	Entry Into Effect	
Main articles	Article 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.”	Article 35(4): “Notwithstanding the preceding provisions of this Article, Article 16 (Mutual Agreement Procedure) shall have effect with respect to a Covered Tax Agreement for a case presented to the competent authority of a Contracting Jurisdiction on or <i>after the latest of the dates on which this Convention enters into force for each of the Contracting Jurisdictions to the Covered Tax Agreement</i> [text-A], except for cases that were not eligible to be presented as of that date under the Covered Tax Agreement prior to its modification by the Convention, without regard to the taxable period to which the case relates.” [Emphasis added.]	
Reservations	Article 16(5)(a) provides that a contracting jurisdiction may reserve the right not to apply the first sentence of article 16(1) to its CTAs if it adopts the alternative rule specified under article 16(5)(a).	Article 35(6) provides that a contracting jurisdiction may reserve the right for article 35(4) not to apply to its CTAs.	Article 35(7)(a) provides that a party may reserve the right to replace text-A in article 34(4) with the text described in article 35(7)(a)(i).
	Is article 16(5)(a) adopted?	Is article 35(6) adopted?	Is article 35(7)(a) adopted?
India	Yes	No	No
Russia	No	Yes	Yes
United Kingdom	No	No	No

III. MAP-Related Reservations

The United Kingdom adopted article 16(1) of the MLI without reserving its right under article 16(5)(a) of the MLI. However, India reserved its right for article 16(1) not to apply.

In case of a clash between the choices of the two parties to a CTA, paragraph 3 of article 28 (reservation) provides that the alternative rule that the reserving party has chosen shall apply. Article 28(3), which largely replicates article 21(1)(a) and (b) of the 1969 Vienna Convention on the Law of Treaties, reads:

Unless explicitly provided otherwise in the relevant provisions of this Convention, a reservation made in accordance with paragraph 1 or 2 [of Article 28] shall:

- a) modify for the reserving party in its relations with another party the provisions of this Convention to which the reservation relates and to the extent of such reservation; and

- b) modify those provisions to the same extent for the other Party in its relations with the reserving Party.

Article 28(3) of the MLI contains two principles. First, unless explicitly provided otherwise, a reservation made on a unilateral basis will not only affect the CTA between the reserving party and the other party, but also affect other CTAs that the reserving party has nominated in accordance with paragraph (1)(a) of article 2 (interpretation of terms) and the new CTAs that it later includes in accordance with paragraph 5 of article 29 (notifications) after having deposited the ratification instrument with the OECD. The main exception to this rule is that a reservation to apply the arbitration articles in Part VI of the MLI requires acceptance under article 28, paragraph 2 of the MLI. Second, unless explicitly provided otherwise, a reservation regarding the application of an article or a provision of an article is reciprocal — that is, in general, reservations do not only work one way; they apply symmetrically.

Note that the United Kingdom is not permitted to make a new reservation under article 16(5)(a) in order to bring its position on reservation in line with the one that India has adopted. However, the first sentence of article 16(1) shall apply in place of the corresponding provision in the India-U.K. CTA in accordance with article 16(4)(a)(i) should India later withdraw its reservation in accordance with article 28(9). The rationale for permitting a jurisdiction to withdraw (but not add or increase) a reservation is to achieve the object and purpose of the BEPS package — that is, contracting jurisdictions can move closer to the MLI provisions that modify the CTAs but not further away from them.

Neither India nor the United Kingdom exercise reservations under article 35(6) for article 35(4), which provides the default rule that the parties shall adopt the entry-into-force date as the entry-into-effect date for the MAP in article 16(1).

IV. MAP and the India-U.K. CTA

Article 35(4) of the MLI reads:

(4) Notwithstanding the preceding provisions of this Article, Article 16 (Mutual Agreement Procedure) shall have effect with respect to a Covered Tax Agreement for a case presented to the competent authority of a Contracting Jurisdiction on or after *the latest of the dates on which this Convention enters into force for each of the Contracting Jurisdictions to the Covered Tax Agreement*, except for cases that were not eligible to be presented as of that date under the Covered Tax Agreement prior to its modification by the Convention, without regard to the taxable period to which the case relates. [Emphasis added.]

The United Kingdom deposited its instrument of ratification on June 29, 2018. Therefore, the entry into force date for its CTAs was October 1, 2018 — the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit by the signatory of its instrument of ratification — in accordance with article 34(2) of the MLI. India deposited its instrument of ratification on June 25,

2019, and its entry into force date was on October 1, 2019. Therefore, under article 35(4), “the latest of the dates on which the MLI comes into force for each of the Contracting Jurisdictions to the Covered Tax Agreement” was October 1, 2019.

The synthesized text of article 35(4) and the India-U.K. CTA reads as follows⁴:

In accordance with paragraph 4 of Article 35 of the MLI, Article 16 of the MLI has effect with respect to this Convention for a case presented to the competent authority of ~~either contracting jurisdiction~~ the Contracting State **of which he is a resident** [per article 16(5)(a)] on or after **1 October 2019** [per article 35(4)], except for cases that were not eligible to be presented as of that date under this Convention prior to its modification by the MLI, without regard to the taxable period to which the case relates.

