

## How contracting jurisdictions apply Article 16 (Mutual Agreement Procedure) of the MLI to their CTA's - From A Japanese Perspective

**Table 1 - Reservation made under Article 16(5)**

The following table shows the reservations, denoted by the letter "R", on Article 16 made under Article 16(5) by some selected Signatories and Parties as of 31st March 2019, using information from the MLI database's matrix of options and reservations, which is provided by the OECD Depository. This section illustrates how Article 16 works in practice *from a Japanese perspective*.

<u>Jurisdiction</u>	<u>Status</u>	16(5)	16(5)	16(5)	16(5)
		(a)	(b)	(c)(i)	(c)(ii)
Australia	Definitive				
Canada	Provisional	<b>R</b>			<b>R</b>
China (PRC)	Provisional	<b>R</b>			
Hong Kong (China)	Provisional				
Japan	Definitive				
Singapore	Definitive	<b>R</b>			
United Kingdom	Definitive				

1) Article 16(5)(a): Reservation for the first sentence of Article 16(1)

- Reservation group (R) that adopt the alternative rule: Canada, China, Singapore
- No-reservation group (non-R): Australia, Hong Kong, Japan, and the U.K.

2) Article 16(5)(b): No reservation is made for the second sentence of Article 16(1)

3) Article 16(5)(c)(i): No reservation is made for the first sentence of Article 16(2)

4) Article 16(5)(c)(ii): Only Canada reserves its right for the second sentence of Article 16(2)

**Table 2 - Bilateral tax treaty relations with reference to the reservation made under Article 16(5)(a)**

Reservation under Article 16(5)(a)

	Australia	Canada Reserve	China (PRC) Reserve	HK	Japan	Singapore Reserve	U.K.
Australia		Y	Y	X	Y	Y	Y
Canada Reserve	Y		Y	Y	Y	Y	Y
China (PRC) Reserve	Y	Y		X	Y	Y	Y
Hong Kong	X	Y	X		Y	X	Y
Japan	Y	Y	Y	Y		Y	Y
Singapore Reserve	Y	Y	Y	X	Y		Y
U.K.	Y	Y	Y	Y	Y	Y	

"Y" denotes that there is a bilateral tax treaty between the two contracting jurisdictions. "X" denotes that no bilateral tax treaty has been signed between the two contracting jurisdictions.

### **Article 16(5)(a): Reservation for first sentence of Article 16(1) - Access to MAP**

#### Reservation positions

It is noted that Canada, China and Singapore have made a reservation under Article 16(5)(a) on the application of the first sentence of Article 16(1) to their CTAs, meaning that a person requesting an MAP must present his case to the CA of the contracting jurisdiction of which he is a resident, or if the case comes under the provision relating to non-discrimination based on nationality, to that of the contracting jurisdiction of which he is a national (the alternative rule).

On the other hand, Australia, Hong Kong, Japan and the U.K. have not made such a reservation. In respect of the application of the first sentence of Article 16(1) to the Japan-Australia CTA, a person who requests an MAP can present his case to the CA of *either* contracting jurisdiction. The same holds for the Japan-HK CTA and the Japan-UK CTA.

However, it appears that in respect of the application of the first sentence of Article 16(1) to the CTAs, Japan finds that Singapore has adopted different positions. The same holds for the application of the first sentence of Article 16(1) to the Japan-Canada CTA and the Japan-China CTA; and similarly to the Australia-Canada CTA, the Australia-China CTA, and Australia-Singapore CTA, to the UK-Canada CTA, the UK-China CTA, the UK-Singapore CTA, and to the Hong Kong-Canada CTAs.

It is noted that Hong Kong and Singapore have not signed any double tax treaty, except for a tax treaty for airline and shipping income. Hong Kong and China (PRC) have signed an arrangement for the avoidance of double taxation, but it is not a CTA. Politically Hong Kong is part of China. China includes Hong Kong as a signatory of the Multilateral Convention on 7th June 2017, pursuant to Articles 28(4), 28(7) and 29(4). China is the responsible party for Hong Kong

extending its list of CTAs, entering a new reservation if the extension is first to fall into the scope of such a reservation, and giving notifications to the Depositary pursuant to Article 29(5), Article 28(4) and Article 29(2) respectively. Before we proceed, it is useful to take a look at paragraph 3 of Article 28 (Reservations) of the MLI. It reads:

“3. Unless explicitly provided otherwise in the relevant provisions of this Convention, a reservation made in accordance with paragraph 1 or 2 (of Article 28 - Reservations) 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.”