V. MAP and the Russia-U.K. CTA

A. Article 16(1)

The synthesized text of article 16(1) (as modified by article 16(4)(a)(i)) and article 25 of the Russia-U.K. CTA reads as follows:

25(1) Where a resident of a Contracting State considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of either Contracting State ~~the Contracting State of which he is a resident or, if his case comes under paragraph (1) of Article 24 of this Convention, to that Contracting State of which he is a national.~~

Article 16(4)(a)(i) is the compatibility clause that modifies the application of article 16(1) to the CTA. According to article 16(4)(a)(i), since neither Russia nor the United Kingdom makes a

⁴The synthesized text of the Indian CTAs discussed in this article are available at Government of India Income Tax Department, “Double Taxation Avoidance Agreements” (last accessed Dec. 2020).

reservation under article 16(5)(a), the first sentence of article 16(1) shall apply in place of the first sentence of article 25 (MAP) of the Russia-U.K. CTA.

Both Russia and the United Kingdom have complied with the notification requirement in article 16(6)(a) of the MLI. The article 16(6)(a) notifications were given by Russia and the United Kingdom on the respective dates when each jurisdiction deposited its instrument of ratification in accordance with paragraph 1 of article 29 (notification of the MLI).

B. Entry Into Effect

The Russian Federation has reserved the right under article 35, paragraph (7)(a), which provides that:

A Party may reserve the right to replace:

i. the references in paragraphs 1 and 4 [of article 35] to “the latest of the dates on which this Convention enters into force for each of the Contracting Jurisdictions to the Covered Tax Agreement”; and

....

with references to “30 days after the date of receipt by the Depository of the latest notification by each Contracting Jurisdiction making the reservation described in paragraph 7 of Article 35 (Entry into Effect) that it has completed its internal procedures for the entry into effect of the provisions of this Convention with respect to that specific Covered Tax Agreement.”

The United Kingdom adopted article 35(4), and Russia adopted the modified version of article 35(4). Russia’s choice shall prevail in the Russia-U.K. CTA. The synthesized text of article 35(4) and the Russia-U.K. CTA reads as follows:

In accordance with paragraph 4 of Article 35 of the MLI, Article 16 of the MLI has effect with respect to this Convention for a case presented to the competent authority of *either* contracting jurisdiction [per article 16(1) and article 16(4)(a)(i)] on or after 30th May 2020 [per article 35(4) and 35(7)(a)(i)], except for cases that were not

eligible to be presented as of that date under this Convention prior to its modification by the MLI, without regard to the taxable period to which the case relates. [Emphasis added.]

On April 30, 2020, Russia notified the OECD depositary and the United Kingdom that it had completed its international procedures for purposes of article 35(7)(a) in accordance with article 35(7)(b).

Both Russia and the U.K. shall substitute “the latest of the dates on which this Convention enters into force for each of the Contracting Jurisdictions to the Covered Tax Agreement” for the text described under article 35(7)(a)(i) in the Russia-U.K. CTA. The date “30 days after the date of receipt [April 30, 2020, per article 35(7)(b)] by the Depository of the ~~latest~~ notification by Russia ~~each Contracting Jurisdiction~~ making the reservation described in paragraph 7 of Article 35” was May 30, 2020.

VI. MAP and the India-Russia CTA

The synthesized text of article 16(1) and article 25 of the India-Russia CTA follows the same pattern as the India-U.K. CTA. Russia adopted the modified version of article 35(4) in accordance with article 35(7)(a)(i). The synthesized text of article 35(4) and the India-Russia CTA reads as follows:

In accordance with paragraph 4 of Article 35 of the MLI, Article 16 of the MLI has effect with respect to this Convention for a case presented to the competent authority of ~~either~~ the contracting jurisdiction of *which he is a resident or a national* [per article 16(5)(a)] on or after 30th May 2020 [per article 35(4) and article 35(7)(a)(i)], except for cases that were not eligible to be presented as of that date under this Convention prior to its modification by the MLI, without regard to the taxable period to which the case relates. [Emphasis added.]

VII. Conclusion

If a person who believes he is not being taxed in accordance with the terms of the CTA is not given access to present a MAP case to the

competent authority of either contracting jurisdiction, then paragraph 5(a) of article 16 introduces an administrative remedy. The remedy is intended to ensure that the competent authorities of both contracting jurisdictions are involved in making the decision whether to proceed with the MAP when the person can only present the MAP case to the competent authority of his residence jurisdiction or, if the case comes under the scope of the nondiscrimination article based on nationality, the jurisdiction of which he is a national.

The alternative rule under article 16(5)(a) ensures that the taxpayer's right to MAP is not compromised. In contrast, article 35, which is procedural in nature, does not deal with the taxpayer's rights and obligations. Specifically, article 35(7)(a) provides an alternative way for a contracting jurisdiction to bring the MAP article into operation, taking into account that it takes time for that contracting jurisdiction to amend its domestic laws to implement the MLI and give effect to the MAP article. ■