Here Article 28(3) contains two important principles. First, a reservation is made on a unilateral basis. [1] Unless explicitly provided otherwise, the reservation entered by a contracting jurisdiction will take effect on all Parties to the MLI. Second, unless explicitly provided otherwise, a reservation is reciprocal between the Parties to the MLI with respect to the application of the MLI provisions to existing CTAs. That is, it does not work only one way, but works both ways. In general, a reservation shall apply symmetrically.

#### Relation between a reserving contracting jurisdiction and non-reserving contracting jurisdiction

Since one of the Parties to the bilateral CTAs between the Japan and Canada reserves its right not to apply the first sentence of Article 16(1) to all of its CTAs, including the Japan-Canada CTA, a person who requests a MAP does not have access to the CA of either contracting jurisdiction. Instead, he can only choose the alternative rule Canada has adopted. However, the same person can present his MAP request to the CA of *either* [emphasis added] contracting jurisdiction if Canada is later to withdraw its 5(a) reservation pursuant to Article 28(9), which reads that “[a]ny Party which has made a reservation in accordance with paragraph 1 or 2 (of Article 28) may at any time withdraw it or replace it with a more limited reservation by means of a notification addressed to the Depositary”. Note that Japan is not permitted to make additional reservation to bring it in line with the reservation position Canada has adopted, except for the situation described under paragraph 5 of Article 29 - Notifications. Article 28 of the MLI only works in one direction in making changes to the scope of the reservation. The reason why a Party is not permitted to expand the scope of its reservation but is allowed to drop its reservation or replace a reservation with a more limited one is that by withdrawing its reservation, the Party will be moving closer to the full adoption of the MLI, and not moving away from it.

In respect of the **Japan-Canada CTA**, Canada reserves its right for the first sentence of Article 16(1) of the MLI not to apply to its Article 24(1) of its CTA. Pursuant to Article 16(5)(a) of the MLI, the alternative rule shall apply to the first sentence of paragraph 1 of the CTA between Canada and Japan.

### **Article 23 Canada-Japan CTA**

The following shall be added to the end of the first sentence of Article 16(1) in accordance with the alternative rule, as set out Article 28(1). It reads:

“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.”

The synthesised text of the first sentence of Article 16(1) and that of Article 23(1) of the Japan-Canada CTA will be read as follows:

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 laws of those Contracting States, present his case in writing to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 22 (non-discrimination), to that of the Contracting State of which he 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 State 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.

In respect of the CTA between China and Japan, the alternative rule shall apply in the same manner as described above because China has reserved its right for the first sentence of Article 16(1) not to apply to the provision of its CTAs. The same holds for the Japan-Singapore CTA as Singapore also reserves its right for the first sentence of Article 16(1) not to apply to its CTAs under Article 16(5)(a).

**Article 16(5)(b): Reservation for second sentence of Article 16(1) - time limit to present MAP request**

It is observed that no contracting jurisdictions in table 1 above have made reservation for the second sentence of Article 16(1).

In respect of a CTA that contains a provision that provides that a case referred in the first sentence of Article 16(1) must be presented within a specific time period that is shorter than three years, the second sentence of Article 16(1) shall apply to replace it. However, it is observed that with the exception for the CTA between Canada and Japan, all of the selected contracting jurisdictions in table 1 do not have a CTA that contains such a provision.

- i) Not containing a provision describing a time period to present a MAP case      None
- ii) Containing a provision providing that the case must be presented within a time period that is less than 3 years      Canada-Japan CTA
- iii) Containing a provision that provides that MAP case must be presented in a specific time period that is at least 3 years      Australia-Japan CTA, China-Japan CTA, Hong Kong-Japan CTA, Japan-Singapore CTA, Japan-UK CTA

A summary of the application of 2<sup>nd</sup> sentence of Article 16(1) to the CTAs is set out below:

<b>2<sup>nd</sup> Sentence of Article 16(1) - Time limit for taxpayer to present MAP case</b>			
CTA provision	Not containing a provision that provides that MAP case must be presented in a specified period	Containing a provision that provides that MAP case must be presented within a specific time period	
		that is less than 3 years	that is at least 3 years
How is modification to CTA applied?	Add a provision it provides that the case .... Presented in time period that is at least 3 years	Replace the sentence in the CTA with 2 <sup>nd</sup> sentence of Article 16(1) of the MLI	2 <sup>nd</sup> sentence of Article 16(1) shall not apply
When the modified CTA provision shall replace the provision of the CTA	N/A	When both Parties make a matched notification	N/A
		With no matched notification, 2 <sup>nd</sup> sentence shall apply to the extent of	

		incompatibility	
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The 2<sup>nd</sup> sentence of Article 16(1) shall replace the 2<sup>nd</sup> sentence of Article 23 of the Japan-Canada CTA as below:-

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 laws of those Contracting States, present his case in writing to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 22, to that of the Contracting State of which he is a national. ~~The case must be presented within two years from the first notification of the action resulting in taxation not in accordance with the provisions of this Convention.~~ The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement.

The above synthesised text is produced by (i) the alternative rule that Canada has opted in for pursuant to Article 16(5)(a); (ii) the second sentence of Article 16(1) shall apply to replace the second sentence of Article 16(1). That is, it is modified pursuant to Article 16(4)(a)(ii).

In respect of the first sentence of Article 16(2), it is observed that no reservation is made by any of the selected contracting jurisdiction. The first sentence of Article 16(2) reads:

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting Jurisdiction, with a view to the avoidance of taxation which is not in accordance with the Covered Tax Agreement.

**Article 16(5)(c): Reservation for second sentence of Article 16(2) - disregarding time limit when implementing a resulting mutual agreement**

The Australia-Japan CTA, the Chiba-Japan CTA, the Hong Kong-Japan CTA, and the Singapore-Japan CTA all contain a provision that disregards any time limit when implementing a resulting mutual agreement in the same manner as the second sentence of Article 16(2).

In contrast, the CTA between Canada and Japan, and CTA between the UK and Japan do not contain a provision that provides that any mutual agreement reached by the CAs shall be implemented notwithstanding any time limits in the domestic law of the contracting jurisdictions. In this regard, the compatibility clause Article 16(4)(b)(ii) provides that the second sentence of Article 16(2) shall be added to the aforesaid CTAs in the absence of such a provision.

However, it is noted that Canada has unilaterally opted out of the second sentence of Article 16(2) of the MLI, pursuant to Article 16(5)(c)(ii). As Canada makes reservation on the second sentence of Article 16(2), Japan has included the UK, which does not make reservation on the second sentence of Article 16(2) pursuant to Article 16(5)(c)(ii), in the list of notification to the Depositary that the CTA does not contain the second sentence of Article 16(2), pursuant to Article 16(6)(c)(ii). The second sentence of Article 16(2) shall apply to the Japan-UK CTA where both Parties to the CTA make a matched notification.

Difficulties in the interpretation and application of the CTA, and the elimination of double taxation in cases not provided under the CTA

Paragraph 3 of Article 16, for which no reservation is permitted, contains two sentences. It provides that

"The competent authorities of the Contracting Jurisdictions shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Covered Tax Agreement. They may also consult together for the elimination of double taxation in cases not provided for in the Covered Tax Agreement."

Article 16(4)(c)(i) provides that "[t]he first sentence of paragraph 3 shall apply in the absence of provisions of a Covered Tax Agreement that provide that the competent authorities of the Contracting Jurisdictions shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Covered Tax Agreement."

Article 16(4)(c)(ii) provides that "[t]he second sentence of paragraph 3 shall apply in the absence of provisions of a Covered Tax Agreement that provide that the competent authorities of the Contracting Jurisdictions may also consult together for the elimination of double taxation in cases not provided for in the Covered Tax Agreement."

End

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